

No. _____

**In The
Supreme Court of the United States**

RICHARD ROE, on his own behalf and on behalf
of a class of those similarly situated,

Petitioners,

v.

J. DAVID DONAHUE, in his official capacity as
Commissioner of the Indiana Department of Correction,

Respondent.

**On Petition For A Writ Of Certiorari
To The Indiana Court Of Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Indiana Department of Correction (“DOC”) has implemented an Executive Directive which has the effect of permanently prohibiting virtually all prisoners who have ever committed a sex offense against a child from visiting with any children during the entire duration of their confinement. Pursuant to the policy no effort is made by the DOC to determine if a specific prisoner is a risk to children, despite the fact that many sex offenders are not a significant risk to offend against their child visitors and despite the fact that lesser alternatives, such as using non-contact visitation areas, are already available and could be utilized instead of the total and permanent ban on visitation.

1. Does this policy, permanently denying visitation, violate the Eighth Amendment under the standards set forth in *Overton v. Bazzetta*, 539 U.S. 126 (2003)?
2. Does this policy violate the prisoner’s right to family association, protected by the Fourteenth Amendment, under the standards set forth in *Turner v. Safley*, 482 U.S. 78 (1987) and reaffirmed in *Bazzetta*?

PARTIES TO THE PROCEEDINGS

Jane Doe, who was allowed by court order to proceed by anonymous name, originally brought this action. The case was certified as a class action pursuant to Rule 23(B)(2) of the Indiana Rules of Trial Procedure with the class defined as:

All prisoners currently, or who will in the future be, confined in institutions maintained by the Indiana Department of Correction or otherwise subject to the executive directive which prohibits prisoners from visiting with minor children if they have a current or past adjudication/conviction of a sex offense involving a minor.

Class member Richard Roe, who was also allowed by court order to proceed by anonymous name, was allowed to intervene in the case as an additional plaintiff and class representative. The original defendant was Evelyn Ridley-Turner, in her official capacity as Commissioner of the Indiana Department of Correction.

The petitioners on appeal are Richard Roe on his own behalf and on behalf of the certified class. J. David Donahue is the current Commissioner of the Indiana Department of Correction.

TABLE OF CONTENTS

| | Page |
|--|------|
| QUESTIONS PRESENTED FOR REVIEW | i |
| PARTIES TO THE PROCEEDINGS | ii |
| OPINIONS BELOW | 1 |
| STATEMENT OF JURISDICTION | 1 |
| CONSTITUTIONAL AND REGULATORY PROVI- SIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| A. Presentation of the federal questions to the courts below | 2 |
| B. Statement of the facts | 3 |
| C. Proceedings below | 7 |
| ARGUMENT | 8 |
| Reasons for Granting the Petition..... | 8 |
| I. This case raises an important federal ques- tion that was left unresolved by <i>Bazzetta</i> , that has national implications, and on which lower courts need guidance | 9 |
| II. Certiorari should be granted because the Indiana Court of Appeals misapplied the standard of review demanded by this Court in both <i>Turner</i> and <i>Bazzetta</i> to assess the va- lidity of the impingement on the prisoners' associational rights with family member visi- tors and stripped all protection from the im- portant constitutional rights at issue | 11 |
| CONCLUSION..... | 16 |

TABLE OF AUTHORITIES

Page

CASES

| | |
|--|---------------|
| <i>Banks v. Beard</i> , 399 F.3d 134 (3rd Cir.), <i>cert. granted</i> , ___ U.S. ___, 126 S.Ct. 650 (2005) | 15 |
| <i>California First Amendment Coalition v. Woodford</i> , 299 F.3d 868 (9th Cir. 2002)..... | 15 |
| <i>Caraballo-Sandoval v. Honsted</i> , 35 F.3d 521 (11th Cir. 1994)..... | 13 |
| <i>Doe v. Donahue</i> , 829 N.E.2d 99 (Ind.Ct.App.), <i>transfer denied</i> , 838 N.E.2d 403 (Ind. 2005) | 1 |
| <i>Evans v. Johnson</i> , 808 F.2d 1427 (11th Cir. 1987)..... | 13 |
| <i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)..... | 11 |
| <i>Feeley v. Sampson</i> , 570 F.2d 364 (1st Cir. 1978)..... | 13 |
| <i>Garber v. Pennsylvania Department of Corrections Secretary</i> , 851 A.2d 222 (Comm.Ct.Pa. 2004) | 14 |
| <i>Johnson v. California</i> , 543 U.S. 499, 125 S.Ct. 1141 (2005) | 15 |
| <i>King v. Frank</i> , 328 F.Supp.2d 940 (W.D. Wis. 2004)..... | 13 |
| <i>Lynott v. Henderson</i> , 610 F.2d 340 (5th Cir. 1980)..... | 13 |
| <i>M.L.B. v. S.L.J.</i> , 519 U.S. 102 (1996) | 12 |
| <i>Muhammad v. Pitcher</i> , 35 F.3d 1081 (6th Cir. 1994)..... | 15 |
| <i>Odenwalt v. Gillis</i> , 327 F.Supp.2d 502 (M.D. Pa. 2004)..... | 13 |
| <i>Overton v. Bazzetta</i> , 539 U.S. 126 (2003) | <i>passim</i> |
| <i>Pell v. Procunier</i> , 417 U.S. 817 (1974)..... | 12 |
| <i>Ramirez v. Pugh</i> , 379 F.3d 122 (3rd Cir. 2004) | 15 |
| <i>Ricco v. Conner</i> , 146 Fed.Appx. 249 (10th Cir. 2005) | 11 |

TABLE OF AUTHORITIES – Continued

| | Page |
|--|-----------------|
| <i>Salaam v. Lockhart</i> , 905 F.2d 1168 (8th Cir. 1990), <i>cert. denied</i> , 498 U.S. 1026 (1991) | 15 |
| <i>Thornburgh v. Abbott</i> , 490 U.S. 401 (1989) | 15 |
| <i>Troxel v. Granville</i> , 530 U.S. 57 (2000)..... | 13 |
| <i>Turner v. Safley</i> , 482 U.S. 78 (1987)..... <i>passim</i> | |
| <i>Wirsching v. Colorado</i> , 360 F.3d 1191 (10th Cir. 2004)..... | 10, 13, 14 |
| CONSTITUTIONAL PROVISIONS | |
| United States Constitution, Amendment VIII | 2, 7, 8, 10, 11 |
| United States Constitution, Amendment XIV | 2, 7, 15 |
| UNITED STATES CODE | |
| 28 U.S.C. § 1257(a)..... | 1 |
| CODE OF FEDERAL REGULATIONS | |
| 28 C.F.R. §§ 540.40-52 (2005) | 14 |
| FEDERAL RULES OF CIVIL PROCEDURE | |
| Rule 23(B)(2)..... | ii |
| STATE STATUTES | |
| FLA. STAT. ANN. § 944.09(1)(n) (2005)..... | 9 |
| IND. CODE § 5-2-12-4 (2005) | 4 |
| IND. CODE § 5-2-12-4.5 (2005) | 3 |

TABLE OF AUTHORITIES – Continued

| | Page |
|--|------|
| IND. CODE § 35-38-1-7.5 (2005) | 3 |
| IND. CODE § 35-42-4-9 (2005) | 4 |
| STATE REGULATIONS | |
| CAL. CODE REGS. tit. 15, § 3173.1(b) (2005) | 14 |
| UTAH ADMIN. CODE § R251-706-7 (2005) | 9 |
| OTHER AUTHORITIES | |
| Federal Bureau of Prisons, United States Department of Justice, <i>Program Statement No. 5267.01-Visitation Regulations</i> (April 7, 2003), http://www.bop.gov/policy/progstat/5267_007.pdf (visited February 3, 2006) | 14 |
| <i>Update</i> , http://www.doc.state.co.us/sex%20Offenders/report%20.pdf , accessible through, www.doc.state.co.us/programs.asp (visited February 1, 2006) | 10 |
| Mary West, S. Scott Hromas, Paula Wenger, <i>State Sex Offender Treatment Programs</i> , Colorado Department of Corrections, http://www.doc.state.co.us/admin_reg/PDFs/SO-report-send2.pdf (2000) (visited January 26, 2006) | 10 |

PETITION FOR A WRIT OF CERTIORARI

Petitioners herein respectfully petition for a writ of certiorari to review the judgment of the Indiana Court of Appeals in this case.

**OPINIONS BELOW**

The opinion of the Indiana Court of Appeals, dated June 10, 2005, is reported at 829 N.E.2d 99 (Ind.Ct.App.), *transfer denied*, 838 N.E.2d 403 (Ind. 2005), and is reprinted in the Appendix at pages 1a through 26a. A timely petition to transfer was filed with the Indiana Supreme Court and was denied on November 21, 2005. The denial is reprinted in the Appendix at pages 41a-42a. The decision of the trial court is not reported and was issued on July 23, 2004. It is reprinted at pages 27a-40a of the Appendix.

**STATEMENT OF JURISDICTION**

The opinion of the Indiana Court of Appeals is dated June 10, 2005. The decision of the Indiana Supreme Court denying the petition to transfer is dated November 21, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1:

. . . 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.

United States Constitution, Amendment VIII

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

Executive Directive 02-01, issued by the Commissioner of the Indiana Department of Correction on February 11, 2002, is the visitation policy that is challenged in this cause. The portion of the policy presented to the Indiana courts is reprinted in the Appendix at pages 43a through 48a.



STATEMENT OF THE CASE

A. Presentation of the federal questions to the courts below

The federal questions in this case were presented in the original complaint as well as in petitioners' motion for summary judgment and supporting memorandum. The trial court in its decision explicitly found that the Executive Directive did not violate any rights protected by the United States Constitution. *See Findings of Fact, Conclusions of Law, and Summary Judgment, Appendix 35a*

through 39a. The petitioners presented the federal constitutional claims in their brief to the Indiana Court of Appeals and the Indiana Court of Appeals found that the challenged visitation policy did not violate either the due process clause or the Eighth Amendment. *See*, Appendix at 15a through 20a.

B. Statement of the facts

There are approximately 20,000 adults confined in DOC prisons. (App. 27a). They are generally afforded liberal visitation rights consistent with the DOC's recognition that visitation is a positive factor for prisoners and for the society to which most prisoners will return. (App. 28a). Children are allowed to visit prisoners, provided adults accompany them. (*Id.*). Generally prisoners have the right to contact visitation, although some prisoners are restricted to non-contact visitation, and every facility in which class members are confined already has non-contact visitation areas where visitation occurs with a barrier between the prisoner and visitor. (*Id.*).

