Eighth Amendment. Cruel and Unusual Punishment and Conditions Cases

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EIGHTH AMENDMENT—CRUEL AND UNUSUAL PUNISHMENT AND CONDITIONS CASES

Wilson v. Seiter, 111 S. Ct. 2321 (1991)

I. INTRODUCTION

In *Wilson v. Seiter*,[1] the United States Supreme Court held that a prisoner alleging that the prison conditions of his confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of the prison officials.[2] The Court, applying the standard announced in *Estelle v. Gamble*,[3] held that deliberate indifference is the appropriate mental standard to apply to an Eighth Amendment analysis.[4]

This Note argues that Justice Scalia, who wrote the majority opinion for the Court, although logically consistent, based his analysis upon an unwarranted definition of the term prison conditions. Specifically, Justice Scalia established a dichotomy between the "per se" imposed sentence and the resulting imprisonment. He stated that the "per se" sentence carries an intent to punish but that the resulting imprisonment requires an additional intent to punish on the part of the prison officials before it can qualify as cruel and unusual punishment. This dichotomy results in an opinion that lends little guidance to lower courts and will potentially lead to horrendous conditions continuing in prisons due to a search for a superfluous intent on the part of prison officials.

This Note also contends that Justice White, in his concurrence, correctly demanded only an objective Eighth Amendment analysis for prison conditions cases. He distinguished past Eighth Amendment cases relied upon by the majority by explaining that these cases were not conditions cases but were the actual sentenced punishment or allegations that only involved specific acts directed at an individual, not prison conditions. He correctly asserted that condi-

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[1] 111 S. Ct. 2321 (1991).
[2] *Id.* at 2326.
[3] 429 U.S. 97 (1976).
[4] *Wilson*, 111 S. Ct. at 2327.

tions are themselves part of the sentence and therefore do not require an additional inquiry into the prison officials intent.

II. Factual and Procedural Background

Pearly L. Wilson is a felon incarcerated at the Hocking Correctional Facility (HCF) in Nelsonville, Ohio.[5] Wilson complained that a number of the conditions of his confinement constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[6] In his suit brought pursuant to 42 U.S.C. § 1983[7] against Ohio prison officials, Wilson specifically alleged that improper conditions included overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates.[8] Wilson sought declaratory and injunctive relief, as well as $900,000 in compensatory damages.[9]

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[5] *Id.* at 2322.

[6] *Id.* The Eight Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const, amend VIII. The Eighth Amendment is made applicable to the states via the Due Process Clause of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962).

[7] 42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1988).

[8] *Wilson*, 111 S. Ct. at 2323. Wilson's complaint alleged that the overcrowding consisted of two inmates in one cell which was less than fifty square feet per person, that the dormitory was "nearly frigid" in the winter with no provision made for adequate clothing and during the summer, due to lack of proper ventilation, the temperatures were excessively high causing difficulty breathing and heat-related rashes. The complaint further alleged that the bathrooms were "dirty, slippery, and malodorous" and that the dining facilities were unsanitary, improperly ventilated with a poor sewage drainage system. In addition, the complaint alleged that the prisoners were improperly classified, thus leading to the presence of physically and mentally ill prisoners in the dormitories which created a dangerous and stressful environment. Brief of Petitioner, Wilson v. Seiter, 111 S. Ct. 2321 (1991) (No. 89-7376) at 6. The prison officials' brief alleged that the prisoners are allowed considerable movement within the prison, the inmates could choose to watch television or cable television including a movie channel, exercise in the gym, walk in the yard, play pool, read in the prison library, visit guests in the visitors' lounge, and attend continuing education classes. The inmates only were required to report to their bunks only at night and for several periodic counts during the day. In addition, only older inmates are placed at HCF for their own protection. Brief for Respondents, Wilson v. Seiter, 111 S. Ct. 2321 (1991) (No. 89-7376) at 33, n.1-2.

[9] *Wilson*, 111 S. Ct. at 2323.

