89-7376

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

(2)

PEARLY L. WILSON,

Petitioner,

vs.

RICHARD SEITER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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(9)

QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in failing to follow the holdings of the Fourth, Fifth, and District of Columbia Circuits that the malicious and sadistic intent requirements of Whitley v. Albers, 475 U.S. 312 (1986), do not apply to Eighth Amendment challenges to continuing conditions of confinement that do not involve the use of force.

2. Whether the Sixth Circuit erred in affirming the trial court's grant of summary judgment in view of the factual conflicts in the record.

LIST OF PARTIES

The petitioner Pearly L. Wilson is a prisoner at the Hocking Correctional Facility (hereafter HCF) in Nelsonville, Ohio. Everett Hunt, Jr., a second plaintiff in the lower courts, is no longer confined at the HCF. The respondents are Richard P. Seiter, Director of the Ohio Department of Rehabilitation and Corrections in Columbus, Ohio, and Carl Humphreys, Superintendent of the HCF.

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The opinion of the Court of Appeals for the Sixth Circuit entered on January 16, 1990, is reported at 893 F.2d 861 and is reprinted in the appendix separately filed (hereafter "App."). The unreported trial court opinion is also reprinted in the Appendix.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were issued on January 16, 1990. On April 3, 1990, the Honorable Antonin Scalia, Circuit Justice for the Sixth Circuit, granted an application to extend the time of filing this petition for writ of certiorari until May 2, 1990. App. at 21. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343.

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) To redress the deprivation, under color of state law,

statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

This action was filed by the petitioner and another prisoner, acting without counsel, in 1986.[1] The amended complaint alleged that prisoners were double bunked in dormitories at the HCF with less than fifty square feet per person; that noise levels were excessive; that the dormitory was "nearly frigid" in the winter and that the clothing provided was inadequate to keep prisoners warm. The amended complaint also claimed that temperatures were excessively high in the summer because of a lack of ventilation, resulting in prisoners experiencing heat-related rashes and prisoners with respiratory problems experiencing difficulty breathing. The complaint further stated that the restrooms were dirty and slippery, and retained offensive odors and that the food

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[1] The trial court had jurisdiction of the complaint pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343.

services were a serious threat to the well-being of the prisoners because of inadequate sanitation, ventilation and sewage drainage. In addition, the complaint alleged that the presence of physically and mentally ill prisoners in the dormitories created a dangerous and stressful environment and that classification was not based on the factors provided by regulation. The prisoner plaintiffs requested injunctive and declaratory relief, as well as damages.

The parties filed cross-motions for summary judgment with supporting affidavits.[3] Although the opinion of the Sixth Circuit ultimately turned on a state of mind question not directly related to the actual conditions at MCF, petitioner summarizes the parties' affidavits below in order to demonstrate that

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[3] The petitioner did not cross appeal the denial of his motion for summary judgment.

the record presents a factual conflict.[3]

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[3] The petitioner has reorganized the allegations of the affidavits and countering affidavits to clarify the parties' allegations. The unrepresented petitioner submitted seven affidavits from prisoners living in the dormitory. These affidavits were countered by several affidavits from staff and a visitor to the HCF.

Ventilation

Petitioner's Allegations

The air is stagnant and foul from toilets, urinals and colostomy bags in the dormitory. It is difficult to sleep at night because of this foul air. In summer, the temperature goes up to 95°, and this heat is compounded by the lack of ventilation and the fact that fire exits are locked at all times. The fans in the dormitories are inadequate to move the foul air out of the dormitory. As a result of the heat some prisoners "[fall] out." Prisoners with respiratory problems have trouble breathing; other prisoners develop heat rash.

Respondents' Allegations

The dormitories contain two large exhaust fans to increase ventilation and keep down the heat in summer. The majority of the windows are in working order, and they are opened in summer. No prisoners have been overcome by heat.

(continued...)

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[3](...continued)

Sanitation

Petitioner's Allegations

Urine accumulates around the toilets and urinals and is inadequately cleaned, resulting in offensive odor; floors are filthy because of a lack of proper cleaning supplies. The dormitory is infested with a variety of insects and mice, and extermination is totally inadequate. The dining hall is filthy and the food is prepared by diseased, unsupervised prisoners. As a result, petitioner fears to eat in the dining hall.

