No. 89-7376

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PEARLY L. WILSON,

Petitioner,

v.

RICHARD SEITER, *et al.*,

Respondents.

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

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. INTRODUCTION

In this case, the lower court held that petitioner's Eighth Amendment challenge to the conditions of his confinement must fail because he did not demonstrate that the conditions were imposed with "persistent malicious cruelty." In so holding, the lower court purported to apply this Court's decision in *Whitley v. Albers*, 475 U.S. 312 (1986). However, the lower court misapplied *Whitley*, since that case made clear that the "malicious and sadistic" intent standard applies only to the use of force by prison officials in an attempt to maintain or restore order. Because continuing conditions of confinement, unlike the use of force, do not implicate security concerns, require split-second decision-making, or involve the special expertise of prison officials, the rationales underlying the "malicious and sadistic" use of force standard do not apply in the conditions context.

Rather, this Court held in *Rhodes v. Chapman*, 452 U.S. 337 (1981), that courts must apply objective criteria in determining whether conditions of confinement violate the Eighth Amendment. These objective criteria include whether prisoners have been deprived of the basic necessities of life, such as adequate food, clothing, medical care, and shelter. More fundamentally, the Eighth Amendment jurisprudence of this Court demonstrates that when a challenge is mounted to a punishment imposed by policy, custom, or pattern of nonfeasance, the state of mind of the officials imposing the punishment is irrelevant to the existence of a constitutional violation.

In the alternative, if official state of mind is at all relevant in conditions cases, a prisoner need show no more than "deliberate indifference" on the part of prison officials to establish an Eighth Amendment violation. This is the standard applied by this Court to challenges to prison health care in *Estelle v. Gamble*, 429 U.S. 97 (1976), and explicitly reaffirmed in *Whitley*. The diffi-

culty of drawing a principled distinction between health cases and conditions cases demonstrates that the same "deliberate indifference" test should be applied to both.[1]

II. THIS COURT SHOULD NOT ADOPT A "PERSISTENT MALICIOUS CRUELTY" STANDARD FOR CONTINUING CONDITIONS OF CONFINEMENT

A. This Court Should Not Create a New, Intermediate Eighth Amendment Standard for Conditions Cases

Respondents concede in their brief that the Eighth Amendment standard for continuing conditions of confinement is not the "malicious and sadistic" test that this Court applied in *Whitley v. Albers*, 475 U.S. 312 (1986), in judging whether the use of force to quell a prison riot violated the Eighth Amendment. *See* Respondents' Brief at p. 27: "A more reasonable interpretation of the lower court's decision evidences careful adherence to the *Whitley* 'wantonness and obduracy' standard, requiring something less than 'malicious and sadistic'[2] and more than negligent conduct." Thus, respondents suggest, there are at least three possible Eighth Amendment standards included within the scope of the general "obdurate and wanton" test drawn from *Whitley* and applicable to challenges to the actions of prison staff: the "malicious and sadistic" standard, drawn directly from *Whitley* and applicable to official use of force; the "deliberate indifference" standard, drawn from *Estelle v. Gamble*, 429 U.S. 97 (1976), and applicable to medical

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[1] The objective test and the "deliberate indifference" standard will in practice lead to the same result, since the persistence over time of obvious conditions that deprive prisoners of the basic necessities of life demonstrates deliberate indifference on the part of the responsible prison officials.

[2] This concession is, of course, virtually compelled by the Court's reaffirmation in *Whitley* of the *Estelle v. Gamble*, 429 U.S. 97 (1976), "deliberate indifference" standard for judging prisoners' Eighth Amendment challenges to deprivations of medical care. The reasons the Court gave in *Whitley* for applying a less exacting standard to medical care claims also apply to continuing conditions of confinement claims. *See* Petitioner's Brief at pp. 12-13.

care; and a third, "modified *Whitley v. Albers* test," applicable to the conditions in this case. *See* Respondents' Brief at 34. This modified *Whitley* standard, according to respondents, requires malice, but not sadism. *See* Respondents' Brief at 27, 29.[3]

This Court should reject the creation of yet another Eighth Amendment standard applicable to prison litigation. This new standard requiring "malice" but not "sadism" is entirely respondents' invention. Respondents provide no convincing rationale for adding further complexities to Eighth Amendment analysis, and there are good reasons not to do so. While there are some limited areas of controversy over the precise scope of the *Whitley* riot standard,[4] the general distinction between cases involving the use of force and those challenging prison medical care is well-defined. In contrast, the distinction between medical care cases, where respondents concede that *Estelle's* deliberate indifference standard applies, and conditions of confinement cases, where respondents would apply a malice standard, is frequently obscure.