The parties filed cross-motions for summary judgment.[10] Wilson, in his supporting affidavit, described the challenged conditions and charged that after notification, the authorities did not attempt to remedy the situation.[11] Prison official's supporting affidavits denied the existence of some of the alleged conditions and described prison officials efforts to improve the others.[12]

In granting respondent's motion for summary judgment, the District Court found that the Eighth Amendment requires states to furnish inmates with reasonably adequate food, clothing, shelter, sanitation, medical care and personal safety.[13] In order to survive a motion for summary judgment, the District Court required proof that the conditions of confinement were the result of "obduracy and wantonness, not inadvertence or error in good faith" on the part of the prison officials.[14] The Court held that the alleged conditions were not the result of obduracy or wantonness on the part of prison officials.[15] The District Court also dismissed Wilson's claims concerning confinement with physically-ill inmates, cleanliness of lavatories, noise levels, heating and cooling, ventilation, eating conditions and general sanitation based on the strength of contrary assertions contained in the respondent's affidavits.[16]

Wilson appealed the District Court's decision, claiming the District Court improperly granted the respondent's summary judgment motion because genuine issues of material fact remained regarding confinement conditions.[17] The Court of Appeals for the Sixth Circuit affirmed the District Court's decision.[18] The Court of Appeals agreed with the District Court that Wilson's claims regarding inadequate cooling, housing with mentally ill inmates, and overcrowding, even if true, did not establish constitutionally violative conditions and therefore, should be dismissed.[19] As to the remaining allegations, the Court of Appeals held that Wilson's allegations failed to raise a reasonable inference of obduracy and wantonness which is marked by persistent malicious cruelty and therefore, there was no genuine issue of material fact.[20]

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10 *Id.*
11 *Id.*
12 *Id.*
13 Wilson v. Seiter, 893 F.2d 861, 863 (6th Cir. 1990).
14 *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)).
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* at 867.
19 *Id.* at 865.
20 *Id.* at 867.

The United States Supreme Court granted certiorari to decide the question whether an inmate claiming that the conditions of his confinement constitute cruel and unusual punishment is required to show that the prison officials possessed a culpable state of mind and if so, what is the required state of mind.[21]

III. SUPREME COURT OPINIONS

A. MAJORITY OPINION

Writing for the majority,[22] Justice Scalia held that prisoners alleging that the conditions of their confinement are cruel and unusual in violation of the Eighth Amendment are required to show that prison officials were deliberately indifferent.[23] The Court vacated the Sixth Circuit's decision and remanded the case for consideration under this deliberate indifference standard.[24]

Justice Scalia began his discussion with an examination of precedent. He noted that the Court in *Estelle v. Gamble*[25] established the rule that prison conditions which are not specifically part of the sentence are subject to the cruel and unusual punishment clause of the Eighth Amendment.[26] He proceeded to examine subsequent cases of cruel and unusual punishment in conditions cases in order to determine the appropriate standard for Eighth Amendment scrutiny of that which is beyond the sentence itself.[27] According to Justice Scalia, the Court in *Estelle* relied primarily upon *Louisiana ex rel. Francis v. Resweber*[28] in which the Court held that the Eighth Amendment Cruel and Unusual Punishment Clause does not forbid subjecting a prisoner to a second electrocution after the first attempt.[29] Justice Scalia pointed out that in *Francis*, since an "unforeseeable accident" thwarted the first attempt at electrocution, the officials lacked the culpable state of mind required to transform the punishment into a violation of the Cruel and Unusual Punishment

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21 Wilson v. Seiter, 111 S. Ct. 2321, 2321-22 (1991).

22 Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy and Souter joined. Justice White, with whom Justices Marshall, Blackmun, and Stevens joined, concurred in the judgment only.

23 *Wilson*, 111 S. Ct. at 2327.

24 *Id.* at 2328.

25 *Id.* at 2323. *Estelle* involved an inmates allegations that he received inadequate medical care and therefore was subject to cruel and unusual punishment. The Court held that the State has an obligation to provide medical care to it's prison inmates and that deliberate indifference to the serious medical needs of the prisoners would constitute an Eighth Amendment violation. 429 U.S. 97, 103-04 (1976).

26 *Wilson*, 111 S. Ct. at 2323.

27 *Id.* at 2323-24.

28 329 U.S. 459 (1947).

29 *Wilson*, 111 S. Ct. at 2323.

