1991 WL 11176810 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Otie JONES, Individually and as Warden of the Morgan County Regional Correctional Facility, and M.C. Hamby, Associate Warden, Petitioners,
v.
Mariam LONG, et al., Respondents.

No. 91-156.
October Term, 1991.
July 25, 1991.

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

Petition for a Writ of Certiorari

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***i** QUESTIONS PRESENTED

1. Whether it was clearly established in 1984-85 that prison wardens lose their qualified immunity for violation of a prison visitor rule, not giving rise to a § 1983 action, which threatened inmates' liberty interest in visitation found by the Sixth Circuit to be created by another rule?

2. Whether lawful incarceration warrants the establishment of a "bright line" that prison regulations should not create liberty interests protected by the Due Process Clause except when they involve the duration of, release from, or the very nature of confinement?

***II LIST OF ALL PARTIES TO THE PROCEEDING**

The parties in the proceeding before the Sixth Circuit are as follows:
Defendants-Appellants-Petitioners

1. Otie Jones, Warden, Morgan County Regional Correctional Facility (MCRCF)

2. M.C. Hamby, Associate Warden, MCRCF

Plaintiffs-Appellees-Respondents

1. Curtis Long, inmate at MCRCF

2. Mariam Long, wife of Curtis Long

3. Ronnie S. Mills, inmate at MCRCF

4. Karen Mills, wife of Ronnie S. Mills

5. James Marlin Hodges, inmate at MCRCF

6. Anita Simmers, fiancee of James Marlin Hodges

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***1** Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 3, 1991, a petition for rehearing having been denied by order of the Sixth Circuit entered on April 29, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in *Long v. Norris*, 929 F.2d 1111 (6th Cir. 1991), and a copy of the slip opinion appears in the Appendix hereto at la. The memorandum decision of the United States District Court for the Eastern District of Tennessee also appears in the Appendix hereto at 15a.

*2 JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 3, 1991, and an order denying a petition to rehear was entered on April 29, 1991. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ADMINISTRATIVE POLICIES INVOLVED:

42 U.S.C. § 1983:

> 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. For the 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.

U.S. Const. Amend. XIV:

> Section 1. 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.

State of Tennessee Department of Corrections Administrative Policies and Procedures. *See* Appendix at 24a-87a.

*3 STATEMENT OF THE CASE

At the time this action arose in 1984 and 1985, Petitioner, Otie Jones, was the Warden in Tennessee of the Morgan County Regional Correctional Facility (MCRCF), a state prison facility. Petitioner M.C. Hamby was the Associate Warden. Three consolidated actions under 42 U.S.C. § 1983 for damages were brought against these Wardens by three male inmates at MCRCF and their wives or fiancees alleging that the Wardens violated certain of the prison's visitation policies regarding the searching of prison visitors. Plaintiffs claim that these violations infringed the inmates' First Amendment freedom of association to receive visitors, the Fourth Amendment right of prison visitors to be free of strip and/or body cavity searches without probable cause, and the inmates' right of due process under the Fourteenth Amendment. These applicable prison visitation regulations were contained within the State of Tennessee Department of Correction Administrative Policies and Procedures which, in the section concerning the searching of visitors, required probable cause to order strip and/or body cavity searches of visitors. App. at 28a. Another section of the policies required a showing of good cause to suspend an inmate's visitation rights. App. at 67a.

The complaints allege that, in order to visit the plaintiff-inmates, the female visitors were required to consent to strip searches and/or body cavity searches which they generally consented to, failure to do so being cause under the prison policies to suspend a visitor's right to see an inmate. App. at 52a. At one point, the right of one of the wives to visit her husband was suspended for 60 days due to her unwillingness to consent to a body cavity search. This is the only suspension of any

visitor's right alleged in the case. The complaints do not allege that the lights of the male prisoners to receive visitors ever was suspended. In fact the inmates' right to receive visitors never was suspended.

***4** Petitioners filed motions for summary judgment claiming qualified immunity protection. The district court denied summary judgment holding that the Wardens were not entitled to qualified immunity on the basis that the Fourth Amendment right of prison visitors to be free of strip and body cavity searches without probable cause or reasonable suspicion was clearly established in the Sixth Circuit at the time this action arose in 1984 and 1985. The complaints only alleged the searches were made without probable cause and did not allege they were made without reasonable suspicion. Also, the district court held that the First Amendment freedom of association of inmates to receive visitors was also clearly established at the time the action arose.

