No. _____

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 Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1995, the Michigan Department of Corrections revised its prison visitation policy to: (1) prohibit visits by a minor child, unless the minor is the child, stepchild or grandchild of the prisoner; (2) prohibit visits by a prisoner's child when the prisoner's parental rights have been terminated; (3) require that all visiting minor children be accompanied by a parent or legal guardian; (4) prohibit visits by former inmates unless the former inmate is in the prisoner's immediate family; and (5) impose a ban on visitation for a minimum of two years for any inmate found guilty of two or more major misconducts for substance abuse. Do these restrictions, as set forth above, (a) violate a right of intimate association under the First Amendment as retained by an incarcerated felon or (b) constitute cruel and unusual punishment in violation of the Eighth Amendment?

PARTIES TO THE PROCEEDING

This case involves a seven-year-old controversy between incarcerated felons, their visitors and the Michigan Department of Corrections. Petitioners are the Michigan Department of Corrections and the Director of the Michigan Department of Corrections (MDOC).

Respondents include eleven class representatives, on behalf of themselves and all others similarly situated, including all inmates incarcerated by MDOC and non-incarcerated potential visitors of MDOC inmates. The eleven representative plaintiffs are Michelle Bazzetta, Stacey Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Branaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton, and Arturo Bunton, through his next friend, Valerie Bunton.

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Petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on April 10, 2002. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002). (App. pp. 5a-23a.) The Court of Appeals affirmed the April 19, 2001 decision of the United States District Court for the Eastern District of Michigan. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001). (App. pp. 24a-120a.)

The district court's October 6, 1995 opinion and order denying Respondent's motion for preliminary injunction is reported at *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1995). (App. pp. 160a-173a.) The April 9, 1996 opinion and order of the district court granting Petitioners' motion for summary judgment is not reported, but is reprinted in the Appendix to this petition. (App. pp. 143a-159a.)

The Court of Appeals' September 4, 1997 opinion affirming the district court's grant of summary judgment is reported at *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997). (App. pp. 127a-142a.) On January 5, 1998, the Court of Appeals issued a supplementary opinion, which is reported at *Bazzetta v. McGinnis*, 133 F.3d 382 (6th Cir. 1998). (App. pp. 121a-126a.)

JURISDICTION

Petitioners seek review of an opinion of the United States Court of Appeals for the Sixth Circuit, which was entered on April 10, 2002. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002). This Court has jurisdiction to review the April 10, 2002 opinion of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. VIII provides that:

> Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV provides that:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

> causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. 1995 Revised Visitation Policy

In 1995, as a result of numerous visitation problems at MDOC facilities, including the molestation of a child during prison visitation, MDOC implemented changes in its visitation policy.[1] The revised visitation policy adopted by MDOC limited the total number of visitors that were eligible to visit each prisoner, regulated the times and dates of visits at MDOC facilities, and required that a visitor be on an approved visitor list prior to participating in visitation. *Bazzetta v. McGinnis*, 124 F.3d 774, 776 (6th Cir. 1997). In an attempt to limit the mass numbers of children entering MDOC facilities for prison visitation, the revised visitation policy limited the number of

[1] The specific rule at issue in this case is Mich. Admin. Code R. 791.6609 and the corresponding provisions of the Director's Office Memorandum 1995-58, which have been reprinted in the Appendix to this petition. (App. pp. 174a-188a.)

minor children who could visit prisoners by requiring that these children be the child, stepchild and/or grandchild of the prisoner and requiring that all minor children be accompanied by an adult immediate family member or legal guardian. The 1995 visitation policy also denied visitation between a minor child and a prisoner when the parental rights of the prisoner had been terminated. In addition, the 1995 visitation policy limited prison visitation between current and former inmates to only those former inmates who were immediate family members of the prisoners they wished to visit. *Id*. at 776.

During the 1995 review of MDOC's visitation policy, MDOC also attempted to adopt a new form of discipline in order to combat inmate substance abuse, which had become an enormous security problem for prison administrators. *Bazzetta v. McGinnis*, 286 F.3d 311, 321 (6th Cir. 2002). The 1995 visitation policy was amended to provide that any inmates found guilty of two or more substance abuse major misconducts would lose all visitation privileges for a minimum of two years, upon approval by the Director. *Id*. at 321. Pursuant to MDOC policy, the two-year visitation restriction could not be imposed until after the inmate at issue had an opportunity to participate in a MDOC disciplinary hearing with regard to the underlying major misconduct tickets. As set forth in the Director's Office Memorandum 1995-58 (App. pp. 178a-188a), after the expiration of two years, the inmate could request reinstatement of visitation privileges; however, the request had to be approved by the Director. *Id*. at 321.