Clause.[30]

Next, Justice Scalia examined *Rhodes v. Chapman*[31] in which inmates at the Southern Ohio Correctional Facility contended that double-celling (lodging two inmates in one cell) violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[32] Justice Scalia conceded that *Rhodes* focused only on the objective component of a cruel and unusual punishment claim but[33] indicated that the Court continued to require a subjective component of an Eighth Amendment violation in the next relevant case, *Whitley v. Albers*.[34] In *Whitley*, a prison official's act of shooting a prisoner in the midst of attempting to quell a riot was not a violation of the Eighth Amendment because "conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interest or safety . . . . It is *obduracy and wantonness, not inadvertence or error in good faith*, that characterizes the conduct prohibited by the Cruel and Unusual Punishment Clause."[35] Justice Scalia concluded that an objective approach was not sufficient to analyze an alleged constitutional violation, but rather an inquiry must be made into the prison officials' state of mind.[36]

According to Justice Scalia not only does precedent demand such an inquiry into the prison official's state of mind, but an examination of the Eighth Amendment itself requires such consideration. Justice Scalia rejected Wilson's and the United States', as *amicus curaie*, suggestion that there should be a distinction drawn between "short-term" or "one-time" conditions (in which a culpable state of mind is required) and "continuing" or "systematic" conditions (in which state of mind would be irrelevant).[37] Justice Scalia held that the intent requirement is not a "whim" of the Court, but rather the logical interpretation of the Eighth Amendment which bans only

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30 *Id.*

31 452 U.S. 337 (1981).

32 *Wilson*, 111 S. Ct. at 2324. The inmates, in *Rhodes*, alleged that double-celling was cruel and unusual punishment because the inmates in the prisons had extended sentences, the prison was overcrowded, the inmates were forced to share a cell measuring sixty-three square feet although several studies recommend that each inmate have at least fifty to fifty-five feet of living quarters, that double-celling was not a temporary condition and that the inmates spent a majority of their time in the cell. *Rhodes*, 452 U.S. 337 (1981).

33 *Wilson*, 111 S. Ct. at 2324.

34 475 U.S. 312 (1986).

35 *Wilson*, 111 S. Ct. at 2324 (emphasis in the original) (quoting *Whitley*, 475 U.S. 319).

36 *Id.* at 2324.

37 *Id.* at 2325.

cruel and unusual *punishment*.[38] There must be some mental element attributable to a prison official before inflicted pain can qualify as punishment if it is not meted out as punishment for the convicted offense by either statute or the sentencing judge.[39] To illustrate, Justice Scalia drew on the following statement.[40]

> "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century. . . [I]f [a] guard accidently stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word,whether we consult the usage of 1791, or 1868 or 1985."[41]

Refusing to accept Wilson's suggested short-term versus continuing conditions distinction in which amici joined, Justice Scalia explained that although continuing conditions may make it easier to establish "intent," this is not a logical reason to forgo the requirement of "intent."[42] In addition, he emphasized that the implementation of a short term/long term distinction would require an hour-by-hour or day-by-day differentiation coupled with a categorizing of different conditions that defy rational implementation.[43] Justice Scalia ignored the United States' fear that an intent requirement would allow officials to defend Eighth Amendment claims by pleading that, despite good faith efforts, fiscal constraints beyond the officials control prevented the elimination of unconstitutional conditions.[44] In rejecting this policy argument, he stated that "[a]n intent requirement is either implicit in the word 'punishment' or is not; it cannot be alternately required and ignored as policy considerations might dictate."[45]

In articulating the appropriate standard for the prison official's state of mind, Justice Scalia adopted the *Estelle* standard as opposed to the *Whitley* standard concluding that "deliberate indifference," as articulated in *Estelle*,[46] is the requisite standard to judge prison con-

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[38] *Id.* (emphasis in the original).

[39] *Id.* at 2325.

[40] *Id.*

[41] *Id.* (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) (Posner, J.), *cert. denied*, 479 U.S. 816 (1986)).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 2326.

[45] *Id.* In addition, Justice Scalia noted that a "cost" defense was not offered in this case and therefore, he would not rule upon the validity of such a defense in a conditions case. *Id.*.