The Sixth Circuit reversed in part holding that the Wardens were entitled to qualified immunity on the alleged Fourth Amendment violation of prison visitors' right to be free of searches without probable cause. The visitor search rule required probable cause to order the strip search or body cavity search of visitors. The Sixth Circuit found no constitutional violation because the right of visitors to be free of strip and/or body cavity searches without probable cause was not clearly established in the Sixth Circuit in 1984 and 1985. App. at 8a-10a. Although no constitutional violation was involved, the visitor searches nonetheless violated the prison rule requirement that visitors not be strip searched except for probable cause. The Sixth Circuit also reversed in part holding that the Wardens were protected by qualified immunity on the First Amendment violation of inmates' freedom of association to receive visitors. The Court held that this right also was not clearly established in the Sixth Circuit at the time the action arose. App. at 13a-14a.

The Sixth Circuit affirmed in part holding that the violation of the visitor search rule, and subsequent suspension of a particular visitor who refused to submit to ***5** a search in order to visit an inmate, was a threat to the inmates' liberty interest to receive visitors. App. at 10a-13a. The Court of Appeals determined that this liberty interest was created by a different section of the policy concerning inmates' visitation rights. App. at 11a-12a. The Sixth Circuit did not find that the Wardens violated any substantive constitutional right belonging to the respondents. Nor did the Sixth Circuit find that the Wardens directly violated the inmates' liberty interest to receive visitors but instead found that the suspension of a wife's right to visit her inmate husband, due to her unwillingness to submit to a search, threatened or chilled the inmates' right to receive visitors. The inmates' right to receive visitors was never suspended.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT CONCERNING THE STANDARDS TO BE APPLIED TO DETERMINE IF PRISON OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY PROTECTION FOR VIOLATION OF THEIR OWN ADMINISTRATIVE RULES.

The administration of state prisons, in this age of burgeoning prison populations, is--at best--always difficult. The potential that wardens will be faced with personal liability for violation of their own prison rules presents these officials with very confusing and difficult dilemmas. This area of prison administration is made doubly difficult when there is the potential that a liberty interest may be created by the prison officials' own rules. Prison officials are called upon daily to make a broad spectrum of administrative decisions concerning the full range of prison life. These diverse decisions can and do interact with, and in some way affect or conflict with, an interest created under another rule which may have sufficient mandatory language to be considered a liberty interest. Whether or not such interaction between diverse ***6** rules will cause a warden to lose his immunity is a very difficult puzzle for judges and lawyers to solve, much less prison officials. Even the Sixth Circuit below stated that "we venture once more into the *labyrinth* of deciding what makes a right 'clearly established' for purposes of qualified immunity." App. at 5a (emphasis added). If solving this puzzle is a labyrinth for court of appeals judges, then prison wardens are faced with negotiating a mine field. This case presents an important question affecting general prison administration throughout the states regarding the potential personal liability of prison officials when their administrative actions result in violation of their own rules. Petitioners urge this Court to give guidance and clarification in this important area of prison administration.

In *Davis v. Scherer*, 468 U.S. 183 (1984), this Court held that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Id.* at 194. On that occasion, this Court explicitly refused to create a new rule which would remove officials' qualified immunity for violation of

a clear state regulation because such a rule would make state officials "liable in an indeterminate amount for violation of *any* constitutional right-one that was not clearly defined or perhaps not even foreshadowed at the time of the alleged violation--merely because their official conduct also violated some statute or regulation." *Id.* at 195. In *Davis,* the regulation which was clearly violated did not itself give rise to the § 1983 action, as is the case here. The Court explained this distinction as follows:

> [O]fficials sued for violation of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation. Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action ***7** for damages .... Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation-of federal or of state law -unless that statute or regulation provides the basis for the cause of action sued upon.

468 U.S. at 193 n.12 (emphasis in original).

A. The Sixth Circuit's Decision Conflicts With The Decisions Of This Court By Forfeiting Prison Warden's Qualified Immunity For Violation Of A Prison Rule, Not Giving Rise To The § 1983 Action, Which Threatened A Liberty Interest Created By Another Rule.

