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PRELIMINARY MEMORANDUM

October 31, 1980 Conference
List 1, Sheet 4

Cert to CA 6 (Lively, Martin, and Peck; p.c.)
*[Sr. Cir. J]

No. 80-332 - CFX

RHODES

Federal/Civil Timely

v.

CHAPMAN

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1. SUMMARY: The question presented involves the propriety of the DC's ruling that double celling in the Southern Ohio Correctional Facility (SOCF) violated the Eighth Amendmeent's proscription against cruel and unusual punishment.

2. Facts and Proceedings Below: This class action alleged that numerous facets of institutional life at SOCF violated the

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Eighth Amendment. Among the complaints was one directed at the practice of double celling prisoners in cells designed for single occupancy and measuring between 63 and 68 square feet. Approximately 1400 of the 2300 inmates were double celled. The institution was designed to hold only 1600 inmates and double celling was required to accomodate the larger than anticipated inmate population.

SOCF was built in 1973. The DC found it to be a modern, first rate institution. Food services, ventilation, lighting, plumbing, sanitation, law library and classroom facilities, medical services, visiting privileges and guard to inmate ratio were all adequate. Due to the overcrowding, however, full time jobs were not fully available, some inmates had had educational opportunities delayed and the number of psychologists and social workers had not increased with the increase in population. There was an increase in violence, but that was due to the size of the prison population not to double celling. The DC rejected all of the prisoners' contentions except the allegation that double celling violated the Eighth Amendment's proscription against cruel and unusual punishment. The factors which led the DC to find a constitutional violation were: (1) SOCF is a maximum security prison housing individuals convicted of serious felonies; (2) The inmates at SOCF are long term; (3) SOCF was holding 38% more prisoners than the prison's rated capacity; (4) The cells were designed to hold one person and the size of these cells was incompatible with expert recommendations that there be a minimum of fifty square feet per occupant; (5) A substantial

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number of prisoners were required to spend substantially all of their time in the cells; (6) This double celling is not a temporary measure. The court ordered a reduction of the inmate population by 25 persons per month until the population is reduced to 1,700. By the time the court entered this order the population had already been reduced to 2000.

In a brief per curiam, the CA 6 affirmed. That court explained that the DC had not held that double celling was per se unconstitutional. The lower court's conclusion was directed only to the facts of this case. The findings of fact were not clearly erroneous and the conclusions of law derived from those findings were permissible.

3. Contentions: The petr phrases the question presented as follows: "Whether the double celling of prison 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." This phrasing both begs the question and overly simplifies the DC holding. The core issue is whether double celling is constitutionally adequate shelter in light of the factors considered significant by the DC. Yet petrs attempt to press the argument that the DC has formulated a per se constitutional rule invalidating double celling. Accepting that premise, the argument is that the holding is inconsistent with Bell v. Wolfish, 441 U.S. 520 (1979) which disavowed the existence of a "one man, one cell" principle

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in the due process clause and with numerous circuit court opinions which have upheld double celling. For example, in Hite v. Leeke, 564 F.2d 670 (4th Cir. 1977), the CA 4 specifically held that double celling in cells designed for single occupancy and measuring 65 square feet did not amount to cruel and unusual punishment.

Resps counter that the DC's holding is based upon the totality of the circumstances presented by these facts and is, therefore, not in conflict with the rule of law announced by any federal court. In fact, Bell v. Wolfish, although relying on the Due Process Clause instead of the Eighth Amendment, since Bell involved pretrial detainees, supports this approach:

> While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.

441 U.S. at 542.

Similarly, the CA 4 has not foreclosed the possibility that double celling could violate the federal constitution:

> In Hite v. Leeke we held that "double-celling," the housing of two prisoners in a cell initially designed for single occupancy, was not itself a violation of the Constitution. It, of course, may be a relevant factor when other consequences of overcrowding create deprivations or impose unusual restrictions and disadvantages upon the prison population.

Johnson v. Levine, 588 F.2d 1378, 1380 (4th Cir. 1978) (en banc).

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4. Discussion: The resps are correct that there is no conflict in the circuits with respect to whether double celling is per se unconstitutional. Although in the prison context courts have adopted various tests to assess the constitutional implications of the alleged deprivations (e.g., shocks the conscience or evolving standards of decency), when addressing a particular problem such as double celling the question is framed in terms of the totality of the circumstances. There is no conflict on this very generalized plane. However, on the facts of this case, the circuits may very well be in conflict as to the appropriate result. The CA 6 result certainly seems more solicitous of prisoners' rights than does the CA 4 result in the factually similar case of Hite v. Leeke. This difference may be due to the DC's reliance on an "evolving standards of decency" approach to assessing the totality of the circumstances. Yet, the DC does cite language seeming to approve a "shock the conscience" test. Indeed, the DC opinion affirmed by the CA 6 is quite odd. From the DC's description of the prison and recitation of the applicable law one is left with the definite impression that the lower court is going to reject the constitutional challenge. The conclusion that double celling at SOCF violates the Constitution is at odds with the tenor of the opinion. The only factor that would seem to justify the conclusion is that a substantial number of prisoners spend substantially all of their time in these cells. Yet the lower court rejected petr's proposed solution of building dormitories which would have alleviated this problem. Thus it may be that

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the DC was more concerned with overcrowding than with double celling; but that is not the focus of the opinion.

Although I am sympathetic with the DC's view of optimal prison conditions, I have doubts that federal law is meant to insure that all prisons meet the ideal standards proposed by penological experts. The Court may want to look at this case as a vehicle to define the scope of federal court involvement in state prison reform. The DC's approach certainly opens the door for continuing involvement by federal courts so long as penological philosophies continue to evolve. On the other hand, the absence of a published CA opinion may make this case less than compelling. The remedy imposed by the DC is not harsh.

There is a response and a reply as well as an amicus brief from the State of Oregon urging the Court to grant the petn.

10/16/80 Ides Opns in petn

I think this is a grant. The memo-writer to the contrary, the DC comes close to announcing a per se rule here, to wit: double celling is unconstitutional unless a certain unspecified amount of square feet of living space is provided for each inmate. See 335-36.* As the memo-writer points out, the DC explicitly rejected resps' arguments that double celling resulted in increased violence or substandard medical care, food or sanitation. The decision appears to turn almost entirely [over]

* amicus br also argues that the DC has announced a per se rule.

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on the DC's reliance on other lower court decisions concerning minimum space requirements & on correctional standards issued by various groups. In Bell v. Wolfish, 441 U.S. at 543 n. 27, the Court cited several DC opinions establishing minimum space requirements - including, interestingly enough, the instant case - but stated that it need not decide "whether we agree w/ the reasoning & conclusions of these cases." It did note, however, that policy statements of correctional groups "simply do not establish the constitutional minima; rather, they establish goals ...." Because I think that the DC confused goal's w/ constitutional minima, I would grant this case; to my mind, it is only when lack of space demonstrably affects the inmate's security or health that constitutional concerns come into play. See Bell v. Wolfish, 441 U.S. at 542.

grant

BLS 10/21/80

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