2. Visitation At MDOC Facilities

There are two types of visitation permitted at MDOC facilities, contact and non contact. Contact visits take place in a large visitation room and physical contact is permitted between the inmate and the visitor, whereas non contact visits take place in a small booth or a cubicle at the edge of the visitation room. *Bazzetta v. McGinnis*, 124 F.3d 774, 775 (6th

Cir. 1997). Prisoners incarcerated at MDOC facilities are classified from security level I through security level VI, and the most dangerous inmates are those classified at security level V and VI. With regard to security level V and VI inmates, all visitation is non contact, and it takes place in separate booths. However, inmates classified at security levels IV through I are normally allowed contact visitation. *Id*. at 775-776. Contact visitation takes place in a large room with numerous prisoners and visitors in attendance. For many MDOC facilities, especially those housing lower security level prisoners, when non contact visitation is necessary, it takes place in a cubicle located in the open visitation room. However, regardless of whether a visitor is going to participate in contact or non contact visitation, all visitors wait in the same waiting room, where they mingle with other visitors. *Id*. at 776-777.

3. The Proceedings Below

As a result of the 1995 visitation changes, Respondents filed a civil rights action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Michigan alleging that MDOC's 1995 visitation policy deprived them of their rights to privacy and family integrity, freedom of association, due process, and the right to be free of cruel and unusual punishment in violation of the First, Eighth and Fourteenth Amendments to the United States Constitution. In their complaint, Respondents sought declaratory, preliminary and permanent injunctive relief. The district court held a three day hearing on September 21, 22 and 28, 1995, which included testimony from various MDOC officials. On October 6, 1995, the district court issued an opinion and order denying Respondents' motion for preliminary injunction. *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1995).[2]

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[2] The district court determined that Respondents' claim that the visitation rule restricting visitation privileges upon an inmate being found guilty of

While Respondents' appeal of the October 6, 1995 opinion and order was pending, on December 5, 1995, Petitioners filed a motion for dismissal and/or summary judgment in which they argued that because Respondents have no constitutional rights to prison visitation as a matter of law, their complaint should be dismissed. After hearing oral argument from both parties, on April 9, 1996, the district court issued an opinion and order granting Petitioners' motion for summary judgment and entered a judgment dismissing the case.[3] Respondents' appeal to the United States Court of Appeals for the Sixth Circuit of the April 9, 1996 judgment was consolidated with their appeal of the October 6, 1995 opinion and order for the purpose of submission.

After briefing by the parties and oral argument, on September 4, 1997, the Court of Appeals affirmed the district court's April 9, 1996 opinion and order granting Petitioners' motion for summary judgment. In its decision, the Court of Appeals determined that because there is no constitutional right to prison visitation, the 1995 visitation restrictions do not violate the First, Eighth and/or Fourteenth Amendments to the United States Constitution. *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997). Subsequently, on January 5, 1998, the Court of Appeals issued an opinion clarifying that its September 4, 1997 decision only applied to **contact** visitation. *Bazzetta v. McGinnis*, 133 F.3d 382 (6th Cir. 1998).

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two substance abuse major misconducts violated the Eighth and Fourteenth Amendments, was not ripe for decision, and therefore, it was never ruled on by the district court.

3 The April 9, 1996 opinion and order of the district court granting Petitioners' motion for summary judgment is not reported, but is reprinted in the Appendix to this petition. (App. pp. 143a-159a.)

4. The Current Appeal

On July 2, 1998, the district court granted Respondents' motion for reinstatement of their claim that the visitation rule restricting visitation privileges upon an inmate being found guilty of two substance abuse major misconducts violated the First, Eighth and Fourteenth Amendments and their claim that MDOC's 1995 visitation policy, as applied to non contact visits, violated the First and Fourteenth Amendments.[4] After Respondents conducted discovery, on May 5, 2000, Petitioners filed their second motion for summary judgment in this case. In their motion, Petitioners argued that because incarcerated felons have no constitutionally protected right to prison visitation, whether contact or non contact, the district court should dismiss Respondents' Third Amended Complaint with prejudice. The district court heard arguments from the parties on June 21, 2000, and on June 22, 2000 the district court issued an opinion and order denying Petitioners' second motion for summary judgment.

