February 25, 1981

Mr. Justice:

Re: No. 80-332, Rhodes v. Chapman

Petrs have filed a reply brief that argues that, resps to the contrary, the unconstitutionality per se of double-celling was the focus of the DC's decision. The petrs also suggest -- somewhat inconsistently, but correctly I think -- that the DC failed to distinguish between double-celling and overcrowding. Petrs renew their argument that SOCF "meets minimal standards of safety and decency," quoting your dissent in Bailey, 444 U.S. at 624 (emphasis added); they contrast the prison described by CA10 in Ramos, and note that the CA there held that the prison's shortcomings in the area of "motility, classification and idleness" were not of a constitutional dimension. In addition, petrs stress that the record does not support resps' contention that double-celling at SOCF has led to violence, riot, physical injury or psychological damage; resps are thus forced to rely on secondary sources to buttress their argument.

Perhaps the most useful aspect of petrs' reply is their attempt to clarify the time spent out of cell by the various classifications of inmates; they assert that the figure of 10 hours per day set out in their proposed findings (and adopted by the DC) represented only an average, i.e., while 75% of the

inmates are free to leave their cell for 15 hours each day, some do not always take advantage of this opportunity. They also assert that prisoners at SOCF are reclassified on a regular basis to other institutions.

My original recommendation remains unchanged.

BCS

April 24, 1981

Mr. Justice:

Re: No. 80-322, Rhodes v. Chapman

I recommend that you await Justice Brennan's separate opinion in this case. For the reasons stated in my bench memo, I am in agreement with the result Justice Powell has reached in his opinion. But I share Justice Brennan's and Justice Stevens' concern over some of the opinion's language. The opinion begins and ends by stating that the question here is whether the housing of two inmates in a single cell at SOCF is cruel and unusual punishment. In fact, however, much of the opinion is devoted to defining "the limitation that the Eighth Amendment imposes upon the conditions in which a State may confine those convicted of crime." Op., at 6.

Justice Powell suggests that this is a question of first impression in this Court; while this may be technically correct, but see Hutto v. Finney, 437 U.S. 678, 685-687 (1978), the Court obviously is not writing on a clean slate in this area. In Hutto, the Court reviewed the conditions at the prison in question and concluded that, "taken as a whole," they violated the punishment against cruel and unusual punishment. The opinion here does acknowledge that a court may look at prison conditions "alone or in combination" in order to determine whether they

inflict unnecessary or wanton pain or are grossly disproportionate to the severity of the crime. But the opinion also suggests that deference should be paid to the actions of state legislatures not only for the purpose of determining contemporary standards of decency, see op. at 8, but for the purpose of determining whether conditions at a particular prison are cruel and unusual. See op. at 11, 12. With all due respect, I think that such deference is unwarranted in light of the conditions in American prisons today. See Bailey, 444 U.S., at 424 (Blackmun, J., dissenting).

Yet it is more the tone of the opinion, rather than any particular statement in it, that disturbs me. What Justice Powell gives with one hand, he takes away with another: courts have a responsibility to scrutinize claims of cruel and unusual confinement, op. at 12, but they must do so "cautiously" since a decision that a given punishment is impermissible "cannot be reversed short of a constitutional amendment," quoting Gregg v. Ga., 428 U.S., at 176. Op. at 11. But, of course, prison litigation cases are not comparable to challenges to the death penalty, for they present only the question whether conditions at a particular prison constitute cruel and unusual punishment; they are inherently fact-specific, and there is no danger that a "constitutional amendment" will be necessary to correct an erroneous judgment. This case involves only conditions at SOCF; I would not use it as a vehicle for cutting back on prison litigation in general.

June 3, 1981

Mr. Justice:

Re: No. 80-332, Rhodes v. Chapman

I recommend that you join Justice Brennan's concurrence. I think that the concurrence is consistent with your vote at conference and with the position you have taken on prison conditions in such prior cases as Bailey. Part I of the concurrence, although overlong, strikes me as an eloquent, and necessary, defense of the role of the judiciary in this area. I am less happy with some of the language in Part II: I agree for the most part with the catalogue of conditions that WB suggests must be considered, see op. 14-15, but I am somewhat wary of his suggestion that courts must also take into account such factors as "educational and rehabilitative programming." Ibid. Likewise, his summation on p. 15 gives me some pause when it suggests that the court must decide not only whether the cumulative impact of the conditions of incarceration "threatens the physical, mental, and emotional health" of the inmates, but also whether it creates "a probability of recidivism and future incarceration," quoting Laaman v. Helgemore, 437 F. Supp. 269 (D.N.H. 1977). I have some difficulty with the second prong of this test: statistics indicate, I believe, that recidivism is a major problem throughout the American prison system, and I fail

to see how it could be linked to conditions at a particular prison. I have spoken to WB's clerk (Mike McConnell) about this point, and he intends to ask WB whether he thinks it necessary to include this reference to recidivism.

If the reference is excised, I have no hesitation in suggesting that you join; even if it is not, in light of the importance of the concurrence, I think that this objection may be too minor to stand in the way of a join.*

BCS

* Mike McConnell has called back to say that WB wishes to leave the recidivism point in the concurrence; WB takes the position that "the probability of recidivism" is one of the factors that may show that the "cumulative impact" of the prison conditions is cruel and unusual. I am not so sure. Depending on how you feel about this issue, you may wish to call WB and discuss the point with him. I think it would be unfortunate to weaken the force of the concurrence by concurring separately in all but this point; it also might call unjustified attention to what is at best a secondary issue.

