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Casenotes: Constitutional Law — Constitutionality of Double Celling Requires Examination of Total Prison Conditions. Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) (en banc)

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CONSTITUTIONAL LAW — CONSTITUTIONALITY OF DOUBLE CELLING REQUIRES EXAMINATION OF TOTAL PRISON CONDITIONS. *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981) (en banc).

Inmates at three Maryland prisons challenged the constitutionality of double celling as cruel and unusual punishment.[1] The United States District Court for the District of Maryland examined the overall conditions at the three institutions, found they imposed unconstitutional conditions of confinement and ordered the elimination of double celling.[2] In a consolidated appeal, the United States Court of Appeals for the Fourth Circuit affirmed the lower court's finding, but granted Maryland an extension of time for compliance at those prisons until the construction of a new prison, the Jessup Annex, was completed.[3] Shortly thereafter, Maryland ended double celling at the three prisons by initiating advanced release parole programs.[4]

Before the Jessup Annex was completed, however, Maryland experienced an unexpected increase in its prison population.[5] To accomodate this increase, Maryland proposed limited double celling at the Jessup Annex.[6] The district court rejected Maryland's plan, declaring double celling to be unconstitutional per se.[7] The court of appeals, relying on a recent United States Supreme Court decision,[8] vacated the district court order, ruling that the constitutionality of double celling requires an examination of total prison conditions.[9]

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1. The term "double celling" refers to the practice of housing two inmates in a prison cell originally designed for housing one inmate. Three suits evolved from these complaints: Washington v. Keller, 479 F. Supp. 569 (D. Md. 1979) (challenging conditions at the Maryland Correctional Institution); Nelson v. Collins, 455 F. Supp. 727 (D. Md. 1978) (challenging conditions at the Maryland Penitentiary and the Maryland Reception, Diagnostic and Classification Center); and Johnson v. Levine, 450 F. Supp. 648 (D. Md. 1978) (challenging conditions at the Maryland House of Corrections).
2. Nelson v. Collins, 455 F. Supp. 727, 734, 736 (D. Md. 1978); Johnson v. Levine, 450 F. Supp. 648, 656, 661 (D. Md. 1978). In Washington v. Keller, 479 F. Supp. 569 (D. Md. 1979) the State and the prisoners entered into a consent decree to eliminate double celling at the Maryland Correctional Institution.
3. Johnson v. Levine, 588 F.2d 1378 (4th Cir. 1978) (en banc).
4. Brief for Appellants at 7-9, Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) (en banc).
5. Nelson v. Collins, 659 F.2d 420, 422 (4th Cir. 1981) (en banc).
6. *Id.* at 423. Maryland proposed double celling inmates in 224 of the 512 cells for a period not to exceed 120 days, with the State pledging its best efforts to limit that period to sixty days. The inmates to be double celled would be: returned escapees awaiting reassignment, inmates charged with parole violations, and those inmates with Mutual Agreed Parole Contracts returning to minimum security institutions. The State also offered to double cell those inmates who volunteered for a period of time not to exceed one year. Brief for Appellants at 2, Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) (en banc).
7. Nelson v. Collins, 659 F.2d 420, 427-28 (4th Cir. 1981) (en banc) (the district court order was unpublished).
8. Rhodes v. Chapman, 452 U.S. 337 (1981). *See infra* text accompanying notes 23-29.
9. Nelson v. Collins, 659 F.2d 420, 428-29 (4th Cir. 1981) (en banc). *Nelson* also

The gravamen of challenges to overcrowded conditions of confinement is the eighth amendment provision which forbids cruel and unusual punishment.[10] While the Supreme Court has held that prison conditions must not inflict wanton and unnecessary pain[11] and must conform to "contemporary standards of decency,"[12] it has not defined what constitutes the latter term. The Court, however, has held that since prisoners are dependent upon prison officials for medical treatment, denial of such treatment inflicts wanton and unnecessary pain and constitutes cruel and unusual punishment.[13] Length of confinement is also a factor the Court has considered, since conditions which exist for a short period of time are less likely to amount to cruel and unusual punishment.[14]