The challenged policy applies to all prisoners who have ever been adjudicated or convicted of a sex offense against a child, even if their current offense does not involve a sex offense. (App. 29a).¹ A prisoner who has been

¹ The particular sex offenses are those listed in Indiana's sex offender registry law as offenses against minors. (App. 29a). These are not necessarily crimes of violence, and a prisoner does not have to be found to be a sexually violent predator, *see*, IND. CODE §§ 5-2-12-4.5 (2005), 35-38-1-7.5 (2005), in order to be denied visitation. The offenses giving rise to the visitation exclusion under the challenged policy are: rape, criminal deviate conduct, child molesting, child exploitation, vicarious sexual gratification, child solicitation, child seduction, sexual misconduct with a minor as a Class A, B or C felony, sexual battery, kidnapping, criminal confinement, or an attempt or conspiracy to

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so adjudicated or convicted will be allowed visitation only if:

- the prisoner has not been convicted or adjudicated of more than one sex offense and there is no documentation that the prisoner has had more than one victim, and
- the circumstances surrounding the adjudication or conviction indicate that the minor, although not legally capable of consenting, was not compelled by force or threat, and
- the prisoner has not had any designated disciplinary code violations for 12 months, and
- the prisoner has not had any other visitation restrictions for sexually related activities within the past 12 months, and
- the intended visitor is an immediate family member, who was not a victim of the prisoner, and
- there are no court orders prohibiting the visitation.

(App. 30a). The DOC, however, interprets the term “force or threat” very expansively as being present whenever:

- the victim was under 14 and the offender was 18 or older, or

commit the above offenses. IND. CODE § 5-2-12-4 (2005). If an 18 year old has consensual sex with his 15-year-old girlfriend, he has committed sexual misconduct with a minor. IND. CODE § 35-42-4-9 (2005). If the conviction is for two different sexual encounters with the same girl, or for two encounters with two different girls, he will be forever barred from visiting children while in prison.

- regardless of the age of the victim, the offender was over 18 and in a position of authority over the victim, or
- the victim was physically or mentally impaired or was unaware at the time of the offense, or
- any coercion is present, even if not physical force or threat.

(App. 7a).

As a result of this expansive interpretation of the policy, of the nearly 2,800 DOC prisoners who are subject to the policy, only ten had been allowed visitation with minors between November 1, 2002 and June 5, 2003. (App. 31a). And, once a determination is made that force or threat was present, then the prisoner can never obtain visitation while incarcerated.² This absolute preclusion of all visitation, and denial of any opportunity to demonstrate a lack of danger to child visitors, exists despite the fact that sex offenders can be classified in different categories and it is rare for someone who has committed one type of sex offense to cross over and offend against children in a different category. (App. 32a through 33a).

The DOC's rationale for the policy is that:

- denying visitation will reduce trauma for victims of abuse

² This does not include visitation that may be allowed if the prisoner is terminally ill or if a child-victim's therapist receives permission for a one-time visit for the child for therapeutic purposes. (App. 46a through 47a).

- denying visitation will assist in breaking the cycle of abuse because it will reduce the prisoner’s ability to fantasize about children
- denying visitation will protect children from the possibility of abuse during visits
- denying visitation will deny sex offenders the opportunity to groom children for future offenses

(App. 31a through 32a). However, petitioners are not seeking to allow prisoners to visit with the victims of their crimes. And it is uncontested that denying visitation with children will not modify an offender’s psychological disorder, and persons who wish to engage in sexual fantasies about children will do so regardless of whether they have visitation with children or not. (App. 33a).

Until May of 2001, when an earlier version of the challenged policy went into effect, petitioners were allowed visitation with children. (App. 29a). In response to an inquiry to all superintendents of DOC institutions concerning inappropriate sexual activity with children during visits before the ban, the DOC reported five incidents of inappropriate sexual conduct involving children ever occurring during visits. *Id.* One involved a male prisoner having sexual contact with his wife during a visit in a visiting room with their children present. Another concerned a male prisoner allowed to visit with his wife and stepdaughter, apparently without incident, in violation of a no-contact order. All the incidents occurred in the contact visitation areas.

As indicated, one of the rationales for the policy is to prevent offenders from “grooming” children for future offenses. Grooming is the process whereby persons who wish to prey on children psychologically prepare them

prior to engaging in sexual activity. (App. 31a, 33a). It is generally done surreptitiously and in private over time as the perpetrator gets to know the child and makes the child comfortable. (App. 33a).

Another rationale is to prevent the possibility of abuse during a visit. The DOC expressed a concern that even a child, accompanied by an adult, visiting in a non-contact visitation area, would be at risk because the offender might convince the child to fondle himself or herself. However, there is no evidence that such activity has ever occurred within the DOC or in any penal facility. And despite these articulated concerns, the DOC allows prisoners, including those subject to the challenged policy, to both have telephone contact with, and write to, children without restriction.

Given the differences between sex offenders, and the fact that a particular sex offender may not be at risk to his or her child visitors, the DOC's own expert opined that any policy concerning visitation should allow for some case-by-case determinations that would allow visitations by a prisoner who could show that he or she is not trying to visit to satisfy sexual impulses. However, the policy represents an absolute and permanent denial of visitation without individualized factfinding.

C. Proceedings below

The case was submitted to the trial court on cross-motions for summary judgment. The petitioners argued that the policy violated Indiana law as well as the Fourteenth and Eighth Amendments. Petitioners urged that the policy violated the due process clause of the Fourteenth Amendment because it impinged on family associational

rights that survived incarceration and this impingement was unjustifiable under this Court's test in *Turner v. Safley*. They also argued that the policy represented cruel and unusual punishment, in violation of the Eighth Amendment, because it represented a permanent and arbitrary denial of visitation, and thus represented a denial of a basic necessity of life. Finally they urged that the policy violated due process because it was irrational and arbitrary. In granting summary judgment for the DOC the trial court found no violation of state law and no violation of due process, although it recognized that the challenged policy impinged on fundamental association rights. However, it found the impingement justifiable under *Turner*. It also found the policy not to violate the Eighth Amendment. A divided Indiana Court of Appeals affirmed. It also found no violation of state law or the United States Constitution although it, too, recognized that the policy impinged on familial associational rights that survived incarceration. A dissenting judge would have found that the policy both violated Indiana law as well as prisoners' rights of familial association under the *Turner* test.



ARGUMENT

Reasons for Granting the Petition

Plenary review in this case is appropriate because the issue of whether a state may permanently deny visitation with children to prisoners who have been convicted of sex offenses against children, ignoring readily available alternatives such as non-contact visitation and refusing to allow prisoners to demonstrate that they are not at risk of harming their child-visitors, raises significant federal questions that affect not only Indiana, but other states

that have imposed similar blanket prohibitions on prisoner visitation. Inasmuch as the challenged policy denies prisoners the ability to visit with their children, grandchildren, and young siblings, this case is not controlled by *Bazzetta*, where this Court explicitly stressed that, despite the general visitation restrictions that were upheld, “[v]isits are allowed between an inmate and those children closest to him or her – children, grandchildren and siblings.” 539 U.S. at 133. In upholding the challenged policy that denies petitioners the right to visit “those children closest to him or her” the Indiana Court of Appeals misapplied the standards set out by this Court in both *Turner* and *Bazzetta* and ignored this Court’s warning in *Bazzetta* that a permanent withdrawal of visitation could give rise to an Eighth Amendment violation.

I. This case raises an important federal question that was left unresolved by *Bazzetta*, that has national implications, and on which lower courts need guidance

Like Indiana, a number of other states generally bar sex offenders against children from any visits with even their own children during their incarceration.³ The Indiana

³ See, e.g., Florida, FLA. STAT. ANN. § 944.09(1)(n) (2005) [denying visitation to persons convicted of sex offenses against children unless special visitation is authorized by the warden, based only on extenuating circumstances]; Utah, UTAH ADMIN. CODE § R251-706-7 (2005) (“inmates with a documented history of sexual misconduct with a child under the age of 18 years shall not visit with any minor while incarcerated.”)

A survey of state sex offender programs and visitation policies done in 2000 by the Colorado Department of Corrections discloses that at that time survey respondents from 24 states indicated that different visitation policies prevailed for sex offenders than other offenders. Mary

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Court of Appeals' decision allows visitation rights to be permanently denied, despite the fact that each facility in which class members are confined has areas allowing for non-contact visitation, and despite the fact that even the DOC's own expert conceded that due to differences among sex offenders, prisoners should be allowed an opportunity to demonstrate that they are not at risk of harming child visitors and obtain visitation rights. Prisoners are irrevocably denied all visitation opportunities with their children, grandchildren, and minor siblings, for the length of their incarcerations. This decision affects not only the nearly 2,800 members of the certified class in this cause, but it potentially affects the numerous prisoners throughout the United States who are now or may in the future be subject to similar policies.

In *Bazzetta*, the plaintiffs claimed that the denial of visitation for two years for prisoners with two substance abuse violations created an Eighth Amendment violation. This Court disagreed and noted that this was "not a dramatic departure from accepted standards for conditions of confinement. . . . Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities or fail to protect their health or safety. Nor does it

West, S. Scott Hromas, Paula Wenger, *State Sex Offender Treatment Programs*, Colorado Department of Corrections, http://www.doc.state.co.us/admin_reg/PDFs/SO-report-send2.pdf (2000) (visited January 26, 2006). An undated supplement to that report discloses that the following states, besides Indiana, responded "no" to the question "Are sex offenders allowed to visit with children": Alaska, Arizona, Colorado, Delaware, Illinois, Iowa, Minnesota, Missouri, New Mexico, and Ohio. *Update*, <http://www.doc.state.co.us/sex%20Offenders/report%20.pdf>, accessible through, www.doc.state.co.us/programs.asp (visited February 1, 2006) At least Colorado, however, currently allows visitation under certain circumstances. See *Wirsching v. Colorado*, 360 F.3d 1191 (10th Cir. 2004).

involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur.” 539 U.S. at 137. However, this Court emphasized Eighth Amendment concerns could be present “[i]f the withdrawal of all visitation privileges were permanent or for a much longer period.” *Id.*

As the Tenth Circuit has noted in *Ricco v. Conner*, 146 Fed.Appx. 249, 254 (10th Cir. 2005), “*Overton* does not provide any clear guidance . . . as to what would constitute ‘a much longer period.’” Here, however, the denial is permanent. And, while the prisoner may still visit with adults, he or she is denied entirely the opportunity to visit with children, grandchildren, and young siblings, without any particularized showing that the prisoner is at risk of harming the child. Plenary review should be granted so that this Court can resolve the important question of how far a state can go in denying prisoners visitation before the denial violates the “minimal civilized measures of life’s necessities,” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), and creates an Eighth Amendment violation.