Respondents' Allegations

The restrooms are completely cleaned twice a day, and throughout the day as necessary. The kitchen area and dining room are cleaned after every meal and kept very clean. Prisoner food workers are required to wear hats and plastic gloves. NCF has contracted with an exterminator which services the facility twice a month. There have been no known cases of food poisoning.

Overcrowding

Petitioner's Allegations

There are 143 beds in the dormitory; all but twenty eight of the beds are double bunked. Prisoners have less than 50 square feet per person. The beds are spaced so closely that, with the inadequate ventilation, prisoners smell the body odors of other prisoners. The general noise level is high, even during sleeping hours.

(continued...)

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[3](...continued)

Respondents' Allegations

The amount of storage space "appears to be adequate" for most prisoners. There are regulations to control noise. Prisoners have a variety of activities available to them, including television, exercise in the gymnasium or yard, a pool table, a weight room, a prison library, and continuing education classes that involve approximately 100 prisoners.

Lack of Heat

Petitioner's Allegations

The dormitory is "frigid" in winter. There are cracks in the walls that can be seen through. Most of the windows cannot be closed completely, so that some bunks get wet during the rain. The clothing is ragged and inadequate to keep prisoners warm in winter; no underwear is distributed.

Respondents' Allegations

The dormitories are adequately heated. Prisoners are not given special winter clothes unless they have jobs that require them to work outside, but they are permitted to buy clothing such as winter underwear. Prisoners are given an extra blanket in winter.

(continued...)

Ultimately, the issue that the Sixth Circuit considered critical to the case was the respondents' state of mind. On this issue, petitioner contended in his affidavit

~~(...continued)~~

Safety and Protection from Communicable Diseases

Petitioner's Allegations

Psychotic prisoners are placed in the dormitories. This causes stress to other prisoners, who cannot predict the behavior of the mentally ill prisoners. Following surgery, prisoners with open sores are housed in the dormitory because of a lack of space in the prison infirmary. One named prisoner housed in the dormitory was repeatedly hospitalized for pneumonia.

Respondents' Allegations

Prisoners with mental problems are sent from HCF to other facilities. Some prisoners have age-related physical health problems. There is an initial medical screening that includes checking prisoners for infectious diseases such as tuberculosis and hepatitis. Based on the health screening there are no prisoners at HCF with active contagious diseases. There has been no outbreak of contagious diseases at HCF since it was converted to a prison four years earlier. The number of illnesses such as colds is normal in view of the relatively advanced age of the population.

that he had forwarded a three-page letter complaining of the conditions of confinement to the two respondents on July 6, 1986.[4] Respondent Seitar, petitioner alleged, never responded to that letter. Respondent Humphreys responded but, according to petitioner, failed to take any action to correct the violations other than to forward a copy of the letter to the MCF unit manager and his staff. Petitioner alleged that the Unit Manager and his staff did not take any action to remedy the conditions and that, in fact, they had no power to do so.

Respondents' alleged attempts to remedy conditions included such matters as the regulations to control noise, the employment of an exterminator, the installation of the two fans, and the provisions for cleaning the

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[4] The affidavit was submitted as part of petitioner's motion for summary judgment, which was filed on November 10, 1986.

dormitory and food service areas.[5]

The trial court granted the respondents' motion for summary judgment on the ground that the prisoners' affidavits did not demonstrate obduracy and wantonness on the part of the prison officials. In granting summary judgment on the claims of lack of sanitation and ventilation, and housing the petitioner with prisoners with communicable diseases, the trial court relied on the factual allegations in the affidavits of the respondents. App. at 20.

Petitioner appealed to the Sixth Circuit.[6] The court held that petitioner's affidavits were more than colorable and that several

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[5] See respondents' allegations in n.3, supra.