SGS

June 3, 1981

Mr. Justice:

Re: No. 80-332, Rhodes v. Chapman

I think that your separate concurrence is very powerful, and completely appropriate in light of your past writings in this area. I have only one suggestion. I am concerned that the second paragraph, while clearly correct in its characterization of the views of your Brethern, may antagonize some of the other Justices. As an alternative, you might consider deleting the second paragraph and adding the following at the end of the first paragraph: "I have long shared this concern. See, e.g., United States v. Bailey, 444 U.S. 394, 419, 424 (1980); Jackson v. Bishop, 404 F.2d 571 (CA8 1968)."

You are, of course, the best judge of whether this change is advisable. In any event, however, I am glad that you have chosen to write this concurrence.

BCS

No. 80-332

RHODES, ET AL.

v.

CHAPMAN, ET AL.

Cert to CA6 (Lively, Martin, Peck [Sr.Cir.J.])(PC)

2/22/81 Swartz

SUMMARY

This case presents the question whether double-celling of prisoners at the Southern Ohio Correctional Facility (SOCF) constitutes cruel and unusual punishment in violation of the Eighth Amendment. Resps, two inmates in SOCF, filed the instant §1983 class action in the USDC for SD Ohio, seeking declaratory and injunctive relief against SOCF's practice of placing two inmates in a cell originally designed for only one occupant. The DC held that the double-celling was unconstitutional, and ordered that SOCF end that practice. CA6 affirmed in a PC opinion, holding that the DC's findings of fact were not clearly erroneous and that its conclusions of law followed therefrom.

Petrs argue that the DC held that double-celling is unconstitutional per se, and they assert that this case therefore presents the question whether double-celling constitutes cruel and unusual punishment where the record indicates that the practice does not deprive inmates of minimum constitutional guarantees to adequate food, clothing, shelter, sanitation, medical care and personal safety. Resps reply that the DC held only that double-celling was unconstitutional under the totality of the circumstances present at SOCF, and that that decision is supported by the record. I conclude that the DC's conclusions of law are not supported by its findings of fact, and I therefore recommend reversal.

I FACTS AND DECISIONS BELOW

In 1975, resps, two inmates in the Southern Ohio Correctional Facility (SOCF), filed the instant §1983 class action in the USDC for SD Ohio. Resps alleged that various conditions at SOCF constituted cruel and unusual punishment in violation of the Eighth Amendment; in particular, resps challenged the practice of "double celling," i.e., placing two inmates in a cell originally designed for only one occupant. The DC (Hogan, CDJ) certified a class consisting of all inmates at SOCF and, after a hearing, found that "overly and on balance ... the double celling at [SOCF] is unconstitutional." CA6 affirmed in a PC opinion, holding that the DC's findings of fact were not clearly erroneous and that its conclusions of law followed therefrom. Because I believe that the proper resolution of this case turns on a close reading of the DC's findings of fact and conclusions of law, I set them forth in detail below.

The DC's findings of fact begin by discussing the physical characteristics of SOCF. Ohio's only maximum security prison, SOCF was built in the early 1970's; the DC found that "[l]ooking at it from a brick and mortar viewpoint, it is unquestionably a top-flight, first-class facility" that has been in use only a relatively few years. As built, the facility contained some 1,660 cells, each designed to contain one inmate; the State therefore contemplated that there would be no more than 1,600 to 1,700 inmates at SOCF. On resps' motion, the DJ visited SOCF, and found that "the facility is new and that, of course, is a plus; as such places go, it is not lacking in color, and most

places surely are; generally speaking, it is quite light and airy, etc."

With regard to the inmates, the DC found that at the time of trial SOCF contained some 2,300 prisoners, 67% of whom were serving either life or first degree felony sentences. Double celling of inmates began sometime in 1975. Of the 1,660 cells, 40 are in the medical ward; the remaining cells are "inside cells" or "outside cells." The 660 inside cells measure 6'x 10'6'' x 9' high, are windowless, and consist of three solid walls with the fourth wall barred. The 960 outside cells measure 6'6'' x 10'6'' x 9' high, and are otherwise similar to the inside cells, except that each has a window that can be opened or closed by the occupants. All cells, with the exception of those in the medical ward, contain various cabinets, a wall-mounted lavatory with hot and cold running water, a china commode that is flushed from inside the cell, a built-in radio, a heating and air circulation vent, and a bed measuring 36'' by 80''; in "doubled" cells, a second bed has been mounted to the wall above the first bed. Each cell block has attached to it a "day room" that contains card tables, a television, and a varying number of chairs.

The cell block in which an inmate is celled establishes, in large part, the amount of time during which he must be locked in his cell with a cellmate. Out of the 1,620 non-medical cells, a total of 340 are designated single-celled; these cells are inside cells, and constitute the merit block, the full protective custody block, sections of the disciplinary isolation block, and

death row. Although the DC suggests that the remaining 1280 cells are all double-celled, see Petn A-17 to A-18, this is obviously incorrect, since it would mean that there were far more than 2300 inmates at SOCF. The correct figure of inmates who were double-celled must that be that stated by petrs: approximately 1400. This means that approximately 700 cells were actually occupied by two inmates. Although neither I nor my engineer wife are sure of our computations -- since the DC uses inconsistent figures, as do petrs -- the best we can come up with is the following. The inmates in more than half of the 960 outside cells were double-celled. See Petrs' Br at 8. But see Petn A-14 (DC says almost all of outside cells doubled). These double-celled inmates constitute approximately 75% of all double-celled inmates, and they have the option of being out of their cell a substantial part of the day. See Petn A-18.