II. Certiorari should be granted because the Indiana Court of Appeals misapplied the standard of review demanded by this Court in both *Turner* and *Bazzetta* to assess the validity of the impingement on the prisoners’ associational rights with family member visitors and stripped all protection from the important constitutional rights at issue

A prisoner “does not retain rights inconsistent with proper incarceration.” *Bazzetta*, 539 U.S. 126, 131 (2003). Nevertheless, “a prison inmate retains those First Amendment rights that are not inconsistent with his

status as a prisoner or with legitimate penological objectives of the corrections system.” *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Thus, “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Turner*, 482 U.S. at 89.

In order to assess the reasonableness of a prison regulation, this Court in *Turner* specified that four factors must be looked to:

- whether the regulation has a valid, rational connection to a legitimate governmental objective. *Id.*
- whether there are alternative means for the prisoners to exercise the rights in question. 482 U.S. at 90.
- what impact will accommodation of the right in question have on guards and other inmates and the allocation of prison resources generally. *Id.*
- whether there are ready alternatives to the regulation in question. “[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation. . . . By the same token, the existence of obvious, easy alternatives, may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.” *Id.*

In *Bazzetta*, this Court applied the *Turner* standard to uphold visitation restrictions imposed by Michigan correctional authorities. The Court found it unnecessary to discuss the extent to which familial associational rights survived incarceration because the Michigan procedure met the *Turner* test. Numerous lower courts prior to *Bazzetta*, however, held that some measure of the fundamental associational rights in the family protected by the Fourteenth Amendment, *see, e.g., M.L.B. v. S.L.J.*, 519

U.S. 102, 116 (1996); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality opinion) (summarizing cases concerning fundamental nature of family relationship), continue to exist even after the family member is incarcerated, subject to legitimate penological objectives. *See, e.g., Caraballo-Sandoval v. Honsted*, 35 F.3d 521, 525 (11th Cir. 1994); *Evans v. Johnson*, 808 F.2d 1427 (11th Cir. 1987); *Lynott v. Henderson*, 610 F.2d 340, 343 (5th Cir. 1980); *Feeley v. Sampson*, 570 F.2d 364, 372 (1st Cir. 1978). And, after *Bazzetta*, courts have continued to accept that prisoners retain a constitutional interest in visitation, subject to the *Turner* standards. *See, e.g., Wirsching v. Colorado*, 360 F.3d at 1198; *King v. Frank*, 328 F.Supp.2d 940, 945 (W.D. Wis. 2004); *Odenwalt v. Gillis*, 327 F.Supp.2d 502, 506 (M.D. Pa. 2004).

The Indiana Court of Appeals also recognized that the petitioners retained an important interest, protected by the Fourteenth Amendment, in their right to maintain familial relationships through visitation. (App. 15a through 16a). And, the Court recognized that in evaluating whether there was a valid penological justification to compromise this right, the standards of *Turner v. Safley* had to be applied. (App. 16a). However, the Court's misapplication of *Turner* renders the standard impotent to protect the fundamental constitutional rights at issue.

The evidence is clear in this case that the prisoners who are permanently denied from visiting their children and grandchildren are not necessarily at risk of harming them. Yet the policy allows no opportunity for the individual offender to demonstrate that he or she does not pose a risk of harm. Of equal importance, every facility that houses sex offenders has in place a system to allow prisoners to have non-contact visitation. Although protecting

children from harm is, of course, a legitimate governmental goal, *Bazzetta*, 539 U.S. at 133, denying the prisoners the opportunity to demonstrate that they are not such a danger, and denying them the opportunity to have non-contact visitation, is not rationally connected to that valid governmental objective. The prisoner's interests can be accommodated, at *de minimis* cost, through the ready and available alternative of non-contact visitation.

Other jurisdictions have opted for the easy alternative of non-contact visitation for persons convicted of sex crimes against children. *See, e.g.*, California, CAL. CODE REGS. tit. 15, § 3173.1(b) (2005); *Garber v. Pennsylvania Department of Corrections Secretary*, 851 A.2d 222 (Comm.Ct.Pa. 2004). Some jurisdictions have elected to have case-by-case determinations by offering treatment programs to the prisoners and denying visitation to prisoners convicted of sex offenses against children unless the sex offender treatment program authorizes the visitation after evaluating the prisoner. *See, e.g.*, *Wirsching v. Colorado*, *supra*. And still others, including the Federal Bureau of Prisons, apparently impose no special visitation restrictions on persons who have been convicted of sex offenses against children. *See, e.g.*, 28 C.F.R. §§ 540.40-52 (2005) (general visitation regulations for prisoners with Bureau of Prisons, containing no mention of restriction on sex offender visitation with children); Federal Bureau of Prisons, United States Department of Justice, *Program Statement No. 5267.01-Visitation Regulations 7-8* (April 7, 2003), http://www.bop.gov/policy/progstat/5267_007.pdf (visited February 3, 2006) (specifying the only restriction on child-visitors under the age of 16 is that they must be accompanied by a responsible adult).

In applying the *Turner* test here, the Indiana Court of Appeals deferred so greatly to the DOC that the review required by the Fourteenth Amendment, as explained in *Turner* and *Bazzetta*, becomes no review at all, thus rendering the rights unprotected. Although deferential, the *Turner* standard is “not toothless”. *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989), *see also, e.g., Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 1170 (2005) (Thomas, J., dissenting); *Ramirez v. Pugh*, 379 F.3d 122, 129 (3rd Cir. 2004) (remanding to the district court the question of whether a law banning use of federal funds to distribute certain sexually explicit materials to prisoners violated the First Amendment); *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 882 (9th Cir. 2002) (finding regulation prohibiting viewing of lethal injection procedures prior to administration of injection violates the First Amendment); *Muhammad v. Pitcher*, 35 F.3d 1081, 1084 (6th Cir. 1994) (finding institution’s mail policy to be unconstitutional); *Salaam v. Lockhart*, 905 F.2d 1168, 1171 (8th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (finding that prison policy that precluded use of prisoner’s new name to be unconstitutional). Review should be granted to assure appropriate interpretation of the Fourteenth Amendment as applied to prisoner visitation issues.⁴



⁴ This Court has agreed to review *Banks v. Beard*, 399 F.3d 134 (3rd Cir.), *cert. granted*, ___ U.S. ___, 126 S.Ct. 650 (2005), which presents the question of whether a prison policy that denied newspapers, magazines, and photographs to a state’s most disruptive, violent, or problematic prisoners, is constitutional under the *Turner* and *Bazzetta* standards. (No. 04-1739). At the very least, the petition for certiorari in this case should be held pending a final decision in *Banks*.

CONCLUSION

The policy here denies all visitation with those children closest to the prisoner. In affirming the policy, the Indiana Court of Appeals has raised, and erroneously answered, important federal questions. Plenary review should be granted so that states and prisoners may receive guidance as to the limits of states' authority in this area.

Respectfully submitted,

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**IN THE
COURT OF APPEALS OF INDIANA**

JANE DOE et al.,)
)
Appellants-Plaintiffs,)
)
vs.)

J. DAVID DONAHUE, in)
his official capacity as)
Commissioner of the Indiana)
Department of Correction,)
)
Appellee-Defendant.)

No. 49A02-0408-CV-674

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn L. Moberly, Judge
Cause No. 49D12-0109-CP-1450

June 10, 2005

OPINION - FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellants-Plaintiffs Jane Doe and the class comprising all persons confined in institutions maintained by the

Indiana Department of Correction, or who will be so confined in the future (collectively, the “Prisoners”), appeal the trial court’s grant of summary judgment in favor of Appellee-Defendant J. David Donahue, in his official capacity as the Commissioner of the Indiana Department of Correction (the “Department”). We affirm.¹

Issues

The Prisoners raise four issues on appeal, which we consolidate and restate as:

- I. Whether the trial court erroneously granted summary judgment to the Department because Executive Directive 02-01 (“ED 02-01”) violates Indiana Code Section 11-11-3-9; and
- II. Whether the trial court erroneously granted summary judgment to the Department because ED 02-01 violates, the First, Eighth, and Fourteenth Amendments to the United States Constitution.

¹ We heard oral argument in this case on April 29, 2005, at the Crawford County Circuit Court with students from Crawford County High School in attendance. We thank the local Bar and the people of English for their hospitality, and we commend counsel for their able presentations. We also note the confusion that filled our morning regarding time. The courts in Crawford County operate on “fast time,” but the schools operate on “slow time.” Thus, we arrived for the argument an hour earlier than the high school students did. We find it ironic that this all took place the morning after our General Assembly passed the Daylight Savings Time bill. And we thank our legislature for hopefully alleviating future confusion when we travel to the southern regions of Indiana.

Facts and Procedural History

I. Background: Visitation at the Department's Prison Facilities

The present controversy concerns the legality of ED 02-01, a directive enacted by the Department that restricts offenders who have been convicted or adjudicated of certain sexual offenses from receiving visitors under the age of eighteen. The directive and its predecessor, Executive Directive 01-06, were implemented to protect children from abuse or misconduct during visitation sessions at the Department's prison facilities. To better understand the policy behind ED 02-01, we examine the reality of visitations at the facilities.

There are twenty-five adult facilities in Indiana ranging in security levels from one to four, with the highest level being four. All facilities have visitation areas. Level two through four facilities, which are the only facilities that house sexual offenders, have "semi-similar" visitation areas. Appellants' App. at 86. In particular, the visitation areas are open areas with twenty-five to thirty tables that can accommodate approximately one hundred people. At the beginning and end of a visit, a prisoner may embrace his or her visitor. However, when the prisoners and visitors are seated, everyone's hands must be on top of the table. There is typically one correctional officer to supervise the visitation room, but more may be added on weekends when visitation volume increases. Thus, according to Stephan McCauley, operational director for the Department's southern region, the visitation room is a "wild and crazy place." *Id.* at 88. In recounting his experience as a supervisor of a visitation room, he explained:

There's a lot of activity. Obviously, a lot of our offenders are in their early 20s, and they have young kids, and they come to visit. So you have a lot of kids in the room, and they're running around. I mean, you know, it's hard to keep children down. So it's just noisy, hectic, a lot of movement.