In the decision below, the Sixth Circuit while acknowledging this Court's decision in *Davis v. Scherer,* clearly misstated the *Davis* rule in its following statement: "As we have stated, 'The Supreme Court has determined that violation of a clearly established state regulation is sufficient to cause officials to forfeit their qualified immunity' for claims of deprivation of federal constitutional guarantees."[1] App. at 10a. Of course, the holding in *Davis v. Scherer* is that violation of a clear state regulation does not cause officials to lose their qualified immunity when sued for constitutional violations unless the rule itself gives rise to the cause of action. Standing the *Davis* rule on its head, the Sixth Circuit has in effect adopted a new qualified immunity rule directly conflicting with this Court's prior refusal to adopt such a rule. In *Davis* a new qualified immunity rule was proposed to be "limited by requiring that plaintiffs allege clear violation of a statute or regulation that advanced important interests or was designed to protect constitutional rights." 468 U.S. at 195. This Court, refusing to open the door to such a liberalized rule, explained that

> once the door is opened to such inquiries, it is difficult to limit their scope in any principled manner. Federal judges would be granted large discretion to ex- ***8** tract from various statutory and administrative codes those provisions that seem to them sufficiently clear or important to warrant denial of qualified immunity. And such judgments fairly could be made only after an extensive inquiry into whether the official in the circumstances of his decision should have appreciated the applicability and importance of the rule at issue. It would become more difficult, not only for officials to anticipate the possible legal consequences of their conduct, but also for trial courts to decide even frivolous suits without protracted litigation.

468 U.S. at 195-96.

The Sixth Circuit, based upon the criteria first clearly established in *Kentucky Dept. of Corrections v. Thompson,* --- U.S. ---, 109 S.Ct. 1904 (1989), determined that section 507.01 of the Tennessee Department of Corrections policies regarding visitation lights of inmates created a liberty interest in visitation. App. at 11a. The Sixth Circuit erroneously concluded that, because the inmate visitation rule was couched in sufficiently explicit mandatory language, an indirect threat to the inmates' visitation right as a result of the Wardens violating a different visitor search rule and the subsequent suspension of the right of one particular visitor to visit her husband after her refusal to submit to the search, "violated clearly established law." App. at 12a. The "clearly established law" that the Sixth Circuit referred to was this Court's decision in *Thompson,* which is not a qualified immunity case but rather is the case which first clearly established the standards by which a state may create a liberty interest in prison visitation rules when the rule uses "explicitly mandatory language" in connection with the establishment of "specific substantive predicates to limit discretion." 109 S.Ct. at 1910.

Since the rule which the Court found that the Wardens clearly violated, Section 506.06 of the prison policies on "Searches," App. at 28a, by conducting strip searches of visitors without probable cause, did not result (as ***9** determined by the Sixth Circuit) in any constitutional violation, it provided no basis for a § 1983 action against the Wardens. Nor did the Sixth Circuit actually find a direct violation of the inmate visitation rule and resulting liberty interest but only "[t]hreats to remove this

visitation right." App. at 12a. Absent a clear violation of the "rights that give rise to the cause of action for damages," officials do not lose their immunity. *Davis,* 468 U.S. at 194 n.12. The Court of Appeals erred in removing the Wardens' qualified immunity for violation of a different rule other than the inmate visitation regulation. An indirect threat of the inmates' liberty interest, which the Court found created by the inmate visitation rule, does not give rise to any protection under the Due Process Clause. The Sixth Circuit's decision clearly violates this Court's ruling in *Davis* that "officials sued for violation of rights enforced by a ... regulation ... do not forfeit their immunity by violating some *other* ... regulation." *Id.* (emphasis in original).

B. The Legal Standard Applied By The Court Of Appeals, To Determine If The Inmate Visitation Rule Created A Liberty Interest, Was Not "Clearly Established" Until Four Years After The Officials' Action --In Violation Of This Court's Requirements.

Although the Sixth Circuit acknowledged the "objective legal reasonableness" standard of *Harlow v. Fitzgerald,* 457 U.S. 800, 819 (1982), "assessed in light of the legal rules that were 'clearly established' at the time [the official action] was taken," *Anderson v. Creighton,* 638 U.S. 635, 639 (1987), it nonetheless erred in applying legal standards first clearly established by this Court's *Thompson* decision in 1989 to test whether the 1984-85 actions of the Wardens violated a protected liberty interest. *See also Mitchell v. Forsyth,* 472 U.S. 511 (1985)[2]. Until *Thompson,* decided four years after the ***10** official conduct challenged in this case, the standards simply were not clearly established to determine if prison visitation regulations create a liberty interest subject to the Due Process Clause. In *Harlow* this Court stated that "[i]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." 457 U.S. at 818. In spite of this, the Sixth Circuit reasoned that applying *Thompson's* criteria to the Wardens' actions in 1984 and 1985 "does not violate the rule that public officials are accountable only for laws that were clearly established at the time of their actions," because *"Thompson* reflected the state of clearly established law in 1985-the time of the visitation in that case." App. at 11a n.4. This twisted logic clearly violates the requirements of *Harlow* and *Anderson.* This Court's 1989 *Thompson* decision cannot be applied in this case to determine if the Wardens' conduct in 1984 and 1985 is to be protected by qualified immunity. The Wardens could not know then what this court would establish four years later as the applicable standards to determine if a prison visitation rule created a liberty interest. Nor could they have known that they might lose their immunity if they violated some general rule which affected or threatened the right protected under a liberty interest then unknown to them.