[46] 429 U.S. 97 (1976). " 'The State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities, so that in that context, as *Estelle* held, 'deliberate indifference' would constitute

ditions cases.[47] He argued that although the offending conduct must be *wanton*, "*Whitley* makes clear, however, that in this context wantonness does not have a fixed meaning but must be determined with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.' "[48] Justice Scalia explained that in *Whitley*, the Court had found wantonness to consist of malicious and sadistic action with the purpose of causing harm.[49] Attributing the required malicious and sadistic mental state to the competing governmental responsibilities under such circumstances, Justice Scalia rejected such a high threshold for allegations of conditions of confinement.[50] Justice Scalia rejected the state's contention that the wantonness of conduct depends upon the effects of the conditions on the prisoners.[51] Instead, he stated that conduct is to be judged in regard to the constraints officials face.[52] Justice Scalia stated that food an inmate is fed, the clothes he is issued, the temperature in his cell and his protection against other inmates are all conditions of an inmate's confinement and no different from the medical care supplied to him.[53] In each of these situations, the prison officials faced the same constraints. Therefore, the Court concluded, the *Estelle* standard of deliberate indifference applied to providing medical care[54] is appropriate for the furnishing of these other basic provisions which make up conditions.[55]

Justice Scalia discounted Wilson's assertion that *Rhodes* stood for the proposition that each condition must be considered in light of every other challenged condition.[56] He explained that "some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise."[57] There must be an identifiable deprivation of a single, human need, not an allegation that the "overall" conditions amount

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wantonness." *Wilson*, 111 S. Ct. at 2326 (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)).

47 *Wilson*, 111 S. Ct. at 2327.

48 *Id.* at 2326 (quoting *Whitley*, 475 U.S. at 320).

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.* at 2326-27.

54 *Id.* at 2326.

55 *Id.* at 2327.

56 *Id.*

57 *Id.*

to a constitutional violation.[58]

Justice Scalia concluded that, although it was probably harmless error, the Court of Appeals erred in affirming the District Court's grant of summary judgment in respondent's favor[59] based upon its use of a "malicious and sadistic cruelty" standard, instead of the correct "deliberate indifference" standard and therefore, remanded the case for consideration under the appropriate standard.[60]

B. JUSTICE WHITE'S CONCURRING OPINION

Justice White, joined by Justices Marshall, Blackmun, and Stevens, concurred only in the decision to vacate the Sixth Circuit's decision and to remand. Justice White disagreed with the Court's decision that the decision be viewed under a deliberate indifference standard, arguing that a subjective intent standard is inappropriate because past decisions have focused solely upon objective criteria.[61]

Justice White agreed with the majority that "pain and suffering that is part of the punishment imposed on convicted criminals is subject to Eighth Amendment scrutiny without regard to an intent requirement."[62] Nevertheless, he criticized the majority's assertion that if the pain and suffering is not expressly due to the punishment inflicted by statute or the sentencing judge, its constitutionality is to be determined on the basis of the official's mental state.[63] Justice White argued that the majority's reasoning disregards prior decisions in which the Court has held that the "conditions are themselves *part of the punishment*, even though not specifically 'meted out' by a statute or judge"[64] and therefore, require only an objective analysis.[65]

Justice White pointed to the first case to address the relation-

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58 *Id.*

59 *Id.* at 2328.

60 *Id.* "Conceivably, however, the court would have given further thought to its finding of '[a]t best . . . negligence' if it realized that that was not merely an argument *a fortiori*, but a determination almost essential to the judgment. Out of an abundance of caution, we vacate the judgment of the Sixth Circuit and remand the case for reconsideration under the appropriate standard." *Id.*

61 *Id.* (White, J., concurring). He stated that "our prior decisions that have involved challenges to conditions of confinement, where we have made it clear that the conditions are themselves *part of the punishment*, even though not specifically 'meted out' by a statute or judge." *Id.* (emphasis in the original). Justice White, later in his concurrence, stated that both *Rhodes* and *Hutto*, the only two conditions cases, looked only to objective criteria. *Id.* at 2328-29. *See infra* notes 66-71.

62 *Id.* (White, J., concurring).

63 *Id.* (White, J., concurring).

64 *Id.* (White, J., concurring).

65 *Id.* at 2329-30. (White, J., concurring).

ship between the Eighth Amendment and conditions of confinement, *Hutto v. Finney*,[66] in which the Court upheld a District Court's limitation of punitive isolation based solely on objective criteria.[67] Justice White added that *Rhodes v. Chapman*[68] squarely resolved the dispute as to whether conditions of a prison could constitute cruel and unusual punishment and determined that they could.[69] He said that "*Rhodes* makes it crystal clear, therefore, that Eighth Amendment challenges to conditions of confinement are to be treated like Eighth Amendment challenges to punishment that is 'formally meted out *as punishment* by the statute or the sentencing judge.' "[70] In determining the constitutionality of the conditions in *Rhodes*, Justice White said that the Court only looked at the objective severity, not the intent of the officials.[71]