The vending machines are very popular because families take money into the visiting room. So I mean everyone's always moving through the visiting room, et cetera. I mean you're trying to keep your eye, especially on the weekend, on a hundred people, and you're constantly being distracted. It's easy to miss things. There's no doubt about it. One person has a very difficult time doing that.

Id.

Unlike the general population, prisoners who are on disciplinary or administrative segregation may only have non-contact visitation, either through closed-circuit television, a physical partition, or separation from the general visiting area. Such non-contact visitation is currently available at all level two through four facilities.

II. Implementation of Executive Directives 01-06 and 02-01

On March 8, 2001, the former Commissioner of the Department issued Executive Directive 01-06 ("ED 01-06"), which provided that "[o]ffenders who have a current or past adjudication/conviction of a sex offense involving a

minor² **SHALL NOT** be permitted to receive visits from minors.” Appellants’ App. at 56 (emphasis in original). As previously mentioned, ED 01-06 was enacted to protect “children from the possibility of being victimized while visiting offenders.” *Id.* Indeed, ED 01-06 was the Department’s acknowledgement of research, which showed that “victims of sex offenses know the perpetrators between 80% and 90% of the time . . . [and] that persons who prey on children often psychologically prepare the children for some time prior to engaging in any sexual activity.” *Id.* In enacting ED 01-06, the Department recognized that sexual offenders have a high risk of reoffending, that their outward behaviors demonstrate responsible and trustworthy actions to others, that they use deception to gain trust, and that they maintain secrecy by psychologically grooming³ the victim. In addition, the Department was cognizant of the problems that confront a prison facility’s visiting room supervision staff, namely, that the supervisory staff: (1) may not recognize the psychological manipulation employed by sexual offenders; (2) are outnumbered and cannot not be everywhere at all times; and (3) may be psychologically prepared by the offender to view the offender as trustworthy, responsible, and unthreatening. Further, and perhaps most importantly, the Department was aware of incidents where children had been sexually

² These offenses include, but are not limited to, the following: “sexual assault on a child; incest; child molestation; child exploitation; child solicitation; child seduction; sexual misconduct with a minor; attempting to commit any of these offenses; promoting prostitution with a minor; and aiding, inducing or causing any of these offenses.” Appellants’ App. at 56.

³ “Grooming” is a very gradual process that child abusers use to “break down the intended victim’s personal boundaries and allow the offender to offend.” Appellants’ App. at 62.

molested in visiting rooms that were being supervised by prison staff. *Id.* at 62.

On February 11, 2002, the Department implemented a revised policy, ED 02-01, i.e., the policy at issue here, which outlines the procedures to be followed when offenders, who have been convicted or adjudicated of a sexual offense involving a minor, request to have a particular minor visit them. Pursuant to ED 02-01, when an offender is received at a departmental intake unit, his or her records will be reviewed to determine whether there has been either a conviction as an adult or an adjudication as a juvenile for a sexual offense involving a minor. “If there is such a conviction/adjudication, the offender’s records [will] be marked with a (Y) in the ‘VMR’ (Visitor-Minor Restriction) field in the Offender Information System (OIS).” *Id.* at 58. Subsequently, upon receipt of the offender at the appropriate housing facility, the Department’s staff will determine whether the offender is a VMR Offender. If so, and if the offender has requested that minors be allowed to visit him or her, the staff will review the offender’s records and decide whether he or she may be eligible for visitation with minors. Specifically, to be eligible for such visitation, the offender must meet the following criteria:

- A) The offender has not had any designated disciplinary code violations for 12 months.
- B) The intended visitor is an immediate family member – i.e., the offender’s child, including adopted or stepchild, sibling, or grandchild – who was not the victim of the offense.
- C) The offender has not been adjudicated/convicted of any other sexual offense and there is no documentation that the prisoner has had multiple victims.

- D) The offender has not had any other visitation restrictions for sexually-related activities within the past twelve months.
- E) There are no known court orders restricting or prohibiting the offender from visiting with the intended visitor.
- F) The circumstances surrounding the adjudication/conviction indicate that the minor, though legally incapable of consenting, was not compelled by force or threat.⁴

If an offender meets the above criteria,⁵ the Department's staff will request that a case management review be completed, assuming that one has not previously been prepared, by a private contractor who manages the Department's sex offender management and monitoring ("SOMM") program. The offender may appeal from an adverse determination by the SOMM staff or from the facility's decision to deny his or her request for visitation with minors.

Presently, there are approximately 20,000 adults confined within the Department's facilities. As of June 17,

⁴ Evidence that the victim was compelled by force or imminent threat of force exists when: (1) the victim was under fourteen and the offender was eighteen or older; (2) regardless of the age of the victim, the offender was over eighteen and in a position of authority over the victim; (3) the victim was physically or mentally impaired or was unaware (unconscious, sleeping, drugged, or intoxicated) at the time of the offense. Additionally, a "force or threat" does not necessarily have to be physical in nature.

⁵ Additionally, offenders may be permitted to have visitation with minors who are immediate family where the offender is in the last stages of a terminal illness or where a therapeutic visit is requested by the victim's licensed therapist.

2003, there were 2,795 prisoners with VMR restrictions. Of those 2,795 prisoners, 138 had applied for visitation and nine had been allowed visitation with minors as of June 5, 2003.⁶

III. Commencement of the Present Litigation

On September 14, 2001, the original plaintiff, prisoner Jane Doe, filed her class action complaint.⁷ On November 26, 2001, and by stipulation of the parties, the trial court certified the case as a class action pursuant to Indiana Trial Rule 23(B)(2). The class is defined as:

All prisoners currently, or who will in the future be, confined in institutions maintained by the Indiana Department of Correction or otherwise subject to the executive directive which prohibits prisoners from visiting with minor children if they have a current or past adjudication/conviction of a sex offense involving a minor.

Appellants' App. at 22. On December 1, 2003, the Prisoners filed their summary judgment motion. In response, on April 29, 2004, the Department filed a cross-motion for summary judgment, asserting that the Prisoners do not have a right to unrestricted visitation and that the policy was rational and furthers a legitimate penological goal. After conducting a hearing on the cross motions for summary judgment, the trial court entered findings of fact,

⁶ Ten of those 138 applications were still under review as of June 5, 2003.

⁷ Pursuant to ED 02-01, administrative review is available to inmates who seek a variance from the regulation. In fact, we learned at oral argument that the named plaintiff had sought and received a variance from the regulation at issue.

conclusions of law, and summary judgment in favor of the Department, determining that ED 02-01 did not violate Indiana law or the First, Eighth, or Fourteenth Amendments. The Prisoners now appeal.

Discussion and Decision

I. Summary Judgment Standard of Review

On review of a trial court's decision to grant or deny summary judgment, we apply the same standard as the trial court: we must decide whether there is a genuine issue of material fact that precludes summary judgment and whether the moving party is entitled to judgment as a matter of law. *Carie v. PSI Energy, Inc.*, 715 N.E.2d 853, 855 (Ind. 1999). Once the moving party has sustained its initial burden of proving the absence of a genuine issue of material fact and the appropriateness of judgment as a matter of law, the party opposing summary judgment must respond by designating specific facts establishing a genuine issue for trial. *Stephenson v. Ledbetter*, 596 N.E.2d 1369, 1371 (Ind. 1992). We may consider only those portions of the pleadings, depositions, and any other matters specifically designated to the trial court by the parties for purposes of the motion for summary judgment. Ind. Trial Rule 56(C), (H). Any doubt as to the existence of an issue of material fact, or an inference to be drawn from the facts, must be resolved in favor of the nonmoving party. *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 633 (Ind. 1991). Although the nonmovant has the burden of demonstrating that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that the nonmovant was not improperly denied his or her day in court. *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 667 (Ind. 1997). Specific findings and

conclusions by the trial court are not required, and although they offer valuable insight into the rationale for the judgment and facilitate our review, we are not limited to reviewing the trial court's reasons for granting or denying summary judgment. *Bernstein v. Glavin*, 725 N.E.2d 455, 458 (Ind. Ct. App. 2000), *trans. denied*. Rather, a grant of summary judgment may be affirmed upon any theory supported by the designated materials. *Id.*

In addition, “[t]he fact that the parties [made] cross-motions for summary judgment does not alter our standard of review. Instead, we must consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law.” *Ind. Farmers Mut. Ins. Group v. Blaskie*, 727 N.E.2d 13, 15 (Ind. Ct. App. 2000).

II. Analysis

A. Indiana Law

On appeal, the Prisoners first argue that the trial court erroneously granted summary judgment to the Department because ED 02-01 violates Indiana law, namely Indiana Code Section 11-11-3-9. Indiana Code Section 11-11-3-9(a) permits the Department to prohibit a person from visiting a confined person or to restrict the visit to an extent greater than that allowed under subsection 8,⁸ provided that the Department has reasonable

⁸ Indiana Code Section 11-11-3-8 expressly provides confined persons with the opportunity to receive visitors at reasonable times. However, the statute also allows the Department to place reasonable restrictions on such visitations for the purpose of maintaining the

(Continued on following page)

grounds to believe that such visitations would threaten the security of the facility or program or the safety of the individuals. Subsection (b) of the statute, which was added in 2004, allows the Department to restrict any person less than eighteen years of age from visiting certain offenders, if: (1) the offender has been convicted of a sex offense or adjudicated a delinquent as a result of an act that would be considered a sex offense if committed by an adult; and (2) the victim of the sex offense was less than eighteen years of age at the time of the offense.

The Prisoners contend that because visitation with minors is forbidden under ED 02-01, as opposed to merely restricted, for the duration of the VMR Offender's confinement without any showing that such visitation would threaten the security or safety of individuals, it violates Indiana law. To support this contention, the Prisoners maintain that Indiana Code Section 11-11-3-9's use of the terms "restrict" and "prohibit" establishes "different degrees of impingement upon a prisoner's right to visit: one that 'prohibits' and one that 'restricts.'" Appellants' Br. at 16. In response, the Department argues that ED 02-01 does not violate Indiana law because "it does not totally prohibit sex offenders from visits with minors." Appellee's Br. at 11. We find both arguments unpersuasive.

