No. 02-94

IN THE

Supreme Court of the United States

WILLIAM OVERTON, Director of
Michigan Department of Corrections;
MICHIGAN DEPARTMENT OF
CORRECTIONS,

Petitioners,

v.

MICHELLE BAZZETTA, et al,

Respondents.

On Writ of Certiorari To the United States
Court of Appeals For The Sixth Circuit

REPLY BRIEF OF THE PETITIONERS

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INTRODUCTION

Petitioners, the Michigan Department of Corrections (MDOC) and its Director, pursuant to Sup. Ct. R. 25.3, submit their response to the Brief of the Respondents, which Petitioners received on February 20, 2003.

ARGUMENTS

I. Michigan Department of Corrections' Visitation Restrictions Are Necessary For Institutional Security.

Respondents cannot dispute that since the visitation restrictions have been implemented, the number of visiting room major misconducts have dropped dramatically from a total of 710 in 1994 to 334 in 1999 (Jt. App. 90a; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. pp. 2235-2236 and 2240-2241; Def. Exh. 10, R. 294). Respondents nevertheless attempt to dismiss the importance of controlling prison visitation volume as part of institutional security.

It cannot be stated strongly enough that there is nothing more critical to institutional security than controlling who may enter and exit a secured correctional facility. Every current and former MDOC witness to testify on behalf of Petitioners noted that there is a direct connection between the volume of visitors at MDOC facilities and MDOC's ability to effectively supervise inmates and their visitors. This is especially true given that at most correctional facilities visitors wait in the same area regardless of whether they are participating in contact or non-contact visitation and that contact and non contact visitation takes place in the same room.

For precisely these types of reasons, this Court has repeatedly held that when it comes to issues of institutional security, federal courts should accord deference to the appropriate prison authorities. In *Thornburgh v. Abbott*, 490 U.S. 401, 407-408 (1989) this Court said:

> All these claims to prison access undoubtedly are legitimate; yet prison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison.

> Acknowledging the expertise of these officials and that the judiciary is ill equipped to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.

The fundamental error of the District Court and the Court of Appeals is that they engaged in precisely what this Court warned against in *Turner v. Safely*, 482 U.S. 78, 89 (1987): holding prison administrators to too high a burden, with the result that "their ability to anticipate security problems and to adopt innovative solutions" has been hampered and those federal courts became "the primary arbiters of what constitutes the best solution to every administrative problem."

Here the lower courts recognized that there were legitimate penological interests at stake, but disregarded the judgment of prison officials about their severity, and instead concluded that the opinions of social scientists and lay persons overrode the officials' concerns about safety, security and prison administration. The lower courts should instead have heeded this Court's admonition in *Block v. Rutherford*, 468 U.S. 576, 589 (1984):

> When the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further "balancing" resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility. Here, as in [*Bell v. Wolfish*, 441 U.S. 520 (1979)], "[it] is plain from [the] opinions that the lower courts simply disagreed with the judgment of [the jail] officials about the extent of the security interests affected and

> the means required to further those interests." 441 U.S. at 554.

This is not to say that the four-factor analysis later enunciated in *Turner v. Safely* should not be applied; rather it means that courts must constantly recognize deference while applying those factors. The lower courts here did not do this.

This Court in *Block* took judicial notice of the narcotics problem in prison, 468 U.S. at 588, and also recognized that it is reasonable to make assumptions about how drugs enter prison facilities, 468 U.S. at 587:

> It is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits. Additionally, identification of those inmates who have propensities for violence, escape, or drug smuggling is a difficult if not impossible task, and the chances of mistaken identification are substantial.

The Court in *O'Lone v. Shabazz*, 482 U.S. 342, 350 (1987) further recognized that courts cannot place on prison officials the burden of disproving alternatives.