Unfortunately, here again the DC makes inconsistent findings, in this instance with regard to the time these inmates may spend outside of their cells: at one point, Petn A-15, the DC states that these inmates are free to be outside of their cells -- either in the day room, at meals, in the library, or at jobs or school -- except between the hours of 9:30 P.M. and 6:30 A.M.; shortly thereafter, the DC states that these inmates "have to be locked in their cell with their cellmate only from around 9 P.M. to 6:30 A.M.," Petn A-16; it then states, however, that these inmates "are out of their cells (or at least have that option) some ten hours a day." Petn A-17. The parties do not explain this discrepancy in any satisfactory manner; resps suggest,

however, that the court accepted petrs' proposed finding that in practice inmates were out of their cells for ten hours daily

Inmates in the remaining "double-celled" cells are allowed out of cells for far shorter times. These inmates are evidently located in approximately half of the remaining 320 inside cells, and constitute 25% of the inmates who are double-celled. Those in "semi-protective" status are "out of cells" 6 hours weekly; those in "voluntary idle" status are allowed out of their cells only 4 hours weekly; those in one section of "administrative isolation" are allowed out only 2 hours weekly; and those in the "receiving" block -- i.e., new arrivals -- are allowed out only 4 hours weekly. The DC noted, however, that inmates in the "semi-protective" and "idle" cell blocks are "there by choice (at least to some degree)"; these are inmates who have requested protective custody or have chosen to be "idle." Similarly, the DC noted that those in the administrative isolation block were there "as a result of claimed rule infractions and following a plenary hearing." Lastly, newly-arrived inmates were kept in the "receiving" block for only a brief time, usually about two weeks.

After making these findings, the DC turned to the "effect that double celling has on other aspects of the inmates' life-style." The DC disagreed with resps' contention that double celling, and the concomitant overcrowding, rendered the day rooms "functionally useless"; the court found any reduction in availability to be "not significant." The DC also rejected resps' contention that double-celling had caused food service to become inadequate; the court found that meals were "adequate in

every respect." Likewise, the DC found no merit to resps' assertion that double celling had rendered air quality and noise levels "intolerable"; resps' own expert testifed that he noticed no odors and that the cell blocks were "too quiet." Resps' also failed to produce any evidence to substantiate their claim that the visitation facilities had been "overwhelmed" by double celling; in fact, the court noted, SOCF is one of the few maximum security prisons in the entire country that permits contact visitation for all inmates. The court next found that the inmate-to-guard ratio was well within the acceptable ratio suggested by resps' expert. Likewise, no evidence was presented that would demonstrate that the plumbing, lighting, or law library facilities are inadequate to meet the needs of the increased population; the general library was superior in quality and quantity, and the law library was "quite adequate."

However, the court did find credible the testimony that there were not enough jobs to go around and that many inmates assigned to jobs worked only about an hour a day. Similarly, while the school classrooms were "light, airy, and well-equipped," and there was no evidence that any inmate had been denied the opportunity to receive schooling, the opportunity to attend school "has been substantially delayed since double celling"; further, double-celling obviously interfered with studying, which had to be done in the cells or the day rooms. With regard to medical care, the court found that medical staff had not been increased since the advent of double-celling, but concluded that the medical situation "cannot be described as out

of hand or the result of indifference." The temporary backlog in the provision of dental care was "intolerable," but the evidence was that the one dentist at the facility was ordinarily able to cope with the needs of the population. In contrast, the staff included only one psychologist and one social worker, and the "services rendered in that area have been substantially denied to a number of inmates due to the double celling." he really means our population

With regard to the relationship between double-celling and violence, the DC considered evidence from three sources. First, the DC noted that the expert witnesses "were all in agreement -- as is everybody -- that single celling is desirable," since double-celling involves "loss of privacy and close contact with another person [that results in] an increase in tensions and frustrations." This tendency was exacerbated by the fact that the inmate has little, if any, choice as to his cellmate and by the fact that a substantial number of the inmates are victims of some form of emotional or mental disorder; one expert testified that in a maximum security prison of any size some 15% of the inmates may be expected to be schizophrenics particularly prone to violence engendered by "close quarters" and "frustrations." The prison psychologist and chaplain both testifed that double-celling had led to increasing tension, both proportionate and geometric, and aggressive and anti-social characteristics. Second, the court considered the testimony of a guard called by resps' and of the inmate-witnesses. While the guard testified to a marked increase of violence after double-celling began, the DC expressly refused to credit his testimony. The inmate's

testimony was likewise "conclusory and general and not of much help from a credibility point of view"; while the court did not doubt that to a certain degree the violence the inmates described existed, it noted that violence was to be expected in a maximum security prison and stressed that "[t]he problem posed by this case is simply whether double celling, as such, accounts for it." Turning to the third source of evidence -- the testimony of prison management and the written prison records of acts of violence -- the court answered that question in the negative: crediting this last evidence, the DC "conclusorily" found that while violence had increased proportionately with the increase in population, "there has been no increase in violence or criminal activity increase due to double celling."

Having made these findings of fact, the DC rendered its conclusions of law. Citing various authorities, the court stated that its task was to ascertain the "totality of the circumstances" in this particular prison, and then to inquire into whether "the totality as determined is intolerant or shocking to the conscience, or barbaric or totally unreasonable in the light of the ever changing modern conscience." Many prior double-celling or overcrowding cases were distinguishable, since they involved pretrial detainees or misdemeanants, rather than "maximum security convicted felons"; similarly, many of those cases involved antiquated or inadequate prisons that bore "no resemblance to SOCF at all." The court also stated that incidents of violence, including homosexual attacks, are inevitable in even the best-run prisons; it held that the State

had not failed to use ordinary care for inmate safety and that "[h]omosexuality, enforced and consensual, extortion and criminal activity have increased with double celling, but only proportionally and not geometrically." Nor, the court held, did these inmates have a constitutional right to privacy or private living quarters. Similarly, the court concluded that the constitutional requirements of basic medical care had been met at SOCF.