In this case, for example, petitioner alleged that psychotic prisoners and prisoners with open sores were placed in the dormitory. In addition, petitioner claimed that the dining hall was filthy and that the food is prepared by unsupervised, sometimes diseased prisoners. Heat is so excessive and ventilation so inadequate that, petitioner alleged, prisoners sometimes faint. Petitioner's

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[3] The respondents' claim that the lower court was attempting to bifurcate the "malicious and sadistic" standard is hard to square with the lower court's opinion, which gave no indication that the court believed it was articulating a test different from the *Whitley* riot standard. *See, e.g., Wilson* at App. 71:

> [A]t least in this circuit, the *Whitley* 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.

See also Wilson at App. 73:

> Additionally, the *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty.

[4] *See* Petitioner's Brief at 13-14, n.10.

Brief at 4-5, n.3. These claims, although fairly characterized as conditions of confinement claims, involve threats of harm to the petitioner's health that are no different in kind from those that may result from deliberate indifference to medical needs. Certainly the concept of attending to prisoners' serious medical needs is not stretched by requiring that prisoners be protected from an unreasonable risk of contracting contagious or foodborne diseases, or that prisoners' health be protected from other unreasonable risks arising from their conditions of confinement. Claims of this type are common in Eighth Amendment jurisprudence, and to require a court to sort petitioner's claims into medical care and other conditions, and to apply different constitutional standards to these ambiguous and overlapping categories, is an invitation to unnecessary litigation and inconsistent results.[5]

B. Conditions of Confinement, Like Deprivations of Medical Care and Failures to Protect Prisoners, Can Cause Prisoners Pain, Injury, or Death

The respondents' justification for the proposed distinction between medical or failure to protect claims and other conditions of confinement claims is that the former

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[5] For example, a number of the lower court cases cited by the parties involve issues that could fairly be characterized as either medical care or conditions. *See LaFaut v. Smith*, 834 F.2d 389, 391-392 (4th Cir. 1987) (holding that a handicapped prisoner's challenge to a deprivation of special toilet facilities could be characterized as either a medical care or conditions of confinement case); *Evans v. Dugger*, 908 F.2d 801, 804 (11th Cir. 1990) (applying "deliberate indifference to serious medical needs" standard to case with facts similar to those in *LaFaut*); and *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990) (characterizing the requirement to be housed in an area not contaminated with asbestos as a "serious medical need"). *See also Clemmons v. Bohannon*, 918 F.2d 858, —— n.7 (10th Cir. 1990) (court of appeals reverses summary judgment for prison officials on prisoner's claim that exposure to second-hand cigarette smoke violates Eighth Amendment, applying "deliberate indifference" test and stating that "the Constitution does not require waiting until the prisoner actually develops a serious medical condition—be it lung cancer or another disease—before affording relief from exposure to a known carcinogen").

involve "a physical injury with concomitant pain." Respondents' Brief at 29. Injunctive relief, however, whether involving a failure to protect, a deprivation of medical care, or other conditions of confinement, seeks to prevent the continued deprivation of the minimal civilized measure of life's necessities. *See Rhodes v. Chapman*, 452 U.S. 337 (1981). Unhealthy or dangerous conditions of confinement—such as lack of fire safety, contaminated food, or structurally unsound buildings—are as capable of causing "physical injury with concomitant pain" as are deprivations of medical care and failure to protect from assault.[6] The difference between a physical injury or illness that has already occurred and one that the litigant seeks to prevent goes only to the form of the appropriate remedy and not to the standard applied in determining the existence of a constitutional violation. Indeed, the purpose of injunctive relief is to prevent irreparable harm, including physical injury. A court need not wait until the potential harm is realized to address such conditions. *See, e.g., Tillery v. Owens*, 907 F.2d 418, 428 (3d Cir. 1990):

> We find nothing in the Supreme Court's relevant jurisprudence that suggests that conditions as deplorable as those at SCIP may not be held to fall below constitutional standards merely because there has not yet been an epidemic of typhoid fever, an outbreak of AIDS, a deadly fire, or a prison riot.

The standard for general conditions of confinement is the same standard used to evaluate systemic challenges to prison medical care. *See, e.g., Todaro v. Ward*, 565 F.2d 48, 51 (2d Cir. 1977) (where systemic medical care deficiencies subjected prisoners to grave and unnecessary

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[6] Respondents assert that "[t]he state of mind requirement is an essential component of any meaningful test for conditions that *do not involve* a threat to bodily integrity, pain, injury, or loss of life." Respondents' Brief at 16. (Emphasis added). Conditions of confinement, for the reasons argued in text, can cause a range of harm that includes the threats listed by respondents, so respondents' position concedes petitioner's point.

risks, the trial court need not wait until an epileptic choked to death on her tongue to grant injunctive relief).