The courts below failed to give proper deference to the considered judgments of prison officials, placed an improper burden of proof on them, and engaged in an improper balancing. The District Court opinion, for example, instead of applying deference, is replete with statements showing its value judgments:

- ". . . substance abuse while in prison is not a large problem and does not warrant the massive injury

caused by separating family members through permanent restrictions." Pet. App. p. 89a;

- "The potential risk that someone will act inappropriately toward a visitor does not justify excluding an entire group of visitors." Pet. App. p. 64a;
- "…it is highly unlikely that restoring non-contact visits to a limited group of people . . . would substantially burden Defendants' staff and resources." Pet. App. p. 63a.

The Court of Appeals, too, improperly criticized the MDOC for supplying only "anecdotal evidence," Pet. App. 20a, rather than "data or expert testimony," Pet. App. p. 13a, or "clear benefits to be gained," Pet. App. p. 14a, to support its claims.

Both the District Court and the Court of Appeals failed to heed this Court's admonitions and instead substituted their judgment on matters of institutional administration and security for that of correctional authorities. Properly evaluated, there is ample evidence in the record to support the prison officials' decisions and demonstrate that the visitor restrictions are reasonable related to legitimate penological interests, so the decisions of the lower courts should be reversed.

II. Respondents And The Lower Courts Totally Disregarded Security Concerns As Set Forth By Michigan Department of Corrections' Witnesses.

In their February 20, 2003 Brief, Respondents make numerous erroneous statements concerning the factual record established by Petitioners in the lower courts. Contrary to Respondents' assertion that Petitioners did not appeal any evidentiary rulings of the District Court, a review of the record shows otherwise. For example, the Petitioners' brief in the Court of Appeals reveals that Petitioners specifically challenged district court's evidentiary ruling as to the testimony of Mark Creekmore as an issue on appeal. (Jt. App. p. 84a; 6th Cir. Dk. 01-1635, Brief, 7/9/01, at p. 45.) In their brief, Petitioners contended that they were denied a fair hearing in this case when the District Court in effect allowed Respondents to call Mr. Creekmore as an expert witness in this case. Mr. Creekmore had been listed as a lay witness to circumvent the District Court's April 26, 2001 order limiting them to three expert witnesses. (Jt. App. p. 90a; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. pp. 386-388; R. 141, Order.) Although the District Court ruled during trial that Mr. Creekmore was a lay witness, in its Findings of Fact and Conclusions of Law, the District Court identified Mr. Creekmore as an expert for Respondents and relied on his alleged expertise throughout the opinion. (Jt. App. p. 90a; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. pp. 4797-4800 and 4827-4829; R. 230, 9/13/00 TR 5-8, 35-37.)

Petitioners also take issue with Respondents' assertion that the lower court was correct to give more weight to the testimony of family members, that visiting and waiting rooms are safe for children, as opposed to the testimony of current MDOC officials who are actually responsible for supervising prison visitation. (Respondents' Brief at p. 24.) Petitioners presented testimony from seven current employees of MDOC and its former Director, Kenneth McGinnis. Not only did

Mr. McGinnis, testify at length regarding all of the security problems faced by MDOC prior to the 1995 visitation restrictions, but he also testified about the serious problems that result from the introduction of drugs inside prison. (Jt. App. p. 90a; 6th Cir. Dk. 01/1635, 10/18/01 Jt. App. pp. 5297-5330, 5354-5358, and 5366-5367; R. 232, 9/18/00 TR 5-38, 61-65, 73-74.) In addition to Mr. McGinnis, Petitioners also called a Regional Prison Administrator, four Wardens, a Deputy Warden and the Administrative Assistant to the Deputy Director,[1] who all testified about the problems associated with prison visitation prior to the 1995 visitation restrictions.