The primary goal of statutory interpretation is to give effect to the intention of the legislature. *Ind. Dep't of Natural Resources v. Town of Syracuse*, 686 N.E.2d 410, 412 (Ind. Ct. App. 1997). This goal is accomplished by examining the statutory language. *Id.* Moreover, the best

security of its facilities and programs, the safety of individuals, and administrative manageability.

evidence of legislative intent is the language of the statute itself, giving all words their plain and ordinary meaning unless otherwise indicated by the statute. *Brown v. State*, 790 N.E.2d 1061, 1063-64 (Ind. Ct. App. 2003). In construing statutes, we will presume that the legislature intended the language used in the statute to be applied logically and not to bring about an unjust or absurd result. *Id.* at 1064. In addition, though we construe penal statutes against the State to avoid enlarging them beyond the fair meaning of the language used, we will not interpret them so strictly as to defeat the obvious or expressed intent of the legislature. *Armstrong v. State*, 818 N.E.2d 93, 96 (Ind. Ct. App. 2004).

Moreover, undefined words in a statute are given their plain, ordinary, and usual meaning. Ind. Code § 1-1-4-1(1). In determining the plain and ordinary meaning of a statutory term, courts may use English language dictionaries as well as consider the relationship with other words and phrases. *Armstrong*, 818 N.E.2d at 96. Statutes are examined and interpreted as a whole and the language itself is scrutinized, including the grammatical structure of the clause or sentence at issue. *Id.* Within this analysis, we give words their common and ordinary meaning, without “overemphasizing a strict literal or selective reading of individual words.” *Id.* (quotations omitted).

As previously noted, Indiana Code 11-11-3-9(b) permits the Department to “restrict” any person less than eighteen years of age from visiting certain sexual offenders. The Prisoners appear to argue that the legislature’s deliberate use of the term “restrict,” as opposed to the word “prohibit,” allows the Department to limit, but not completely forbid, minor visitors from visiting VMR Offenders. However, this reading of the statute is too

restrictive and it sacrifices the contextual meaning of Indiana Code Section 11-11-3-9. Indeed, we note that, while the term “restrict” may be defined as “to set bounds or limits to” – a definition advocated by the Prisoners – it may also be defined as to “bar or carefully govern addition or increment to.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1937 (2002) (providing an example of this latter definition as “countries where literacy was largely [restricted] to the upper classes”).

Here, read in context, the term “restrict” – as used in Indiana Code Section 11-11-3-9(b) – prevents or bars minors from visiting with offenders, whether the visitation is face-to-face or through a non-contact transparent barrier. Likewise, the directive at issue, ED 02-01, prohibits VMR Offenders from receiving visitors under the age of eighteen. Put another way, the directive restricts minor visitors from visiting VMR offenders. Such restriction is entirely consistent with Indiana Code Section 11-11-3-9. Accordingly, ED 02-01 does not violate Indiana law.

Assuming *arguendo* that the statute’s use of the word “restrict,” as opposed to “prohibit,” defeats the regulation in dispute under Indiana Code Section 11-11-3-9(b), we still find no violation because it is consistent with Indiana Code Section 11-11-3-9(a). That statute allows the Department to prohibit a person from visiting a confined person if the Department has reasonable grounds to believe that such visitation would threaten the security of the facility or program or the safety of the individuals. Thus, the question before us becomes whether, in enacting ED 02-01, the Department had reasonable grounds to believe that visitations between VMR offenders and their minor visitors would either threaten the security of the

prison facility or the safety of the individuals involved. To resolve this question, we look to the designated evidence.

Here, the designated evidence reveals that the enactment of ED 02-01 arose out of “a need to protect children from the possibility of being victimized while visiting offenders.” Appellants’ App. at 56. Indeed, in implementing the directive at issue, the Department relied upon certain research, which indicated that “victims of sex offenses know the perpetrators between 80% and 90% of the time” and, further, that “persons who prey on children often psychologically prepare the children for some time prior to engaging in any sexual activity.” *Id.* At the time that it implemented ED 02-01, the Department recognized that sexual offenders have a high rate of recidivism because “they have significant difficulty overcoming their desire to continue molesting children” and was aware of incidents where children had been sexually molested in visiting rooms that were being supervised by prison staff. *Id.* at 62. Lastly, the Department was mindful of its staffing inadequacies, namely, that the supervisory staff: (1) may not recognize the psychological manipulation employed by sexual offenders; (2) are outnumbered and cannot not be everywhere at all times; and (3) may be psychologically prepared by the offender to view the offender as trustworthy, responsible, and unthreatening.

From this evidence, it is clear that the Department had reasonable grounds to believe that visitation between minors and sexual offenders would either threaten the security of the prison facility or the safety of the individuals involved. Accordingly, ED 02-01 is not in violation of Indiana Code Section 11-11-3-9(a).

B. Federal Constitutional Law

Second, the Prisoners assert that ED 02-01 is unconstitutional in that it violates the First, Eighth, and Fourteenth Amendments. Specifically, the Prisoners contend that ED 02-01 violates their First Amendment right of association, Fourteenth Amendment right to establish and maintain familial relationships, and Eighth Amendment right to be free from cruel and unusual punishment. We separately address these arguments.

1. First and Fourteenth Amendments

The Prisoners first argue that ED 02-01 violates their rights under the First and Fourteenth Amendments to the United States Constitution. Specifically, they contend that ED 02-01 prevents them from exercising their freedom of association with their families.

The United States Supreme Court has recognized that “[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ . . . rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). Therefore, generally, an individual’s Fourteenth Amendment right to establish and maintain family associations is entitled to “a substantial measure of sanctuary from unjustified interference from the state.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). Nevertheless, “[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner.” *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003), *reh’g denied*. Prison inmates only retain those constitutional rights that are consistent with their status

as prisoners or with the legitimate penological objectives of the corrective system. A prisoner's freedom of association, for example, is "among the rights least compatible with incarceration" and, therefore, "[s]ome curtailment of that freedom must be expected in the prison context." *Overton*, 539 U.S. at 131; *see also Ind. Dep't of Correction v. Stagg*, 556 N.E.2d 1338, 1342 (Ind. Ct. App. 1990) (recognizing that Department may place restrictions upon visitation to maintain security, promote safety, and retain manageability of correctional institutions), *reh'g denied, trans. denied*.

When a prison regulation impinges upon an inmate's constitutional rights, such as his or her right of association or right to maintain familial relationships, the regulation must be reasonably related to legitimate penological interests and must not represent an exaggerated response to those concerns. *Cohn v. Strawhorn*, 721 N.E.2d 342, 350 (Ind. Ct. App. 1999), *trans. denied*. In evaluating the constitutionality of a particular prison regulation, such as the one at issue, the following factors should be considered: (1) whether a valid, rational connection exists between the regulation and a legitimate government interest underlying the rule; (2) whether there are alternative means of exercising the right in question that remain available to prisoners; (3) the impact that accommodation of the asserted constitutional right would have on guards and other inmates and the allocation of prison resources; and (4) whether there are ready alternatives to the prison regulation. *See Turner v. Safley*, 482 U.S. 78, 89-91 (1987).

We will accord "substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most

appropriate means to accomplish them.” *Overton*, 539 U.S. at 132. The burden is upon the prisoner to disprove the validity of the prison regulation. *Id.*

Turning to the regulation in dispute, we conclude that there is a rational correlation between the Department’s interest in protecting child visitors from sexual or other misconduct and ED 02-01. Protecting children from harm is a legitimate goal. *Id.* at 133. The logical connection between the Department’s interest and regulation is clear: preventing VMR offenders from receiving minor visitors will reduce the number of minors with whom they come into contact and, thus, the number of child molestation incidents that might have emanated from those contacts or visitations, which, in turn, will protect children. The mere fact that the directive does not ban all communications between VMR offenders and minors or segregate all such offenders from the visitation room – where the offenders may come into contact with minors visiting non-VMR offenders – does not render it irrational and, thus, unconstitutional. To be constitutional, ED 02-01 does not have to represent the most narrowly-tailored remedy or survive any other form of heightened or strict scrutiny. Rather, the regulation need only be rational.

Having determined that ED 02-01 bears a rational relationship to a legitimate penological interest, we consider whether the Prisoners have alternative means of exercising their right to associate with their families. Were it shown that no alternative means of communication existed, though it would not be conclusive, it would be some evidence that the regulation at issue was unreasonable. *See, e.g., Overton*, 539 U.S. at 135.

Here, such a showing cannot be made because, even with the enactment of the regulation, the Prisoners have alternate means to associate with their minor family members. Indeed, the Department notes that sexual offenders are free to communicate with their family, including minor members, “by mail, telephone calls or messages brought by persons permitted to visit.” Appellee’s Br. at 15.

Next, we examine the impact that accommodation of the prisoner’s rights to associate with minor visitors would have on guards and other inmates and the allocation of prison resources. In their brief, the appellants presume that the costs for accommodating their visitation demands with minors would be *de minimis*. For example, the Prisoners contend that because all facilities in which they are presently housed have areas for non-contact visitation, the alternative of non-contact visitations could presumably be used without major disruption. However, merely presuming that a cost would be *de minimis* does not make it so, nor does it satisfy the Prisoners’ burden to demonstrate a genuine issue of material fact sufficient to defeat the trial court’s grant of summary judgment.

Lastly, we consider whether the presence of ready alternatives undermines the reasonableness of ED 02-01. This factor, however, does not impose a least-restrictive alternative test, but inquires instead whether the Prisoners have pointed to some obvious regulatory alternative that fully accommodates their right of association while not imposing more than a *de minimis* cost to the valid penological goal. *Overton*, 539 U.S. at 136. The Prisoners have failed to proffer any alternative that would meet this high standard for the regulation at issue. While areas for non-contact visitations may be readily available at these

prison facilities, the Prisoners have failed to demonstrate that such an alternative would meet with a de minimis cost. We remind the Prisoners that we accord substantial deference to the professional judgment of prison administrators in defining the legitimate goals of a corrections system and determining the most appropriate means to accomplish them. *Id.* at 132. Likewise, and as the Prisoners concede, the proposed alternative of requiring the Department to provide evaluations of prisoners to determine whether they are likely to harm child visitors, i.e., the so-called phase I, phase II, and phase III programming, cannot be accomplished at a de minimis cost. Accordingly, the Prisoners have failed to raise a genuine issue of material fact that ED 02-01 violates their rights of association under the First and Fourteenth Amendments.

