

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: SAMUEL A. LEWIS, DIRECTOR, ARIZONA
DEPARTMENT OF CORRECTIONS, ET AL., Petitioners
v. FLETCHER CASEY, JR., ET AL.

CASE NO: No. 94-1511

PLACE: Washington, D.C.

DATE: November 29, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SAMUEL A. LEWIS, DIRECTOR, :

4 ARIZONA DEPARTMENT OF :

5 CORRECTIONS, ET AL., :

6 Petitioners :

7 v. : No. 94-1511

8 FLETCHER CASEY, JR., ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, November 29, 1995

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10:05 a.m.

15 APPEARANCES:

16 GRANT WOODS, ESQ., Attorney General of Arizona, Phoenix,

17 Arizona; on behalf of the Petitioners.

18 ELIZABETH ALEXANDER, ESQ., Washington, D.C.; on behalf of

19 the Respondents.

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

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-1511, Samuel A. Lewis v. Fletcher Casey.
5 General Woods.

6 ORAL ARGUMENT OF GRANT WOODS

7 ON BEHALF OF THE PETITIONERS

8 GENERAL WOODS: Mr. Chief Justice, and may it
9 please the Court:

10 This is an inmate access to the court case. The
11 State of Arizona meets and exceeds the requirements of
12 Bounds v. Smith by providing at the time of trial 26 law
13 libraries at nine separate prison complexes across the
14 State.

15 As the prison population has grown from more
16 than 15,000 to 22,000 prisoners, we have added seven more
17 libraries, for a total of 33. In addition to providing
18 adequate legal resources to the inmates through these law
19 libraries, Arizona goes above and beyond the requirements
20 of Bounds by facilitating the use of legal clerks and
21 legal assistants to obtain books and to help in the
22 preparation of lawsuits.

23 Also, we encourage inmates to take our classes
24 to teach them to read English, and we find interpreters
25 for non-English-speaking inmates. We facilitate also

1 assistance from family, from friends, outside lawyers and
2 paralegals and other prisoner rights groups.

3 Although deference to State officials in the
4 area of prison administration is required by this Court,
5 the district court in this case has imposed an order which
6 micromanagers virtually every aspect of prison life in
7 this area.

8 Additionally, the district court has entered its
9 order despite a record that has not established an injury
10 warranting systemic relief. The result is that the order
11 is overbroad, overreaching, and far beyond the
12 requirements of Bounds.

13 QUESTION: Mr. Woods, what are the findings of
14 the district court that would support a system-wide
15 violation of Bounds? Was there any express finding that
16 there was a system-wide violation of the requirements this
17 Court set forth in Bounds?

18 GENERAL WOODS: We believe there is not, Justice
19 O'Connor. The record in this case is difficult, and it's
20 difficult for a variety of reasons, but one reason is
21 because it's difficult to separate pure findings of fact
22 from the judge's order, from how he has extrapolated that
23 based upon, we believe, his misinterpretation of what
24 Bounds requires. If the Court --

25 QUESTION: Well, you take the position that

1 Bounds was an either-or situation, that the State can
2 provide a library or assistance?

3 GENERAL WOODS: Yes.

4 QUESTION: Well, Bounds said that in so many
5 words, didn't it?

6 GENERAL WOODS: Yes. Mr. Chief Justice, I think
7 it's important for the Court to look at the reasoning
8 behind Bounds, and how it's been --

9 QUESTION: Well, if you do that, I certainly
10 think there is some indication that a prisoner who cannot
11 read or who does not speak English might not have
12 meaningful access to a library even if it were there, and
13 you want us to take the position that there's no
14 requirement to provide any assistance at all.

15 GENERAL WOODS: Yes, Justice O'Connor. We
16 believe that's the proper reading of Bounds, although
17 we --

18 QUESTION: You take the position that, if a
19 prisoner is illiterate or is illiterate in English, that
20 that -- that the requirements therefore are still
21 satisfied so long as there is, in fact, a library in
22 existence to which the prisoner could resort if he were
23 able to read it, or a legal helper to whom he could turn
24 if he were able to communicate?

25 GENERAL WOODS: That's correct. We believe

1 Arizona goes far beyond the requirement of Bounds, but we
2 believe that the proper interpretation of Bounds is that a
3 law library, in and of itself, is enough.

4 QUESTION: Well --

5 QUESTION: So there is no obligation to an
6 illiterate prisoner.

7 GENERAL WOODS: The obligation is really not an
8 affirmative duty. I think what we're asking the Court to
9 do is apply -- as the courts generally have over the past
10 18 years, apply the strict interpretation of bounds and
11 the language of Bounds.

12 QUESTION: Well --

13 QUESTION: But that turns -- I'm sorry, I keep
14 interrupting Justice --

15 QUESTION: Go ahead -- no, go ahead.

16 QUESTION: This will be my last question.

17 That, it seems to me turns the requirements even
18 in the strict either-or sense into pure formalities.
19 We're placing books in front of someone who cannot read
20 them, and we're placing legal helpers in front of someone
21 who cannot communicate with them. That seems utterly
22 senseless.

23 GENERAL WOODS: Justice Souter --

24 QUESTION: Why isn't it senseless?

25 GENERAL WOODS: This is why we believe it's not.

1 This is -- again, you have to look at the reasoning behind
2 Bounds, and we believe the reason the Court ruled the way
3 it did in Bounds is, the Court was saying that what we
4 have to do is put prisoners on similar footing as they
5 would be for access to the courts to people who are not
6 incarcerated.

7 The State has taken a step in their lives that
8 has put a barrier to the courts, and therefore we have
9 to -- we have an affirmative duty to provide something
10 there, in this case a law library.

11 QUESTION: Well, suppose we don't agree with you
12 on the meaning of Bounds, because there certainly is
13 language in it that speaks in terms of meaningful access,
14 do you have a fallback position?

15 GENERAL WOODS: Yes, we do, Justice O'Connor,
16 and the fallback position is that Arizona goes above and
17 beyond the requirements of Bounds. As I've said, we do
18 facilitate legal clerks, legal assistants. They -- again,
19 you have to go to what we're talking about, and the Court
20 has said in --

21 QUESTION: Well, do you want us to find that the
22 district court findings were erroneous? I mean, what is
23 it we're supposed to do, parse through the record and say
24 that their findings were clearly erroneous? What is it
25 you're asking us to do, then?

1 GENERAL WOODS: We're asking you to reverse the
2 findings of the district court, because Arizona has met
3 the requirements set forth in Bounds. The Arizona system
4 provides meaningful access, and you can find that --

5 QUESTION: So you don't make an argument, then,
6 today, that the injunction exceeded the scope of the
7 district court's authority? You're not making that
8 argument, I take it.

9 GENERAL WOODS: Yes, we are making that
10 argument. We don't think you have to get to that, but if
11 you find -- that is another fallback position.

12 Clearly, in this case, if you found that we
13 were not in compliance with Bounds, and that some
14 remediation was appropriate, then you have to look at the
15 scope of the injunction and, of course, when you look at a
16 litany of cases from Dayton through the recent Jenkins
17 case, you see that this case is a perfect example of an
18 overbroad order.

19 Rather than finding a specific systemic injury
20 and trying to resolve that specific injury, what this
21 district court judge has done has basically decided how he
22 would micromanage the prison, to the point where he
23 decides where people sit and when, who goes, and when they
24 go to the library.