C. The Standard Respondents Advocate for Conditions of Confinement Is Higher Than the *Whitley* Standard for Prison Riots

As noted above, the respondents' contention that the lower court appropriately applied a third standard for continuing conditions of confinement concedes that the *Whitley* riot standard should not be applied to such conditions. This concession by respondents, however, is inconsistent with the fact that the new standard they advocate is in one significant respect even higher than the prison riot standard articulated in *Whitley*.

The respondents defend the lower court's reference to *persistent* malicious cruelty. *See* Respondents' Brief at 30: "First, the condition had to be 'persistent', reasonably meaning something more than an isolated act or omission. It is reasonable to require more than an isolated act or omission to impose liability in a conditions case." (Footnote omitted). This is a higher standard even than the *Whitley* riot standard, since under this test no single act, regardless of intent or resulting harm, could violate the Eighth Amendment. Thus, prison officials who intentionally served prisoners contaminated food on a single occasion could not be held liable regardless of the resulting illness, pain, or even fatality, while officials who used force "maliciously and sadistically" to quell a riot could be held liable. Such a result would be illogical. The heightened standard of *Whitley* was crafted to shield prison officials from second-guessing when they had to balance compelling penological justifications against prisoners' safety. By contrast, there is *no* penological justification for denying heat, depriving prisoners of ventilation, serving contaminated food, or tolerating insect infestation or the other conditions alleged by the present petitioner.[7] Thus there is no jurisprudential rationale for

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[7] *See* n.15, *infra*.

imposing a more demanding standard on such conditions claims than this Court imposed in the context of prison disturbances.

D. State of Mind Is Irrelevant to Eighth Amendment Analysis of Punishments Imposed by Official Policy

Petitioner also notes that respondents defend this new third standard in part based on a contention that the Eighth Amendment cannot be violated unless the defendants act with a culpable state of mind. *See* Section I.A.3 of Respondents' Brief. This assertion does not respond to petitioner's demonstration that punishments imposed as part of an official policy have never been analyzed in terms of the officials' state of mind. *See* Petitioner's Brief at 24-25.[8] Moreover, the respondents' argument ignores the history of the Eighth Amendment. In fact, the use of the word "cruel" in the Eighth Amendment does not imply a state of mind analysis. *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 *Calif. L. Rev.* 839, 860 (1969):

> In the seventeenth century, the word "cruel" had a less onerous meaning than it has today. In normal usage it simply meant severe or hard. The Oxford English Dictionary quotes as representative Jonathan Swift, who wrote in 1710, "I have got a cruel cold, and staid within all this day." Sir William Black-

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[8] In respondents' brief at p.15, n.14, they contend that petitioner did not include among the questions presented for review the argument that no separate state of mind analysis is necessary in continuing conditions of confinement cases under the Eighth Amendment. However, the first question presented in the petition is "[w]hether 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." Arguing that the "malicious and sadistic intent" standard from *Whitley* does not apply to continuing conditions of confinement fairly includes a contention that no state of mind requirement applies. *See* S.Ct. Rule 14.1(a): "The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein."

> stone, discussing the problem of "punishments of unreasonable severity," uses the word "cruel" as a synonym for severe or excessive.

(Footnotes omitted). Indeed, as noted by the United States (*see* Brief for the United States as Amicus Curiae, p. 16, n.12), in *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), when this Court first referred to the "unnecessary and wanton infliction of pain," the Court was considering whether the punishment was excessive, not the state of mind with which the punishment was imposed.[9]

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[9] In *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court authoritatively rejected the argument (*see* Respondents' Brief at 8) that the Eighth Amendment is relevant only to claims of torture and sadistic punishment:

> But the Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital, must be capable of wider application than the mischief which gave it birth." Thus the Clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."
>
> In *Weems* [*v. United States*, 217 U.S. 349 (1910)] the Court addressed the constitutionality of the Philippine punishment of *cadena temporal* for the crime of falsifying an official document. That punishment included imprisonment for at least 12 years and one day, in chains, at hard and painful labor; the loss of many basic civil rights; and subjection to lifetime surveillance. Although the Court acknowledged the possibility that "the cruelty of pain" may be present in the challenged punishment, 217 U.S., at 366, 30 S.Ct., at 549, it did not rely on that factor, for it rejected the proposition that the Eighth Amendment reaches only punishments that are "inhuman and barbarous, torture and the like." *Id.*, at 368, 30 S.Ct., at 549. Rather the Court focused on the lack of proportion between the crime and the offense.
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> It is clear from the foregoing precedents that the Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, "[t]he Amendment must draw its meaning from the evolving stan-