Also in *Anderson. v. Creighton,* 638 U.S. 635 (1987), this Court established the requirement that, in testing qualified immunity protection, determination is to be ***11** made whether a reasonable official could have believed that his actions comported with constitutional requirements even though it actually did not. The Sixth Circuit failed to make this inquiry. Had it done so, it readily could have found that the Wardens could have believed their actions did not violate any liberty interest and violated no due process requirement. The Wardens could have believed, on the basis of this Court's decision in *Hewitt v. Helms,* 459 U.S. 460 (1983), as specifically noted in *Thompson,* "that 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 U.S., at 468, 103 S. Ct., at 869, and therefore is not 'independently protected by the Due Process Clause." 109 S.Ct. at 1909; *accord, Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119 (1977); *Bellamy v. Bradley,* 729 F.2d 416 (6th Cir.), *cert. denied,* 469 U.S. 485 (1984), a prisoner has no constitutional right to meet with a particular visitor of his choice; a visitor has no constitutional right to visit a particular inmate.

There appears to be no question that the inmate received some notice that his wife's visitation right had been suspended for her unwillingness to submit to a search. The inmates at MCRCF have the right to file a grievance over any non-disciplinary matter including visitation. App. beginning at 78a. The Wardens could have believed that the availability of the grievance procedure met the due process requirements for a threatened liberty interest in light of the existing decision of this Court in *Hewitt.* There, faced with a clear liberty violation regarding disciplinary action against an inmate being placed into restrictive confinement, this Court held the prisoner was entitled only to "an informal, nonadversary evidentiary review" and the "inmate must merely receive some notice of the charges against him and an opportunity to present his views...." 459 U.S. at 476. According to *Hewitt,* "[o]rdinarily a written statement by the in- ***12** mate will accomplish this purpose...." *Id.* The due process proceeding need not occur prior to the action which allegedly violates the liberty interest but "must occur within a reasonable time following [the official action] taking into account the relatively insubstantial private interest at stake and the

traditionally broad discretion of prison officials." *Id.* at 476 n.8. The Wardens easily could have believed that the availability to an inmate of the grievance procedures shortly after the suspension of a wife's visitation rights would satisfy any due process requirements of *Hewitt.* There is no allegation that the inmates ever sought to invoke these grievance procedures.

II. PRISON RULES WHICH DO NOT AFFECT THE DURATION, RELEASE, OR THE VERY NATURE OF PRISON CONFINEMENT SHOULD NOT CREATE LIBERTY INTERESTS PROTECTED BY THE DUE PROCESS CLAUSE.

Since the prison visitation regulation in *Thompson* did not create a liberty interest, it was unnecessary then to express a view on whether this Court should
adopt a rule that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, "do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement...."

109 S.Ct. at 109 n.3 (quoting brief for petitioners at 10). The *Thompson* petitioners urged that establishing "this bright line would allow prison officials to issue guidelines to prison staff to govern minor decisions, without thereby transforming the details of prison life into 'liberty interests' with accompanying procedural rights. Inasmuch as a 'bright line' of this kind [was] not necessary for a ruling in favor of petitioners," the Court in *Thompson* left "its resolution for another day." *Id.*

***13** Hopefully, that day has come. Petitioners urge the Court to consider now the question whether such a "bright line" for prison administrative rules should be established. There are compelling reasons to do so. Prison- officials throughout the states are faced with serious potential for loss of immunity when their decisions implementing day-to-day prison administrative rules fail to recognize, in light of the standards established in *Thompson,* that a general rule may create a liberty interest or that the interaction of various general rules may affect a right under another rule which a district court or court of appeals later determines created a liberty interest.