Because of the narrow scope of these Supreme Court decisions, the burden of developing constitutional standards for inmate confinement devolved upon the lower federal courts. In an attempt to meet this burden, the courts developed a "totality of conditions" test requiring an examination of the challenged conditions and a determination as to whether their cumulative impact on prison life constitutes cruel and unusual punishment.[15] Judges, recognizing their lack of expertise in this area, frequently rely upon standards established by health associations and penologists in reaching a determination.[16] Intolerable living conditions caused by insufficient cell space, increased potential for violence, exposure to health hazards and denial of adequate medical care have been held to be cruel and unusual punishment by lower federal courts, resulting in orders to cease double celling.[17] These decisions

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examined the constitutionality of double bunking inmates in the dormitories at the Maryland House of Corrections and an appeal of a district court order transferring prisoners to federal prisons. This casenote focuses solely on the constitutionality of double celling at the Jessup Annex.

10. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Confinement in prison is a form of punishment subject to eighth amendment scrutiny. Hutto v. Finney, 437 U.S. 678, 685 (1978).
11. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion). Inflictions of wanton and unnecessary pain would be those actions "totally without penological justifications." *Id.* at 183.
12. Estelle v. Gamble, 429 U.S. 97, 103-04 (1976).
13. *Id.*
14. Hutto v. Finney, 437 U.S. 678, 686-87 (1978). "A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months." *Id.*
15. *See, e.g.,* Battle v. Anderson, 564 F.2d 388, 401 (10th Cir. 1977); Laaman v. Helgemoe, 437 F. Supp. 269, 317, 322-23 (D.N.H. 1977). For a list of tests used when conditions other than overcrowding are challenged, see Fair, *The Lower Federal Courts as Constitution-Makers: The Case of Prison Conditions,* 7 AM. J. CRIM. LAW 119, 124-28 (1979).
16. *See, e.g.,* Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977).
17. Capps v. Atiyeh, 495 F. Supp. 802, 810-11 (D. Or. 1980); Anderson v. Redman, 429 F. Supp. 1105, 1119 (D. Del. 1977); Costello v. Wainwright, 397 F. Supp. 20, 33 (M.D. Fla. 1975).

demonstrate that "contemporary standards of decency" require states to provide inmates with the basic necessities of life, such as food, clothing, shelter, sanitation, medical care and personal safety.[18]

The Fourth Circuit applied an identical standard as other lower federal courts in determining whether double celling of inmates was constitutionally permissible. When inmates at a modern South Carolina facility challenged the practice of double celling, claiming that the housing conditions alone were cruel and unusual, the Fourth Circuit applied the totality of conditions test and dismissed the prisoners' claims.[19] Significantly, the inmates had not alleged a lack of adequate food, clothing, medical attention, or unsanitary conditions.[20] However, when the effect of double celling, combined with other deprivations caused by overcrowding, resulted in serious deficiencies in Maryland's prison system the court of appeals affirmed a finding of unconstitutional conditions of confinement.[21]

As the practice of double celling became widespread and the number of state prison systems ordered to reduce overcrowding increased,[22] it became apparent that the federal courts needed an eighth amendment interpretation of double celling by the Supreme Court. In *Rhodes v. Chapman,*[23] the Court addressed the issue of double celling in a prison housing a population in excess of its stated capacity, but otherwise providing the basic necessities of life.[24] The conditions at the newly built Southern Ohio Correctional Facility (SOCF) had been found unconstitutional by a federal district court because of the permanent double celling of long-term inmates in cells providing less space than that recommended by penologists.[25] Applying the totality of con-

18. Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977), *cert. denied,* 438 U.S. 915 (1978).

19. Hite v. Leeke, 564 F.2d 670 (4th Cir. 1977). When triple celling at the same prison was challenged as cruel and unusual punishment one year earlier, the court of appeals balanced the "legitimate rights of the prisoner with the necessary concern and responsibility of the prison authorities for security and order." Crowe v. Leeke, 540 F.2d 740, 741 (4th Cir. 1976).