Accordingly, petitioner urges that this Court refuse to apply either the *Whitley* "malicious and sadistic" test or the lower court's "persistent malicious cruelty" standard to continuing conditions. Petitioner has pointed out that the court below is alone in applying the *Whitley* "malicious and sadistic" intent standard to cases involving conditions of confinement. Petitioner's Brief at 15-20, nn. 13-20. Respondents' only answer is that the cases cited by petitioner are "not conditions cases." Respondents' Brief at 33-34, nn. 25, 26.

Respondents do not define "conditions cases" or explain why a case in which the issue is the conditions under which prisoners are confined is not a "conditions case." *See, e.g., Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990) (exposure to asbestos); *Evans v. Dugger*, 908 F.2d 801, 802-803 (11th Cir. 1990) (disabled prisoner's lack of access to toilets, showers, dining area, laundry, and law library); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 559-560 (1st Cir. 1988), *cert. denied*, 109

> dards of decency that mark the progress of a maturing society." Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment . . . [T]his assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.
>
> But our cases also makes clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." This means, at least, that the punishment not be "excessive." When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.

Id. at 171-173. (Citations omitted).

S.Ct. 68 (1988) (severe overcrowding; failure to segregate mentally ill prisoners; gang warfare); *Morgan v. District of Columbia*, 824 F.2d 1049, 1052 (D.C. Cir. 1987) (severe overcrowding).

Respondents' point seems to be that some of these cases involve a prisoner's allegation that officials failed to protect him from assault by other prisoners. This point is nonresponsive to petitioner's argument. Although the plaintiffs in both *Morgan* and *Cortes-Quinones* sought damages for violent injuries, the gravamen of their complaints was continuing conditions of confinement, of which the assaults and resulting injuries were the predictable consequences. These cases' application of a deliberate indifference standard therefore supports petitioner's position directly. *See especially Morgan*, 824 F.2d at 1057-58 (citing continuing nature of jail crowding in rejecting *Whitley* standard). Respondents have no more support for the application of a "malicious and sadistic" standard to continuing conditions of confinement than for the "persistent malicious cruelty" standard.[10]

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[10] Three of the cases cited by respondents involve use of force by prison officials to maintain or restore order, and are thus clearly distinguishable from cases where continuing conditions of confinement are at issue. *See Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1988) (correctional officer's use of force against individual prisoner; summary judgment against prisoner reversed); *Holloway v. Lockhart*, 813 F.2d 874, 879 (8th Cir. 1987) (officers' use of tear gas to end occupation of a dayroom by prisoners; summary judgment against prisoner reversed); *Ort v. White*, 813 F.2d 318, 325 (11th Cir. 1987) (officer's temporary denial of drinking water to prisoner who refuses to work; court characterizes officer's actions as "necessary coercive measures undertaken to obtain compliance with a reasonable prison rule . . ."). *Givens v. Jones*, 900 F.2d 1229 (8th Cir. 1990), cited by respondents, supports petitioner's contention that the "malicious and sadistic" test is not properly applied in cases challenging conditions of confinement. In that case, the court of appeals applied the "deliberate indifference" test in rejecting a prisoner's claim that his Eighth Amendment rights were violated when he was subjected to noise and fumes from remodeling in the prison, causing him migraine headaches. *Id.* at 1234.

III. STATE OF MIND IS RELEVANT TO EIGHTH AMENDMENT ANALYSIS OF ONE-TIME EVENTS, BUT NOT OF CONTINUING CONDITIONS

There is a distinction between one-time events, such as suppression of the riot at issue in *Whitley*, and continuing conditions of the type at issue in this case.[11] Contrary to respondents' assertion, however, the distinction is not that continuing conditions cannot violate the Eighth Amendment unless they are imposed as a result of persistent malicious cruelty, whereas one-time events require malice and sadism.[12]

Rather, the distinction that has been consistently applied by this Court is that state of mind is relevant in judging one-time events challenged under the Eighth Amendment, but is not relevant in the analysis of punishments or conditions imposed as a result of official policy, custom, or pattern of nonfeasance.[13] *See* Petitioner's Brief at 24-30.