2. Eighth Amendment

The Prisoners also assert that the restriction on minor visitation for VMR offenders is a cruel and unusual condition of confinement in violation of the Eighth Amendment.⁹ The restriction undoubtedly makes the prisoner's confinement more difficult to bear. However, it does not, under the circumstances of this case, fall below the standards mandated by the Eighth Amendment. Much of what we have already discussed regarding the withdrawal of privileges that incarceration is expected to bring applies in the context of the Eighth Amendment. Although ED 02-01 restricts VMR offenders from receiving minor visitors, it does not create inhumane prison conditions, deprive

⁹ The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

inmates of basic necessities, fail to protect their health or safety, or represent a dramatic departure from accepted standards for conditions of confinement. *See Overton*, 539 U.S. 126. Nor does the regulation involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur. *See, e.g., id.* If ED 02-01 required the withdrawal of all visitation privileges or if it were applied in an arbitrary manner to a particular inmate, this case would present different considerations. However, under the present circumstances, the Prisoners have failed to show that the regulation at issue rises to the level of an Eighth Amendment violation. Accordingly, the trial court did not err by granting summary judgment to the Department.

For the foregoing reasons, we affirm the trial court's grant of summary judgment to the Department.

Affirmed.

MAY, J., concurs.

BAKER, J., dissents with separate opinion.

BAKER, Judge. dissenting.

Because I believe that ED 02-01 violates both Indiana law and the Constitution, I respectfully dissent from the majority opinion and vote to reverse the judgment of the trial court.

Indiana Code section 11-11-3-8 provides in pertinent part:

A confined person may receive visitors at reasonable times. The department may, for the purpose of maintaining the security of its facilities and

programs, the safety of individuals, and administrative manageability, place reasonable restrictions on visits consistent with the following:

- (1) Visits may be conducted in areas where a confined person and his visitors are not physically separated and that allow for as much informality and privacy as possible. . . .
- (2) Any restrictions regarding visiting times, the number of visitors a person may receive on a particular occasion or during a designated period of time, or the duration of a particular visit must take into account the accessibility of the facility or program to the visiting public. . . .
- (3) Any restrictions imposed on visitation under this section must be communicated to the confined person and be made accessible to the visiting public.
- (4) The department may not impose restrictions on visitation that obstruct the availability of adequate legal representation. . . .

At the time that this case was litigated in the trial court, Indiana Code section 11-11-3-9 provided that “a person may be prohibited from visiting a confined person, or the visit may be restricted to an extent greater than allowed under Section 8 of this chapter, if the department has reasonable grounds to believe that the visits would threaten the security of the facility or program or the safety of the individuals.” This statute was amended, effective July 1, 2004, to read:

- (a) A person may be *prohibited* from visiting a confined person, *or* the visit may be *restricted* to an extent greater than allowed under section 8 of this chapter, if the department has reasonable

grounds to believe that the visit would threaten the security of the facility or program or the safety of individuals.

(b) The department may *restrict* any person less than eighteen (18) years of age from visiting an offender, if:

(1) the offender has been:

(A) convicted of a sex offense under IC 35-42-4; or

(B) adjudicated delinquent as a result of an act that would be considered a sex offense under IC 35-42-4 if committed by an adult; and

(2) the victim of the sex offense was less than eighteen (18) years of age at the time of the offense.

(c) If the department *prohibits or restricts* visitation between a confined person and another person under this section, it shall notify the confined person of that *prohibition or restriction*. The notice must be in writing and include the reason for the action, the name of the person who made the decision, and the fact that the action may be challenged through the grievance procedure.

(d) The department shall establish written guidelines for implementing this section.

(Emphasis added). My reading of the plain language of the statute indicates that the General Assembly intended “prohibit” and “restrict” to mean two different things. Were this not the case, there would be no reason to use both words. By reading the statute to mean that “prohibit” and “restrict” are the same thing, the majority has

nullified the meaning of one of the two words. To prohibit means, "To forbid (an action or thing) by or as by a command or statute; to interdict." *Oxford English Dictionary online*, at <http://www.oed.com> (last visited May 19, 2005). To restrict means, "To confine (some person or thing) to or within certain limits; to limit or bound." *Id.*

It is apparent to me that ED-02-01 acts as a total prohibition to anyone who falls under the ambit of ED 02-01. Visitation with minors is forbidden for the duration of the VMR prisoners' confinement without any particularized showing that such visits would threaten security or the safety of individuals. But the General Assembly, through the amendment of Indiana Code section 11-11-3-9, has rejected the argument that the fact that an individual has been convicted of a sex offense against a minor automatically means that visitation will endanger the safety of individual minors. This conclusion is supported by the deposition of the State's own expert, Dr. Richard Lawlor, which indicates that cross-over behaviors are unlikely between different types of sex offenders, e.g., a pedophile would be unlikely to molest a more mature child, such as a teenager. Appellants' App. p. 96. Furthermore, any risk can be minimized by restricting visitation to non-contact visits. I would therefore find that ED 02-01 violates Indiana code section 11-11-3-8.

I further disagree with the majority's determination that ED 02-01 does not violate the Prisoners' First and Fourteenth Amendment rights. The DOC has listed four purposes for ED 02-01: (1) denying visitation will protect children from the possibility of abuse during visits; (2) denying visitation to VMR prisoners will assist in breaking the cycle of abuse because it will reduce the prisoners' ability to fantasize about children; (3) denying visitation

will deny sex offenders the opportunity to groom children for future offenses; and (4) denying visitation will reduce trauma for the victims of abuse. Appellants' App. p. 12.

As to the fourth rationale, the prisoners rightly make no argument that they should be permitted to visit with the victims of their abuse. Moreover, the trial court found – and the evidence is uncontested – that denying visitation will not change a prisoner's ability to fantasize. Appellants' App. p. 13. This leaves us with the twin rationales of protecting children from abuse during visitation and protecting children from grooming during visitation. While I strongly agree that protecting children is a valid governmental interest, it is difficult to believe that the State is actually protecting children as the current visitation situation stands. VMR prisoners who are not otherwise restricted may visit with adults in the open visitation rooms. As the State notes, these rooms are “wild and crazy” places with many children “running around” and “a lot of activity.” Appellants' App. p. 88. Thus, VMR prisoners have access to children for possible abuse, grooming, or fantasy whether or not those children are there to visit the VMR prisoner. Furthermore, as noted above, there is evidence that many VMR prisoners are not at risk of harming the vast majority of children. Pedophiles will rarely offend against post-pubescent children; perpetrators of incest will rarely commit offenses outside of the family. Appellants' App. p. 96. Moreover, the State's argument that it is concerned about the possibility of grooming in non-contact visitation is belied by the fact that VMR prisoners are allowed telephonic contact with minors. If grooming can be accomplished over a closed-circuit television, so too can it be done over the telephone. I would

therefore find that there is no rational connection between the asserted governmental interests and the regulation.

Moreover, all of the facilities in which the prisoners are currently housed have areas for non-contact visitation that could be utilized by VMR prisoners without major disruption. The cost to allow this alternative method of visitation would therefore be de minimis, and disruption to the prison and the guards would be minimal.

The DOC asserts that the screening process that the prisoners seek to identify and grant visitation to VMR offenders who pose no risk to children is unduly burdensome. Dr. Lawlor testified that the nature of pedophiles makes diagnosis difficult and burdensome, requiring a staff of “several thousand” and “many dozens of mental health professionals. . . .” Appellants’ App. p. 98. Nevertheless, the DOC already provides this type of service. The SOMM program, which is the DOC’s general method for managing sex offenders, has three phases: Phase I is a 15-hour awareness program given to all adult male prisoners with a current conviction involving any sex offense, Phase II is a voluntary program that is offered to prisoners within three years of the termination of their commitment, and Phase III involves parole conditions imposed on sex offenders after their release. Appellants’ App. p. 12. Although there are more than 1400 VMR prisoners within three years of their release, only 72 are in Phase II programming, and there are waitlists at every facility that offers Phase II. Appellants’ App. p. 34, 45-46. At oral argument, the State noted that it is working to expand the Phase II program. Although the cost of expansion may be more than de minimis, the framework already exists for evaluating and rehabilitating sex offenders.

The final *Turner* factor examines whether there are ready alternatives to the challenged regulation. As previously noted, non-contact visitation is a readily available alternative that would remove many or all of the State's concerns of children being at risk of molestation during visits. The cost will be de minimis because the non-contact areas already exist at the facilities. Furthermore, there is no evidence that child molestation has ever happened in non-contact visitation areas. Additionally, the DOC could provide evaluations of prisoners by making Phase II programming more available.

In sum, I would find that ED 02-01 violates Indiana law because it acts as a prohibition without any particularized showing that visits with minors would threaten security or the safety of individuals. I would also find that ED 02-01 unreasonably impinges on inmates' freedom of association because there is no rational connection between the asserted governmental interests and the regulation. Thus, I vote to reverse the judgment of the trial court.

STATE OF INDIANA) IN THE MARION
) SUPERIOR COURT
) ss: ROOM NO. 12
) CAUSE NO.
 COUNTY OF MARION) 49D12-0109-CP-001450

JANE DOE, *et al.*)
 Plaintiffs,)
 v.)
 EVELYN RIDLEY-TURNER, *et al.*,)
 Defendant.)

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
 AND SUMMARY JUDGMENT**

(Filed Jul. 23, 2004)

On May 20, 2004, the parties appeared by counsel for oral argument on the Plaintiffs *Motion for Summary Judgment* and the Defendant's *Cross Motion for Summary Judgment*. The Court being duly advised in the premises finds and orders as follows:

1. Plaintiffs have brought this action alleging the Defendants have violated the Indiana Constitution and the Constitution of the United States by their adoption of Executive Directive #02-01.
2. Executive Directive #02-01 is a policy that outlines the criteria for sex offenders convicted or adjudicated of sexual offenses against minors to participate in visitations with minors.
3. There are currently 25 Department of Corrections institutions (hereinafter referred to as "DOC" or "the Department") confining approximately 20,000 adults.