Notwithstanding the above, however, the DC's ultimate conclusion was that double celling at SOCF was "on balance" unconstitutional. This conclusion was based on five factors. First, the inmates are "long term," which "can only accent the problems of close confinement and overcrowding." Second, the prison was now holding 38% more people than the designers intended it to; courts have consistently issued remedial decrees limiting prisons to "design capacity," since overcrowding "necessarily involves excess limitation of general movement as well as physical and mental injury from long exposure." See, e.g., Miller v. Carson, 401 F. Supp. 835 (MD Fla 1975); Ambrose v. Malcolm, 414 F. Supp. 485 (SDNY 1976). Third, double-celling reduces the square footage per inmate in the cell to approximately 30-35 square feet. In Gates v. Collier, 423 F. Supp. 732, 743 (ND Miss. 1976), the court stated that "50 square feet of living space is the minimal acceptable requirement to comport with the Constitution," and that conclusion is supported by the evidence in this case. The DC cited a number of policy statements and standards issued by correctional officials and

groups, all of which called for more space per occupant than that provided at SOCF; the DC found these to be evidence of the "contemporary" standard. Fourth, the court stated that at best, "a prisoner who is double celled will spend most of his time in the cell with his cellmate"; "[a] substantial number must so spend all but six hours a week and another substantial number all but four hours a week." Fifth, while double-celling in 60 square foot cells is "undoubtedly permissible as a temporary measure," double-celling at SOCF was a condition of "relative permanence."

Petrs were ordered to submit plans to terminate double-celling at SOCF. The DC rejected one alternative plan, which would have provided that all double-celled inmates would be allowed to remain outside their cells between 6:30 A.M. and 9:30 P.M.; this, the court stated, would, or could, lead to increased double-celling, and would simply add to the overtaxation of the facilities. Instead, the court ordered that petrs reduce the inmate population at a rate of 25 men per month until the population is reduced to approximately 1,700 overall. The DC subsequently denied petrs' Fed. R. Civ. P. 60(b) motion, which argued that the DC's opinion was in conflict with Bell v. Wolfish, 441 U.S. 520 (1979). See Response to Petn A-2. The DC pointed out that Wolfish had distinguished the instant and similar cases on the grounds that they involved not pretrial detention, but "tradtional jails and cells in which inmates were locked most of the day"; Wolfish explicitly did not decide whether it agreed with the reasoning of this line of cases.

CA6 affirmed in a brief PC opinion. The CA rejected petrs' contention that the DC had held double-celling to be unconstitutional per se; it read the opinion as holding not that double-celling is unconstitutional under all circumstances, but rather that it was unconstitutional under the circumstances of this particular prison. As the DC noted, this case is distinguishable from Wolfish. The CA concluded that the DC's "findings of fact are not clearly erroneous, that its conclusions of law are permissible from the findings of fact and that the rmedial provisions are a reasonable response to the violations which were found."

II CONTENTIONS

(A) Contentions of Petrs:

Petrs contend that the DC held that double-celling is unconstitutional per se. They argue that the DC rejected virtually all of resps' allegations, and rested its conclusion that double-celling was unconstitutional not on the particular facts of this case, but on the nature of double-celling itself. Thus, this case presents the question whether double-celling of inmates constitutes cruel and unusual punishment where the record indicates that the practice does not deprive inmates of minimum constitutional guarantees to adequate food, clothing, shelter, sanitation, medical care and personal safety. Petrs answer that question in the negative, relying on Newman v. State of Ala., 559 F.2d 283 (CA5 1977), cert. denied, 438 U.S. 915 (1978). In

Newman, the CA stated that if "the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety ... that ends its obligations under Amendment Eight." Id., at 291. The decision below is contrary to this Court's statement in Wolfish, 441 U.S., at 542, that "there is [not] some sort of 'one man, one cell' principle lurking in the due process clause of the Fifth Amendment." If double-celling is a lawful limitation on the freedom of pretrial detainees, a fortiori it is lawful as to convicted felons. Double-celling is not a "punishment" within the standards set forth in Wolfish, 441 U.S., at 537-538: it has not historically been regarded as punishment, and has analogies in the military, school, and the home; it was instituted at SOCF solely because of the increase of persons sentenced to prison; and no person was double-celled as punishment for his crime or violation of an institutional rule. The fact that double-celling is less than ideal in no way renders the practice cruel and unusual punishment.

The decision below is also in direct conflict with all other CAs that have decided the issue. In Crowe v. Leeke, 540 F.2d 740 (CA4 1976), it was held that it did not amount to cruel and unusual punishment to confine three protective custody inmates for all but a few hours a week in 63 square foot cells with only two beds. In Burks v. Teasdale, 603 F.23d 59 (CA8 1979), CA8 affirmed a DC decision allowing double-celling of administrative isolation inmates on a 24 hour per day basis, despite deficiencies in the prison that were absent at SOCF. In Hite v.

Leeke, 564 F.2d 670 (CA4 1977), CA4 reaffirmed that double-celling alone failed to state a claim for relief under §1983; that case is particularly relevant here, since it involves a facility similar to SOCF, where inmates were allowed out of their cells for slightly less time than the inmates in the instant case. In contrast, CA4 has found an institution unconstitutionally overcrowded where the double-celling created unsanitary conditions, a high level of violence, and lack of medical care. Johnson v. Levine, 588 F.2d 1378 (CA4 1978).