[6] Petitioner continued to proceed pro se until the Sixth Circuit appointed counsel. The counsel indicated in the published opinion withdrew prior to briefing and argument because of the discovery of a conflict of interest. The subsequently-appointed counsel withdrew after the decision of the Sixth Circuit.

circuits had found Eighth Amendment violations arising from conditions similar to those alleged by the petitioner. App. at 5. Accordingly, the court held that to the extent that the district judge had adopted the factual allegations in the respondents' affidavits to find that conditions at the RCF did not violate the Eighth Amendment, the district court committed error. App. at 5-6.

Nonetheless, the Sixth Circuit held that the allegations of mixing mentally ill prisoners with others in the dormitory, the allegations of excessive heat, and the allegations of overcrowding did not rise to a constitutional level. With respect to the other claims, the Sixth Circuit held that the respondents' state of mind was the critical issue, as evidenced by respondents' allegations suggesting an attempt to improve conditions. As to these latter allegations, the Sixth Circuit stated that:

> At least in this circuit, the Whitley [v. Albers, 475 U.S. 312 (1986)] standard is not confined to the facts of that case; that is, to suits alleging use of excessive force in an effort to restore prison order.

App. at 10.

Although the Sixth Circuit noted that state of mind is typically not a proper issue for resolution on summary judgment, it held that petitioner's affidavits raised no genuine issue as to the respondents' state of mind. Because the petitioner did not directly dispute the respondents' claims of affirmative efforts to improve conditions, the respondents could not be acting with "obduracy and wantonness...marked by persistent malicious cruelty." App. at 11-12. Accordingly the Sixth Circuit affirmed the trial court's grant of summary judgment.

The judgment of the Sixth Circuit was entered on January 16, 1990. On April 3, 1990, the Honorable Antonin Scalia granted

petitioner's application for an extension of time to file a petition for writ of certiorari to May 2, 1990. App. at 21.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT CREATES AN IMPORTANT CONFLICT WITH THE FOURTH, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS

In this case, as noted in the Statement of the Case, the Sixth Circuit found that the affidavits filed in the trial court on behalf of petitioner were "more than colorable" and that several circuits had found Eighth Amendment violations arising from conditions similar to those alleged by the petitioner. App. at 5. For that reason, the Sixth Circuit indicated, the trial court had erred in dismissing the complaint on the basis of controverted claims in affidavits filed on behalf of respondents.

Nonetheless, the Sixth Circuit held, the petitioner's allegations regarding unsanitary eating conditions, housing with physically ill inmates, inadequate ventilation,

excessive noise, and vermin infestation could not survive summary judgment. The Sixth Circuit held that the affidavits of respondents, indicating that they had attempted to remedy these conditions, demonstrated that respondents could not possess the state of mind consistent with a violation of the Eighth Amendment, even though petitioner disputed the results of these efforts. App. at 11-12. The Sixth Circuit, purporting to apply Whitley v. Albers, 475 U.S. 312 (1986), held that efforts to maintain decent conditions, even if unsuccessful, demonstrated that the respondents lacked an obdurate and willful state of mind "marked by persistent malicious cruelty." App. at 12.

A survey of federal Court of Appeals decisions citing Whitley demonstrates that this is the only case in which a Court of Appeals has relied upon the state of mind requirements of Whitley to dismiss a case

challenging continuing conditions not involving the use of force. In contrast, the other circuits that have considered this issue have explicitly rejected the application of the "malicious cruelty" state of mind test to such cases.

In Foulds v. Corley, 833 F.2d 52 (5th Cir. 1987), the Court of Appeals revieved the trial court's dismissal of a prisoner's complaint as frivolous. The prisoner raised due process and Eighth Amendment claims. The latter involved allegations that the solitary confinement cell was very cold and infested with rats and that the prisoner had to sleep on the floor. The Fifth Circuit held that if the prisoner proved his Eighth Amendment allegations, he would be entitled to relief. In the course of doing so, the court explicitly rejected the analysis of the district court, which was precisely the same analysis as the Sixth Circuit employed in this case:

> The district court relied on Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed. 2d 251 (1986), to require a showing that the deputies acted with malicious and sadistic intent in subjecting Foulds to the above-described conditions. This reliance was in error. Whitley involved the shooting of an inmate during a prison riot. In that setting, involving essential prison security, the Supreme Court required a showing of "malicious and sadistic intent" by prison officials to support a claim under the eighth amendment. Whitley, 475 U.S. at 320, 106 S.Ct. at 1085, 89 L.Ed.2d at 261. The facts of the instant case markedly differ. There was no imminent danger. We decline the invitation to extend the rule of Whitley to cover all prison disciplinary actions, ostensibly under the guise of achieving prison security. We do not see Whitley as the harbinger of such, see 475 U.S. at 319, 106 S.Ct. at 1084, 89 L.Ed.2d at 260 (recognizing the general "unnecessary and wanton" standard of review).

Id. at 54.

A different panel of the Fifth Circuit reached precisely the same conclusion in

reversing another dismissal of a prisoner complaint alleging that the prisoners contracted tuberculosis as a result of confinement in a dirty, overcrowded cellblock that had inadequate ventilation and lighting as well as insect infestation. In the course of reversing the trial court, the Fifth Circuit made clear that the Whitley intent requirements did not apply to continuing conditions of confinement:

> But unlike "conduct that does not purport to be punishment at all" as was involved in Gamble and Whitley, the Court has not made intent an element of a cause of action alleging unconstitutional conditions of confinement. Prison conditions may violate the eighth amendment even if they are not imposed maliciously or with the conscious desire to inflict gratuitous pain.

Gillespie v. Crawford, 833 F.2d 47 at 50 (5th Cir. 1987). Although the Fifth Circuit en banc vacated other portions of the panel's opinion on unrelated procedural grounds, this

portion of the decision was reinstated. Gillespie v. Crawford, 858 F.2d 1101 at 1103 (5th Cir. 1988) (en banc).

In LaFaut v. Smith, 834 F.2d 389 (4th Cir. 1987), former Justice Powell, sitting by designation, found that the deprivation of basic necessities of personal hygiene to a handicapped prisoner violated the Eighth Amendment. In LaFaut, the defendant prison officials had been aware of the special hygiene needs of the prisoner and had made some belated, ineffectual attempts to respond to them. Id. at 392-393. The court held that the case could be characterized as either a conditions of confinement or a medical care case. In either event, the court held, in such circumstances Whitley required no more than a "deliberate indifference" standard, and the prison officials' conduct demonstrated the requisite deliberate indifference:

> Although in Whitley v. Albers, the Court held that

the "deliberate indifference" standard does not adequately capture the importance of the competing obligations that exist in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, id., 106 S.Ct. at 1085, the instant case does not involve such concerns. Whether one characterizes the treatment received by LaFaut as inhumane conditions of confinement, failure to attend to his medical needs or a combination of both, it is appropriate to apply the "deliberate indifference" standard articulated in Estelle to this case. In the context of this case there is no clash between LaFaut's treatment and "equally important governmental responsibilities." Cf. Whitley v. Albers, 475 U.S. at 320, 106 S.Ct. at 1084.[4]

[4] To the extent the district court's memorandum and order can be construed as requiring appellant to demonstrate that Hambrick "acted intentionally to deprive LaFaut of medical care," (App. at 102-03) this is erroneous.

> Appellant need only show that Hambrick was deliberately indifferent to his needs, not that she affirmatively intended to deprive him of the means of satisfying his needs.

834 F.2d at 391-392.

In Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987), the court upheld a jury verdict finding that the correctional officials acted with deliberate indifference in failing to protect the plaintiff from assault by a fellow prisoner. In the course of that affirmance, the Court of Appeals analyzed Whitley and held that the jury instruction based on deliberate indifference was sufficient:

> The exigencies and competing obligations facing prison officials while attempting to regain control of a riotous cellblock, which led the Court to conclude that the "deliberate indifference" standard was inadequate in Whitley, are not present in this case. The gravamen of Morgan's claim is the

> District's overcrowding of the Jail; the conduct Morgan challenges is the municipality's operation of the Jail generally. In this context, unlike in the prison riot setting, there can be no legitimate concern that liability will improperly be based on "decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." Whitley, 106 S.Ct. at 1085. The District's practice of overcrowding has endured since at least 1971. We therefore conclude that "deliberate indifference" was the appropriate standard by which to judge the District's conduct in this case.