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[11] Petitioner's contention on this point is in no way inconsistent with the position taken by the petitioner in *McCarthy v. Bronson, et al.*, No. 90-5635, *cert. granted*, 111 S.Ct. —— (12/10/90).

[12] Although the distinction may often appear to be a distinction between damages cases and injunctive actions, it is not always so. All injunctive actions involve continuing practices, and many damages actions challenge one-time or short-term events. Some damages actions, however, involve harm caused by continuing conditions. *See* the discussion of *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987), and *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 68 (1988), *supra*, p. 10. Of course, there are also defenses available in damages actions. *See* Petitioner's Brief at 25, n.23. The defenses available in a damages action, but not an injunctive action, include the defense that a professional was unable to follow professional standards because of budgetary constraints. *See Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

[13] Respondents claim that *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), demonstrates that all Eighth Amendment challenges require an inquiry into state of mind. *See* Respondents' Brief at 16-17. Again, *Francis* is consistent with the distinction between one-time events and continuing conditions im-

Petitioner agrees with respondents that the amicus United States' hypothetical case of a nonfunctioning boiler during a cold winter usefully demonstrates the circumstances in which analysis of state of mind is relevant.[14]

If prison officials turned off the boiler with the intent of causing pain and suffering to the prisoners, then the deprivation of heat could constitute the imposition of pain without penological justification.[15] Similarly, if prison officials refused to supply heat in order to save money,[16] with deliberate indifference to the resultant suf-

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posed as a result of policy, unofficial custom, or pattern of conduct. That case involved a challenge, under the due process clause, to the issuance of a second death warrant after the initial attempt to electrocute the prisoner failed because of a latent defect in the electrocution apparatus. The four-person plurality emphasized the accidental nature of the failed electrocution attempt. Justice Frankfurter, whose concurrence provided the fifth note for refusing to find a constitutional violation, stated that "[t]he fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions." 329 U.S. at 471. Thus, *Resweber* is consistent with the contention that a custom or practice of utilizing a painful, unreliable method of execution would violate the Eighth Amendment.

[14] Respondents concede in their brief at p. 31, n.23, that a failure to supply heat in the winter could amount to an Eighth Amendment violation.

[15] Respondents do not suggest that there is a penological justification for deliberately failing to supply heat to prisoners. There may be cases in which continuing harsh conditions are imposed for penological reasons (*see, e.g., Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 3193 (1989)), but that is not the case here.

[16] Respondents urge that their decisions regarding conditions are entitled to deference because these decisions spring from "legitimate governmental economic interests attendant to the effective management" of a detention facility." Respondents' Brief at 11-12. However, federal courts have uniformly held that a lack of funds or a desire to save money cannot justify unconstitutional prison conditions. *See Rozecki v. Gaughan*, 459 F.2d 6 (1st Cir. 1972). In that case, prisoners at the Massachusetts Correctional Institution Treat-

fering, such a practice could also involve the imposition of pain without penological justification.[17] On the other hand, if the boiler breaks, even through the negligence of prison officials, this event by itself would not give rise to a constitutional violation.[18] Whatever the cause of the

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ment Center filed a complaint alleging that grossly inadequate heat led to physical ills. The court of appeals reversed the dismissal of the complaint and held that the defendants' personal good faith was no defense against injunctive relief:

> The result, not the specific intent, is what matters; the concern is with the "natural consequences" of action or inaction. *Monroe v. Pape*, 1961, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492; *Pierson v. Ray*, 1967, 386 U.S. 547, 556, 87 S.Ct. 1213, 18 L.Ed.2d 288. "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations." *Jackson v. Bishop*, 8 Cir., 1968, 404 F.2d 571, 580 (Blackmun, J.).

Id. at 8. *See also Gates v. Collier*, 501 F.2d 1291, 1319-1320 (5th Cir. 1974), and cases cited therein. As this Court has recognized, "vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny [them] than to afford them." *Watson v. City of Memphis, Tenn.*, 373 U.S. 526, 537 (1963) (desegregation of public parks).

[17] *Cf. Estelle v. Gamble*, 429 U.S. 97, 103-105 (1976):

> In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."
>
> We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs, or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

(Citations and footnotes omitted).

[18] Thus, respondents are wrong to claim that petitioner argues for a strict liability standard. *See* Respondents' Brief at 23. Strict,

boiler breakdown, however, officials must take prompt steps to correct it, since they know of the need for heat and they have an affirmative duty to supply shelter.[19] If the boiler cannot be repaired immediately, prison officials could meet their duty in the short term by supplying extra blankets and clothing, even though prisoners would continue to suffer because of the lack of heat.