Thus, each of these courts has taken the position that the right to relief turns not on the practice of double-celling itself, but on whether that practice is part of a larger problem of deprivation of the basic necessities of life. Here the DC found a "watering-down" of jobs, a delay in education, and a less than desirable level of psychological and social work staff; it did not find, however, that these deficiencies presented a threat to the lives and health of the imates. The Constitution simply does not guarantee full employment, immediate education, or rehabilitative services. The DC's reliance on cell-size standards promulgated by professional organizations was also misplaced, for Wolfish, 441 U.S., at 543, n.27, makes clear that constitutional rights are not coextensive with such constantly changing and somewhat utopian standards. Petrs conclude by noting that while they are not seeking a reversal on the separate question whether the relief awarded was appropriate, the relief ordered underscores that the DC's decision as to liability rests on what is desirable, rather than what is constitutionally

required. The DC did not order an increase in psychologists and social workers or in work and educational opportunities; nor did the DC order that inmates be allowed to spend more time out of their cells. Instead, the DC ordered that the practice of double-celling be eliminated and SOCF be limited to its original design capacity.

(B) Contentions of Resps:

Resps reply that the DC did not hold that double-celling is unconstitutional per se; instead, it considered the totality of the circumstances at SOCF and concluded that the size of the cells, the length of time in the cell, the duration of the sentences, the incidence of mental illness, the idleness, the lack of ameliorative services and the violence amounted to a totality that caused "physical and mental injury from long exposure." The DC thus applied the correct legal test, and its conclusions are supported by the record. Resps turn intially to their contention that the record shows that double-celling at SOCF caused mental and physical injury. First, the DC correctly found that the length of the sentences exacerbated the problems caused by close confinement; in addition, the very nature of the inmate population at SOCF and all maximum security prisons aggravates the problems caused by double-celling. The DC found that a substantial number of the inmates in a maximum security prison are likely to have some form of emotional or ~~emotional~~ disorder, and maximum security prisons obviously contain the most violent criminals. The DC also found that violence increased as

the inmate population increased; this increase took place, of course, in a constant physical space. Resps then cite numerous experts for the proposition that overcrowding and double-celling increase aggressiveness, break down normal social behavior, and increase the likelihood of prison riots; they note that the superintendant of SOCF testified that he prefered individual cells because there is "[n]ot so much violence."

The second factor focused on by the DC was SOCF's capacity. The effect of overcrowding, the DC found, was pronounced, since it "necesarily involves excess limitation of general movement as well as physical and mental injury from long exposure." SOCF's capacity to meaningfully employ or educate inmates was overtaxed; the expert witnesses agreed that such enforced idleness was harmful and increased agressive behavior. Medical and psychological care was also overtaxed. The third factor the DC identified was the amount of space provided per inmate. Resps assert that the actual walking floor-space per double-celled inmate was 21-24 square feet; but in any event, accepted professional standards uniformly reject the living space of 30-35 square feet found by the DC. For instance the recently promulgated Federal Standards for Prisons and Jails, formulated by the Justice Dept, recommend that cells rated for single occupancy house only one inmate, Standard 2.02, and that multiple-occupancy cells must provide a minimum of 60 square feet of floor space per inmate, Standard 2.05; long-term facilities where over 10 hours a day are spent in the cell must provide at least 80 square feet of floor space. Standard 2.05. Accord,

Comm'n on Accreditation for Corrections, Manual of Standards. See also, e.g., American Correctional Institution (75 square feet); National Sheriffs Ass'n (70-80 square feet); Nat'l Council on Crime and Delinquency (50 square feet); U.S. Army (55 square feet). See generally Br. 17-18. The fourth factor used by the DC was the amount of time spent by inmates locked in their cells. Resps rely on the DC's finding that at best prisoners will spend a "substantial time" in their cells, and its finding that most double-celled inmates were out of their cells for only "some ten hours a day." They cite authorities indicating that lock-up of over 14 hours a day is harmful to the health of the inmate. Finally, the DC looked to the relative permanence of double-celling at SOCF; without judicial intervention, double-celling at SOCF will continue to increase.

Resps argue next that the DC applied the correct legal test to these findings of fact. The test employed -- whether the totality of the circumstances violated the Eigth Amendment -- was approved in Hutto v. Finney, 437 U.S. 678 (1978). Petrs' attempt to mischaracterize the holding below as announcing a per se rule should be rejected. Similarly, the Court should reject petrs' argument that the Eighth Amendment protects only the "minimum necessities" of life. The "totality" test applied in Hutto includes more than the physical necessities of life. The Eighth Amendment "proscribes more than physically barbarous punishments"; it embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency ...." Estelle v. Gamble, 429 U.S. 97, 102 (1976). Thus, the trier of

fact must consider whether the totality of circumstances unnecessarily inflicts suffering or is sufficiently serious to transgress modern concepts of decency. The totality test has been consistently applied by other courts and, petrs to the contrary, the decisions of those courts are not in conflict with the holding below. See Johnson v. Levine, 588 F.2d 1378, 1380 (CA4 1978) (en banc) (double-celling unconstitutional in 44 square foot cell); Newman v. Alabama, supra, 559 F.2d 283 (CA5) (double celling unconstitutional under existing conditions but not in newly constructed prisons); Burks v. Teasdale, supra, 603 F.2d 59 (CA8 1979) (unconstitutional in 47 square foot cell but acceptable in 65 square feet cell because of generally favorable totality of conditions); Battle v. Anderson, 564 F.2d 388 (CA10 1977) (unconstitutional in less than 60 square feet). Deference to the expertise of prison officals is inappropriate in this area; in any event, prison experts all agree that double-celling is undesirable. The State cannot be allowed to deny constitutional rights by pleading lack of funds.