Id. at 1057-1058.

The First, Eighth and Ninth Circuits have also rendered decisions that, while not in direct conflict with this case, apply the deliberate indifference standard, rather than the malicious cruelty standard, to prisoner challenges to conditions of confinement.

In Howard v. Adkison, 887 F.2d 134 (8th Cir. 1989), in a decision not discussing Whitley, the Eighth Circuit applied the

deliberate indifference standard to supervisor liability to affirm a jury verdict against correctional officials based on a failure to maintain sanitation in the plaintiff's cell. The officials claimed that there was no evidence that they actually knew about the plaintiff's conditions of confinement. The Eighth Circuit, relying on earlier precedent from that circuit, held that actual knowledge was not required. Rather, the standard was more than negligence but less than malicious or actual intent. The Eighth Circuit held that the pattern of events over a period of two years in a unit supervised by the correctional officials allowed the jury to find tacit authorisation or reckless disregard. The court thus upheld the jury instruction, which employed the deliberate indifference standard.

Similarly, in Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir. 1988), cert. denied, 109 S.Ct. 68 (1988) the Court

of Appeals affirmed a jury verdict finding that prison officials had acted with deliberate indifference in failing to protect the prisoners' lives in a prison characterized by "severe overcrowding (a system-wide average of twenty square feet per prisoner), squalor, maltreatment, gang warfare, killings, lack of proper medical care, failure to segregate mentally disturbed prisoners, guards unable to control entire cellblocks, and other horrors." Id. at 558. See also Holl v. Carlson, 809 F.2d 1446 at 1449, n.4 (9th Cir. 1987) (citing Whitley and reversing the dismissal of a Bivens complaint because the prisoner might be able to establish that the alleged failure to protect him constituted deliberate indifference).

Because the decision of the Sixth Circuit creates a conflict among the circuits, petitioner requests that the Court grant certiorari.

II. THE DECISION OF THE SIXTH CIRCUIT MISAPPLIES THIS COURT'S DECISION IN WHITLEY V. ALBERS

In Whitley v. Albers, 475 U.S. 312 (1986), this Court considered the standard for determining whether a prison security measure undertaken to resolve a disturbance violates the Eighth Amendment. The Court stated that, while all Eighth Amendment violations must involve "obduracy and wantonness," these terms encompass more than one possible state of mind. When the Eighth Amendment issue involves the use of force to resolve a prison disturbance, defendants are liable only if their state of mind manifests a "malicious or sadistic" intent.

By contrast, the Court in Whitley indicated, in the context of prisoner medical care, the Eighth Amendment is violated if the prison official's state of mind is one of "deliberate indifference." Thus, Whitley reaffirmed the holding in Estelle v. Gamble, 429 U.S. 97 (1976) that deliberate

indifference to a prisoner's serious medical needs violates the Eighth Amendment. The Court in Whitley noted that the Estelle deliberate indifference standard was appropriate in medical care cases "because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." Whitley at 320.

The decisions from the Fourth, Fifth, and District of Columbia Circuits correctly apply this Court's decision in Whitley by recognizing that Whitley formulated the Eighth Amendment standard of liability for damages in the context of an emergency involving the use of force to end a prison disturbance. Continuing prison conditions of confinement not involving the use of force differ from the situation in Whitley in several ways. First, and most obviously, the interest in avoiding second-guessing prison

officials is greatest when prison officials make decisions during an emergency. In contrast, continuing conditions of confinement allow prison officials the opportunity for reflection. Second, deference to official judgment is at its greatest when prison officials make security judgments with regard to the use of force. Where conditions of confinement are at issue, the rationale for deference is less persuasive. Finally, a prison official's state of mind in imposing a particular deprivation is more important if the issue is one of liability for damages than if the issue is whether continuing conditions should be enjoined.[7]

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[7] For similar reasons, public officials charged with violations of the Constitution enjoy a qualified good faith defense in damages but not in injunctive actions. See Wood v. Strickland, 420 U.S. 308 at 314, n.6 (1975). Here, the petitioner sought injunctive relief as well as damages, and it was particularly inappropriate to apply "malicious or sadistic intent" test to the claims for injunctive relief.