Prior to *Thompson,* the *Davis* rule protected prison officials from personal liability for rule violations unless the rule violated gave rise to the cause of action. Now since *Thompson,* a violation of any rule on any general subject matter of prison life may cause a warden to lose his immunity if a federal court later determines that the rule created a liberty interest by use of sufficiently explicit mandatory language with a substantive predicate limiting discretion.[3] However, to simply illustrate how difficult this task can be, consider the fact that the court of appeals judges in *Thompson* reached a different conclusion than this Court as to whether the prison visitation rule there created a liberty interest. When the leading jurists in the nation can fairly disagree on whether a prison rule creates a liberty interest, then wardens, who are not judges or even attorneys, are faced with an insurmountable task. In *Davis,* this Court found strong policy reasons why officials should not generally be personally liable for administrative rule violations:

***14** Officials would be required not only to know the applicable regulations, but also to understand the intent with which each regulation was adopted. Such an understanding often eludes even trained lawyers with full access to the relevant legislative or administrative materials. It is unfair and impracticable to require such an understanding of public officials generally.

468 U.S. at 196 n.13.

If this Sixth Circuit decision is allowed to stand, wardens would additionally be required to know how the violation of one rule, not creating a liberty interest, could impact on another rule which a court subsequently may find did create a liberty interest. This is not only unfair but essentially an impossible As this Court stated in *Davis,* it is not
[a]lways fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, to say nothing of higher level executives who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively. See P. Schuck, Suing Government 66 (1983). In these circumstances, officials should not err always on the side of caution. "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office."

Id. at 196.

***15** However, if a warden acts swiftly and does "not err always on the side of caution," he may become personally liable for violation of a general rule not involving the very nature of confinement which later is determined to have created a liberty interest. Faced with this impossible task, a "bright line" needs to be established that liberty interests may only be created by prison rules relating to the nature of confinement. This Court's prior decisions have found the existence of liberty interests only when the prison rule involved the duration of, or release from confinement, or that the very nature of confinement was somehow dramatically altered.[4] Since visitation rules and other general rules of prison management do not involve the duration of or release from confinement, no due process right would be implicated in this case if such a "bright line" were established.

Incarceration necessarily restricts an inmate's liberty and such restrictions of liberty are within the overall limitations to be expected in a penal institution unless the conditions are "cruel and unusual" or unjustifiably interfere with substantive rights. *Rhodes v. Chapman,* 452 U.S. 337 (1981). An inmate has no constitutional right to meet with any visitor of his choice. Neither do prison visitors have a fundamental right to visit specific inmates. *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119 (1977); ***16** *Bellamy v. Bradley,* 729 F.2d 416 (6th Cir.), *cert. denied,* 489 U.S. 469 (1984). For instance, as this Court explained in *Jones:*

In a prison context, an inmate does not retain those First Amendment rights that are "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier, supra* at 822. Prisons, it is obvious, differ in numerous respects from free society. They, to begin with, are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance. In seeking a "mutual accommodation between institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application," *Wolff v. McDonnell,* 418 U.S., at 556, this Court has repeatedly recognized the need for major restrictions on a prisoner's rights.

433 U.S. at 129.

This necessarily expected withdrawal and limitation of an inmate's liberty and privileges has previously caused this Court in *Hewitt* to express its concern over the expansion of liberty interests created by prison rules into the general areas of prison life:

We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests. As to the first point, we have recognized that broad discretionary authority is necessary because the administration of a prison is "at best an extraordinarily difficult undertaking." *Wolff v. McDonnell, supra,* at 566 ..., and have concluded that "to hold ... that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Meachum v. Fano, supra,* at 225. ***17** .... As to the second point, our decisions have consistently refused to recognize more than the most basic liberty interests in prisoners. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 344 US 266, 285 .... As we have held previously, these decisions require that "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye v. Haymes,* 427 US 236, 242 ....

459 U.S. at 467-68.

In *Hewitt,* a prison regulation, regarding restrictive confinement of a prisoner who was disciplined for engaging in a riot causing serious injury to prison guards, was found to create a liberty interest. Even then, the nature of confinement was altered. However, this Court stated there were "persuasive reasons why we should be loath to transpose all of the reasoning in the cases just cited" to create a liberty interest in "the situation where the statute and regulations govern the day-to-day administration of a prison system." *Id.* at 470. The Court was loath to do so because "the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials," and the "deprivations

imposed in the course of the daily operations of an institution are likely to be minor when compared to the release from custody at issue in parole decisions and good time credits." *Id.* This Court stated that "[t]hese facts suggest *'that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes and regulations in other areas.*' " *Id.* (emphasis added).

***18** The Court should now consider this important question and decide whether lawful incarceration warrants the establishment of a "bright line" beyond which prison regulations should not create liberty interests protected by the Due Process Clause unless the rules involve the duration of, release from, or the very nature of confinement.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.