25 Telephone calls is just one example I would give

1 you. We have 22,000 prisoners. He's mandating by this
2 order that we have to provide, now, 66,000 20-minute calls
3 per week.

4 QUESTION: General Woods, was there a point --
5 ever a point, after finding constitutional violation, at
6 which the State was asked to come up with a plan to cure
7 the violation, or was this directly referred to a special
8 master?

9 GENERAL WOODS: Well, Justice Ginsburg, what the
10 district court did was, we had a prior ruling from him in
11 the Gluth case which was just applicable to one prison
12 unit and, again, micromanaged the entire unit much as this
13 order does.

14 He told us that he -- his plan was to put this
15 order in place throughout the State, and he gave us the
16 opportunity to make any objections which we wanted to,
17 which we did, but the ball game was over at that point.

18 QUESTION: But before that, isn't it usual in
19 these situations to give the State the first opportunity
20 to present a remedial plan?

21 GENERAL WOODS: Yes, Justice Ginsburg, and
22 that's exactly what Bounds requires, is that -- that you
23 will give deference to the States, and the States will be
24 allowed to formulate their own plans.

25 QUESTION: Did you ask at any point to be

1 permitted to do that before you encountered the special
2 master?

3 GENERAL WOODS: We anticipated that that would
4 be how -- the answer is yes, but we were not allowed to do
5 so. What we were allowed to do is object any way we
6 wanted to the Gluth decision being imposed upon us State-
7 wide and, again, I think that's why you have in this
8 order.

9 If you see -- we have orders for things that
10 have nothing to do with the record there's not even any
11 testimony on. We're required to train inmates, for
12 example, for immigration law, for divorce and custody
13 cases, according to this order. We're --

14 QUESTION: Mr. Woods, Attorney General Woods --

15 GENERAL WOODS: Yes, sir.

16 QUESTION: -- did you give consideration, or
17 have any of the people who have written in this field in
18 the scholarly community given any consideration to whether
19 or not the library requirement makes sense at all?

20 It seems to me that maybe libraries might be a
21 waste, and that there might be much better, more efficient
22 ways in which to provide prisoners some assistance.

23 GENERAL WOODS: I think we've -- we've
24 considered that, and I think these things will change with
25 the advent of computers and technology changing, where the

1 old style law library may some day be a thing of the past,
2 but what the Bounds court told us was that we could choose
3 between a law library or -- and I believe the disjunctive
4 was used something like 10 times in the decision -- or
5 some other form of legal assistance.

6 Most States have chosen a law library, and --

7 QUESTION: Well, I'm asking whether or not other
8 forms of legal assistance were considered by you. It
9 seems to me you're defending your position, advancing your
10 position on the theory that your library facilities were
11 adequate. You have not taken the position, I take it, and
12 have any other prisoners, prison systems taken the
13 position, that the library requirement is just fanciful,
14 what prisoners need are small books with forms and a
15 couple of people to tell them how to fill them out.

16 GENERAL WOODS: I don't know specifically if
17 anyone has been bold enough to do that, Your Honor, in the
18 face of the Bounds decision. In other words, we have felt
19 for 18 years we're required to do a law library. We can
20 come up with another form of --

21 QUESTION: Well, it says other forms --

22 GENERAL WOODS: Yes.

23 QUESTION: -- of legal assistance.

24 GENERAL WOODS: But I think we would be -- I'm
25 supposing that the States would be hesitant to come up

1 with too minimal of a plan for fear that it wouldn't meet
2 the standards, and also --

3 QUESTION: Have there been any studies on the
4 effectiveness of prison libraries?

5 GENERAL WOODS: Well, there have been -- there
6 have been commentators who have commentated upon it, but I
7 don't know that that's particularly persuasive.

8 I think that the Bounds court understood, we
9 have to assume that the Bounds court understood that there
10 are illiterate and not English-speaking prisoners in every
11 prison in the United States. There were then, there are
12 now, there always will be, and the point is --

13 QUESTION: General Woods, isn't it the case that
14 in Bounds the district judge would have preferred some
15 other form of legal assistance? It was the State that
16 decided that the library was a better way for it to go.
17 This Court mentioned both, but the district court in that
18 case, I thought, had made it clear that he thought it
19 would be a much better idea to provide some form of legal
20 assistance other than Federal reporters, State reporters
21 on a shelf.

22 GENERAL WOODS: I believe that's correct,
23 Justice Ginsburg, and this Court, as -- following the
24 direction that it has given ever since then, deferred to
25 the State administrators, which is only reasonable given

1 the very difficult nature of prison administration, and
2 also --

3 QUESTION: So it's the State that made this
4 choice, isn't it, the States?

5 GENERAL WOODS: That's correct.

6 QUESTION: It was not something that this Court,
7 and surely not the district court in Bounds, dictated.

8 QUESTION: And haven't you made that same
9 choice? In other words, you're defending your position,
10 or advocating your position based on the adequacy of the
11 library system.

12 GENERAL WOODS: Yes, we have, and Justice
13 Kennedy, let me make it clear why we believe it is
14 adequate, and why this 18-year period of the States
15 complying with Bounds mainly with law libraries is
16 sufficient, and it's because we put people on equal
17 footing as to the people who have not committed crimes and
18 who are not in prison.

19 And then, what they can do on the outside, if a
20 person is illiterate, if a person doesn't speak English,
21 and they live in Phoenix but they haven't committed a
22 crime, they haven't murdered anybody, they're not
23 incarcerated, if they have a 1983 case they can go to the
24 law library, public library.

25 If they can't use it because of their own

1 personal deficiencies, they can use family, friends, they
2 can try to get a lawyer, they can use prisoner groups, and
3 we facilitate that in Arizona. We allow them to do all of
4 those sort of things so they are not disadvantaged, and
5 that's the point behind Bounds.

6 QUESTION: Well then you're not taking the
7 position that it's irrelevant that they're illiterate,
8 then. You're not saying, we can comply in a purely formal
9 way, and that's the end of the matter.

10 GENERAL WOODS: What we can do, Justice --

11 QUESTION: Well, isn't that correct? You're
12 not -- I thought you were taking the formalistic position,
13 and now, it seems to me, you're not. Am I correct that
14 you are not?

15 GENERAL WOODS: It's not formalistic in this
16 sense. The affirmative duty that we have is to provide a
17 law library. However, we also have an obligation, from
18 Johnson to Wolff and beyond, not to place barriers to the
19 prisoners so that they can't access lawyers, prison
20 groups --

21 QUESTION: Well, do you --

22 GENERAL WOODS: -- friends and other inmates.

23 QUESTION: Let me put it another way. Do you
24 deny that you have any affirmative obligation to give the
25 prisoners some capacity, whether it be through other

1 prisoners, family, friends, the group you were mentioning,
2 to be able to use the library or to have access in some
3 other way? Do you deny that you have any affirmative
4 obligation?

5 GENERAL WOODS: Justice Souter, I don't know
6 that I would characterize it as an affirmative obligation.
7 It's an obligation not to interfere with that right of the
8 prisoner.

