ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: PEARLY L. WILSON, Petitioner V.

RICHARD SEITER, ET AL.

CASE NO: 89-7376

PLACE: Washington, D.C.

DATE: January 7, 1991

PAGES: 1 - 48

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IN THE SUPREME COURT OF THE UNITED STATES

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PEARLY L. WILSON, :

Petitioner :

v. : No. 89-7376

RICHARD SEITER, ET AL. :

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Washington, D.C.

Monday, January 7, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:40 p.m.

APPEARANCES:

ELIZABETH ALEXANDER, ESQ., Washington, D.C.; on behalf of the Petitioner.

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

RITA S. EPPLER, ESQ., Assistant Attorney General of Ohio, Columbus, Ohio; on behalf of the Respondents.

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P R O C E E D I N G S

(1:40 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 89-7376, Pearly L. Wilson v. Richard Seiter.

We'll be with you in just a minute.

Ms. Alexander, you may proceed.

ORAL ARGUMENT OF ELIZABETH ALEXANDER

ON BEHALF OF THE PETITIONER

MS. ALEXANDER: Mr. Chief Justice, and may it please the Court:

This case involves the holding of the lower court that the Eighth Amendment does not allow relief directed at continuing conditions of prison confinement unless the individual defendants in the case acted with persistent malicious cruelty in maintaining the conditions of confinement. To affirm the lower court's decision in this case would mean that the conditions of confinement in the Nation's prisons could fall beneath any standard of decency without redress from the Federal courts.

The truly terrible conditions that gave rise to cases such as Hutto v. Finney would return. To affirm the lower court would mean that even if a prison deprived prisoners of the basic necessities of life on a continuing basis, that fact, regardless of the consequences in suffering and death to the prisoners, would not be enough

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to justify Federal court intervention. For this Court to affirm the lower court would necessarily mean abandoning the holdings of Rhodes v. Chapman, of Estelle v. Gamble, of West v. Atkins, of Youngburgh v. Romeo, and also the rationale of DeShaney v. Winnebago County DSS, that government has an affirmative duty to supply the basic necessities of life to those whom it has deprived of the ability to supply those necessities on their own.

Affirming the lower court would cause serious doctrinal problems because it would in effect create a good faith immunity defense to injunctive actions. Such a holding would be inconsistent with this Court's settled rule that good faith immunities apply solely to damages actions.

And there is good reason for this rule by the Court. Giving prison officials a defense against damages when the constitutional deprivation is not their personal fault makes sense. Denying injunctive relief on that ground makes no sense. Once continuing conditions of confinement in a prison are bad enough to violate the Constitution by denying the basic necessities of life, the point of injunctive relief is to end the suffering, not to fix the blame.

No case in this Court supports the application of a malice standard to challenges to continuing conditions of confinement. No case in the courts of appeals other than

the lower court decision that is before the Court today supports such a result. The decision below is inconsistent with fundamental principles of Eighth Amendment jurisprudence established by this Court, and should be reversed.

In this case, the court of appeals held that the critical issue was the prison officials' state of mind, and that the affidavits of the petitioner, Mr. Wilson, did not put in issue the prison officials' state of mind under this Court's decision in Whitley v. Albers. According to the court of appeals, because the prison officials had alleged that they had made affirmative efforts to improve conditions, they could not be acting with, quote, "obduracy and wantonness," and then there is an ellipsis from the court of appeals, "marked by persistent malicious cruelty."

Whether one construes the holding of the lower court as applying the full Whitley prison disturbance standard requiring malice and sadism, or some newly invented standard of the lower court requiring malice but not requiring sadism, the application of a malice standard to continuing conditions of confinement was error.

This case is governed by Rhodes v. Chapman, in which the Court dealt with a challenge to continuing conditions of confinement. In Rhodes this Court held that Eighth Amendment challenges to continuing conditions of

confinement should be examined by determining whether the conditions, alone or in combination, deprived prisoners of the minimal civilized measure of life's necessities. These necessities, as set forth in Rhodes and later in DeShaney, include food, medical care, sanitation, shelter, and reasonable safety. Had the court of appeals simply applied Rhodes, as its opinion makes clear, it would have remanded most of Wilson's claims for trial.

Wilson's claim of a lack of heat provides a convenient example of how the court of appeals should have analyzed this case under Rhodes v. Chapman. In their brief in this Court, the prison officials concede that a lack of heat can violate the Eighth Amendment. Wilson's allegations included a claim of a lack of heat since the prison opened in 1983. A lack of heat is an obvious condition.

QUESTION: Are we talking, Ms. Alexander, about a comparative lack of heat or a total lack of heat? Or can you tell?

MS. ALEXANDER: The -- there are several affidavits in support of petitioner that make slightly different claims. All of them are consistent with the claim that the complete is completely inadequate. It appears that there is some form of heat. One affidavit says the only place there is heat is right around the central toilet. The other affidavits say things such as because of the frigid

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air going through the large cracks in the walls, prisoners have to put blankets over their head. And therefore, a lack of heat is an obvious condition.

This is a facility with three living units. No warden in a facility with three living units could be aware -- unaware for three winters of that sort of lack of heat in the facility.

QUESTION: And when you say that, are you implying that you would accept a test that included deliberate indifference as one of the components?

MS. ALEXANDER: Your Honor, our position is that for continuing conditions of confinement no state of mind test is relevant. However, were this Court to find that any state of mind test were to be imposed, the court of appeals would have still erred because it applied the wrong test. If any test is relevant, and we think it is not for continuing conditions, then the relevant test ought to be deliberate indifference.

QUESTION: But you can tell -- you can make that determination by looking at objective factors, can't you? You can make an inference? I mean, you said yourself, no warden could let this go on for 3 years without knowing about it.