The district court held a bench trial in this case on September 7-8, September 11-15, and September 18-19, 2000. At the bench trial in this matter, Respondents called twenty-six witnesses, including many inmates and their family members, and Petitioners called eight witnesses, seven current employees of MDOC and the former director. After the end of the testimony but before the district court heard final arguments in the case, on November 17, 2000, Petitioners filed a motion to expand the record to include the prison visitation rules for all fifty states and the District of Columbia. In their motion, Petitioners argued that how other states restrict prison visitation is relevant to the issue of whether MDOC's 1995

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4 A review of the April 9, 1996 Judgment entered by the district court reveals that Defendants' motion to dismiss and/or for summary judgment was granted and the entire case was dismissed with prejudice.

visitation policy is within contemporary standards of decency as required by the Eighth Amendment. After hearing oral argument from the parties on November 28, 2000, the district court denied Petitioners' motion to expand the record.

While the parties were awaiting a decision of the district court, on April 9, 2001, Petitioners filed a motion to hold this matter in abeyance pending the outcome of an effort by the State of Michigan to amend MDOC's visitation rules. At the time of Petitioners' motion, the Michigan House of Representatives was considering a bill that would amend the MDOC's definition of immediate family to include minor siblings of prisoners, which would allow minor siblings to participate in prison visitation. The district court denied Petitioners' motion to hold this matter in abeyance on April 12, 2001.[5] On April 19, 2001 the district court issued its findings of fact and conclusions of law, wherein it determined that MDOC's 1995 visitation restrictions were unconstitutional with regard to non contact visitation and the substance abuse visitation restriction. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001). The district court entered judgment in this case in favor of Respondents and against Petitioners as to all claims, along with interest, costs, and attorneys' fees as provided by law on April 25, 2001.

On April 27, 2001, Petitioner timely filed a notice of appeal of the April 25, 2001 judgment. After the filing of briefs by both parties and oral argument, on April 10, 2002, the Court of Appeals issued an opinion affirming the April 25, 2001 judgment of the district court adopting its April 19, 2001 findings of fact and conclusions of law in favor of Respondents as to all claims. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir.

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5 On May 24, 2001, Public Act 8 of 2001, which gives MDOC authority to permit the minor siblings of a inmate to participate in prison visitation, was signed into law.

2002). The April 10, 2002 Court of Appeals decision creates a constitutionally protected First Amendment right to intimate human relationships for incarcerated felons. The April 10, 2002 decision also seriously undermines MDOC's ability to manage security at state prisons by striking down, under the Eighth Amendment's prohibition against cruel and unusual punishments, the use of a permanent ban on visitation as a means of disciplining prisoners for repeated substance abuse violations and other serious misconduct. Petitioners' motion to stay the issuance of the mandate in this case was denied by the Court of Appeals on May 2, 2002, and the mandate issued the same day. This Court denied Petitioners' application for recall and stay of mandate pending certiorari by letter on May 17, 2002.[6]

REASONS FOR GRANTING THE WRIT

In its April 10, 2002 decision, the Court of Appeals determined that incarcerated felons have a constitutionally protected First Amendment right to intimate human relationships. The April 10, 2002 decision of the Court of Appeals also held that the use of a two-year visitation restriction as a punishment for repeated substance abuse violations and other serious misconduct is a violation of the Eighth Amendment's prohibition against cruel and unusual punishments. None of this Court's prior decisions recognizing a constitutionally protected First Amendment right to intimate human relationships, which were relied on by the lower

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6 Subsequent to this Court's denial of a stay of the mandate in this case, on May 16, 2002, the district court entered an order of compliance that enjoins MDOC from enforcing any rule, policy or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for substance abuse. (App. pp. 1a-4a.)

courts,[7] address the issue of whether this right survives incarceration. In addition, this Court has never held that restricting visitation as a means of disciplining prisoners for repeated substance abuse violations and other serious misconduct constitutes cruel and unusual punishment. Thus, because the Court of Appeals April 10, 2002 decision is beyond the scope of any constitutional right heretofore recognized by this Court and is in direct conflict with all of the other circuit courts that have addressed the issue of prison visitation, Petitioners request that this Court grant certiorari.