9 QUESTION: Well, that seems to me a somewhat
10 negative obligation.

11 GENERAL WOODS: Yes.

12 QUESTION: And I take it you deny that you have
13 any affirmative obligation.

14 GENERAL WOODS: That's correct. Well --

15 QUESTION: So that if you had a prisoner who had
16 no friends and there were no other prisoners who could or
17 would help him, and there were no legal assistants, and
18 all there was was a library, you would say, we have done
19 all that the law requires?

20 GENERAL WOODS: I would --

21 QUESTION: You'd say he'd be in the same shape
22 he was in if he was not in prison.

23 GENERAL WOODS: Correct.

24 QUESTION: No friends, no library, no lawyer.

25 GENERAL WOODS: That person may live in Phoenix

1 and have not committed a crime, and we wouldn't have an
2 obligation to him either.

3 I would point out --

4 QUESTION: Does your case -- do you rest your
5 whole case, win or lose, on that position?

6 GENERAL WOODS: No. I --

7 (Laughter.)

8 GENERAL WOODS: Again, this Court can decide
9 this case based upon what Arizona does, and we do -- we
10 move far beyond the requirements of Bounds, all of the
11 things that we do, but you don't --

12 QUESTION: May I ask you sort of a specific
13 question? We're talking in general terms here. You
14 mentioned earlier about the large number of phone calls
15 that have to be made. As I understand, you don't have to
16 pay for those calls, do you? If I understood the district
17 judge, he said they could call collect or pay for them.

18 GENERAL WOODS: That's correct, Justice Stevens.
19 We don't have to pay --

20 QUESTION: The problem is -- and is it not also
21 true that he made findings that the prisoners had been
22 arbitrarily denied access to their attorneys over the
23 phone, and do you question those findings?

24 I'm really asking you whether you think there
25 was any violation at all here justifying any relief, or

1 are we just talking about the scope of relief?

2 GENERAL WOODS: The answer to your question is
3 no, we do not find any systemic violation.

4 He -- and to answer the cost question first,
5 it's extremely costly, and this order would be -- would
6 basically break the bank in most of the States, and I
7 don't think I'm exaggerating there.

8 We don't have the pay for the actual phone call
9 because they call collect, but we have to escort prisoners
10 to and from these phone calls. We have to -- we'll have
11 to install extra phone lines. We'd have to hire extra
12 guards.

13 California, for example, we're talking about
14 almost 20 million calls per year of a 20-minute length
15 that they would have to somehow facilitate, and remember,
16 the judge said that if nobody answers or if they don't
17 accept the call, that doesn't count. It's just totally
18 impractical, and that's the sort of thing that the prison
19 administrators themselves should be able to do.

20 QUESTION: Well, but again, what I'm really
21 trying to find out, let's assume that maybe he's ordered
22 too many phone calls. Are you taking the position that he
23 had no authority to order any phone calls, that there was
24 no violation of their rights of access to their lawyers by
25 the way in which the prisons restricted and listened in on

1 the calls, that sort of thing?

2 GENERAL WOODS: Justice Stevens, I would apply
3 the Turner analysis here, because we do not allow them
4 simply to walk up and use the phone, because again, most
5 of the calls --

6 QUESTION: No, I understand that, but are you
7 saying there was no evidentiary basis for a finding of
8 violation of constitutional rights in denying adequate use
9 of the phone? It maybe should have been much less than
10 they allowed, but are you saying there was no evidence of
11 a violation at all?

12 GENERAL WOODS: There's no evidence of a
13 systemic violation, because what we found was that there
14 were a -- I think there were two inmates who said that
15 their confidentiality was violated because they asked the
16 guard to leave the room and he wouldn't. The guard
17 testified differently, but he believed the prisoner.

18 QUESTION: Where do you get the constitutional
19 right to make phone calls out of prison?

20 GENERAL WOODS: I don't believe you have that.
21 Again, Arizona I think goes beyond what it needs to do in
22 that we allow them to do that. We do encourage -- we
23 encourage them to confer by mail.

24 QUESTION: No, but again, I'm trying to figure
25 out, are you asking that the entire decree be vacated and

1 the complaint be dismissed because there's no proof of any
2 violation, or are you merely arguing, as I thought you
3 were, that he overreached in a lot of the provisions of
4 the decree and we should trim it back somewhat? Which is
5 the basic approach you take?

6 GENERAL WOODS: Well, the basic approach is that
7 you should simply reverse it because there is no evidence
8 of --

9 QUESTION: Reverse and direct dismissal of the
10 complaint?

11 GENERAL WOODS: That's correct.

12 Now, again, falling back from that, if you
13 didn't want to do that you could simply --

14 QUESTION: Well, most of the argument in the
15 briefs is not about whether there was a violation, but
16 rather about whether he was overly ambitious in the relief
17 he granted.

18 GENERAL WOODS: Well, I think what we tried to
19 point out when we talked about injury in the brief is
20 that, again, going back to Jenkins and Dayton, City of Los
21 Angeles v. Lyons where one, two or three instances when
22 they find that, that's not evidence that we need systemic
23 relief, and there is no evidence here that we need
24 systemic relief. Unless you feel that Bounds needs to be
25 dramatically expanded --

1 QUESTION: General Woods, are you attacking --
2 you're saying the findings themselves were not sufficient,
3 or the evidence beneath them, because I think you told us
4 that these findings didn't originate with the judge, that
5 they were, indeed, I think you said verbatim what were
6 submitted to him, the findings that he made.

7 GENERAL WOODS: Oh, yes, that's correct. They
8 were verbatim what were submitted to him. His factual
9 findings are difficult to discern because they are --

10 QUESTION: Submitted by whom? What are you
11 talking about? I don't even understand what you're
12 saying.

13 GENERAL WOODS: The judge basically adopted the
14 inmate's version of everything, the findings of fact and
15 the conclusions of law.

16 QUESTION: Well, all right, let's -- I mean,
17 that's fairly normal, parties submit findings and the
18 judge --

19 GENERAL WOODS: Yes.

20 QUESTION: The -- following up on what Justice
21 Stevens said, as I read this, and your opponents say this,
22 at the heart of this decree -- there are a lot of
23 provisions to it, and I think your opponents, to my
24 reading, concede that some are overreaching, but at the
25 heart of it lie 261 prisoners who are locked up, and what

1 I think it found is, respect to those who were locked up
2 in solitary confinement, or whatever, that often they can
3 only ask for one or two law books at a time, and there are
4 frequently long delays, 1 day, 2 days, 3 days, and
5 sometimes weeks before they get those one or two law
6 books.

7 That seems supported in the record, and your
8 opponents concede that we could modify the decree in that
9 respect, and they don't have to be escorted across the
10 place. All they have to have, on page 39, is some
11 effective method, all right.

12 The second major part of this was the Hispanic
13 population, and possibly the illiterates, and as for the
14 Hispanic population, there are a lot of them, and there
15 are findings that the Hispanic people cannot read these
16 law books and are not given proper assistance of any sort,
17 such as organizing other Hispanic bilingual prisoners, and
18 the decree in that respect didn't require too much. It
19 simply required that they get down to figuring out how
20 these Hispanic people systematically could rely on
21 bilingual prisoners to help them out.

22 All right. At least as to those two key
23 matters, which I think everyone thinks are at the heart of
24 this, is there any argument that we -- I mean, why
25 shouldn't we do just what your opponents tell us to do in

1 that respect?