20. Hite v. Leeke, 564 F.2d 670, 674 (4th Cir. 1977).

21. Johnson v. Levine, 588 F.2d 1378 (4th Cir. 1978) (en banc). The court listed the deprivations caused by the overcrowding: limited recreation, instruction, and rehabilitation, poor maintenance of sanitation, high level of violence and psychological injury, and strain on medical facilities. *Id.* at 1380.

22. A list of state prisons and state prison systems under court order may be found in Rhodes v. Chapman, 452 U.S. 337, 353-54 n.1 (1981) (Brennan, J., concurring).

23. 452 U.S. 337 (1981).

24. The prison examined by the Court had gymnasiums, various types of workshops, school rooms, day rooms, two chapels, a hospital ward, commissary, barber shop, library, a recreational field, visitation area and garden. *Id.* at 340-41.

25. Chapman v. Rhodes, 434 F. Supp. 1007 (S.D. Ohio 1977). In an unpublished opinion, the United States Court of Appeals for the Sixth Circuit affirmed, 624 F.2d 1099 (6th Cir. 1980), interpreting the district court opinion as holding that double celling was unconstitutional under the conditions at the SOCF but not unconstitutional per se. Rhodes v. Chapman, 452 U.S. 337, 344 (1981).

ditions test,[26] the Court found no evidence that double celling at SOCF, in and of itself, inflicted wanton and unnecessary pain. Double celling had not deprived inmates of food, medical care or sanitation nor had it increased inmate violence.[27] Because "the Constitution does not mandate comfortable prisons," the Court viewed double celling as a permissible consequence of incarceration.[28] Noting the lower court's reliance upon testimony by penologists, the *Rhodes* Court conceded that such opinions may be useful, but stated that the responsibility for establishing the "constitutional minima" for inmate confinement rests with the courts and not the experts.[29]

The United States Court of Appeals for the Fourth Circuit was presented with an opportunity to apply the precepts of *Rhodes* when Maryland's proposal to initiate double celling at the Jessup Annex was rejected by the district court.[30] The court of appeals, in *Nelson v. Collins,*[31] compared the inmates' complaints in *Rhodes* to those of Maryland inmates and opined that the facts and lower court decisions in the two cases were "almost a carbon copy" of each other.[32] Maryland, like Ohio, was beset by an unexpected rise in its prison population and was forced to double the housing of its inmates.[33] The Jessup Annex and the SOCF are both modern penal institutions with comparable cell sizes and adequate provisions for food, dental care, psychiatric services and recreational opportunities.[34] The *Nelson* court rejected the district court's simplistic reasoning that "two prisoners should not be confined to a single cell" and that double celling was constitutionally impermissible.[35] Because the conditions at the Jessup Annex equaled those found constitutional in *Rhodes,* the district court order preventing

26. The Court stated "[Prison] . . . [c]onditions *alone or in combination,* may deprive inmates of the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (emphasis added). In his concurring opinion, Justice Brennan reviewed the tests developed by the lower federal courts and concluded that the majority adopted the totality of conditions test as the proper degree of scrutiny for eighth amendment challenges to inmate confinement. *Id.* at 362-63 & n.10 (Brennan, J., concurring); *see also* Ruiz v. Estelle, 679 F.2d 1115, 1139-40 n.98 (5th Cir. 1982).
27. Rhodes v. Chapman, 452 U.S. 337, 342-43 (1981).
28. *Id.* at 349.
29. *Id.* at 348-49 n.13. *But see id.* at 363 & n.11 (Brennan, J., concurring) (Justice Brennan does not read the majority's opinion as rejecting the use of experts. Brennan cites the Court's acknowledgment "that expert opinion may be 'helpful and relevant' in some circumstances").
30. Nelson v. Collins, 659 F.2d 420, 427-28 (4th Cir. 1981) (en banc).
31. 659 F.2d 420 (4th Cir. 1981) (en banc).
32. *Id.* at 427.
33. *Id.*
34. *Id.* at 429. In contrast to the lower court in *Rhodes,* the *Nelson* court did not make an extensive finding as to the other facilities available to Jessup Annex inmates. *See supra* note 24.
35. Nelson v. Collins, 659 F.2d 420, 428 (4th Cir. 1981) (en banc). The district court had stated, "Double celling is not an acceptable solution to the problem of overcrowding in Maryland prisons." *Id.*

double celling at the new Maryland prison was vacated by the court of appeals.[36]