A continued refusal to repair the boiler, however, amounts to a conscious choice, or at least a deliberately indifferent choice, to deny prisoners a necessary element of shelter. Settled principles of Eighth Amendment law support the grant of injunctive relief to require that adequate heat, and other elements of shelter, be provided.

The example of lack of heat is particularly appropriate in the context of this case. Although respondents argue that petitioner urges a standard that would impose strict liability for equipment failure, this is not the issue here. Rather, this case involves petitioner's allegations that, on a continuing basis, the respondents have failed to carry out their duties to provide minimally adequate shelter. Indeed, respondents have attached to their brief the letter from petitioner to respondents, dated July 8, 1986, stating:

> 7th: In winter, there is no heating system in "C" Dormitory. This has been like so since this Facility has been opened in 1983. I will also bring to your attention that there is insufficient clothing given these men for winter since there is no heating sys-

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liability is a concept that applies to damages actions and criminal liability, not injunctive actions. No Supreme Court case in the last twenty years has applied the concept of strict liability to injunctive actions. Rather, strict liability is a concept that relates to tort and tort-like damages (*see, e.g., Miles v. Apex Marine Corp.*, 111 S.Ct. 317, 322 (1990)); contractual liability (*see, e.g., Ricketts v. Adamson*, 107 S.Ct. 2680, 2691, n.11 (1987) (Brennan, J., dissenting)); and criminal liability (*see, e.g., Osborne v. Ohio*, 110 S.Ct. 1691, 1698, n.9 (1990)).

[19] *See DeShaney v. Winnebago County DSS*, 109 S.Ct. 998, 1005-1006 (1989).

> tem in the dormitory listed. Such is an infliction of cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.
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> • • •
>
> I shall await your response to these conditions listed by me above and certainly request, again, that every listed violation be corrected forthwith. In the event that no changes are made within a reasonable time, be advised that I shall be forced to file a lawsuit against you and all prison personnel involved in these unhealthy conditions and cruel and unusual punishment imposed upon me without cause or justification.[20]

Respondents' Appendix at 15. The complaint in this case was filed on August 28, 1986, and petitioner's motion for summary judgment on November 10, 1986. App. 1.

This boiler analysis illustrates that when prisoners are subjected to continuing, rather than short-term or one-time,[21] conditions that deprive them of a basic necessity

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[20] Petitioner's affidavit contains similar assertions. *See* App. 33-34. Petitioner's letter was not included in the appendix submitted in the court of appeals. The court of appeals accordingly did not see the letter and appears not to have been aware of petitioner's claim that he brought the conditions to respondents' attention before filing suit. Thus, the dictum from the court of appeals that the record showed only negligence apparently did not take into account petitioner's notice of the conditions to respondents. Petitioner's counsel in this Court did not see the letter as part of the original record in the trial court until after the compilation of the Joint Appendix.

[21] At p. 44 of their brief, respondents cite a number of court of appeals summary judgment cases that they argue support their position. In fact, all four cases cited by respondents involve actions by individual staff that resulted in one-time or short-term deprivations visited upon an individual prisoner; none involved a continuing condition of confinement. *See, e.g., Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988):

> In *Lewis* [*v. Lane*, 816 F.2d 1165, 1171 (7th Cir. 1987)], we held, as Harris points out, that summary judgment was inappropriate . . . . More importantly for the purposes of this case, however, *Lewis* involved prison policies and practices affecting

of life, prison officials have violated a duty imposed by the Constitution. *See* Petitioner's Brief at 25-29. The consequences of the failure to perform this affirmative duty are obvious and foreseeable. If prison officials violate that affirmative duty by depriving prisoners of the minimal civilized measure of life's necessities on an ongoing basis, any state of mind requirement under the Eighth Amendment is necessarily satisfied. Accordingly, when a court analyzes an injunctive challenge to continuing prison conditions, a separate inquiry into state of mind is redundant.[22]

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all prisoners and not just an isolated instance of negligence temporarily inconveniencing only one inmate.

Similarly, *Lopez v. Robinson*, 914 F.2d 486, 491-492 (4th Cir. 1990), cited at pp. 15-16 of the Amici Curiae Brief filed by various states, involves the short-term shut-off of water to prison cells after lightning struck the electrical lines that supplied power to the water pumps. During the water shut-off, the warden ordered that water and ice be delivered to every prisoner. Accordingly, *Lopez* is consistent with petitioner's argument that short-term or one-time events, but not continuing conditions, may require an analysis of official state of mind.