I. THE COURT OF APPEALS' DECISION IMPERMISSIBLY EXPANDS THIS COURT'S PRIOR DECISIONS INVOLVING PRISONERS' FIRST AND EIGHTH AMENDMENT RIGHTS

1. First And Fourteenth Amendments

This Court has not yet addressed the extent to which incarcerated felons have a constitutionally protected First Amendment right to intimate human relationships. However, whenever the Court has addressed whether prisoners retain other delineated First Amendment rights, this Court has held that these First Amendment rights are fundamentally inconsistent with incarceration. In *Pell v. Pecunier*, 417 U.S. 817 (1974), the Court determined that, as long as there were other means of communication available to prisoners, incarcerated felons have no constitutionally protected First Amendment right to face-to-face interviews with members of the press. Subsequently, in *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977), the Court determined that

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[7] *MLB v. SLJ*, 519 U.S. 102, 116 (1996); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

prisoner labor unions do not have any associational rights protected by the First and Fourteenth Amendments. "Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution." *Id.* at 125-126.[8]

During that same term in *Turner v. Safley*, 482 U.S. 78, 93 (1987), the Court upheld a prison regulation barring inmate-to-inmate correspondence. *In O'Lone v. Shabazz*, 482 U.S. 342 (1987), the Court held that prison regulations precluding certain religious services do not violate the First Amendment to the United States Constitution.[9] In addition, this Court has also noted that members of the public have no greater constitutional rights than inmates when it comes to prison regulations that affect the rights of prisoners and outsiders. *Thornburgh, supra*, at 410. Last term, in *Shaw v. Murphy*, 532 U.S. 223 (2001), the Court ruled that prisoners do not have a First Amendment right to provide legal assistance to other prisoners. "In the First Amendment context, some rights are simply inconsistent with the status of a prisoner or with the legitimate penological objectives of the correctional system." *Id.* at 229. Thus, during the past twenty-eight years, this Court has consistently upheld restrictions on the First Amendment rights of prisoners that would be unconstitutional if applied to members of the public.

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[8] Recently, the Court has determined that whatever associational rights are protected by the First Amendment, they do not include a general right to associate with others. *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989).

[9] *See also*: *Thornburgh v. Abbott*, 490 U.S. 401 (1989), where the Court upheld as facially valid, regulations prohibiting federal prisoners from receiving publications found to be detrimental to institutional security.

With regard to the issue of visitation with family, this Court has upheld the right of jail officials to restrict the exercise of the First Amendment right to intimate human relationships by pretrial detainees. In *Block v. Rutherford*, 468 U.S. 576 (1984), the Court held that a blanket prohibition on contact visits for pretrial detainees was not unconstitutional.

> Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates. [*Id*. at 586.]

Although this Court acknowledged that there might be other alternatives to address the security issue, prison administrators are not constitutionally required to use the least restrictive means available in order to achieve the legitimate governmental objective. "In sum, we conclude that petitioners' blanket prohibition is an entirely reasonable, non-punitive response to the legitimate security concerns identified, consistent with the Fourteenth Amendment." *Id*. at 588. *See also: Bell v. Wolfish*, 441 U.S. 520 (1979).

In *Ky. Dept. Of Corrections v. Thompson*, 490 U.S. 454 (1989), the Court upheld prison regulations that prohibited certain persons from visiting with incarcerated felons, determining that there is no Fourteenth Amendment right to unfettered prison visitation.

> Respondents do not argue - nor can it seriously be contended, in light of our prior cases - that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause. We have rejected the

> notion that "any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause." * * * The denial of prison access to a particular visitor "is well within the terms of confinement ordinarily contemplated by a prison sentence," *Hewitt v. Helms*, 459 US at 468, 74 L Ed 2d. 675, 103 S Ct 864, and therefore is not independently protected by the Due Process Clause. [*Id*. at 460-461.]

Previously in *Olim v. Wakenekona*, 461 U.S. 238 (1983), this Court held that the transfer of a state prisoner from Hawaii to California did not violate the Due Process Clause of the Fourteenth Amendment.