The *Nelson* decision manifests the potential problem of hasty applications of the views expressed by the Supreme Court in *Rhodes v. Chapman*.[37] *Rhodes* merely holds that double celling alone can never amount to cruel and unusual punishment. *Rhodes* is a narrow decision, limited to the impact of double celling on the inmates of a specific facility, the SOCF. Additionally, it should be noted that the SOCF was a fully operating institution when examined by the Supreme Court, while the Jessup Annex was still under construction when *Nelson* was before the Fourth Circuit.[38] The Supreme Court's adoption of the totality of conditions test indicates that federal courts must investigate the overall conditions at a challenged prison before determining whether double celling results in unconstitutional confinement. The *Nelson* court did not make such an investigation to determine the effect of double celling at the new prison. Instead, generalized comparisons were made in an attempt to show that the facilities and programs at the SOCF were factually similar to those at the Jessup Annex. In fact, the *Nelson* decision appears to have been motivated solely by the Fourth Circuit's desire to vacate the district court ruling that double celling is unconstitutional per se. Considering the years of litigation over the conditions in Maryland prisons, the concurring and dissenting judges rightly assert that this case should have been remanded for fuller consideration of the effect of double celling on the inmates at the Jessup Annex.[39]

Double celling is a natural focal point of attack because it is immediately apparent, whereas the effect of reducing basic necessities other than adequate living space is not. Cells, however, are more easily equipped to accomodate an additional body than are prison nutritional, medical, recreational, vocational and rehabilitative services. But, as the inmate population increases, the quality of these services inevitably diminishes. *Rhodes* indicates only that double celling, in and of itself, does not constitute cruel and unusual punishment. Future challenges to double celling, therefore, must demonstrate the deleterious impact overcrowding has on an entire facility. Courts must continue to insure that inmates are provided the basic necessities of life, despite the double celled conditions. This determination can best be made by a judge who has personally witnessed the challenged conditions. Furthermore, while the Supreme Court has cautioned that the "constitutional minima" is to be determined by the courts, judges should remain receptive to the opinions of penologists when determin-

36. *Id.* at 429.
37. 452 U.S. 337 (1981).
38. Brief for Appellants at 5, Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) (en banc).
39. Nelson v. Collins, 659 F.2d 420, 429-31 (4th Cir. 1981) (en banc) (Winter, C.J., concurring and dissenting).

ing whether overcrowded conditions constitute cruel and unusual punishment.[40]

The overwhelming caseload of prisoner related cases[41] attests that something is wrong with the methods employed in prisons.[42] Prison officials are faced with the dilemma of dealing with burgeoning populations in facilities incapable of handling the increase. State legislatures are reluctant to spend tax dollars for construction of new prisons. Therefore, courts hear overcrowding cases with the knowledge that a state may have no place to transfer inmates should the conditions be found unconstitutional. This knowledge, however, must not deter courts from protecting the constitutional rights of inmates and assuring that their conditions of confinement meet contemporary standards of decency.

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40. *See* Rhodes v. Chapman, 452 U.S. 337, 363 (1981) (Brennan, J., concurring).
41. Approximately one out of every six cases filed in the federal courts of appeals are prisoner related cases. Administrative Office of the United States Courts, MANAGEMENT STATISTICS FOR UNITED STATES COURTS 12 (1980) (generally available in law libraries).
42. "We simply do not know what to do with the persons who are convicted of crimes nor do we appear to know why we are doing whatever we do." Barnes v. Government of Virgin Islands, 415 F. Supp. 1218, 1221 (D.V.I. 1976).