2 GENERAL WOODS: Well --

3 QUESTION: Which is either to modify or to
4 affirm those two key provisions, and then systematically,
5 it wouldn't take too long, go through the other ones and
6 see whether they may or may not have gone beyond the
7 evidence?

8 GENERAL WOODS: Your Honor, I think regarding
9 the lockdown prisoners, then I believe there clearly we're
10 not talking about an inadequate law library or --

11 QUESTION: What they were complaining about --

12 GENERAL WOODS: Yes.

13 QUESTION: -- was just what I said.

14 GENERAL WOODS: I understand that. That means,
15 I believe, that you go to the Turner analysis and you have
16 to see in that case a whole variety of things, and also,
17 even under the Ninth Circuit's interpretation of injury,
18 you have to find injury. You have to find systemic
19 injury, and there is no injury.

20 QUESTION: Is there not injury in the fact, to
21 take one example, a person is locked down. He says, I
22 would like to see some law books. He makes a request. He
23 gets no books for many days. Finally, he gets one book.
24 Then he has to ask for another book. It would take him
25 4 years before he was able to have enough books actually

1 to see what the law was. I mean, those seem found here.
2 Isn't that injury?

3 GENERAL WOODS: If that was the case, Your
4 Honor, I think Arizona would have a bigger problem, but
5 that's not the case, and that is not even what this court
6 found.

7 QUESTION: What do you mean by a bigger problem?
8 Do you concede, General Woods, that a lockdown prisoner is
9 entitled to have law books, even for matters that have
10 nothing to do with a collateral attack on his conviction?

11 GENERAL WOODS: I think that --

12 QUESTION: Even for matters that have nothing to
13 do with the Constitution, he's entitled to that as one of
14 his basic needs like food, housing, shelter, medical care,
15 and a lawyer? Is -- you've made that concession?

16 GENERAL WOODS: No, I don't make that
17 concession.

18 QUESTION: Well then, what about the -- wanting
19 law books either for collateral attacks on his conviction
20 or because he feels he's being treated in an unlawful
21 manner? I imagine people don't read these books for their
22 health. I assume they have a reason for wanting them.

23 GENERAL WOODS: Once again, Justice Breyer, the
24 reason I point to first the necessity for systemic injury
25 is because the findings here by the judge were that many

1 times -- he used the word many -- they had to wait a
2 long -- longer period of time.

3 Also he found, though, that it's very clear the
4 policy in Arizona is they get their books within 24 hours.

5 QUESTION: That may be the policy, but what he
6 found happened was that they are routinely denied physical
7 access, there are often long delays in receiving books,
8 and then there's a lot of testimony in that respect.

9 GENERAL WOODS: Often long delays, the policy is
10 24 hours, and the record shows from the testimony that
11 that is generally what happens. The fact that sometimes
12 somewhere in a prison you can find 9 days, 7 days, the
13 Bureau of Prisons' own policy from their brief is 3 to 4
14 days, and we're doing 24 hours.

15 QUESTION: But General Woods, isn't it
16 inevitable that if the State takes the position that it's
17 going to comply with Bounds by having a library system,
18 that you're going to get decrees like this?

19 If I were a district judge, and I read the
20 requirement of the Supreme Court that you have to have a
21 law library, the first thing I'd do probably is make up a
22 list of the books that ought to be in the law library, and
23 how often it ought to be open, and all we're doing is just
24 arguing about details.

25 It seems to me that once you accept the

1 requirement of Bounds that you have an affirmative
2 obligation to provide a library, we're going to be talking
3 up here -- we may disagree on exactly how long it ought to
4 be open, and how much of a delay is acceptable, but it
5 just seems to me the district judge is essentially correct
6 in most of what he said if there's an affirmative
7 obligation to provide a library.

8 GENERAL WOODS: Well, we don't believe that --
9 that that is the case, that the case is that if we provide
10 a reasonably adequate law library that that's enough, and
11 you don't have to micromanage it from there.

12 If it pleases the Court, I would like to reserve
13 the rest of my --

14 QUESTION: I have one question, if I may.

15 It seems to me that there are essentially two
16 kinds of legal as opposed to factual issues here, that the
17 first we've spent a lot of time on, and that is, what is
18 the required level of access and so on, and whether you
19 have an affirmative obligation.

20 The other one you've touched upon a couple of
21 times by reference to Turner, and that is, how do we
22 measure sort of what, kind of the reasonable level of
23 required service may be, or required opportunity.

24 I think I'm correct that you argued on the basis
25 of Turner in at least your reply brief in the Ninth

1 Circuit. Did you go to the district court at any time and
2 say, look, we not only have to apply Bounds here, we have
3 to apply Bounds in the light of Turner, which sort of
4 looks, as it were, to both sides of the equation. Did you
5 make that argument to the district court that it wasn't
6 applying Turner and should have?

7 GENERAL WOODS: The answer is yes, we did, and I
8 think I -- it appears that the district court judge simply
9 had his own version of this expansive reading of Bounds
10 and never applied any other test whatsoever.

11 QUESTION: Okay. Would -- on what I'm calling
12 here sort of the second issue, call it the overreaching
13 issue if you want to, do you believe it would be
14 appropriate for us to return the case to the Ninth Circuit
15 and perhaps have them return it to the district court for
16 a consideration of Turner?

17 GENERAL WOODS: We don't believe you have to do
18 that, and we're a little wary, frankly, of going back
19 and --

20 QUESTION: You want an all-or-nothing win here,
21 in effect.

22 (Laughter.)

23 QUESTION: A win or loss.

24 GENERAL WOODS: That's correct.

25 If it pleases the Court, I would like to reserve

1 the rest of my time.

2 QUESTION: Very well, General Woods.

3 Ms. Alexander, we'll hear from you.

4 ORAL ARGUMENT OF ELIZABETH ALEXANDER

5 ON BEHALF OF THE RESPONDENTS

6 MS. ALEXANDER: Mr. Chief Justice, and may it
7 please the Court:

8 Before I start trying to talk systematically
9 about this case, I'd like to respond to a few of the
10 questions from General Woods' discussion.

11 First, I think the basic finding here was that
12 the vast majority of adult prisoners have no adequate
13 means to research and present their papers in court, and
14 that was made up specific findings and a number of
15 elements.

16 How the lockdown system -- the system as to how
17 the great majority of prisoners actually got the books
18 from the library, inability to use them, how the staffing
19 worked in the system, how the law clerks, who, by the way,
20 have no role in research, worked, how the supposed one
21 source of legal assistance worked, that is the prisoner
22 legal assistance, and what the sources for illiterate and
23 Spanish-speaking prisoners were.

24 I want to point out also that in the defendants'
25 reply brief they said that they were not challenging any

1 of the findings of the district court as clearly
2 erroneous, and I want to further point out that a number
3 of the findings, and these actually from the district
4 court, if one goes back, both parties submitted findings,
5 a number of the findings actually came from defendants.

6 I want to further say that I do not believe that
7 the order -- that the record supports a claim that the
8 State asked for some different form of developing the
9 remedy. I do not believe that there is anything at all
10 that would support that.

11 QUESTION: I thought that --

12 QUESTION: Ms. Alexander --

13 QUESTION: I thought that the claim was they had
14 no opportunity to, that they were given simply the choice
15 of deciding -- of saying why the previous order that had
16 been applied more narrowly shouldn't be expanded State-
17 wide.