Resps further contend that double-celling at SOCF violates the Eighth Amendment even under the "minimum necessities" test advanced by petrs and amici. The concept that the Eighth Amendment protects only the bare necessities of life has no precedential support in this Court. But in any event, confining two prisoners for a majority of the day in cells measuring approximately 65 square feet constitutes inadequate shelter; a "state must provide an inmate with shelter that does not cause his degeneration or threaten his mental and physical well-being."

Ramos v. Lamm, No. 79-2324 (CA10 Oct. 2, 1980). The DC's finding that the shelter provided here was inadequate is supported by the record and by the standards promulgated by all professional organizations; while those standards do not establish "constitutional minima" in a due process case, see Wolfish, 441 U.S., at 544, n.27, they are evidence of "contemporary standards of decency" in an Eighth Amendment case. See Estelle, 429 U.S., at 103, n.8.

Finally, resps assert that the decision below is consistent with Wolfish, which held that double-celling of pretrial detainees at the Metropolitan Correctional Center did not constitute punishment. In the first place, Wolfish itself distinguished the instant case on the grounds that it dealt with a traditional jail and cells in which inmates were locked for most of the day. But in any event, a comparison of the facts of the two cases reveals the factual disparities that supports the different results reached: in particular, resps stress that the inmates here were serving long sentences, and there was a finding that double-celling caused them physical and mental harm and denied them some services. No such findings existed in Wolfish.

(C) Contentions of Amici urging reversal:

There are two amici urging reversal. Amici Alaska, et al., have filed a brief that argues that this Court must remain sensitive to federalism, comity and separation of powers when rendering decisions involving prison conditions. Amici attack the "totality of the circumstances" standard on the grounds that

it is too subjective, and vests the DC with unreviewable discretion. Instead they advance what they claim is an "objective" test: does the challenged condition cause extreme or unnecessary pain. The historical background of the Eighth Amendment indicates that it was designed to address three abuses: the imposition of cruel and unusual methods of punishment; the imposition of penalties that are illegal or not authorized by statute; and the imposition of disproportionate punishment. It is the first of these abuses that is relevant in prison condition litigation. The question a court must ask itself is whether singly or in aggregate the challenged conditions cause pain and, if so, whether the pain is so unnecessary and severe as to be "cruel"; in making this inquiry, the court must determine both the quality and quantity of pain inflicted. By failing to focus on the pain caused by any particular violations, the totality of the circumstances test leads to a generalized intrusion on the functioning of state prisons. Further, courts must look not to evolving standards of decency in the abstract, but rather to evolving standards concerning what constitutes cruel and unusual punishment. The conditions at SOCF, while no doubt uncomfortable, were not cruel.

Amicus Texas strenuously maintains that the decision below holds that double-celling is unconstitutional per se. Like amicus Alaska, Texas argues that the Eighth Amendment requires only that conditions of confinement not result in the wanton infliction of serious injury. A court must first determine that double-celling directly causes serious injury before any Eighth

Amendment violation can be found. See Estelle v. Gamble, 429 U.S., at 106 (only deliberate indifference to serious medical needs violates evolving standards of decency under Eighth Amendment). As in Wolfish, double celling at SOCF may have taxed some equipment or facilities, but that does not mean that the practice was unconstitutional. Further, even assuming that the DC correctly found injuries cognizable under the Eighth Amendment, the correct remedy was not the elimination of double-celling, since that remedy trenched upon the discretion of prison officials. Amicus does not suggest what alternatives might have been adopted.

(D) Contentions of amici urging affirmance:

There are two amicus briefs urging affirmance. Amici American Medical Ass'n and American Public Health Ass'n argue that the Court's Eighth Amendment analysis has focused on "contemporary standards of decency," and has looked to professional guidelines as evidence of those standards. See, e.g., Estelle, 429 U.S., at 103; Hutto, 437 U.S., at 683. These professional standards -- which generally call for at least 60 square feet of space per person -- are not simply desirable goals, but are rather the minima rquired to safeguard mental and physical health. Substantial empirical data demonstrate that physical and mental injury results from sustained overcrowding. Thus, these standards are not intuitive, normative, or idealistic; they represent the broad consensus of public health experts and behavioral scientists based on empirical findings in

the fields of medicine, psychology and epidemiology. In particular, long term overcrowding demonstrably causes: increased levels of physical illness and disease; increased rates of stress and mental disorders; and increased rates of aggressive and violent behavior.

Amicus Cal. Public Defender takes issue in particular with the amicus brief submitted by the states of Alaska, et al. Amicus submits that "federalism" is not a cloak behind which states may indefinitely expand prison populations while refusing to provide sufficient facilities to permit those imprisoned to live consistently with minimum standards of human decency. The relevant inquiry is not whether a particular condition or practice shocks the conscience, but rather whether the totality of the conditions constitutes cruel and unusual punishment; the court must consider an aggregate of factors, none of which alone need rise to a constitutional level. The number of inmates housed in a cell, its size, the amount of time they are confined and the diversions offered are all key factors; no one factor is determinative.