MS. ALEXANDER: That -- our position is that in fact, while it makes much more doctrinal sense to simply say

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for continuing conditions of confinement no state of mind test, in fact that analysis is going to come out the same way. Since it's going to come out the same way, it is a more coherent position and easier for the Federal courts to apply to simply say there is no state of mind test. Because it -- when you have an obvious condition, and that denies someone the basic necessity of life, and it continues for 3 years, then there is necessarily deliberate indifference.

QUESTION: Well, then you say that if something is unintentional, completely unforeseeable by the officials, it is necessarily cruel and unusual punishment?

MS. ALEXANDER: Short-term conditions raise different issues. They --

QUESTION: Well, then we have one test for short-term conditions and another for long term?

MS. ALEXANDER: In this sense, in the Rhodes -- in both Hutto and in Rhodes this Court said the conditions of confinement are punishment. And that is consistent with what we think we -- with our idea of what punishment is. That is the conditions that you have in your cell for a -- that continue, those are what we mean as punishment. And for those conditions, there is no state of mind test. The reason that in Whitley the Court applied the state of mind test was that it was dealing with conditions that were not imposed -- were not said to be imposed as punishment, and

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therefore it's important to know why they are.

And that distinction works when you look at long-term and short-term thing. If some -- if a condition in a cell continues for 3 years, then it is part of the punishment. If the heat fails for --

QUESTION: But there is also a showing of deliberate indifference.

MS. ALEXANDER: I would agree with that.

QUESTION: Because you use objective facts to determine an institutional state of mind.

MS. ALEXANDER: I would agree that the tests come out exact -- precisely the same. If you look at the short-term situation, and Whitley was in this sense a short-term situation, it looks, it makes more sense to find out why it happened. If there is no heat because the boiler broke, even if it was negligence on the part of the prison officials, then that's a different situation. What stops being different is, for whatever reason the boiler broke, if 3 years later it's not working, that's part of the punishment. That's also deliberate indifference, if that analysis is relevant.

QUESTION: Why is it part of the punishment after 3 years and not after, you know -- I just don't understand that at all. I also don't understand how you can say that -- I mean, we have said explicitly in Whitley that it is

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obduracy and wantonness, not inadvertence of -- or error in good faith, that characterizes the conduct prohibited by the cruel and unusual punishments clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control. I mean, that -- that's obviously a frame of mind test, not a --

MS. ALEXANDER: Your Honor, if I could respond to your second question regarding the language in Whitley first.

QUESTION: Yes. What do you do with that?

MS. ALEXANDER: The first thing is that the language, obdurate and wantonness, it was quoted at that point in Whitley, comes first from Gregg v. Georgia and later from Rhodes v. Chapman. In both those cases when that language was used it was used to refer to the effects of the -- of the policy or condition on people. It wasn't in fact in those cases used to refer to a state of mind.

The second thing I would -- and that seems to -- that's one way to reconcile that language in Whitley.

QUESTION: Well, what about the phrase, not only it is obduracy and wantonness, but it goes on to say not inadvertence or error in good faith. That's what we said in Whitley: not inadvertence or error in good faith.

MS. ALEXANDER: It seems to me that the other way

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to reconcile that dictum in Whitley is to say that the precise language that the Court was using at that point was conduct. We agree that there is a difference about whether or not state of mind applies to short-term conduct. And in a -- and that distinction between short-term events and continuing conditions or formal government policies, reconciles all the Court's Eighth Amendment decisions easily. It also, by the way, reconciles Estelle v. Gamble.

QUESTION: Yes, but you can say that it reconciles them by the simple fact that when it goes on for a long time you can more easily find the absence of inadvertence or error in good faith. That's the reason it reconciles them. Because when it lasts for 3 years it's impossible to believe that somebody didn't know about them. So it does show the obduracy. It does show the mental state. I don't know any other basis for just picking out of the air a long-term/short-term distinction. Where do you get it from?

MS. ALEXANDER: The distinction reconciles all this Court's cases in the Eighth Amendment area. In fact, when the Court has --

QUESTION: Well, blue-eyed defendants might do it, too, but what's the reason for long term-short term? I have given you a reason that reconciles long term and short term. It's the same one that Justice Kennedy suggested. Long term shows a different state of mind than short term does.

MS. ALEXANDER: I agree that if one, if courts go through the analysis on long-term events they will always come to the same result. That is that the deliberate indifference test in practice will be satisfied. I think, however, it is -- it is less -- it is less complicated and makes more sense -- of all the cases from Stanford v. Kentucky, Rhodes v. Chapman, and so forth, in which this Court has not remotely suggested that a state of mind was an element of an Eighth Amendment violation to look at it this way when there is an official Government policy, or when there is a continuing condition, so that the conditions are necessarily part of the punishment, then there is no reason to look at state of mind.

Indeed the precise language from Rhodes v. Chapman is we held in Hutto v. Finney that -- well, I am obviously paraphrasing broadly -- because the conditions in that case were so bad, there was a violation of the -- the conditions violated the Eighth Amendment. There is not the slightest suggestion in Rhodes v. Chapman that any state of mind was relevant in determining whether a continuing condition of confinement violated the Eighth Amendment.

QUESTION: Well, Ms. Alexander, in, certainly in Estelle against Gamble, where there was a claim based on failure to render medical care to prisoners, the Court followed, as I understand it, a deliberate indifference

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standard.

MS. ALEXANDER: Yes.

QUESTION: A state of mind component.

MS. ALEXANDER: Yes. And the reason it did so is that the Court majority in Estelle also viewed that as, as a one time short-term event, a series of limited individual interactions with the medical department. Justice Stevens in dissent instead said this looks to me as if it could be a systemic case, and then said, and I think this was a prescient comment, when it's -- when you look at something as a systemic case, then it's irrelevant for there to be any state of mind test under the Eighth Amendment.