18 MS. ALEXANDER: But --

19 QUESTION: Is that inaccurate?

20 MS. ALEXANDER: They never asked for anything
21 else.

22 QUESTION: It's too late to ask for that when
23 the judge summons you up and says, tell me why this order
24 shouldn't be applied State-wide.

25 MS. ALEXANDER: No, Your Honor, I don't think

1 that's so, because they had five opportunities to say
2 anything in this order is not correct, and any --

3 QUESTION: They had five opportunities, but were
4 they ever given the opportunity to propose, to draft and
5 propose their own order? Did the judge ever give them
6 that opportunity?

7 MS. ALEXANDER: Not in that form, but I don't
8 think --

9 QUESTION: Well, that's -- what form did it give
10 them, the right to comment on its proposal?

11 MS. ALEXANDER: Yes, but that did not limit in
12 any manner --

13 QUESTION: Ms. Alexander, is that common in
14 these institutional decrees? I think it's something that
15 juts out in this case, and whether we're talking about
16 prisons, schools, other institutions, isn't it usual for
17 the alleged offender, the State, to be given the
18 opportunity to come up with a plan, and if that's no good,
19 sometimes the court has to devise its own?

20 MS. ALEXANDER: Justice O'Connor, that is a
21 common --

22 QUESTION: Ginsburg.

23 QUESTION: Justice Ginsburg.

24 MS. ALEXANDER: Excuse me, Justice Ginsburg, my
25 apologies.

1 That is a usual way of doing this. However, the
2 factual history in this is that they had originally in the
3 Gluth case completely failed to cooperate in any manner
4 with the district court. That order then went from the
5 district court to the court of appeals, was affirmed --

6 QUESTION: That's no excuse. If it should be
7 done that way, it should be done that way.

8 MS. ALEXANDER: But certainly --

9 QUESTION: We don't punish the State for past
10 defalcations.

11 I can't imagine a judge just whipping up an
12 order on his own and submitting it to the State without
13 asking the State, who knows a lot more about running
14 prisons, how to solve the problem. I just can't imagine
15 that.

16 MS. ALEXANDER: Well, I think the -- this was an
17 injunction that was running in one of the institutions,
18 and it -- there's nothing that the State lost by this
19 process, nothing at all.

20 QUESTION: Well, how about the loss of any
21 Turner analysis in this thing? I mean, in the Turner
22 case, this Court indicated that prisoners' claims of
23 constitutional violations have to be viewed through some
24 kind of a lens of deference to the needs for prison
25 security and so forth, and there is no indication in this

1 record that I have found of any Turner-type analysis by
2 the district court in deciding to issue the order and
3 injunction that it did in this case.

4 MS. ALEXANDER: Your Honor --

5 QUESTION: Can you point me to that?

6 MS. ALEXANDER: I would certainly agree that
7 there is no place anywhere in the court's findings in the
8 district court in which it says, here I am applying the
9 Turner analysis and here is what I find. I --

10 QUESTION: And the breadth of the detailed
11 orders is breathtaking. It has to do with the noise
12 levels in these places, and hours of operation, and no
13 deference to the prison's need for lockdown or security.
14 I mean, it's just -- it really is breathtaking in its
15 scope.

16 MS. ALEXANDER: Your Honor, if I could take that
17 apart just a bit, I agree that the noise provision goes
18 too far, and I have no problem with just simply getting
19 rid of it, but the claim that somehow it prohibits their
20 lockdown system and requires lockdown prisoners to get
21 direct access to the books is just not correct.

22 It's very clear in the commentary that that was
23 never what the judge or the special master intended, and
24 if there's any --

25 QUESTION: Well, it's not clear from the

1 language of the injunction, is it?

2 MS. ALEXANDER: But it is completely clear from
3 the commentary, and if the Court has any question about
4 that, we also have no objection to a modification to make
5 that absolutely clear.

6 QUESTION: Well, Ms. Alexander, on a broader
7 level -- I think Justice O'Connor has raised this -- my
8 reading of the district court order and I believe of the
9 Ninth Circuit opinion fails even I think to disclose a
10 single citation to Turner.

11 Do you claim that -- let me ask you two
12 questions. Do you agree that Turner is applicable here,
13 that Bounds must be read in the light of Turner?

14 MS. ALEXANDER: Yes, and I --

15 QUESTION: Okay.

16 MS. ALEXANDER: If I could go on to explain my
17 answer on that --

18 QUESTION: Sure. I'll tell you what my second
19 question is, because that may be what you're going to get
20 at. Even though neither court, if my recollection is
21 correct, so much as cited Turner, do you claim that Turner
22 was in fact applied by the Court?

23 MS. ALEXANDER: I believe that if one looks at
24 how the district court treated those things and in fact
25 left, for example, the lockdown provisions in place means

1 that in effect Turner was applied.

2 Now, in terms of the relationship between
3 Turner --

4 QUESTION: Well, I think that boils down to
5 saying that if we assume Turner was applied, that
6 particular aspect of the order is not inconsistent as a
7 matter of law with a Turner analysis, but that's about as
8 far as we can go, isn't it?

9 MS. ALEXANDER: I would agree.

10 QUESTION: We -- yes, okay.

11 MS. ALEXANDER: The relationship between Bounds
12 and any affirmative obligation in the prison context case,
13 whether personal safety or whatever, is there's an
14 obligation to provide that. However, that doesn't mean
15 that regulations that have some incidental effect on
16 something that's an affirmative obligation, therefore
17 cannot be put in place on the State, so if there is
18 something that both has Turner implications --

19 QUESTION: Well, you speak of an affirmative
20 obligation, Ms. Alexander. Now, in Estelle v. Gamble,
21 where we were dealing with medical claims of prisoners
22 under the -- the basic approach of the Court was, you've
23 got this fellow in prison, or this woman in prison, and
24 they're sick. You can't just leave them there because if
25 they were on the outside of the prison they could have

1 gone and done something about it. Isn't -- shouldn't our
2 approach here be somewhat similar?

3 The idea of an affirmative obligation to do more
4 than the person could have done if he were outside, I
5 don't see where that comes from.

6 MS. ALEXANDER: Actually I think Estelle,
7 Mr. Chief Justice, is a good illustration of how this
8 principle works, because there is no obligation for the
9 person who's bleeding on the street for the State to do
10 something because the State hasn't been involved in that.

11 But there is an affirmative obligation on the
12 part of the State to provide medical care for the person
13 who is in its custody.

14 QUESTION: Even though he has appendicitis --
15 he's not beaten up in the prison. He just has some
16 disease that he could have easily just as well gotten
17 outside, but still he's been cut off from access to other
18 medical sources, so the prison has to supply it.

19 MS. ALEXANDER: That's correct.

20 QUESTION: But it doesn't have to supply more
21 than he could have gotten on the outside.

22 MS. ALEXANDER: Well, it has to provide
23 reasonable medical care, just as it has to provide
24 reasonable safety. That is the affirmative obligation.
25 That is the obligation that's not --

1 QUESTION: Incidentally, where does that
2 affirmative obligation come from? I understand the sick
3 prisoner case. That comes from the Eighth Amendment.
4 This isn't an Eighth Amendment case, is it?