(E) Contentions of the SG:

While the U.S. takes no position in the instant case, the SG has submitted an amicus brief setting forth current federal policy in this area. In addition, they have filed with the Court copies of the new Federal Standards for Prisons, issued by the AG on Dec. 16, 1980. These standards specify that "[i]n long term institutions, there is [to be] one inmate per cell or room,"

which is to have at least 60 square feet of floor space; in addition, all cells and detention rooms rated for single occupancy are to house only one inmate. The preamble emphasizes that, while the standards are intended to "promote practices that protect the basic constitutional rights of inmates," they "should not be taken to be a statement of constitutional minima. They confer no rights and create no legal causes of action." They do, however, express the firm federal policy that there should be no double-celling in long-term correctional facilities. The SG brief contains several charts detailing the current status of double-celling in the federal system; these charts show, inter alia, that in Dec. 1980, 1,292 federal prisoners -- approximately 5% of the federal prison population -- were double-celled in cells less than 63 square feet in size; of these inmates, 1,106 were required to spend 5 to 9 and 1/2 hours a day in their cells. The remaining 186 prisoners were confined in "special housing" (i.e., protective or disciplinary cells) for about 23 hours a day. In addition, if I read the charts aright, in Dec. 1980 every federal correctional facility was in excess of "design capacity."

III DISCUSSION

I begin with the premise stated in your dissent in U.S. v. Bailey, 444 U.S., at 424: "[t]here can be little question that our prisons are badly overcrowded and understaffed and that this is in large part the cause of many of the shortcomings of our

penal systems. This, however, does not excuse the failure to provide a place of confinement that meets minimal standards of safety and decency." The question here is whether SOCF meets such minimal standards; on this record, I believe that it does. In my view, this case turns on the discrepancy between the DC's findings of fact and its conclusions of law; I simply cannot agree with CA6's conclusion that the DC's "conclusions of law are permissible from the findings of fact." I would rest the decision on this narrow ground, for in almost every other particular I find myself in disagreement with the position taken by petrs and amici urging reversal. The following discussion argues first that the appropriate test is one that looks to "the totality of the circumstances"; after analyzing the findings of fact here in light of that test, I conclude the DC's findings of fact provide no basis for its conclusions of law.

Petrs and amici to the contrary, it is well established that the Eighth Amendment "proscribes more than physically barbarous punishments." As early as Weems v. U.S., 217 U.S. 349, 378 (1910), the Court noted that the "cruel and unusual punishment" clause of the Eighth Amendment is "progressive and not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice." The Court has thus held "repugnant to the Eighth Amendment punishments which are incompatible with the 'evolving standards of decency that mark the progress of a maturing society,' ... or which 'involve the unnecessary and wanton infliction of pain.'" Estelle v. Gamble, 429 U.S., at 102-103 (citations omitted).

Nonetheless, petrs urge that the Eighth Amendment requires only that the State furnish its prisoners with "reasonably adequate" food, clothing, shelter, sanitation, medical care and personal safety; amici Alaska, et al., argue that the Court should adopt a test that asks whether the challenged condition inflicts "pain." But, as the author of the pool memo suggested, such formulations beg the question, for the phrases "reasonably adequate" and "pain" do not have fixed and immutable meanings; it is only by reference to contemporary standards that we can know whether particular shelter is "adequate" or whether, contrariwise, it inflicts "pain" by its insufficiency. Nor is there any merit to amici's suggestion that the "totality of the circumstances" test is inappropriate. This Court applied such a test in Hutto v. Finney, 437 U.S., at 687, in holding that, taken as a whole, the conditions of confinement at issue violated the Eighth Amendment. I find nothing anomalous in the proposition that the sum total of conditions in a prison might rise to the level of a constitutional violation, even though no one condition standing alone might constitute cruel and unusual punishment.

Here, however, the DC rejected virtually every allegation resps made with regard to the conditions at SOCF. In this regard, it is helpful to distinguish between "double-celling" and "overcrowding." Double-celling, resps suggest, is both an evil in itself and an evil in that it causes the general facilities of a prison to become overcrowded. But the findings of fact suggest that resps failed to prove either claim. With regard to the problem of overcrowding, the DC noted that SOCF was a modern

facility; more significantly, it flatly held that sanitation, medical care, visitation rights, food service, and the libraries and other facilities were either all adequate or more than adequate. One has only to compare the DC's description of conditions at SOCF with the prisons described in other recent cases, see, e.g., Ramos v. Lamm, No. 80-332 (CA10 9/25/80)(copy with briefs), to recognize that SOCF is far above average as prisons go.

In only three areas did the DC suggest that overcrowding had had a negative effect on facilities or services at SOCF: work assignments had been "watered down," educational opportunities had been delayed, and the psychological counselling staff was insufficient. But at most this shows that certain facilities were "taxed" by the double-celling, see Wolfish, 441 U.S., at 543. Standing alone, I cannot believe that deprivation of meaningful work, educational opportunities, or psychological counselling amounts to "cruel and unusual punishment"; after all, the same conditions exist for many who are not imprisoned. Further, even if these conditions did violate the Eighth Amendment, it is obvious that they could have been remedied by less drastic means than ordering the end of double-celling; however, petrs' failure to challenge the remedy ordered here suggests that the Court's decision cannot be placed on the ground that the remedy was inappropriate.

Thus, the DC's opinion can be upheld only if double-celling at SOCF constitutes cruel and unusual punishment in itself or in combination with the deprivation of meaningful work assignments,

psychological care and educational opportunities. Amici APHA and AMA contend that studies have shown that double-celling leads to increased violence, mental stress and physical disease. Yet resps failed to prove that double-celling at SOCF had led to any of these results. Their failure of proof with regard to violence is manifest; the DC found that there was a proportional increase in violence, rather than the geometric increase that one would expect if double-celling itself was a cause of violence. The absence of findings of fact with regard to mental or physical disease is equally telling; while the DC refers to expert and prison official testimony that double-celling had led to increased tension and aggressive characteristics, no finding to that effect was made. While resps seize on the DC's statement that overcrowding "necessarily involves excess limitation of general movement as well as physical and mental injury from long exposure," Petn A-35, they fail to recognize that this is stated as a conclusion of law. Although it is conceivable that the DC was taking judicial notice of the effects of double-celling, it does not say so; in any event, the court's finding that violence at SOCF had not increased geometrically is inconsistent with one of the main conclusions of the empirical studies.