Given the Court's construction in Estelle of the medical claim in that case as a one-time event, then the Court's decision to use a deliberate indifference standard makes sense.

QUESTION: Well, don't you think the deliberate indifference standard would apply to a long-term neglect of medical care needs as well?

MS. ALEXANDER: No, because given -- the only point --

QUESTION: Would it reach the same result?

MS. ALEXANDER: You would reach the same result. I agree with that. However, given that you would always reach the same result when you have an obvious condition

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that deprives prisoners of the basic necessities of life, then there is no need to put this extra complication in the law requiring courts to look at a state of mind.

QUESTION: Ms. Alexander, you've confused me now. I thought you were drawing the distinction between long term and short term, but in your colloquy with Justice O'Connor it has changed to systemic versus nonsystemic. It can be long term but nonsystemic, it seems to me, that is if one particular prisoner were denied medical treatment over the long term. Where does that come within your theology here? Is that a long term or is it a nonsystemic? What -- how does it work?

MS. ALEXANDER: I apologize, Your Honor. What I meant by systemic, because it's a word usually used in the medical area, is that -- is equivalent to long term. That is a continuing denial of the basic necessity --

QUESTION: Even to one prisoner?

MS. ALEXANDER: Even to one prisoner.

I'll reserve the balance of my time.

QUESTION: Thank you, Ms. Alexander. Mr. Bryson, we'll hear from you.

ORAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING THE PETITIONER

MR. BRYSON: Mr. Chief Justice, and may it please

the Court:

Our position in this case can be stated very simply, and that is that a prisoner is subjected to cruel and unusual punishment if the conditions of his confinement deny him a minimal level of basic human needs. Now, it follows from that that where the conditions of confinement are at issue there is no need to inquire into the state of mind and certainly no need to inquire to find that the conditions are the product of, and I quote, "persistent malicious cruelty," as the defendants in the court of appeals suggest. This --

QUESTION: Not even negligence? You consider negligence to be a state of mind, too, right? It doesn't even require negligence?

MR. BRYSON: Not -- there is no need to inquire into the reason. That is right. Because there is a duty. There is --

QUESTION: What if you have a hurricane and all the lights go out in the prison and there is just no air conditioning. It's just terrible for 2 days, and help can't get through. Is that --

MR. BRYSON: That, Your Honor, that is not what we would consider to be the prison conditions. That is something that happens to the prison; it happens to the people who live outside the prison. It is something that's,

if you will, an act of God. It isn't something that is a product of the incarceration, that is part of the punishment --

QUESTION: More specifically, it's not a product of anybody's negligence or deliberateness.

MR. BRYSON: Your Honor, the reason we -- the reason we resist the notion of negligence or resist deliberateness is simply this, and it's really -- it comes down to the class of cases that we are particularly concerned about here. And that is suppose that the warden, the prison officials -- the prison officials are trying to do a good job, but they don't have the resources. There is some reason in just the way resources are allocated by the legislature or requirements of law that they can't provide the services that are basic to human necessity, human life. They can't provide enough decent food. They can't provide enough decent shelter. The fact that they aren't acting in bad faith, deliberately, or even negligently should not be a defense to an injunctive action. If you want --

QUESTION: But we could say that the State is. The State legislature is guilty of deliberate indifference in the hypothetical you --

MR. BRYSON: You could. You could. Your Honor, you could say that there is a collective deliberate indifference by virtue of somebody, we can't point the

finger at any particular person, but somewhere out there there is deliberate indifference because how in the world could anybody allow conditions like this to continue without being deliberately indifferent.

Now, it seems to me you have created a fiction if you do that. It is not, in our view, the most direct way to approach the problem, but it's going to be a way that will result in most instances, perhaps all instances, in the same result.

QUESTION: I don't consider it a fiction if the legislature is in default of an obvious duty.

MR. BRYSON: Well, it may be though. When you speak of deliberate indifference, the normal sense is that somebody has some kind of moral culpability with respect to the conduct. It may be that the -- nobody, no one person in the legislature ever sat down and looked at the situation and said this is a problem but we are not going to attend to it. So if, when -- normally when you say deliberate indifference you are talking about somebody who is reckless or something like recklessness. We don't think that should be required.

But, of course, if the Court construes the term deliberate indifference in a way that does not impose this kind of moral requirement of recklessness, but simply says if you have a condition which is a general condition in the

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prisons and it denies people the necessities of life, that's deliberate indifference, then you come out exactly where we come out. You just have one more step in the process.

QUESTION: Well, Mr. Bryson, you are really submitting quite a broad proposition to the Court, not so much about intent, but the idea that it is a cruel and unusual punishment if prisoners are not provided with minimal, what you regard as minimal, what, food, clothing, shelter?

MR. BRYSON: Exactly, Your Honor.

QUESTION: What authority do you have from this Court for that?

MR. BRYSON: Your Honor, we looked to the cases --

QUESTION: Go ahead, tell me what the authorities are.

MR. BRYSON: Yes, well, I would look first to, the best statement is the DeShaney case. If I can just read --

QUESTION: The DeShaney case doesn't deal with the Eighth Amendment.

MR. BRYSON: Well, it did discuss. It was admittedly dictum, but I think the dictum is very telling, in which the Court said with respect explicitly to the Eighth Amendment, it said that there is a duty when you have someone in your custody -- you have taken them into your

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custody and you have thereby deprived them of the ability to fend for themself, that if they are nonprisoners it's the due process clause, if they are prisoners it's the Eighth Amendment, you have a duty to provide them with the basic necessities of life. That, Your Honor, is the position that this Court set forth --

QUESTION: All you have is dicta in DeShaney for this sweeping proposition?