5 MS. ALEXANDER: That's correct, Your Honor, it
6 is not.

7 QUESTION: So where does this affirmative
8 obligation to provide a law library come from?

9 MS. ALEXANDER: In Bounds --

10 QUESTION: Other than Bounds.

11 MS. ALEXANDER: In Bounds it comes from the fact
12 that the right of access to courts is the most fundamental
13 right that a prisoner has, because no other right,
14 including Eighth Amendment rights, can --

15 QUESTION: It depends on purpose the access is
16 sought, for what purpose the access is sought, doesn't it?
17 I mean, if you say for purposes of vindicating
18 constitutional rights taken away when he's thrown in
19 prison, I suppose that's true.

20 MS. ALEXANDER: Yes.

21 QUESTION: But if you're talking about the right
22 to sue for some monetary damages, that's just a
23 deprivation of economic welfare which he's been deprived
24 of that when he's thrown in prison. He can't go out and
25 make money in all sorts of ways. I don't see that that's

1 so fundamental.

2 MS. ALEXANDER: I agree that the most
3 fundamental core of the right of access to courts has to
4 do with those things related to the criminal process.

5 QUESTION: Maybe the only one. Maybe the only
6 one. I don't see how the other has anything to do with
7 fundamental human rights.

8 MS. ALEXANDER: Well, civil rights under section
9 1983 I would think is equally fundamental, because if that
10 doesn't exist, then absolutely nothing that the prison
11 authorities do to the person while in prison can be
12 redressed.

13 QUESTION: Well, I'd say that, but that's a
14 constitutional violation again.

15 MS. ALEXANDER: I would agree, Your Honer, and
16 those --

17 QUESTION: I'm giving you constitutional
18 violations, but would you acknowledge that as far as the
19 obligations of the prison, they don't have to give any
20 legal advice about anything that doesn't deal with
21 constitutional violations.

22 MS. ALEXANDER: I think that is more debatable.
23 However, custody rights are -- also relate to a
24 fundamental interest, and immigration is in fact so
25 closely tied to the criminal process --

1 QUESTION: You think they have to -- the prisons
2 have to provide advice on immigration?

3 MS. ALEXANDER: I think that it is not beyond
4 the discretion of the district court.

5 QUESTION: What provision of the Constitution
6 would cause that to be required?

7 MS. ALEXANDER: Collateral to the criminal
8 justice rights because they are so closely related.

9 QUESTION: Is it an abuse of discretion not to
10 get --

11 QUESTION: Well now, wait a minute, collateral
12 to the criminal justice rights -- I don't really
13 understand your answer.

14 MS. ALEXANDER: Well, there are a number of --

15 QUESTION: You can be deported. It's not
16 criminal.

17 MS. ALEXANDER: Your Honor, a number of detainer
18 issues with regard to immigration also have effects on the
19 criminal justice system. However, I would think that in
20 the overall context this is not nearly as important.

21 Almost all of the access that's here involved in this case
22 has to do with the two fundamental things that Justice
23 Scalia mentioned, that is, the direct relation to the
24 criminal justice process and civil rights. That --

25 QUESTION: Well, those things may be taken care

1 of maybe by four or five form books Has there been any
2 studies to show the effectiveness, the cost effectiveness
3 of these massive libraries?

4 MS. ALEXANDER: Your Honor, I can't answer the
5 question directly in that form. What I can say, but I
6 can't give the Court citations, is that the studies of
7 effective legal access program show that the effect of the
8 program is to reduce the filing of frivolous lawsuits.
9 The volume goes down, because once prisoners have some
10 opportunity to know what are the requirements of --

11 QUESTION: In the Federal system it's now
12 running 1 percent successful.

13 MS. ALEXANDER: That may be, but those are still
14 extraordinarily important cases, because without some
15 access to the courts, then there is no possible limit on
16 governmental power. These are the people who have the --
17 in which there is the most possibility of abuse of --

18 QUESTION: Ms. Alexander, may I ask you to focus
19 for a minute on what you say the injury is that must be
20 proven for a system-wide violation that would justify a
21 system-wide decree?

22 MS. ALEXANDER: There has to be a threat of
23 injury to the class, or some defined portion of the class.

24 QUESTION: A constitutional injury?

25 MS. ALEXANDER: Yes, Your Honor.

1 QUESTION: And in this context, what do you say
2 has to be established to justify system-wide relief?

3 MS. ALEXANDER: Well, in terms of the argument
4 that the defendants have made, the --

5 QUESTION: No, in terms of what you say the
6 class representatives must prove --

7 MS. ALEXANDER: The class --

8 QUESTION: -- to get system-wide relief.

9 MS. ALEXANDER: The -- they must prove that this
10 entire system as directed to this element poses a real and
11 immediate threat to the likes of access of the class.

12 QUESTION: The question, to go back for a
13 second -- because you know a lot more about this actually,
14 and as you've read into the constitutional basis for
15 Bounds, I think really the question is in my mind, too,
16 what part of the Constitution rest on?

17 Naively, I have thought, well, the person is
18 being deprived of his liberty. He's in prison, so he's
19 deprived of his liberty. In a certain number of cases,
20 small, perhaps, it would be an improper deprivation, and
21 he has to have some kind of process available, or at least
22 he can't be cut off from process through which he could
23 challenge what could be an unlawful deprivation of his
24 liberty.

25 So in my own mind I was pinning it on the Fifth

1 or Fourteenth, but that's a naive and uninformed reaction
2 compared to what yours will be, so I think people are
3 trying to get at what, in your reading, has struck you, or
4 you've come to the conclusion as to what the Bounds basis
5 is in the Constitution. Quite literally and specifically,
6 what amendment do you tie it to?

7 MS. ALEXANDER: Well --

8 QUESTION: And I'm not asking you to accept my
9 characterization.

10 MS. ALEXANDER: Well, Justice Breyer, Bounds
11 says also that it's a due process right. I notice that
12 Turner v. Satley describes Johnson v. Avery, the earlier
13 right of access case, as involving a First Amendment
14 petition right.

15 I think the reason that one could describe it
16 best as a due process right is that it has various
17 elements. It has elements of equal protection. It has
18 elements, for a person who has already been convicted, of
19 petitions to redress grievances, and for those reasons I
20 have no quarrel with Bounds' description of it as a due
21 process right.

22 QUESTION: My other question, if I could ask it
23 now, is as you say in your brief on page 39, for example,
24 I think you believe yourself that in certain respects this
25 decree is overdrawn, and your opponent's brief, which is

1 very good, points out certain respects it is -- seemed to
2 me is in certain respects overdrawn, yet there are other
3 respects that you point to which may have a good basis,
4 and they've challenged those too, but I mean, the evidence
5 seems more your side, in my opinion, but in other ones
6 not.

7 So what, in your view, should this Court do if
8 we think there are certain basic things like the Hispanic
9 and 261 locked-up people, where the evidence is not too
10 terrible for you, and there are other respects where the
11 evidence seems pretty good for their side, and so what
12 should we do?

13 Should we act like an appeals court and just
14 review the decree as if we were an appeals court? Should
15 we send it back? How do we get to the result even that
16 you want on page 39?