4. The Department recognizes that family visitation is a positive factor for prisoners and the society to which the prisoners are generally going to return. It is a motivational tool.
5. DOC prisoners are generally allowed visitation two times a month with the same person.
6. Visitation is important for prisoners.
7. A prisoner may put non-family members on his or her visitation list as long as the person is not on probation or parole. As long as the visitors are with adults there is no age restriction as to visitors.
8. All DOC facilities have visitation areas where persons can visit in an open area without barriers.
9. Visitors in disciplinary segregation visit with a physical barrier between them and their visitors and administrative segregation prisoners may also have barriers between them and their visitors.
10. For prisoner [sic] who have face-to-face visitation, visitation takes place in visiting rooms with 25-30 tables at which the prisoners and up to three visitors sit.
11. At least one officer supervises the visiting room. It is noisy and hectic in the visiting room. It is difficult to watch for inappropriate contact of offenders and their guest.
12. Prisoners and their visitors are allowed to embrace at the beginning and end of each visit and can hold hands on top of the table only during the visit.
13. The most frequent abuse of the visitation policy is drug trafficking. This violation is typically detected by conducting drug tests.
14. Activity in furtherance of child molestation is difficult to detect.

15. Child molestation can occur even though there is no physical contact.
16. The presence of another adult with the visiting child is not necessarily adequate protection against grooming. Adults accompanying child visitors cannot always be trusted.
17. In response to a query to the superintendents of DOC institutions as to problems with inappropriate sexual activity with children during visits, the DOC produced documentation supporting suspicions of five inappropriate sexual contacts, which included 2 incidences of suspected child molestation.
18. The challenged policy limiting child visitation by prisoners who have committed sex offenses against children is entitled Executive Directive #02-01.
19. Executive Directive #02-01 is the result of a process that began in May of 2001 with an earlier Executive Directive that denied visitation to prisoners who had committed sex crimes against children. The current policy applies to any prisoner who has been convicted or adjudicated of a sex offense against a child, even if the prisoner's current offense is not a sex offense.
20. For purpose of the visitation minor restriction program (hereinafter "VMR") implemented by the Executive Directive, qualifying sex offenses are the sex offenses listed in Zachary's law insofar as the offenses are against minors. The Indiana sex offender registration law is referred to as Zachary's law. *See e.g.*, http://www.ai.org/serv/cji_sor (Indiana Sex and Violent Offender Registry). The law applies to the following offenses: rape, criminal deviate conduct, child molesting, child exploitation, vicarious sexual gratification, child solicitation, child seduction, sexual misconduct with a minor as a Class A, B or C felony, sexual battery, kidnapping, criminal confinement, or

an attempt or conspiracy to commit the above offenses. IND. CODE § 5-2-12-4.

21. Adjudications as a juvenile are included as well as adult convictions.
22. If a prisoner has been convicted of a sex offense against a child the Executive Directive provides that he or she cannot visit with a minor child unless:
 - s/he has not had any designated disciplinary code violations for 12 months
 - the intended visitor is an immediate family member who includes children (natural, adopted and step-children), siblings and grandchildren, and the visitor may not have been the victim of the prisoner
 - the prisoner has not been convicted or adjudicated or [sic] more than one sex offense and there is no documentation that the prisoner has had more than one victim. This documentation can occur through sources other than the prisoner's prior convictions.
 - the prisoner has not had any other visitation restrictions for sexually related activities within the past 12 months
 - there are no known court orders prohibiting the prisoner from visiting with the intended visitor
 - the circumstances surrounding the adjudication or conviction indicate the minor, although not legally capable of consenting, was not compelled by force or threat
23. The determination as to whether force or threat was present is made on a case-by-case basis by a VMR designee who reviews each child sex-offender.

24. The determination is then reviewed by staff employed by the private contractor who manages DOC's sex offender management and monitoring (hereinafter "SOMM") program.
25. If an offender is found not to have met the criteria or the head of the housing facility has determined that the offender should be denied visitation with minors, the offender may appeal. Offenders may also be permitted visitation with minors with immediate family where the offender is terminally ill or where such visit is requested by a victim's therapist for therapeutic reasons.
26. The facility head makes all of the ultimate decisions and uses Executive Directive #02-01 as criteria when determining whether to grant a sex offender visitation with minors.
27. The most important concern is the protection of the child.
28. There are almost 2,800 VMR designated prisoners within the DOC.
29. 10 VMR designated prisoners were approved visitation between November 1, 2002 and June 5, 2003.
30. The DOC's rationale for the policy is that:
 - denying visitation will protect children from the possibility of abuse during visits
 - denying visitation to VMR prisoners will assist in breaking the cycle of abuse because it will reduce the prisoner's ability to fantasize about children
 - denying visitation will deny sex offenders the opportunity to groom children for future offenses

– denying visitation will reduce trauma for victims of abuse

31. The visitation prohibition is part of the DOC's general SOMM programming which is the DOC's general method for managing sex offenders in the corrections environment.
32. The SOMM program has three phases. Under phase I all adult male prisoners who enter the DOC with a current conviction involving any sex offense, whether against a child or adult, will have a 15 hour awareness program when they are first confined in the DOC.
33. Phase II of the programming is a voluntary program that is offered to prisoners who are within three years of the termination of their commitment.
34. There are more than 1400 VMR prisoners within three years of their release. There are 72 prisoners in phase II programming this programming is open to offenders who have committed any sex offense, not just those who have offended against children.
35. Phase III programming involves parole conditions imposed on sex offenders after their release.
36. Pedophiles suffer from a mental disorder where their sexual gratification is exclusively from pre-pubescent children. Therefore, a person who has sex with a 14 or 15 year old is most likely not a pedophile.
37. Most persons with pedophilia are not likely to offend against children of both genders; usually they are focused on one sex or another.
38. Pedophiles are at increase risk of re-offending.

39. Persons who commit incest have a specific psychological need that is not addressed by committing offenses against strangers.
40. There are dynamics within the family that have caused the incest taboo to be broken down.
41. Crossover behaviors among sex offenders occur but are rare.
42. Child victims of sexual offenses know their perpetrators between 80% and 90% of the time. Persons who prey on children often psychologically prepare them prior to actually engaging the child in sexual activity and this is called “grooming”.
43. Denying visitation and access to someone who has molested a child is not going to modify the person’s psychological disorder.
44. Grooming of potential future victims by pedophiles generally occurs in private.
45. Grooming is a process that takes place over time as the perpetrator gets to know the child and makes the child comfortable.

Conclusions of Law

1. This case is properly certified as a class action pursuant to Rule 23(B)(2) of the Indiana Rules of Trial Procedure.
2. In a summary judgment proceeding it is up to the moving party to prove that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. *Meyer v. Marine Builders, Inc.*, 797 N.E.2d 760, 767 (Ind.Ct.App. 2003). The moving party must “designate to the court all parts of pleadings, deposition, answers to interrogatories, admissions,

matters of judicial notice, and any other matters on which it relies for purposes of the motion.” Rule 56(c), Indiana Rules of Trial Procedure. “Once the moving party has sustained its initial burden of proving the absence of a genuine issue of material fact and the appropriateness of the judgment as a matter of law, the party opposing summary judgment must respond by designating specific facts establishing a genuine issue for trial.” *Meyer*, 797 N.E.2d at 767. The court is to consider only the evidentiary materials specifically designated to the “court by the parties for purposes of the motion for summary judgment.” *Id.*, *see also*, Rule 56(c), Indiana Rules of Trial Procedure.

3. There are a number of Indiana statutes that directly concern prisoner visitation.
4. Indiana Code § 11-11-3-8 specifies, in relevant part, that:

A confined person may receive visitors at reasonable times. The department may, for the purpose of maintaining the security of its facilities and programs, the safety of individuals, and administrative manageability, place reasonable restrictions on visits consistent with the following:

(1) Visits may be conducted in areas where a confined person and his visitors are not physically separated and that allow for as much informality and privacy as possible . . .

(2) Any restrictions regarding visiting times, the number of visitors a person may receive on a particular occasion or during a designated period of time, or the duration of a particular visit must take into account the accessibility of the facility or program to the visiting public . . .

(3) Any restrictions imposed on visitation under this section must be communicated to the confined person and be made accessible to the visiting public.

(4) The department may not impose restrictions on visitation that obstruct the availability of adequate legal representation . . .

5. Indiana Code § 11-11-3-9 indicates that “[a] person may be prohibited from visiting a confined person, or the visit may be restricted to an extent greater than allowed under section 8 of this chapter, if the department has reasonable grounds to believe that the visits would threaten the security of the facility or program or the safety of individuals.”
6. The DOC must have “reasonable grounds to believe that the visit would threaten . . . the safety of individuals.” Indiana Code § 11-1-3-9.
7. Prisoners upon incarceration necessarily give up many of the rights and privileges normally enjoyed by the general citizenry. “An inmate does not retain rights inconsistent with proper incarceration.” *Overton v. Bazzetta*, U.S., 123 S.Ct. 2162, 2167. The denial of an inmate’s access to a certain visitor is well with in the contemplated terms of incarceration and not separately protected by the Due Process Clause. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 460-61 (1989).
8. The Supreme Court of the United States has long recognized that “[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ . . . rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996)

9. Therefore, the Fourteenth Amendment rights to establish and maintain family associations are entitled to “a substantial measure of sanctuary from unjustified interference from the state.” *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).
10. The First Amendment protects the right of association in certain situations. See e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958).
11. These associational rights, however, are not just limited to parent and child, but include all family members. “[T]he Constitution protects the sanctity of the family.” *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1976) (plurality opinion). For, “[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.” *Moore*, 431 U.S. at 504.
12. Executive Directive #02-01 reaches and affects rights that are deemed to be fundamental under the United States Constitution.
13. The right to visit with minors may be regulated or restricted if the regulation is reasonably related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987).
14. In *Turner*, the Court acknowledged the primacy of the penological needs inherent in running a prison.

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.

482 U.S. at 84-85.

15. Therefore, the Court held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” 482 U.S. at 89.
16. “We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.” *Bazzetta*, 123 S.Ct. at 2167.
17. The burden is on the prisoner to disprove the validity of the policy, to show that the restriction is an exaggerated response to the threat, and an alternative fully accommodates the security concern at *de minimis* cost. *Turner*, U.S. at 90-91. In assessing the reasonableness of any prison regulation under the *Turner* standard, the Court stated four factors must be considered:
 - whether the regulation has a valid, rational connection to a legitimate governmental objective.
 - whether there are alternative means for the prisoners to exercise the rights in question.
 - what impact will accommodation on the right in question have on guards and [sic] other inmates and on the allocation of prison resources generally.