In contrast to the testimony produced by Petitioners, Respondents and the lower courts relied on the testimony of three experts who had no relevant experience with MDOC correctional facilities. Although Respondents and the District Court rely on the testimony of Dr. Terry Kupers to support their factual findings, during his testimony Dr. Kupers admitted that he has never been employed with any federal, state or county correctional facility. (Jt. App. p. 90a; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. pp. 5158-5159; R. 231, 9/15/00 TR 33-34.) Respondents' expert witness Prof. Sue Ellen Scarnecchia also admitted during her testimony that she had never even visited an MDOC facility housing male inmates and she had no experience, training or education with regard to running a correctional facility. (Jt. App. p. 90a; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. pp. 4262-4264; R. 227, 9/8/00 TR 8-10.) The only other expert called by Respondents,

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[1] The lower court record also reflects that as Regional Prison Administrator, Ms. Pat Caruso, was responsible for managing five maximum security facilities which only permit non-contact visitation. Based on her experience, the substance abuse visitation restriction is an important management tool for dealing with higher security level prisoners who have already lost most of their privileges. (Jt. App. p. 90a; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. pp. 5369-5389, 5397-5399, and 5401-5402; R. 232, 9/18/00 TR 76-96, 106-108, 110-111.)

Dr. Mintzes, did have corrections experience, but he admitted during cross-examination that he had not been employed by MDOC since 1982. (Jt. App. p. 90a; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. pp. 4886-4887 and 4957-4962; R. 230, 9/13/00 TR 94-95; R. 256, 9/14/00 TR 21-26.) Given the enormous changes to the prisons in the past twenty years, including the huge growth in the prison population as well as the increase in drugs and violence in prisons, testimony as to how prisons were managed twenty years ago is not relevant to the problems faced by MDOC prison administrators today.[2]

However, ignoring all of the testimony set forth by MDOC officials in support of the 1995 visitation restrictions, Respondents and the lower courts incorrectly applied the rational basis test set forth in *Turner v. Safely*, *supra*.

> Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process,

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[2] Respondents also relied on the testimony of two former MDOC employees, Mr. Bolden and Ms. VanOchten, to establish that the 1995 visitation restrictions are not reasonably related to legitimate penological interests. A review of the lower court record reveals that although Respondents attempt to characterize these two former MDOC employees as adverse witnesses, both witnesses were called by Respondents in their direct case because neither employee supported the 1995 visitation restrictions when they were first implemented. With regard to Ms. VanOchten, the district court even noted that her testimony was adverse to MDOC. (Jt. App. p. 90a; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 4176-4180; R. 255, 9/7/00 TR 124-128.) Although Mr. Bolden was called by Respondents in their direct case, the district court refused to let Petitioners examine him using leading questions, which greatly limited Petitioners' ability to cross-examine this witness. (Jt. App. p. 90a; 6th Cir. Dk. 01-1635, Jt. App. pp. 4610-4612; R. 229, 9/12/00 TR 13-15.)

> for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration. [*Id*. at 89.]

It is difficult to imagine a more important, legitimate penological interest than having control over who may breach the secure perimeter of a prison and participate in prison visitation. Respondents and the lower courts ignored and dismissed all of the concerns and issues raised by the MDOC prison administrators, who are actually in charge of and responsible for prison security in favor of individuals who have either never managed a correctional facility, or have not managed a prison in more than 20 years. Therefore, because the lower courts totally disregarded the testimony of MDOC officials and erroneously placed the burden of proof on Petitioners, those decisions should be reversed.

III. Children Participating In Non-Contact Visitation Can Be Victims Of Sexual Abuse And Other Misconduct.

In their Brief, Respondents take the position that because the type of visitation at issue in this case is non-contact, Petitioners' concerns about limiting the number of minor children participating in prison visitation in order to protect them from sexual abuse, is specious. Respondents' entire argument opposing Petitioners' 1995 revised visitation policy, which limits the number of minors entering prison for visitation, is based on the premise that as long as minors are participating in non-contact visitation, they cannot be the victims of sexual abuse. "Petitioners never proffered a single document or non-hearsay testimony demonstrating a real possibility of a minor child being sexually abused during a non-contact visit." (Respondents' Brief at p. 18.) Although non-contact visitation may limit the types of sexual abuse that can be perpetrated on minors, non-contact visitation does not completely eliminate the risk of sexual abuse of minors.