We are left, then, with the question whether placing two men in a cell with less than 60 square feet of floor space for an extended time constitutes cruel and unusual punishment even if no external effects can be shown. Cf. Wolfish, 441 U.S., at 542 (confining given number of people in given amount of space in such a manner as to cause them genuine hardship over an extended

period of time might raise serious due process questions). I have little doubt that some combinations of cell size and time spent in cell might be so shocking that it would be unnecessary to prove actual mental or physical disintegration. But, in my subjective judgment, this is not such a case. It is true that the cell size here is less than that recommended by apparently every correctional organization. In Wolfish, however, the Court stated that "while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." 441 U.S., at 544. They are, to be sure, some evidence of contemporary standards of decency; but they are not conclusive evidence, for they seek as much to form contemporary standards as to reflect them. Further, these standards are not uniform; the Constitution provides no guidance for choosing between the 50 square foot standard suggested by, e.g., the Nat'l Council on Crime and Delinquency, and the 60 square foot standard suggested by, inter alia, the federal government.

Thus, the size of the cell cannot be controlling standing alone; at the least, it is also necessary to take into account the time spent in the cell. See Hutto, 437 U.S., at 686. The DC's failure to distinguish between prisoners who spent virtually all of their time locked up and those who were locked up only overnight indicates that in actuality it did not take time in cell into account. The DC explicitly found that 75% of the inmates spent a substantial time out of their cell: at the least,

according to the various figures used by the DC, those inmates were free to be outside their cells 10 hours a day; at the most, they were not locked up approximately 14 hours a day. Thus, as in Wolfish, 441 U.S., at 543, most of the time this group of inmates spent in their cells was presumably devoted to sleeping. A stronger case may be made that cruel and unusual punishment was inflicted upon those prisoners who were locked up for all but a few hours per week. But the DC's findings indicate that these prisoners were locked up for such periods either while they were in transit, or because they were voluntarily idle or undergoing punishment; the temporary, or at least volitional, nature of this confinement suggests that it was not cruel and unusual. 710

IV CONCLUSION

In sum, I conclude that the DC's findings of fact belie its conclusions of law; the court appears to have confused desirable correctional goals with constitutional minima. But while I believe that this case was decided incorrectly below, I hope that it will not be used as a vehicle for cutting back on the power of federal courts to prevent cruel and unusual conditions in state or federal prisons. I think that any such attempt should be strongly resisted, and that the decision of the Court should stress that this case involves nothing more than a failure of proof. 720

QUESTIONS

For Petrs:

1. Exactly how many prisoners were double-celled at the time of trial? How many of these prisoners were in outside cells? How many were in inside cells? Where is this in the record?

2. How do you explain the DC's statement that nearly all 960 outside cells were double-celled? [Petn A-14]

3. At one point in the DC opinion, the court suggests that 75% of the prisoners were locked up for all but 10 hours a day [Petn A-17]. At another point, the court states that these prisoners were locked up from only around 9:00 P.M. until 6:30 A.M. [A-16]. How do you explain this discrepancy?

4. Are not the correctional standards relied upon by the DC evidence of contemporary standards of decency? Do you disagree with the argument of amici that these standards are based on empirical studies?

5. Could not the DC take judicial notice of the fact that overcrowding leads to increased tension? Need the courts wait until a certain level of violence is reached before intervening?

For Resps:

1. Assume that SOCF were to provide sufficient psychologists and work and educational opportunities for all 2300 inmates; under those circumstances, would double celling still be unconstitutional?

2. Is there any distinction to be drawn here between the inmates who were locked up for all but a few hours a week and those who locked up only overnight? Is it cruel and unusual punishment to

force two inmates to share a cell as sleeping quarters if adequate space is provided for sleeping?

3. Is it not true that those inmates who were locked up for all but a few hours a week were either voluntarily idle, in transit, or in disciplinary cells? [Petn A-18]

June 22, 1981

#80-332

I agree! Prisons aren't to have Holiday Inn conditions; nor should jails or detention homes. Clean facilities - yes!

I believe in the death penalty for positive "on-the-spot" identification of a murderer, kidnapper, assassin, etc. "Citizen life" has been placed on the list of unimportant; "criminal life" has preference.

Marcella Prendergast

Marcella Prendergast
1205 13th Avenue North
Fort Dodge, IA 50501

6/29/81

#80-332

Barry Deckell
290 Bulgaria Way
Laguna Beach Calif. 92651

6-26-81

Hon. Justice
Harry A. Blackmun
U.S. Supreme Court Bldg.
Washington D.C.

Your honor,

May I respectfully take exception to Justice Powell's opinion in regard to two prisoners in a cell built for one.

"... they are part of the penalty that criminal offenders pay for their offenses against society"

and further

The constitution does not "mandate comfortable prisons."

Regardless for which crime a person is in prison, he has still to be treated as a human being. His penalty is loss of freedom not family life.

As the constitution does not mandate comfortable prisons, it does not mandate overcrowded prisons either.

You may remember that some years ago a judge went for some weeks into the prisons to find out for himself about such institutions.

He was crushed to listen to the cries through the night of the prisoners.

When our prisons are customarily overcrowded, which has led to riots, the voters can say in the world should go on to build more prisons and replace the obsolete ones.

Your decision discourages such action.

When a 60 square-foot cell is the rule for one prisoner, 2 in a 63 square-foot cell constitute a cruelty, going on for years.

With the constant overcrowded prisons the harsh decisions for longer prison terms is not easy to understand.

Very truly
Benj Heckel