When prisoners are subjected to continuing conditions that deprive them of the basic necessities of life such as adequate food, clothing and shelter[8], such practices rarely result from a malicious intent to inflict pain. Rather, such conditions typically result from neglect and failure to remedy obvious conditions, the textbook examples of deliberate indifference. It is inappropriate to require prisoners to prove that the state of mind of prison officials constituted malicious cruelty rather than simply deliberate indifference. Such a test for state of mind would ignore the distinction between use of force cases and medical care cases drawn in Whitley, and would also inappropriately focus judicial attention on officials' state of mind rather than on the harm caused by the challenged conditions. If a condition bad enough to violate the

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[8] See Rhodes v. Chapman, 452 U.S. 337 at 348 (1981).

Eighth Amendment continues to exist for a period of time, prison staff obviously know of its existence. If, knowing of the condition, officials do not act, they are deliberately indifferent, and a "deliberately indifferent" state of mind satisfies constitutional standards for injunctive relief. Cf. City of Canton, Ohio v. Harris, 109 S.Ct. 1197 at 1205 (1989):[9]

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[9] In Smith v. Wade, 461 U.S. 30 (1983), plaintiff complained that during a stay in administrative segregation he was placed in a cell with another prisoner who sexually assaulted him. The district judge instructed the jury that the prisoner plaintiff could recover damages if the prison staff were guilty of gross negligence or egregious failure to protect. The district judge further instructed the jury that it could award punitive damages if it found that the staff acted with reckless or callous disregard or indifference to the prisoner's rights. The Eighth Circuit affirmed a jury award for compensatory and punitive damages based on these instructions.

In this Court, the prison staff argued that the proper standard for punitive damages was "actual malicious intent." This Court held that the instructions were proper, and rejected any requirement that the plaintiff show actual malicious intent. The standard for constitutional liability was not before

(continued...)

The lower federal courts have routinely applied this Court's decision in Estelle v. Gamble, 429 U.S. 97 (1976), that deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment, in a manner consistent with the above analysis. When a case focuses on continuing conditions of medical care, rather than on the factual

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[9](...continued)
the Court. Id. at 51. However, in view of the Court's holding that punitive damages required only recklessness or callous indifference, a fortiori, the Court could not have approved an actual malice standard for initial liability. Accordingly, the Sixth Circuit's decision is inconsistent with Smith v. Wade because it attempts to apply a standard for liability higher than the standard this Court has applied for punitive damages for violations of Eighth Amendment rights not involving official use of force.

See also Davidson v. Cannon, 474 U.S. 344 at 347 (1986), holding that negligence in preventing an attack by a fellow prisoner does not violate the Due Process clause and noting that the prisoner did not challenge the trial court finding that prison officials were not deliberately indifferent. Again, the Court's reference to deliberate indifference implies that a finding of deliberate indifference would have been sufficient to impose liability.

circumstances of an individual instance of alleged failure to treat, the federal courts have routinely held that systemic failures to make adequate provision for medical care, including obvious failures to provide adequate staffing or equipment, demonstrate deliberate indifference justifying injunctive relief. See, e.g., Ramos v. Lamm, 639 F.2d 559 at 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981):

> In class actions challenging the entire system of health care, deliberate indifference to inmates' health needs may be shown by proving repeated examples of negligent acts which disclose a pattern of conduct by prison medical staff, or by proving there are such systemic and gross deficiencies in staffing, facilities, equipment or procedures that the inmate population is effectively denied access to adequate medical care.

(Citations omitted) See also Wellman v. Faulkner, 715 F.2d 269 at 272 (7th Cir. 1983); Hoptowit v. Ray, 682 F.2d 1237 at 1253

(9th Cir. 1982); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979), on remand, 487 F.Supp. 638 (W.D. Pa. 1980); and Todaro v. Ward, 565 F.2d 48 (2d Cir. 1977).