MR. BRYSON: No. Your Honor, we have, in Rhodes against Chapman, in Hutto against Finney, the Court has said essentially the same thing. I think not as clearly as in the DeShaney case and in West against Atkins, and again in Youngburgh against Romeo. But in each of those cases, either the premise or the explicit point was that there is a duty under the Eighth Amendment, in a case in which you have somebody in your custody, to provide them with the basic necessities of life. You can't let someone starve when you have deprived him of the ability to feed himself.

QUESTION: But all we granted certiorari in on this case was whether the malicious and sadistic intent requirement. We didn't take it to decide a whole range of questions as to what sort of things prisons have to furnish. It's just basically a question of what is the intent which must be shown when they fail to provide something.

MR. BRYSON: That's right. And our suggestion is

no intent. Our suggestions with respect to that precise question is certainly not malicious and sadistic intent or even persistent malicious intent, as the Sixth Circuit and as the respondents suggest.

QUESTION: In Justice Scalia's hypothetical of the hurricane, I take it if the prison warden, in anger at the prisoners, had so arranged the heating and the plumbing that the same conditions applied, you would say that was cruel and unusual, wouldn't you? In other words, he hoses the prisoners down with water and turns up the heat.

MR. BRYSON: Yes. And that would be Whitley against Albers. In other words, you can have cruel and usual punishment.

QUESTION: So cruel and unusual does have an intentional component?

MR. BRYSON: Well, it does in the case in which one person sets out to punish another, even if it is in a single isolated instance. If I, as a prison warden, decide to punish you, prisoner number 443, by arranging for your cell mate to attack you, that's a violation of the cruel and unusual punishment clause, and you can -- that is actionable. But that doesn't mean that's the only thing that's actionable, and it doesn't mean that although state of mind is necessary in that case, because it is an isolated instance, that state of mind is also necessary in cases

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involving general continuing conditions.

I think the problem, to reiterate, which we see with the position that the court of appeals took and that the respondents are arguing for is that it leaves a major hole in the cruel and unusual punishment jurisprudence that this Court and the lower courts have recognized for years. We are not asking for a radical change in the way cruel and unusual case -- punishment cases are litigated. This is, if you will read these cases one after another in the lower courts, this is the standard they have used. They have said are the conditions unacceptable? If they are and it's a product of general prison conditions, that's a violation.

And I think if this Court in fact adopts the position urged upon it by the State, that will be a radical change in the nature of cruel and unusual punishment litigation, and we would strongly urge that the Court not follow that path.

Thank you.

QUESTION: But you would leave the Estelle test intact for medical --

MR. BRYSON: The Estelle test seems to me to go more to the nature of the medical care that is adequate. In other words --

QUESTION: And you would leave Whitley in place --

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MR. BRYSON: Oh, yes, I --

QUESTION: -- where there is prison security involved?

MR. BRYSON: That's right, yes. Yes, we have no problem with that.

QUESTION: Thank you, Mr. Bryson.

Ms. Eppler, we'll hear from you now.

ORAL ARGUMENT OF RITA S. EPPLER

ON BEHALF OF THE RESPONDENTS

MS. EPPLER: Thank you. Mr. Chief Justice, and may it please the Court:

In Whitley v. Albers this Court determined that it is wantonness and obduracy that characterize conduct prohibited by the cruel and unusual punishment clause, whether that conduct occurs in connection with conditions of confinement, supplying medical needs, or in quelling a prison uprising. A necessary balance between the competing societal interest of humane treatment of inmates and the security and financial concerns of operating our Nation's prisons requires a standard that affords proper deference to prison officials' decision making. This balance would be achieved in a conditions of confinement case by defining wantonness and obduracy as requiring malice.

QUESTION: May I just ask, you mentioned financial concerns. Would it always be a defense to a warden, no

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matter how bad the conditions were, to say I tried to get money from the legislature but they wouldn't appropriate?

MS. EPPLER: No, Your Honor, it clearly would not. But since this Court --

QUESTION: But why not? Because he was acting entirely in good faith, nothing wanton about what he is doing. He just can't get the money.

MS. EPPLER: Your Honor, I think that would depend on whether the named defendants were the ones that had a culpable state of mind. If in fact the warden is the only named defendant, there would --

QUESTION: Well, they name everybody on the prison staff, and they are all boy scouts. They want to help as much as they can, but the legislature didn't appropriate the money.

MS. EPPLER: I think in that instance, under a 1983 action there would not be a culpable state of mind present on behalf of a named defendant, and yes, there would be no actionable Eighth Amendment conduct.

QUESTION: And who could the -- who could the prisoners sue? Could they sue the State?

MS. EPPLER: No, Your Honor, they could sue --

QUESTION: So there'd be -- there would be no remedy in the case I pose then?

MS. EPPLER: To the contrary, Your Honor. There

would be a remedy --

QUESTION: What would the remedy --

MS. EPPLER: -- within the State courts, if this did not rise to constitutional --

QUESTION: Oh, in the State courts.

MS. EPPLER: -- deprivation.

QUESTION: But there would be no Federal remedy?

MS. EPPLER: If there was in fact the proper named defendant with a culpable state of mind named --

QUESTION: No, I'm assuming there is nobody who has a culpable state of mind. They are all trying to help the prisoners, but they cannot get the money because the legislature won't appropriate. And they have the conditions, just -- Andersonville. You cannot imagine worse conditions, but there is no remedy under your proposal.

MS. EPPLER: As alluded to in --

QUESTION: No Federal remedy.

MS. EPPLER: -- in the earlier questions, there could in fact be a collective state of mind type of inquiry based on --

QUESTION: On behalf of whom?

MS. EPPLER: -- whether the legislature or the governor --

QUESTION: But who -- but who do you sue for that collective state of mind? Don't you have to sue the State?

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MS. EPPLER: I believe you could sue the governor or you could sue the legislature itself.

QUESTION: Well, what if the governor also urged such legislation, but the legislature just wouldn't pass it?