In contrast, Justice White posited that the majority mistakenly relied upon *Estelle v. Gamble*, *Whitley v. Albers*, and *Louisiana ex rel. Francis v. Resweber* for the proposition that intent is required to find a constitutional violation in prison conditions cases.[72] According to Justice White, in *Estelle* the challenge was to allegedly inadequate medical care that one individual received as opposed to a challenge to medical care in provided in general.[73] Similarly, he asserted that *Whitley* did not concern a prison condition but rather a shooting of an inmate.[74] Justice White additionally countered that *Francis* involved a constitutional challenge to a specific second electrocution after the first electrocution failed.[75] Justice White concluded that because these cases are not conditions cases, they will not support the proposition that intent is a requirement for Eighth Amendment violations in conditions cases.[76]

In addition, he indicated that *Whitley* expressly negates a re-

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66 437 U.S. 678 (1978).

67 *Wilson*, 111 S. Ct. at 2328-29 (White, J., concurring). The majority addressed Justice White's analysis of *Hutto* and said that the only issue in that case, apart from attorney's fees, addressed "punitive isolation" which inherent in its concept involves punitive intent. *Id.*, at 2324 n.2.

68 452 U.S. 337 (1981).

69 *Wilson*, 111 S. Ct. at 2329 (White, J., concurring). The majority said that White's interpretation of *Rhodes* was in error because *Rhodes* simply and only addressed the "disputed" issue of whether "the conditions were a sufficiently serious deprivation to violate the constitutional standard." *Id.*, at 2325 n.2.

70 *Id.* at 2329-30 (White, J., concurring) (emphasis in the original).

71 *Id.* (White, J., concurring).

72 *Id.* at 2330 (White, J., concurring).

73 *Id.* (White, J., concurring).

74 *Id.* (White, J., concurring).

75 *Id.* at 2330 (White, J., concurring).

76 *Id.* (White, J., concurring).

quirement of subjective intent in conditions cases.[77] "An express intent to inflict unnecessary pain is not required[78] and *harsh 'conditions of confinement' may constitute cruel and unusual punishment* unless such conditions 'are part of the penalty that criminal offenders pay for their offenses against society.' "[79] Justice White found that the majority erroneously interpreted subsequent dictum in *Whitley* by characterizing the obdurate and wanton conduct prohibited by the Eighth Amendment as harsh conditions of confinement instead of conduct that does not purport to be punishment at all.[80]

Turning from the case law, Justice White argued that the majority's intent requirement does not easily lend itself to practical application.[81] He explained that prison conditions are the result of many interconnected factors at play over long periods of time. According to Justice White, the Court offered no guidance as to how to determine whose intent the Court should examine.[82] In addition, he argued that the "deliberate indifference" standard could allow claims to be dismissed based solely on inadequate funding.[83] Accordingly, Justice White concluded "serious deprivations of basic human needs" will be immune from constitutional challenges due to a futile search for "deliberate indifference" on the part of prison officials.[84]

IV. ANALYSIS

A. THE CASE LAW OF CONDITIONS CASES

Constitutional challenges to prison conditions and the law that has developed in this area stem from the law regarding Eighth Amendment challenges to capital punishment. Like so many judicially created tests, in *Gregg v. Georgia*,[85] the Supreme Court established a two-prong test for determining the constitutionality of

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77 *Id.* (White, J., concurring).

78 *Id.* (White, J., concurring) (quoting Whitley v. Albers, 452 U.S. 312, 347 (1986) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976))).

79 *Id.*, at 2330 (White, J., concurring) (quoting *Whitley*, 452 U.S. at 347 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981))).

80 *Id.* (White, J., concurring). Justice White said that "[t]he majority places great weight on the subsequent dictum in *Whitley* that '[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the Cruel and Unusual Punishment Clause. . . . ' " *Id.* at 2330 (White, J., concurring) (quoting *Whitley*, 475 U.S. at 319). He criticized the majority's interpretation of conduct as "harsh 'conditions of confinement' " instead of the proper interpretation of conduct as "conduct that does not purport to be punishment at all." *Id.* (White, J., concurring).

81 *Id.* at 2330. (White, J., concurring).

82 *Id.* (White, J., concurring).

83 *Id.* (White, J., concurring).