For the reasons given above, state of mind may well be relevant in Eighth Amendment analysis of one-time or short-term conduct by officials. Such analysis, however, is unnecessary and redundant in the context of continuing practices and customs. Those courts that have undertaken such an analysis, other than the lower court in this case, however, have concluded that a consistent pattern of conduct that ignores a known or obvious risk is sufficient to establish deliberate indifference where the conduct results in the deprivation of a basic necessity of life, such as medical care. *See DeGidio v. Pung*, —— F.2d ——, 1990 WL 191501 (8th Cir.) (12/4/90) and *Kelley v. McGinnis*, 899 F.2d 612, 617-618 (7th Cir. 1990). *See also* the cases cited in petitioner's brief at pp. 28-29. Accordingly, petitioner was not required to put the respondents' state of mind in issue in opposing their motion for summary judgment. If respondents are wrong about the state of mind issue, then their summary judgment argument about state of mind fails.

[22] Even if state of mind were relevant, it was error for the district court in this case to resolve the issue by simply adopting the assertions in respondents' affidavits. From petitioner's averment that he apprised respondents of unhealthy and dangerous conditions and they took no remedial action other than to refer the letter to a staff member who did not, and could not, correct the conditions

IV. THE CONDITIONS OF CONFINEMENT ALLEGED BY PETITIONER CONSTITUTE PUNISHMENT

At pages 9-12 of their brief, respondents argue that this Court must first determine whether the conditions challenged by petitioner constitute punishment, citing *Bell v. Wolfish*, 441 U.S. 520 (1979). *Bell*, however, unlike this case, involved a due process challenge to conditions of pretrial detention. In that context, it was necessary to determine whether the conditions constituted punishment at all.[23]

In contrast, in Eighth Amendment challenges to the conditions of confinement of convicted prisoners, "[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards." *Hutto v. Finney*, 437 U.S. 678, 685 (1978). *See also Rhodes*, 452 U.S. at 345, calling this principle "unquestioned" and setting forth the applicable standard "when the conditions of confinement compose the punishment at issue." *Id.* at 347. Accordingly, the conditions under which prisoners are confined pursuant to criminal convictions are, by definition, punishment. The issue before this Court is whether these conditions entail cruel and unusual punishment.

V. THE PETITIONER HAS ALLEGED CONDITIONS THAT, IF PROVEN, INVOLVE SERIOUS DEPRIVATIONS OF BASIC HUMAN NEEDS

Respondents attempt to argue that the petitioner has not alleged conditions that involve serious deprivations of

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(App. 33), a reasonable trier of fact could conclude that respondents acted with a culpable state of mind. As this Court held in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986):

> [T]he plaintiff, to survive the defendant's [summary judgment] motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

[23] *Bell* also indicated that conditions of detention that required pretrial detainees "to endure genuine privations and hardships over an extended period of time" might raise serious questions under the due process clause as to whether these conditions amounted to punishment. *Id.* at 542.

basic human needs by restating those allegations in a manner that minimizes the seriousness of the conditions described by petitioner. *See* Respondents' Brief at 13-14. Yet respondents do not challenge the petitioner's summary of the parties' opposing contentions at pp. 4-6, n.3, of petitioner's brief.[24] Petitioner's affidavits alleged filth, foul odors, unclean food, vermin infestation, a stifling lack of ventilation coupled with high temperatures in summer and frigid temperatures in winter, bunks wet with rain from malfunctioning windows, and psychotic prisoners and prisoners with open sores mixed into the general population.[25] In addition, the respondents admit that some prisoners in the dormitory have age-related health problems.

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[24] It is black letter law that the evidence of the party opposing summary judgment is to be taken as true, and all justifiable inferences are to be drawn in that party's favor. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Thus, for example, when respondents cite their affidavits for the contentions that the heaters are in good working order, the restrooms are frequently cleaned, and the institution regularly exterminated, respondents are simply contradicting the petitioner's affidavits. Respondents' Brief at 43.

Indeed, the district court made the same mistake about summary judgment. At p. 4 of respondents' brief, they note that the district court made a finding that the respondents had not deprived petitioner of the minimal civilized measure of life's necessities. Respondents fail to note that the court of appeals held that the trial court had erred in granting summary judgment by adopting the findings in respondents' affidavits. App. 66.