MS. EPPLER: The governor does have the ability in a fiscal emergency to take over and appropriate monies where necessary, so in fact that could be a resolution within the Federal judiciary, as well as having the ability to sue the State (inaudible).

QUESTION: But he would be guilty of violating the Eighth Amendment if he did not exercise his extraordinary power to appropriate that kind of money, even though he thought it was in the best interest, but as a matter of political philosophy he thought the legislature ought to be doing it?

MS. EPPLER: Your Honor, it is, it is the State's position that if there is in fact a condition that constitutes punishment, deprives a basic human need, and is done with a wanton and obdurate state of mind, that that would be the only way in which an Eighth Amendment violation should be able to be made out. If in fact there is any of those three elements missing, it is the State's position that that should in fact be fatal to an Eighth Amendment claim.

QUESTION: What if it's lack of medical care? Do

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you think the Estelle test is applicable?

MS. EPPLER: Yes, Your Honor.

QUESTION: Deliberate indifference.

MS. EPPLER: Yes, Your Honor. In fact --

QUESTION: And why not other prison conditions, then? Lack of food. Why wouldn't you apply the same standard?

MS. EPPLER: When looking at conditions of confinement, Your Honor, there are in fact competing governmental interests at issue. Security and financial concerns play a role.

QUESTION: Well, they play a role in medical care too. I don't see how you distinguish.

MS. EPPLER: When this Court looked to the medical claims raised in Estelle v. Gamble, I believe they in fact identified that the interests of the inmate in being free from physical injury were paramount. However, when looking at conditions of confinement, we are looking to conditions that are uncomfortable but do not involve the type of detriment to bodily integrity, injury, or illness that could result in a medical case.

QUESTION: But they might involve all those things, actually.

MS. EPPLER: At the point --

QUESTION: If the food were insufficient or the

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circumstances of incarceration were such that they were subjected to abuse and injury from other prisoners. I mean, there could be a wide variety of things that would cause severe medical results in effect.

MS. EPPLER: That is certainly correct, Your Honor.

QUESTION: And why wouldn't you apply the same test?

MS. EPPLER: At the point in time when there is a serious medical need that arises that prison officials had been deliberately indifferent to, there would be an actionable Eighth Amendment violation. But when the conditions are simply something that is more hypothetical in nature and does not --

QUESTION: They're just inhuman, but they are not medical?

MS. EPPLER: If there is no deprivation --

QUESTION: That's a very odd line, it seems to me.

MS. EPPLER: Your Honor, if the -- the deliberate indifference test should apply when looking at medical needs. Prior to a condition becoming a medical need, it is the State's position that there is a requirement of showing some form of malice because of the competing societal interests at issue here. In fact, if looking at petitioner's own claims, can give examples.

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Petitioner claims that there is a lack of ventilation in the dormitory, and that this is true because there is a requirement on behalf of the prison officials to close the fire doors, and that crash gates down at the bottom of the stairwell will be sufficient to hold prisoners. Clearly this is an example of a clear security question that must be left to the deference of prison officials.

The petitioner also claims or challenges his classification in the particular institution that he is assigned to, and then his classification or assignment to the dormitory facility that he is in. Again, this goes to the very core of security-type of determinations that prison officials must be afforded wide deference to.

QUESTION: But does he contend, Ms. Eppler, that his wrong classification is a cruel and unusual punishment?

MS. EPPLER: Your Honor, that is one of the claims that he raises that has -- that he has challenged violates the Eighth Amendment. Yes, in fact it is.

This Court has recognized that the courts are ill equipped to deal with the increasing urgent problems of prison administration, and that it would be not wise to second-guess the expert administrators on matters to which they are better informed. This Court has in fact readily recognized that there are security and special expertise-

type of decisions on behalf of prison officials that must be afforded wide deference.

The United States in this case attempts to in essence apply a no state of mind test when looking at conditions of confinement. It is clear that when this Court has looked at any Eighth Amendment case, the inquiry is whether the claim constitutes cruel and unusual punishment. Petitioner attempts, as well as United States, to apply a test that disregards prison officials' state of mind. In fact that clearly runs afoul of this Court's decision in Whitley v. Albers, and in fact runs afoul of a number of other decisions of this Court.

First off, in Whitley this Court defined wanton and obdurate behavior as requiring in fact malicious and sadistic for the very purpose of causing harm type of mind set.

QUESTION: In the context of a prison riot, of course.

MS. EPPLER: Yes, Your Honor.

QUESTION: And I thought the opinion was careful to say that it might be some different mental component in other contexts.

MS. EPPLER: Absolutely, Your Honor.

QUESTION: I thought it referred specifically to Estelle against Gamble, for example.

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MS. EPPLER: That is absolutely correct, Your Honor. And Estelle v. Gamble is another example of the use of a state of mind analysis when looking at medical cases. The Court found that there had to be deliberate indifference to a serious medical need.

Again in Graham v. Connor this Court, when examining a Fourth Amendment question, looked at the very terminology of the Fourth Amendment as it was compared to the Eighth Amendment, and found that the terms "cruel" and "punishment" clearly require an intent or some inquiry into the intent analysis, whereas the terms "unreasonable" from the Fourth Amendment did not.

QUESTION: Will you help me on this state of mind point? If you cut off my breathing and stop me from breathing, does it matter to me as to what your state of mind is?

MS. EPPLER: Your Honor, I would submit that the state of mind is equally important whether it is a physical --

QUESTION: Does it matter to me while I'm being strangled?

MS. EPPLER: Well, it may not matter what the intent of the official is to you --

QUESTION: Of course it doesn't.

MS. EPPLER: It certainly would make equally as

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much sense to look at the intent of the prison officials in a medical-type of context.

QUESTION: Well, what other reason would he do it, other than to choke me?

MS. EPPLER: Your Honor, in that instance, if an inmate were being choked by a prison official, there is no question but that malicious intent would in almost all instances under that type of hypothetical be implied.