17 MS. ALEXANDER: If the Court were of the view
18 that a constitutional violation had been proven but was
19 concerned that certain aspects, subsidiary aspects of the
20 remedy did not appropriately consider the Turner analysis,
21 the appropriate relief, I would think, would be to remand
22 it to the Ninth Circuit with directions to remand to the
23 district court to determine what provisions should have a
24 Turner analysis then applied.

25 I'd like to --

1 QUESTION: Ms. Alexander, but what about the
2 problem that we were discussing before about who frames
3 the remedy?

4 You -- if you think that we are -- we have no
5 reason to be concerned with the method by which this
6 decree was arrived at, that is, a special master was
7 appointed, he drafted the decree, how do you answer the
8 question that the State never had a chance to come up with
9 its own plan? Should it not be given now a chance to do
10 so?

11 MS. ALEXANDER: Justice Ginsburg, it seems to me
12 that that -- it would be wrong to apply a flat-out rule
13 that no district court can ever enter structural relief
14 without first giving a defendant, no matter how
15 recalcitrant, no matter what the history --

16 QUESTION: But the judge never said why he
17 wasn't -- nothing on the record indicates why the State
18 wasn't given an opportunity to present a plan.

19 MS. ALEXANDER: Well, Your Honor, I think that
20 one can look at the record, one can look at what happened
21 in Gluth, one can look at the finding of the district
22 court that any books that were not on the so-called Michie
23 list were then immediately removed from the law library,
24 one can look at the finding of the special master in the
25 development of the process that there had been retaliatory

1 practices at some of the facilities, and that's in the --
2 QUESTION: But we would be -- you seem to be
3 suggesting that we should make the best case for the judge
4 why he didn't ask the State to come up with a plan first,
5 and I could agree with you that it's not an inexorable
6 requirement in every case, but there's a lot of litigation
7 like this, and this is an important question about what is
8 the general way of proceeding.

9 So if it's proper here for the judge to say,
10 system-wide violation, I will appoint a special master,
11 that's one thing. If it's not appropriate, what should
12 the judge do once he finds a system-wide violation?

13 MS. ALEXANDER: I think it would be different,
14 Your Honor, if the Court were now to tell district judges
15 there is such a rule, but to apply retroactively in this
16 case a rule that a district judge who gave the defendants
17 8 months and five sets of objections during which -- and
18 many informal meetings with the special master, and in
19 which many, many, if not most of the defendant's
20 objections were accommodated -- indeed, the only reason,
21 for example, that the noise provision, that for the first
22 time in the Supreme Court the defendants objected to, is
23 in there, is at no earlier point did the defendants say,
24 we don't want it.

25 There ought to be some obligation on the part of

1 State --

2 QUESTION: They were given the chance, as I
3 understand, to say why the earlier order, which contained
4 such a provision, should not be applied State-wide.

5 MS. ALEXANDER: And had they taken that
6 opportunity it would have been out of there, because, in
7 fact, I would -- there was --

8 QUESTION: That is not an opportunity to object
9 to one of the provisions of the earlier order. It is
10 simply an objection to say why the earlier order should be
11 extended State-wide.

12 But you know, I'm not even as far along as
13 Justice Ginsburg. I don't know why it shouldn't be an
14 inexorable requirement. What is wrong with an absolute
15 requirement that before a district judge decides how to
16 manage prisons, he ought to ask the State how they think
17 it ought to be managed?

18 MS. ALEXANDER: It fail --

19 QUESTION: What is wrong with making that an
20 absolute, universal, inexorable rule?

21 MS. ALEXANDER: It fails to account for the
22 circumstance that if the defendants are not going to
23 cooperate the district court is going to be forced to
24 delay the imposition of consti --

25 QUESTION: He says, you have 2 weeks to come up

1 with a plan. If you don't come up within 2 weeks, I'll
2 make up my own.

3 MS. ALEXANDER: Your Honor --

4 QUESTION: I'll use the one I used, you know,
5 several years ago.

6 MS. ALEXANDER: I think that suggests some of
7 the practical difficulties. If the State, in fact, had
8 been given 2 weeks to come up with a plan, I submit to the
9 Court that what it would have been able to submit in that
10 time would have been less responsive to its interest than
11 the 8-month period it had --

12 QUESTION: And if 2 weeks is a reasonable period
13 and the State comes up with something that's patently
14 absurd, the judge would say, well, I gave you your chance,
15 now I'm going to make up one. That's fine.

16 MS. ALEXANDER: If that is actually what the
17 rule of the court were, it would be a rule that wouldn't
18 really give the State and local defendants anything that
19 they now don't have, because it wouldn't be -- it would be
20 just a formality.

21 QUESTION: For this judge it would give them
22 something.

23 QUESTION: Ms. Alexander, let me return, if I
24 may, to the question of systemic violation, and I'd like
25 to get some feel for how you would quantify it.

1 Supposing there are 260 prisoners in lockdown,
2 and a number of them request books, and say in maybe two
3 or three of those examples the books don't come within a
4 3-day period that the regulations require.

5 Now, is that a systemic violation?

6 MS. ALEXANDER: Your Honor, first of all, I --
7 let me say that that's not this case.

8 QUESTION: No, but I -- give me some idea of
9 what -- how many individual violations you have to get of,
10 say, the performance of a particular prison official
11 before you get what's called a systemic violation.

12 MS. ALEXANDER: Obviously, one can't give a hard
13 and fast rule, but I think the key here is looking, is
14 this the way, based on what you know about the system,
15 that -- does this represent isolated events or is, based
16 on what the system is supposed to do, is this what is to
17 be expected?

18 This is a case in which what the evidence showed
19 how the system was working was exactly how one would
20 expect a system to work.

21 QUESTION: Is the evidence here the evidence in
22 footnotes 23, 24, and 25 on page 23a, where as I count
23 there are about 50 or 60 examples, is that what -- do you
24 know what I'm referring to?

25 MS. ALEXANDER: Yes, Your Honor.

1 QUESTION: Is that the relevant evidence in this
2 respect to the 261 lockdown prisoners?

3 MS. ALEXANDER: Your Honor, if I could say
4 again --

5 QUESTION: Is there more than that, or is that
6 not relevant? I mean, that's what I was looking at.

7 MS. ALEXANDER: There -- I think there is more
8 evidence. That's what the district judge cited. There is
9 more evidence in the record, particularly from the
10 transcripts, about that, but --

11 QUESTION: There's --

12 QUESTION: Did any of those instances indicate
13 that there was a real danger of a constitutional right
14 being sacrificed?

15 MS. ALEXANDER: Yes, because --

16 QUESTION: Or being impaired? What was one of
17 those? Having in mind that only 1 percent of prisoner
18 petitioners are successful anyway, where in one of these
19 is there a real threat of a constitutional right, in a
20 concrete sense, being deprived?