> Respondent's argument to the contrary is unpersuasive. The Court in *Montanye [v. Haymes*, 427 U.S. 236 (1976)] took note that among the hardships that may result from a prison transfer are separation of the inmate from home and family, separation from inmate friends, placement in a new and possibly hostile environment, difficulty in making contact with counsel, and interruption of educational and rehabilitative programs. [Citation omitted.] These are the same hardships respondent faces as a result of his transfer from Hawaii to California. [*Id*. at 248, n.9.]

To the extent that this Court has addressed the issue of whether the First Amendment and/or Fourteenth Amendment protects a fundamental right to family integrity, that constitutional right has been limited to grandparents, parents, children and grandchildren. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court ruled that a housing ordinance limiting occupancy to members of a single nuclear family violated the Due Process Clause of the Fourteenth

Amendment as applied to a grandmother's choice to live with her grandson.

> On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here. * * * "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." [*Id*. at 498-499.]

More recently, in *Troxel v. Grandville*, 530 U.S. 57 (2000), the Court refused to extend the constitutionally protected rights in matters of marriage and family life to any relationship beyond that of parents and children. Thus, whatever the extent of the First Amendment right to intimate human relationships and/or family integrity, none of this Court's prior cases addressing the nature and extent of this right involve incarcerated felons.

2. Eighth And Fourteenth Amendments

In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court set forth the test for determining whether conditions of confinement in general may result in a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. "The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency, . . . against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society." *Id*. at 102. Subsequently, in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Court clarified that not all harsh conditions of confinement violate the Eighth Amendment, but

rather, the courts should look at whether the deprivation at issue is sufficiently serious.

> No static "test" can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." * * * But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society. [*Id*. at 346-347.]

Recently, in *Wilson v. Seiter*, 501 U.S. 294 (1991), the Court identified the types of deprivations that may involve an Eighth Amendment violation.

> Some conditions of confinement may establish an Eighth Amendment violation in combination when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise - for example, a low cell temperature at night combined with a failure to issue blankets. [*Id*. at 304.]

See, Sandin v. Conner, 515 U.S. 472 (1995).

> The punishment of incarcerated prisoners, on the other hand, serves different aims than those found invalid in *Bell* and *Ingraham*. The process does not impose retribution in lieu of a valid conviction, nor does it maintain physical control over free citizens forced by law to subject themselves to state control over the educational mission. It effectuates prison

> management and prisoner rehabilitation goals. * * * Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentenced imposed by a court of law. [*Id*. at 485.]

In the instant case, the Court of Appeals determined that pursuant to the First, Eighth and Fourteenth Amendments, prisoners have a constitutionally protected right of intimate human relationships, and depriving prisoners of visitation is cruel and unusual punishment. As support for this conclusion, the Court of Appeals relied on the concurring opinion of Justice Kennedy in *Ky. Dept. of Corrections v. Thompson*, *supra*, at 465. *Bazzetta v. McGinnis*, 286 F.3d 311, 317 (6th Cir. 2002). A review of the *Thompson* case, however, reveals that it actually supports Petitioners' position that incarcerated felons have no constitutionally protected right to visitation. As set forth above, in *Thompson*, the Court refused to find that prisoners have a Fourteenth Amendment right to participate in visitation. *Id.* at 461.

The Court of Appeals also relied on numerous Supreme Court cases that have upheld a First Amendment right to establish and maintain family relationships and to make childrearing decisions, as support for its determination that prison visitation is a constitutionally protected right. *Id*. at 317. However, none of the cases relied on by the Court of Appeals involve incarcerated felons, and this Court has never held that the First Amendment right to establish and maintain family relationships and to make childrearing decisions survives incarceration.

With regard to its determination that depriving prisoners of visitation is cruel and unusual punishment, a review of the cases relied on by the Court of Appeals reveals that none of these cases involve prison visitation. Therefore, given that this Court has never held that depriving an inmate of prison

visitation for a minimum of two years constitutes cruel and unusual punishment, the Court of Appeals' determination that use of a two-year visitation restriction as a punishment for repeated substance abuse violations and other serious misconduct violates the Eighth Amendment, is erroneous.