QUESTION: You would have to -- it would be implied?

MS. EPPLER: Yes, Your Honor.

QUESTION: But you would have to consider it?

MS. EPPLER: Absolutely, Your Honor.

QUESTION: So what we're arguing about is considering and applying it.

MS. EPPLER: Your Honor, I believe what we're -- what we are here to consider --

QUESTION: When they complain about the air coming in the room and freezing them, we have to find out whether they intended that maliciously?

MS. EPPLER: Absolutely, Your Honor.

QUESTION: They did it knowing full well what they were doing. But in addition to that you have to prove by a preponderance of the evidence that it was malicious?

MS. EPPLER: Yes, Your Honor. In fact it is --

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it is the necessity of using a persistent malicious cruelty test that will afford the proper deference to prison officials' decision making.

The lower --

QUESTION: Then why isn't it equally true, to go back to Justice O'Connor's question, why isn't it equally appropriate in the medical care context? I understand what you're saying, but I am missing the point of how you distinguish Estelle.

MS. EPPLER: Your Honor, the distinction between Estelle and this type of a situation is when you are looking at systemic conditions of confinement there is not yet the type of physical injury or illness that is in fact identifiable in a medical case. In the deliberate indifference context there is a specific individual that is in fact seriously ill, and there has been a disregard of that inmate's medical needs.

When looking at conditions of confinement there is a need to look at not only whether the prison officials had knowledge of the existing conditions, but what actions they took to cure those existing conditions, and what barriers to action there were, if any, financial or any otherwise type of barriers, to their ability to cure deficient conditions. We believe the lower court's definition of persistent malicious cruelty allows the

ability for examination of good faith remedial efforts taken to cure deficient -- allegedly deficient conditions, and also allows the ability to look at whether there is ongoing policies in place to maintain habitable conditions, such as were in place at the Hocking Correctional Facility.

This Court in Whitley v. Albers was clear to identify that inadvertence or error in good faith should not be identified as actionable conduct. We believe the persistence element of the lower court's test proscribes that just that type of conduct should not be actionable. In addition, the petitioner's claims here fail to present any genuine issue of material fact regarding any condition of his confinement.

QUESTION: What test do you think Rhodes against Chapman used? That was a prison conditions case.

MS. EPPLER: Yes, Your Honor. I believe in that case this Court looked to the conditions existing at the Southern Ohio Correctional Facility and found that in fact double-celling did not violate the minimal civilized measure of life's necessities.

QUESTION: I know that. What test -- did it have a standard? Did it -- do you think they -- that that case included a mental element in deciding the Eighth Amendment issue?

MS. EPPLER: I believe this Court did not need to

reach that question because they found that there was no deprivation of a basic human need. Once that element was not satisfied, the culpable state of mind inquiry really did not become relevant. So while this Court did not directly address the question of whether culpable state of mind was necessary in the Rhodes v. Chapman decision, it is our interpretation that that simply was not a necessary inquiry to at that point inquire into.

QUESTION: And you think Rhodes against Chapman has not been overruled or confined to its facts, or anything of the kind, by later cases?

MS. EPPLER: My understanding is that there are no -- no decisions since the 1981 decision in Rhodes v. Chapman that either limits it to its facts or in any way overrules that decision.

QUESTION: May I ask you this question about the Rhodes case? Supposing there had been proof -- it is very unlikely, but there had been internal memoranda, smoking guns, and all sorts of things, that proved that the warden and his staff just hated these prisoners and had a malicious state of mind, but all they did was just exactly what they did objectively there. An Eighth Amendment violation or no?

MS. EPPLER: What they did objectively in this case, Your Honor?

QUESTION: No, what they did objectively in Rhodes

against Chapman. You have those conditions, but they were in fact motivated by a malicious state of mind because the warden and his colleagues just hated these prisoners, but they thought they couldn't get away with anything more than what they did.

MS. EPPLER: No, Your Honor, I still believe --

QUESTION: They imposed double-celling because they thought it would make the prisoners uncomfortable, and they wanted to do it to harm them.

MS. EPPLER: In Rhodes v. Chapman, I believe the answer --

QUESTION: Would that violate --

MS. EPPLER: -- would be no. In Rhodes v. Chapman this Court found that there was no deprivation of basic human need.

QUESTION: So the malicious state of mind is not the sole criteria?

MS. EPPLER: That's correct, Your Honor.

QUESTION: It's just one of -- a necessary, but not a sufficient condition.

MS. EPPLER: Correct, Your Honor. Our position is that this Court should adopt a three-part test that requires an analysis into whether the conditions constitute punishment, whether they were inflicted by a prison official acting with a wanton and obdurate state of mind, and in fact

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whether there was a deprivation of a basic human need. And failure to present any of those three claims should be fatal to an Eighth Amendment violation.

In fact the attempt to apply what the petitioner and the United States are attempting to argue here would result in, in essence, strict liability on behalf of prison officials. All good faith remedial efforts --

QUESTION: Well, strict liability against action for an injunction. Not necessarily, as your opponent pointed out, in action for damages.

MS. EPPLER: That is correct, Your Honor. The United States concedes that there should be examination of state of mind when looking at a damage action, and tries to limit their argument to simply injunctive relief. However, it, that simply runs afoul of this Court's analysis of general 1983 law. In fact in Daniels v. Williams and Davidson v. Cannon this Court considered Fourteenth Amendment claims and found that there was in fact a need to find something more than lack of due care or negligence to trigger the protection of the due process clause.

And in Daniels this Court specifically stated that in any given 1983 suit the plaintiff must prove a violation of the underlying constitutional right, and depending on the right, merely negligent conduct simply may not be enough. When looking at the right in question here, the Eighth

Amendment, clearly this Court has recognized that an intent element is a necessary inquiry to make out any Eighth Amendment violation. So what the United States is attempting to do here is to proscribe for injunctive relief a different form of identifying the cause of action, and in fact it is the State's position that that would simply be incorrect.