[25] Respondents dismiss as "conclusory" the allegations in petitioner's affidavits regarding heating, lack of ventilation, and the presence of vermin. Respondents' Brief at 40. In fact, petitioner's affidavits contain numerous specific allegations about these claims. *See, e.g.*, App. at 16 (lack of ventilation combined with high temperatures causes prisoners to experience heat-related rashes and difficulty breathing); App. at 24 (walls and floors are cracked, and frigid air comes through the walls during winter months; prisoners, who are required to sleep with their heads toward the windows, use their blankets at the heads of their beds because of the frigid air); and App. at 35 (insects enter through the cracked walls and floors).

The lower courts did not conclude that the conditions alleged by petitioner failed to describe objective conditions serious enough to violate the Eighth Amendment. Indeed, the court of appeals held that petitioner's affidavits were "more than colorable" and further noted that "[s]everal circuits have found eighth amendment violations arising from conditions similar to those alleged by the [petitioner]." App. 66. (Citations omitted). Accordingly, based on the petitioner's affidavits, it was error to grant summary judgment against petitioner.

VI. IN EVALUATING PRISON CONDITIONS UNDER THE EIGHTH AMENDMENT, COURTS MUST CONSIDER THE TOTALITY OF CONDITIONS

Respondents' argument that "each challenged condition must constitute cruel and unusual punishment," and that courts may not consider the totality of conditions, flies in the face of settled precedent from this Court.[26] In *Rhodes v. Chapman*, 452 U.S. at 347, this Court held that conditions of confinement, "alone or *in combination*," may deprive prisoners of the minimal civilized measure of life's necessities. (Emphasis added). *See also id.* at 363 n.10 (Brennan, J., concurring) ("The Court today adopts the totality-of-the-circumstances test") (citations omitted).[27] In *Hutto v. Finney*, 437 U.S. at 688, this

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[26] The claims of excessive heat and the presence of psychotic prisoners in the dormitories raise Eighth Amendment claims independent of any related conditions.

[27] Respondents argue that this Court in *Rhodes* rejected the totality of the circumstances test, because the trial court applied that test, and this Court reversed the judgment of the trial court. In view of the language of both the majority and the concurrence cited in the text, this position is untenable. This Court disagreed with the trial court's conclusion that double-celling at the facility in question constituted cruel and unusual punishment, but in no way implied that conditions should not be considered in their totality. Indeed, this Court specifically considered the effect of double-celling on food, medical care, sanitation, and violence. 452 U.S. at 348.

Court noted "the interdependence of the conditions producing the [Eighth Amendment] violation." Thus, the Court in *Hutto* approved the action of the lower court in determining whether the Eighth Amendment had been violated by examining conditions "taken as a whole." *Id.* at 687. *See also* Petitioner's Brief at 36-39.

Moreover, the novel approach advocated by respondents is totally unworkable. Respondents do not explain exactly what an "individual condition" is. For example, in the case at bar, do petitioner's allegations that the air in the dormitories is hot, stagnant and foul-smelling constitute two conditions ("heat" and "ventilation") or one? Do the allegations of dirty toilet facilities, vermin infestation, and unwholesome food preparation pertain to three separate conditions, or do they all fall under the rubric of "sanitation"? Does the allegation that physically ill prisoners are housed in the dormitory due to a lack of infirmary space relate to "protection from disease" or "overcrowding"?

Prisoners do not experience "individual conditions" one at a time; they experience these conditions, and the interactions among them, in their totality.[28] This Court wisely recognized this reality in *Rhodes* and *Hutto*, and should now reject the unrealistic and unworkable formulation proposed by respondents.

Respondents also assert that the totality test is "inconsistent with the [*Rhodes*] majority's instructions to use 'objective criteria' to the greatest extent possible." Respondents' Brief at 22 n.17. *Rhodes* holds that conditions violate the Eighth Amendment when they "deprive inmates of the minimal civilized measure of life's necessities." 452 U.S. at 347. Whether prisoners are deprived of the basic necessities of life cannot be determined without examining the totality of the conditions under which they are confined. The objective conditions to which prisoners are subjected include the interaction among the various conditions.

[28] There are common-sense limits to this doctrine. Some conditions may be sufficiently discrete that they are not cumulative in their effect on prisoners. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986) ("a number of *unrelated* conditions, each of which satisfy eighth amendment requirements, cannot in combination amount to an eighth amendment violation") (emphasis in

CONCLUSION

For the above reasons, petitioner urges this Court to reverse the decision of the court of appeals affirming the grant of summary judgment to the respondents, and to remand this case to the district court for trial.

Respectfully submitted,

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original). But conditions pervasively affecting the prisoners' physical environment, like those alleged here, are particularly appropriate for a totality analysis. *See Tillery v. Owens*, 907 F.2d at 428 (double celling could be "unbearable" in connection with violence, filth, and fire hazards).