As set forth in the Brief of the Petitioners, in Michigan, lower security level inmates and those inmates housed at multiple security level facilities, participating in non-contact visitation, must utilize a cubicle located in the open visitation room. Thus, children participating in non-contact visitation at these facilities are at the same level of risk of sexual abuse as children participating in contact visitation. In addition, all visitors, whether they are going to participate in non-contact or contact visitation, wait in the same waiting room where they are in contact with lower security level inmates doing various janitorial tasks. Given the reality of limited resources and space available for non-contact visitation, at most Michigan prisons there is no glass wall completely separating inmates from visitors, including non-contact visitors. (Jt. App. p. 90a; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. pp. 2536, 2537, 2539, 2540, 2543, 2544, and 2549-2551; Def. Exhs. 23a, 23b, 24b,

24c, 24f, 24g, 25a, 25b, and 25c, R. 296 and 267.) Thus, the notion that by limiting visitation to non-contact Petitioners no longer need worry about children being sexually abused is erroneous.

In addition, contrary to Respondents' assertion that there has never been an incident of a child being sexually abused during non-contact visitation, during the trial in this case, Petitioners did produce evidence of an inmate masturbating while participating in non-contact visitation with his wife and minor daughter. (Jt. App. 90a; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. pp. 2469-2489; Def. Exh. 15, R. 295 and 266.) Although the District Court ultimately admitted the written misconduct ticket packet concerning this sexual misconduct, the District Court refused to admit the videotape of the incident, which clearly established that the prisoner's minor daughter was able to see her father's exposed penis during non-contact visitation. This ruling by the District Court was especially troubling in view of the fact that the District Court later ignored its refusal to admit the videotape and ruled that there was no evidence in the record to show that any child had ever been the victim of sexual abuse while participating in non-contact visitation. (*Bazzetta v. McGinnis*, 148 F. Supp. 2d 813, 829 (2001). (Pet. App. pp. 58a-59a.)

Respondents attempt to diminish the type of sexual abuse at issue in this videotape by arguing that one incident of sexual abuse is insignificant, and that because the victim was the daughter of the inmate, the incident is irrelevant to this case. However, Respondents' analysis completely ignores the fact that the more children participating in non-contact prison visitation, the more difficult it is for MDOC to adequately protect these children. With regard to the issue as to whether this type of sexual abuse is significant, Petitioners strongly believe that any incident of sexual abuse of a minor child is significant. In addition, six photographs from the videotape were attached to Petitioners' May 22, 2001 "Defendants-

Appellants' Response in Opposition to Plaintiffs' Emergency Motion," and are part of the Court of Appeals' record in this case. (Jt. App. 83a; 6th Cir. Dk. 01-1635, Response, 5/22/01.) This Court can make its own determination from that videotape and those photographs as to whether minor children can be the victims of sexual abuse while participating in non-contact visitation.

Because of the unique nature of children, including their inability to consent to being searched and their inability to remain seated for long periods of time, supervision of children participating in prison visitation is the type of complex problem that is best left to prison administrators. As noted in *Turner v. Safely*, 482 U.S. 78, 85 (1987):

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

It should also be noted that as the total volume of prisoners increases, so does the volume of visitors coming into prisons to participate in visitation. When prison visitation rooms and waiting rooms are crowded, trying to supervise unruly children becomes extremely difficult. Requiring that children brought for prison visitation be accompanied by an immediate family member or legal guardian increases the chances that children participating in prison visitation will be adequately supervised. (Jt. App. 90a; R. 232 9/18/00 TR 5-28; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. pp. 5297-5320). Thus, the unique problems associated with having children participate in prison visitation is not eliminated by having those children visit non-contact.

In short, Respondents' premise that children cannot be victims of sexual abuse as long as they are participating in non-contact visitation is false. The Petitioners' concerns about limiting the number of minor children entering prisons to participate in non-contact visitation, and requiring that minor children be accompanied by an immediate family member or legal guardian in an attempt to protect them from sexual abuse, are legitimate and should be afforded deference by this Court.

CONCLUSION

For all of the above-stated reasons and the reasons set forth in the Brief of the Petitioners, the Michigan Department of Corrections and its Director, respectfully request this Honorable Court to reverse the April 10, 2002 decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted.

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