The -- in a conditions of confinement case, malice is required here to show a wanton --

QUESTION: Let me just interrupt you again, if I may. What about our capital punishment cases? Is there any requirement of a malicious intent on the part of the State? Say, you can't impose the death sentence for the crime of rape. That is true regardless of what the State's intent is, isn't it?

MS. EPPLER: In those cases, Your Honor, I believe the Court was looking more to the element of whether something was punishment in the constitutional sense --

QUESTION: Right.

MS. EPPLER: -- and if something is in fact intended as punishment --

QUESTION: But all I'm suggesting is there's no requirement that the State be motivated by any kind of special malicious intent in those cases.

MS. EPPLER: In imposing the death penalty --

QUESTION: Yeah.

MS. EPPLER: No, Your Honor.

QUESTION: So you're -- this is just -- your argument goes only to confinement cases?

MS. EPPLER: That is correct, Your Honor. It is solely limited to the conditions of confinement context.

QUESTION: Maybe what Justice Stevens' question suggests is that you're wrong to establish, as you did earlier, three separate criteria. That maybe there is one that always has to exist, and that is the deprivation of some basic necessity of life, including life itself, and either of the other two, either the intent to punish, which would explain the capital punishment cases, because you are taking away the person's life intentionally in order to punish the person, not malicious or anything, but in order --

MS. EPPLER: It would certainly not be inconsistent with the State's position, Your Honor.

QUESTION: So why don't you do it that way? There must either be an intent to punish or, as you say, if not an intent to punish, it -- that's not the purpose of it but nonetheless it is done with the requisite state of mind, ranging from indifference up to wantonness. I don't know how you want to describe it. Would that explain the cases?

MS. EPPLER: I think that would still be

consistent with the State's position and consistent with the precedents of this Court, yes, Your Honor.

When looking at the question of the procedural nature of this case it must be kept in mind that this is a motion for summary judgment and not a motion to dismiss. Summary judgment has been recognized by this Court as an important tool to expeditiously resolve disputes. Summary judgment preserves the rights of parties to have their disputes heard, and enables judges to determine without trial cases in which no genuine issue of material facts exists.

The courts' ability to utilize summary judgment is particularly important when looking at Eighth Amendment claims of pro se prisoners who are entitled to liberal construction of their pleadings and who make conclusory allegations fairly often that they have been denied the -- in fact the Eighth Amendment rights, or that they have been subjected to cruel and unusual punishment.

As noted by the amicus brief filed on behalf of 19 state's attorneys general, by any gauge prisoners are a group of prolific litigators. The volume of prison litigation has been steadily increasing. Petitioner himself is a classic example of an individual adding to the congestion in the Federal courts. In the last 2 years alone he has filed over 24 Federal court appeals, and since 1976

himself has filed over 70 Federal court appeals.

While state of mind is in fact a factual question that may not be resolved on a motion to dismiss, it clearly is an essential inquiry on a motion for summary judgment. If the actions taken by prison officials to show their state of mind are not relevant in conditions of confinement cases, a prisoner could defeat a motion for summary judgment merely by making conclusory statements that mirror or reflect a conclusory complaint. It is unavoidable that conditions of confinement will be objectionable to prisoners. However, good faith efforts made by prison officials to in fact provide prisoners with habitable conditions must be considered in the summary judgment analysis.

To evaluate whether petitioner has in fact presented a genuine issue of material fact, this Court must evaluate the objective facts to determine whether a reasonable jury could find that the petitioner has been denied the minimal civilized measure of life's necessities, and whether prison officials acted with a wanton and obdurate state of mind. Petitioner here has not been denied any minimal civilized measure of life's necessity, which has been defined to include food, clothing, shelter, medical care, and reasonable safety.

The threshold level at which unpleasant conditions become a constitutional violation is not defined by the

point at which petitioner himself is personally offended.

QUESTION: I thought that state of mind issues were almost inappropriate for summary judgment.

MS. EPPLER: No, Your Honor, I think this Court has directly recognized in Anderson that state of mind question are certainly appropriate for disposition on summary judgment. In fact the inquiry is the same as it would be at a trial on a directed verdict question. And the question is whether a reasonable jury could conclude that there is --

QUESTION: That's true of any issue, of any -- but if you put state of mind, it seems to me that you are certainly inviting waiting for a jury trial to decide all this.

MS. EPPLER: Your Honor, I think this -- in all due deference, I believe this Court has previously recognized in Anderson that there is an ability to decide questions of state of mind on a summary judgment level as well as on a directed verdict level at trial.

QUESTION: You say that you have a three-step inquiry?

MS. EPPLER: That's correct, Your Honor.

QUESTION: And any one of them that is missing is fatal to the case?

MS. EPPLER: That is correct, Your Honor.

QUESTION: Including deprivation of basic conditions of life?

MS. EPPLER: That is correct. And on this record we believe that no reasonable jury could have concluded that the respondents here acted with a wanton and obdurate state of mind, or that the petitioners were denied the minimal civilized measure of life's necessities. When looking solely at the objective facts that show the efforts taken by prison officials, there is no question that petitioner's complaints simply do not state an Eighth Amendment violation.

Regardless of whether this Court defines wanton and obdurate for purposes of conditions of confinement cases as requiring deliberate indifference or persistent malicious cruelty, there is no question but the petitioner has simply presented no genuine issue of material fact for this Court. The petitioner has made a series of complaints that basically identify that he is not pleased with being housed in a dormitory facility. He believes that there is inadequate cooling; he believes that the restrooms are unclean and the kitchen facilities are unclean and that there is excessive noise.