II. THE SIXTH CIRCUIT COURT OF APPEALS' DECISION CONFLICTS WITH THE OTHER CIRCUITS THAT HAVE ADDRESSED THE ISSUE

All of the other circuit courts that have looked at the issue of whether incarcerated felons have a constitutionally protected right to intimate human relationships, have ruled that the right to intimate association as protected by the First and Fourteenth Amendments does not survive incarceration. Recently, in *Gerber v. Hickman*, No. 00-16494, 2002 U.S. App. LEXIS 9749 (9th Cir. May 23, 2002), the Ninth Circuit was confronted with the issue of whether a prisoner has a constitutional right to procreate while incarcerated. Although the Ninth Circuit acknowledged that the right to procreate is a protected part of the First Amendment right to intimate human relationships, it held that the right does not survive incarceration. Thus, because the Ninth Circuit determined that the loss of the right to intimate association was part and parcel of being imprisoned for conviction of a crime, the Court never addressed whether the prison's regulation was related to a valid penological interest. *Id*. at *6-7, 13.

In *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985), the Fifth Circuit refused to find that inmates have a right to visitation grounded in the First Amendment.

> Such incarcerated persons as the Thorne brothers maintain no right to simple physical association -- with their parents or with anyone else -- grounded in the first amendment. * * * At all events, the claims

> of the Thorne brothers, whatever their source, to go where they like and to meet with whom they choose have been terminated by a proceeding conducted according to the strictest of due process: a criminal trial. [*Id*. at 1274.]

See also: *Berry v. Brady*, 192 F.3d 504 (5th Cir. 1999), "Berry has no constitutional right to visitation privileges." *Id*. at 508; *Lynott v. Henderson*, 610 F.2d 340 (5th Cir. 1980); and *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir. 1975).

Although only one circuit court has addressed the issue of whether a denial of prison visitation is cruel and unusual punishment, none of the circuit courts addressing the issue of prison visitation in general have found that a denial of visitation is a violation of the Eighth Amendment.

In *Berry, supra*, the Fifth Circuit refused to find that a denial of visitation deprived a prisoner of the minimal measure of life's necessities such that it violated the Eighth Amendment. *Id*. at 507. Previously, in *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), the Tenth Circuit upheld visitation regulations limiting visitors to an inmate's immediate family, or up to three non-family visitors. *See also*: *Peterson v. Shanks*, 149 F.3d 1140 (10th Cir. 1998). "Prison necessarily disrupts the normal pattern of familial association, so lawful imprisonment can hardly be thought a deprivation of the *right* of relatives to associate with the imprisoned criminal." *Mayo v. Lane*, 867 F.2d 374, 375 (7th Cir. 1989).

The Second Circuit has also upheld visitation restrictions that limited prison visitation to non-contact visits with members of an inmate's immediate family, but prohibited visitation with friends or other members of the public.

> Considering the alternative means of communication that were available to appellant through those persons

> with whom he could visit and the justifications put forth by prison officials. we conclude that the restrictions on Smith's visiting rights did not violate the First Amendment. [*Smith v. Coughlin*, 748 F.2d 783, 788 (2nd Cir. 1984).]

In *White v. Keller*, 588 F.2d 913 (4th Cir. 1978), the Fourth Circuit affirmed a district court ruling that there is no constitutional right to prison visitation either for prisoners or visitors. More recently, the Eleventh Circuit upheld the denial of visitation for **two years** to an inmate and his visitor who misled prison authorities about their relationship. *Caraballo-Sandoval v. Honsted*, 35 F.3d 521 (11th Cir. 1994).

In its April 10, 2002 decision, the Court of Appeals does not cite any other circuit court decision to support its conclusion that inmates have a constitutionally protected right to prison visitation. Although the Court of Appeals refers to *Thorne v. Jones, supra,* generally, as explained above, in *Thorne v. Jones*, the Fifth Circuit held that inmates have no right to prison visitation that is protected by the United States Constitution. In addition, the Court of Appeals does not cite any circuit court cases to support its determination that the denial of prison visitation constitutes cruel and unusual punishment.

Given that the April 10, 2002 decision of the Court of Appeals conflicts with every other circuit court that has addressed the issues of whether incarcerated felons have a constitutionally protected First Amendment right to intimate human relationships, and whether the use of a two-year visitation restriction as a punishment for repeated substance abuse violations violates the Eighth Amendment's prohibition against cruel and unusual punishment, Petitioners request that this Court grant certiorari and reverse the Court of Appeals' April 10, 2002 decision.

CONCLUSION

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

Respectfully submitted.

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Dated: July, 2002