– whether there are ready alternatives to the regulation in question. “[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation . . . By the same token, the existence of obvious, easy alternatives, may be evidence that the regulation is not reasonable, but is an “exaggerated response” to prison concerns.

18. Executive Directive #02-01 must be measured by the *Turner* factors.
19. Concern for the physical and emotional well being of minors who would be visiting child sex offenders is rationally connected to the objections [sic] of Executive Directive #02-01.
20. The alternative means for VMR prisoners to exercise visitation with minors would require more guards or special facilities at a cost that would not be *de minimis*. Further, the alternative means would not assure the safety of minors.
21. The Eighth Amendment to the United States Constitution proscribes the infliction of “cruel and unusual punishments.”
22. Under the Eighth Amendment, prison officials have a duty to “provide humane conditions of confinement.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).
23. The Amendment prohibits “the unnecessary and wanton infliction of pain.” *Whitley v. Albers*, 475 U.S. 312, 320 (1986). Specifically, a Plaintiff seeking to establish an Eighth Amendment violation must demonstrate that he is being caused objectively serious harm which “result[s] in the denial of ‘the minimal civilized measures of life’s necessities.’” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Additionally, the

Defendant must have acted in a manner that subjectively demonstrates “deliberate indifference” to the health of the prisoner.

24. Non-physical deprivations can certain [sic] cause cruel and unusual punishment. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
25. Executive Directive #02-01 is rationally related to a legitimate penological interest. Limitation upon visitation with minor children by convicted child molesters is not a denial of a life necessity.
26. Any conclusion of law should be deemed to be a finding of fact to the extent necessary.

Proposed Summary Judgment

There are no contested issues of material fact in this cause and the law is with the Defendant.

For the foregoing reasons, it is therefore found that the VMR policy implemented by Defendant is lawful and constitutional.

It is therefore ordered that summary judgment is granted to the Defendant. The request to permanently enjoin the VMR policy is denied.

Dated: July 23, 2004

/s/ Robyn L. Moberly
Robyn L. Moberly, Judge
Marion Superior Court,
Civil Division

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**In the
Indiana Supreme Court**

| | |
|------------------------------|------------------------------|
| Jane DOE, <i>et al.</i> , |) Supreme Court Cause No. |
| Appellants, |) 49S02-0S09-CV-436 |
| v. |) Court of Appeals Cause No. |
| J. David DONAHUE, in his |) 49A02-0408-CV-674 |
| official capacity as Commis- |) |
| sioner of the Indiana De- |) |
| partment of Correction, |) |
| Appellee. |) |

**PUBLISHED ORDER VACATING PRIOR
ORDER GRANTING TRANSFER**

(Filed Nov. 21, 2005)

By order dated September 28, 2005, the Court granted a petition seeking transfer of jurisdiction of this appeal from the Court of Appeals to this Court. After further review, including oral argument, a majority of the Court has determined that transfer was improvidently granted. Accordingly, the order granting transfer is VACATED and transfer is DENIED. The Court of Appeals opinion reported as *Doe v. Donahue*, 829 N.E.2d 99 (Ind. Ct. App. 2005), is no longer vacated under Appellate Rule 58(A) and is reinstated as Court of Appeals precedent. Pursuant to Appellate Rule 58(B), this appeal is at an end.

The Court DIRECTS the Clerk to certify this order as final and to send copies of this order to the Hon. Robyn L. Moberly, Judge of the Marion Superior Court; the Hon. James S. Kirsch, Chief Judge of the Court of Appeals; Steve Lancaster, Court of Appeals Administrator; Kent

Zepick, staff counsel to the Court of Appeals; and all counsel of record.

The Court further DIRECTS the Clerk to send a copy of this Order to LexisNexis and to West Group for publication on-line and in the bound volumes of this Court's decisions.

Done at Indianapolis, Indiana, this 21st day of November, 2005.

/s/ Randall T. Shepard
Randall T. Shepard
Chief Justice of Indiana

All Justices concur, except Boehm and Rucker, JJ., who believe transfer was properly granted.

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February 11, 2002

EXECUTIVE DIRECTIVE: # 02-01

This Executive Directive supersedes Executive Directive: # 01-14 that presented criteria to be considered when reviewing grievances filed by offenders denied visitation with minors due to having a sex crime conviction against a minor. In the previous Executive Directive, it was stated that offenders who are denied visitation with minors could file an appeal of the decision through the Offender Grievance Process. That Executive Directive presented the criteria to be considered when grievances were reviewed.

Changes have been made in both the reviewing process and criteria when considering an offender's eligibility for exemption to the visitation restriction(s). This Executive Directive presents the new procedure to be followed when offenders who have been convicted/adjudicated of sex offenses involving minors request to have particular minor(s) visit.

All offenders shall be made aware of the new criteria and review process outlined in this Executive Directive. Offenders who have been denied visits with minor children using the previous criteria may submit a grievance asking for reconsideration under the new criteria. The facility shall consider all grievances received after the implementation of this Executive Directive as new grievances and

the grievances shall be reviewed using the criteria presented in this Executive Directive.

When an offender is received at a departmental intake unit, staff at the Intake Unit shall review the offender's records to determine whether there has been either a conviction as an adult or an adjudication as a juvenile for a sex offense involving a minor. If there is such a conviction/adjudication, the offender's records shall be marked with a "Y" (for Yes) in the "VMR" (Visitor-Minor Restriction) field in the Offender Information System (OIS). This data is entered into the "Current Classification" screen. The "VMR" flag can then be viewed in the "Current Classification" screen and above the Offender's DOC Number on the "Visitor List" and "Visitor Log" screens.

Upon receipt of the offender at the housing facility and during the admission and orientation (A & O) process, staff shall determine whether the offender is a "VMR" offender. If the offender is a "VMR" offender and has requested that minors be allowed to visit, staff shall review the offender's records to determine if the offender may be eligible for visitation with minors. The offender must meet, or continue to meet if previously approved, the following criteria:

- A. The offender must not have had any disciplinary code violations for the following offenses during the past 12 months:
 - Class A – Code 100 (for any sex related offense, including, but not limited to all of the previously indicated SOMM offenses), 104, 111 (for a Code 100 involving a sex related offense or a 104);
 - Class B – 216, 217; or,

- Class C – 349.
- B. The intended visitor must be documented in the offender's packet as an immediate family member (i.e., the offender's child(ren), including adopted and step children; siblings; and/or grandchildren) and must not have been a victim of the offender.
 - C. The offender has not been adjudicated/convicted of any other sex offense and there is no documentation, in the offender's records, indicating the offender has/had multiple victims.
 - D. The offender must not have had any other visitation restrictions for sexually related activities within the past 12 months.
 - E. There must be no known court orders restricting/prohibiting the offender's contact with the intended minor visitor(s).
 - F. The circumstances surrounding the triggering adjudication/conviction indicate the minor, though legally incapable of consenting, was not compelled by force or threat.

If the offender meets the above criteria and a Case Management Review has not previously been completed, A & O staff shall request that a Case Management Review be completed. A SOMM Provider shall conduct the Case Management Review including a review of the offender's records and may conduct an interview with the offender. While the offender is still in the A & O unit, staff shall make the referral and notify the offender of the pending review, as outlined below:

- (1) Notify the offender that the offender may meet the exemption criteria and will be scheduled for a Case Management Review by a SOMM Provider. Also, advise

the offender that even if the requested visits are approved participation in any volunteer activity or work assignment involving minors remains restricted and to engage in any such activity may result in a termination of the approved visits.

- (2) Contact the SOMM Liberty Office or contact the in-house SOMM Provider if the facility is a SOMM Facility, in writing to refer the offender for a Case Management Review which is to be completed within 60 days from the date of referral.

* * *

If it is determined that the offender does not meet the stated criteria or if the decision of the Facility Head is to deny visitation with minors, the offender shall be advised that this decision may be appealed through the Offender Grievance Process. As the decision to deny these visits is made at the Facility Head level, the grievance shall be forwarded immediately to the Facility Head for review.

If the offender, after having been approved for visits, fails to continue to meet any of the above criteria, the approval for any visits with minors shall be rescinded immediately. The offender may submit another grievance requesting an exemption 12 months after the final decision of the original grievance or the termination of previously approved visits. The offender's visitation status shall be reviewed as changes in eligibility are identified. The Facility Head shall ensure that reviews are completed at least annually, in conjunction with the annual Classification Review, to ensure that the offender continues to meet all of the above criteria.

In certain cases, visits with minors may be permitted even if the offender does not meet all of the above criteria and a

Case Management Review has not been conducted. Unless prohibited by a court order, the Facility Head may approve a visit with minors who are immediate family members in the following situations:

- A. The offender is in the last stages of a terminal illness and it appears that the offender's death is imminent.
- B. A therapeutic visit is requested by the victim's licensed therapist. If the victim is in therapy and the victim's therapist believes that the visit is necessary for the successful treatment of the victim, the therapist may request a special visit. The therapist must submit a request on his/her letterhead stating the purpose of the visit and those to be present at the meeting. Additionally, the therapist must provide a signed statement from the victim or the victim's parent/legal guardian, if the victim is still a minor, authorizing this visit and a copy of the therapist's state license. The Facility Head shall review this request and determine whether it appears that to permit such a visit will be in the best interests of all parties. If the proposed visit appears to be appropriate, the Facility Head or designee shall contact the offender to ensure that the offender agrees to such a meeting. If the Facility Head approves such a visit and the offender agrees to the visit, a written notification, indicating the date and time of the visit, shall be sent to the therapist. The permission for such a therapeutic visit shall be for one (1) visit only. If the therapist believes that another visit is necessary, the therapist must obtain approval for any subsequent visits, in accordance with the above process. The Facility Head shall not approve a therapeutic visit if it appears that the visit may be used to override or circumvent an order from a court that prohibits visitation between the victim and the offender or the Department's restrictions on offender visitation with minors.

This Executive Directive is applicable to all facilities housing adult offenders and is to be effective April 1, 2002.

If you have any questions regarding this Executive Directive, please contact Mr. Michael Pavese, Policy Manager, at (317) 232-5703.

/s/ Evelyn I. Ridley-Turner
Evelyn Ridley-Turner
Commissioner