However, the record shows by undisputed affidavits that Petitioner's claims that he is occasionally subjected to 95 degree temperatures, which certainly all Ohio

residents without air conditioning are likewise subjected to, shows that the ventilation is adequately maintained during summer months by open windows and two large fans that are placed at each end of the dormitory.

Petitioner's claims of unclean restrooms and kitchen facilities are also countered. The evidence shows that the restrooms are cleaned two times a day and additionally spot cleaned as needed. The kitchen areas and dining room areas are cleaned after every meal, and that prison individuals that work in the kitchens are required to wear plastic gloves and hats. And in fact both inmates and prison staff --

QUESTION: Ms. Eppler, this wasn't the ground that the court of appeals for the Sixth Circuit went off on, that these things were not deprivations, whatever the state of mind. They said that in order for them to be deprivations you had to show the state of mind set forth in the Whitley opinion, and really didn't get to the question of whether, had that state of mind been shown, these nevertheless would have been deprivations.

MS. EPPLER: Your Honor, I believe what the lower court did was identify that Whitley v. Albers' wantonness and obduracy is what controls the analysis of conditions of confinement claims. They then did add an additional sentence that said that wantonness and obduracy would be

defined as behavior marked by persistent malicious cruelty. The court did not apply the Whitley v. Albers test, which has been argued by our opponent. In fact there was no -- nowhere in the entirety of the opinion the word sadistic utilized. Unquestionably an analysis that looked at a sadistic state of mind would have required additional evidence than simply showing malice.

QUESTION: But wanton and obdurate does -- which are the words the court of appeals did use, certainly suggest some sort of subjective inquiry.

MS. EPPLER: Clearly there was an inquiry into state of mind, without question, and the lower court found, correctly, that there was no evidence that could have supported a reasonable jury determination that the prison officials acted with a wanton and obdurate state of mind. And the position of the respondents is that regardless of what standard is utilized for analyzing wantonness and obduracy, be that deliberate indifference or malice or persistent malicious cruelty, the outcome in this case is the same. There is no evidence in this record that would show that the prison officials in any way acted with a wanton and obdurate state of mind.

In conclusion, Your Honors, the cruel and unusual punishment clause was never intended to serve as an escape from the unpleasantness of imprisonment. Ohio does not seek

to operate its prisons without regard to prisoners' constitutional rights. However, inmates should not be encouraged to use the Federal courts as arbiters of grievances for what amount to only uncomfortable living conditions. The lower court imposed a meaningful test that protects the rights of inmates and still allows appropriate deference to prison officials' decision making.

Therefore, respondents respectfully request that this Court affirm the grant of summary judgment by the lower court.

Thank you, Your Honors.

QUESTION: Thank you, Ms. Eppler.

Ms. Alexander, you have 4 minutes remaining. Do you have rebuttal?

REBUTTAL ARGUMENT OF ELIZABETH ALEXANDER

ON BEHALF OF THE PETITIONER

MS. ALEXANDER: Thank you, Your Honor.

I want to begin by going back to the last series of questions, Mr. Chief Justice, that you asked opposing counsel. I want to point out that the court of appeals found that most of the claims raised by Wilson did suggest the type of seriously indecent conditions that, if proven, would violate the Eighth Amendment. That is, the first thing that the court of appeals did was not the state of mind analysis, but whether the conditions alleged were bad

enough that there was an Eighth Amendment violation. On that ground it has already said yes, most of these claims do rise to that level.

I -- as to the -- I want to go back to the point about whether or not Rhodes has anything to say about whether or not the state of mind analysis applies. I submit that the Court's discussion in Rhodes of the Hutto case makes very clear that in Rhodes this Court saw no reason for a state of mind test. The Court in Rhodes makes clear that in Hutto v. Finney the Constitution was violated because the conditions were so bad. There is no suggestion in that language that there was some other element necessary for it. And Rhodes and Hutto also say that the conditions of confinement are punishment, because they are -- and that's why they are to be analyzed as they are.

Because they are punishment in a sense, I think that they are equivalent to Justice Scalia's point about don't we know that these are intentionally imposed. When the conditions are in the sense that one intends the natural consequences of one's act imposed on a condition, on a continuing basis, those are part of the punishment. Given that they are part of the punishment, then Whitley simply isn't relevant, because Whitley is a case that analyzes when some particular conduct that is not imposed as punishment might nonetheless violate the Eighth Amendment.

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Justice Stevens asked -- well, I'm sorry. I have one other point I want to go to. I want to go back to whether or not there is any difference between damages and injunctive actions. Now, the first point and I think the central point is that the Eighth Amendment standard for either injunctive actions or damages actions is the same. The standard under the Eighth Amendment is the same, but of course there are differences when one is speaking about damages with regard to special defenses that apply the damages and not injunctive actions, and --

QUESTION: What authority do you have that 1983 liability, if we accept the standard you propose, would be limited so far as damages are concerned?

MS. ALEXANDER: The major authority, Your Honor, that I would cite is the Youngburgh case, and that is where I wanted to go next. Justice Stevens asked about the financial issues, and the prison officials in this case have made no claim at all that the reason that they failed to supply the necessities of life has to do with financial reasons. But let's assume that they did. Then there would come a time when there would be a difference between damages and injunctive actions, because under this Court's decision in Youngburgh if a professional is prevented from doing his or her duty because of a lack of finances, then that is a defense in damages. And it can't possibly --

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QUESTION: As against the professional only.

MS. ALEXANDER: Against the professional only. It can't -- you can't possibly apply that defense, of course, in injunctive actions, because if you did, and there was some question about isn't -- shouldn't we look for deliberate indifference from someone. And, imagine how hard in an injunctive action it would be to figure out who actually was the person who denied the money. That just doesn't work.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Alexander.

The case is submitted.

(Whereupon, at 2:36 p.m., the case in the above-entitled matter was submitted.)

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