An analysis of Whitley thus demonstrates that in cases challenging continuing conditions, outside of the use of force area, meeting the "wanton and obdurate" standard to show Eighth Amendment violations requires no more than a demonstration of deliberate indifference. In turn, the existance of obvious continuing conditions intrinsically demonstrates deliberate indifference if the conditions impose sufficient harm to violate the Eighth Amendment.

In this case, the Sixth Circuit failed to apply Whitley correctly. The Sixth Circuit failed to recognize that the "obdurate and wanton" state of mind requirements of Whitley for all Eighth Amendment violations encompass both the "deliberate indifference" and the

"malicious and sadistic" intent standards. Which of the two "obdurate and wanton" state of mind requirements applies depends on the circumstances. Accordingly, the Sixth Circuit erroneously equated "obdurate and wanton" simply with "malicious and sadistic" intent. Petitioner had alleged obvious continuing conditions. The respondents, it is true, had claimed that certain remedial steps had been taken, but petitioner specifically charged that he notified the respondents about the challenged conditions, and the respondents' only action was to pass on the complaint to staff who did not act and, in fact, had no power to act. Given that the Sixth Circuit acknowledged that the conditions claimed in petitioner's affidavits were sufficiently severe to raise Eighth Amendment claims and that disputed factual issues could not be resolved on summary judgment, the court could not have resolved the case on summary judgment if it had

applied the correct standard for judging Eighth Amendment claims involving continuing conditions. Accordingly, the Sixth Circuit should have held that, because the existence of obvious continuing conditions that may violate the Eighth Amendment had been put in contention by petitioner, summary judgment was inappropriate.[20] Moreover, the Sixth Circuit compounded its error by holding that

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[20] As noted, the Sixth Circuit dismissed the claims regarding overcrowding, excessive heat, and the mixing of the mentally ill with other prisoners in the dormitory as not alleging deprivations serious enough to violate the Eighth Amendment. This dismissal was error because the claims should have been considered as part of the overall conditions challenged in the dormitory. See Rhodes v. Chapman, 452 U.S. at 347, noting that conditions of confinement alone or in combination may deprive prisoners of the minimal civilized measure of life's necessities. See also Hutto v. Finney, 437 U.S. 678 at 687-688 (1978), affirming the trial court's conclusion that the conditions of confinement, taken as a whole, continued to violate the Eighth Amendment and therefore justified an order that might not be appropriate if the particular order challenged were considered in isolation from the totality of conditions sought to be remedied.

the petitioner's affidavits failed to show that respondents acted with "persistent malicious cruelty." App. at 12. This holding by the Court of Appeals demonstrates that it was applying the use of force standard from Whitley, not the Estelle standard of deliberate indifference.

Since applying the use of force standard was error, this Court should grant certiorari to clarify the Eighth Amendment state of mind requirements in continuing conditions cases that do not involve the use of force. It is important for the Court to review the decision of the Sixth Circuit because the Sixth Circuit's decision has extraordinarily far-reaching implications for prison law. If this case is followed, almost all prison conditions will be shielded from review under the Eighth Amendment. For the reasons given above, continuing prison conditions do not typically result from the malicious cruelty of prison officials. When such conditions

are intrinsically bad enough to violate the Eighth Amendment, imposition of a separate state of mind requirement as a barrier to relief is inconsistent with the admonition in Rhodes v. Chapman, 452 U.S. at 352:

> Courts certainly have a responsibility to scrutinize claims of cruel and unusual confinement, and conditions in a number of prisons, especially older ones, have justly been described as "deplorable" and "sordid." When conditions of confinement amount to cruel and unusual punishment, "federal courts will discharge their duty to protect constitutional rights."

(Citations and footnote omitted).

Failure to reverse the Sixth Circuit decision will once again draw an iron curtain between the Constitution and the nation's prisons.[11]

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[11] See Wolff v. McDonnell, 418 U.S. 539 at 555-556 (1974):

> But though his rights may be diminished by the needs and exigencies of the

(continued...)

Accordingly, the petitioner urges that the Court grant certiorari.

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[11](...continued)
institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.

Respectfully submitted,

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