21 MS. ALEXANDER: Well, first, Your Honor, I think
22 the right is -- of access is violated whether or not the
23 prisoner would ultimately succeed if the prisoner was
24 denied a reasonable opportunity to present his or her
25 claims to court, and certainly there was testimony with

1 regard to the lockdown system that that happened. There
2 were prisoners who were unable to get the books, who were
3 unable to find, figure out --

4 QUESTION: You mean there's a right of access
5 even if you don't have a ground for a complaint?

6 MS. ALEXANDER: There is a right of access to
7 determine, Your Honor, whether there is a ground to file a
8 case, and certainly that's what we would want prisoners to
9 do. We would want prisoners to be able to determine
10 before they file whether or not what they're filing is a
11 frivolous case, and there certainly was evidence that this
12 system with regard to the one book delivered to the cell
13 with nothing to tell the prisoner that he wants or she
14 wants Volume 452 of Fed 2d --

15 QUESTION: But there's no evidence of the
16 efficacy of that system, is there?

17 MS. ALEXANDER: Of -- of how the -- whether the
18 law -- yes, there is evidence.

19 QUESTION: What is that --

20 MS. ALEXANDER: There's evidence that that's how
21 it normally worked, that it normally took a long time.
22 What the --

23 QUESTION: No, no, there's no evidence that
24 there's some demonstrated link between access to library
25 materials and successful prisoner petitions.

1 MS. ALEXANDER: There is evidence --

2 QUESTION: As contrasted with simply filing the
3 form that's prescribed in the Federal Rules of Civil
4 Procedure.

5 MS. ALEXANDER: There is evidence that those
6 persons who didn't get it were not able to file cases and
7 were -- and had their cases dismissed because they were
8 unable to make responses in conformity with the order, and
9 Your Honor, I would submit --

10 QUESTION: How many instances of that were
11 found? Was it two?

12 MS. ALEXANDER: Your Honor, that is a
13 misunderstanding that the defendants first put forward in
14 their reply brief.

15 If one looks at the findings of the district
16 court on this point, it's not that there were two
17 incidents, it is that prisoners, plural, were unable to
18 file their cases. Prisoners, plural, had their cases
19 dismissed.

20 Now, it is the case that the judge cites on this
21 only one witness for each, but that certainly is not what
22 the evidence in this case showed. There were numerous
23 other witnesses who testified to similar events, and I
24 could go through them.

25 QUESTION: Well, isn't the district court under

1 some obligation, if he's going to give a system-wide
2 remedy, to say this is the reason I find a systemic
3 violation, that there were not just two prisoners who
4 failed to get their books, but that there were 26?

5 MS. ALEXANDER: Your Honor, I believe that he
6 did make systemic findings, and given that the defendants
7 specifically say in their reply brief we are not
8 challenging any of the findings of the district court as
9 clearly erroneous, I think this issue is at an end.

10 QUESTION: Okay, but if you say, prisoners are
11 not getting books, is it two prisoners, is it -- you can't
12 challenge that finding as clearly erroneous if only two
13 got it, because two is a plural, so you can't challenge
14 that, and yet it doesn't lay the groundwork for a systemic
15 violation.

16 MS. ALEXANDER: Well, I think what I would see
17 as the missing step in this, the two, we disagree, that's
18 not what's involved, but in any event, these are cases in
19 which someone had actually had his or her constitutional
20 rights impaired, but the question the district judge ought
21 to be addressing is a different one, is there threatened
22 injury from the class when I see that these harms have
23 occurred, that this same system is operating the way I
24 would expect this flawed system to operate, and therefore
25 --

1 QUESTION: What if all the harms --

2 QUESTION: Ms. Alexander --

3 QUESTION: No --

4 QUESTION: Why wouldn't it satisfy the
5 Constitution if prisoners were allowed to file whatever
6 they want to file and provided access to forms so that
7 they could file, and secondly, they were also provided
8 access to legal advice, period? No books, no anything
9 else.

10 They have the forms, you fill out a form, we'll
11 mail it for you, and moreover, you can have legal advice
12 about any particular issues you want to discuss, any
13 particular constitutional issues you want to discuss,
14 maltreatment in prison, your conviction was void for some
15 reason.

16 MS. ALEXANDER: For some prisoners that might
17 well provide meaningful access, but for a prisoner who
18 cannot write, the opportunity to be given legal advice and
19 to be given form books just doesn't work to --

20 QUESTION: I'll add that, that legal advice and
21 the lawyer will fill out the form for you if you can't
22 write.

23 MS. ALEXANDER: The -- in fact, I would say that
24 the best systems are those systems that rely on something
25 like that, rely on using direct sources of assistance.

1 QUESTION: So that would be good, and you could
2 get rid of the library.

3 MS. ALEXANDER: Oh, absolutely. We have no
4 attachment to law libraries. Personally, I think law
5 libraries are not the best way to provide access, but in
6 some sense what Bounds does here is helpful, because it
7 gives us something to measure access by.

8 Does the prisoner have the access that is
9 equivalent to what a literate prisoner given access to a
10 law library would have? That ought to be the appropriate
11 standard.

12 Thank you, Your Honor.

13 QUESTION: Thank you, Ms. Alexander.

14 General Woods, you have 2 minutes remaining.

15 REBUTTAL ARGUMENT OF GRANT WOODS

16 ON BEHALF OF THE PETITIONERS

17 GENERAL WOODS: Thank you, Mr. Chief Justice.

18 First, there were no -- there was no showing of
19 actual injury by any lockdown inmates. It wasn't two.
20 Two would not be enough for a systemic remedy, but there
21 were none.

22 QUESTION: I count 30 -- 29 in those footnotes.
23 I mean, I don't know what you mean by actual injury, but
24 he listed 29 instances in which there were delays that he
25 thought were significant or --

1 GENERAL WOODS: This is the question, Justice
2 Breyer. We do not believe that delay is actual injury.
3 We're talking about whether somebody actually had a case
4 or a cause of action somehow impaired because of delay.

5 Prisoners, the one thing they have in abundance
6 is time, and if it takes 4 or 5 days and they have a
7 statute of limitations of 300 days, they are not impaired.

8 Secondly, Turner has to be applied to the
9 lockdown situation. That, I think, is crystal clear, that
10 first Turner wasn't applied, and if it is applied, that
11 there is a legitimate penalogical interest in saying that
12 you can't have an unlimited amount of books in a cell,
13 that you can't have them for an unlimited amount of time,
14 and that our system, where -- which was place at this
15 time, and Exhibit 85 shows that legal assistance would go
16 and help these people if they were illiterate or if they
17 just wanted any book, that that is a reasonable system,
18 and Turner has to be applied to lockdown, and that
19 lockdown situation isn't just in Arizona, it's in every
20 prison, and in fact ours is better than the Bureau of
21 Prisons.

22 I think the whole point here -- I'd like to
23 conclude and ask the Court to consider what Arizona has
24 done and what most States has done is, we've met your
25 precedent. We've said, we have a law library and it's an

1 adequate law library. A pock-apart missing here or there
2 that the judge pointed out does not make it inadequate.

3 And then we have removed any barriers for --
4 caused by incarceration, as dictated by Johnson and by
5 Wolff. If you can't speak English on the outside, you try
6 to get help from whoever you can get help from. We
7 provide that on the inside. We go above and beyond that,
8 and I think that is the key point, and that's why we ask
9 you to reverse.

10 CHIEF JUSTICE REHNQUIST: Thank you, General
11 Woods.

12 GENERAL WOODS: Thank you, Your Honor.

13 CHIEF JUSTICE REHNQUIST: The case is submitted.

14 (Whereupon, at 11:05 a.m., the case in the
15 above-entitled matter is 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:

SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS
AL., Petitioners
v. FLETCHER CASEY, JR., ET AL.

CASE NO. : 94-1511

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

BY Ann Marie Federico

(REPORTER)