84 *Id.* at 2331 (White, J., concurring).

85 428 U.S. 153 (1976).

capital punishment under the Eighth Amendment. The attempt to bring clarity to an elusive area of the law resulted in a far from well articulated test. The Court iterated the test as follows: first, the Court is required to look to objective criteria that establish contemporary values in regard to a challenged sanction,[86] and second, the punishment must comport with the "dignity of man"[87] which the *Gregg* court translated to mean that the punishment may not be "excessive."[88] This second prong requires that the punishment must not involve the unnecessary and wanton infliction of pain and the punishment may not be grossly disproportionate to the severity of the crime.[89]

In *Estelle v. Gamble*,[90] the Supreme Court extended the holding announced in *Gregg* and applied the enunciated Eighth Amendment analysis to the delivery of medical care to an individual prisoner. The Court explained that the State has an obligation to provide medical care for its inmates in order to avoid pain and suffering.[91] While recognizing that the contemporary values of a maturing society as enunciated in *Trop v. Dulles*[92] and *Gregg v. Georgia*[93] still define the evaluative criteria of a punishment,[94] the Court held that deliberate indifference to the serious medical needs of the prisoners would constitute "unnecessary and wanton infliction of pain" and hence would violate the Eighth Amendment.[95]

In a subsequent prison case, the Court decided the constitutionality of double-celling (two inmates in one cell) in *Rhodes v. Chapman*.[96] The Court held that double-celling did not constitute cruel and unusual punishment prohibited by the Eighth Amend-

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86 *Id.* at 173.

87 *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)). The *Trop* Court held that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop*, 356 U.S at 100. Therefore, the divestment of one's citizenship because of the act of desertion of the military is unconstitutional since it does not comport with the dignity of man. *Id.*

88 *Gregg*, 428 U.S. at 173.

89 *Id. See also*, Martin K. Thomas, Note, *The Effect of Rhodes v. Chapman on the Prohibition Against Cruel and Unusual Punishment*, 35 ARK. L. REV. 731 (1982).

90 429 U.S. 97 (1976).

91 *Id.* at 103.

92 356 U.S. 86, 101 (1958) (punishing a deserter of the military by denying him nationality is cruel and unusual punishment).

93 428 U.S. at 172-173 (punishment of death for the crime of murder does not, under all circumstances, violate the cruel and unusual punishment standard of the Eighth Amendment).

94 *Estelle*, 429 U.S. at 102.

95 *Id.* at 104.

96 452 U.S. 337 (1981).

ment.[97] Again the Court required a showing of unnecessary or wanton infliction of pain or gross disproportionately to the severity of the crime in order to find a constitutional violation.[98] The Court began to limit itself to the second prong of *Gregg* by restricting the weight that the contemporary standard of decency as enunciated in *Trop* could have in Eighth Amendment cases by saying that conditions that are not cruel and unusual under contemporary standards are the price that criminal offenders must pay for their crimes against society.[99]

Five years later, in *Whitley v. Albers*,[100] the Court found that a prison official's act of shooting an inmate in the leg in an attempt to quell a prison riot was not cruel and unusual punishment, because "conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety."[101] The Court stated that, although a constitutional violation is established if the punishment involves the unnecessary and wanton infliction of pain, the conduct needs to be examined with regard to the differences in the kind of conduct that is allegedly violative.[102] In *Whitley*, the Court held that the competing obligations involved in quelling a prison riot require a different standard than the deliberate indifference standard which had been used in previous decisions.[103] The Court defined the unnecessary and wanton infliction of pain as "force. . . applied. . . maliciously and sadistically for the very purpose of causing harm."[104]

B. WHAT ARE PRISON CONDITIONS?

The Court did not expressly state a reason for accepting certiorari in *Wilson v. Seiter* beyond its statement that the case presents the questions whether an inmate alleging cruel and unusual punishment in a prison conditions case must show a culpable state of mind and if so, what is the required state of mind.[105] It is not clear that Justice Scalia was suggesting that this area of the law was already decided

97 *Id.*
98 *Id.*
99 *Id.* at 347.
100 475 U.S. 312 (1986).
101 *Id.* at 319.
102 *Id.* at 320. The Court said that "in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to the inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used." *Id.*
103 *Id.*
104 *Id.* at 320-21.
105 Wilson v. Seiter, 111 S. Ct. 2321, 2322 (1991).

but different views of what constitutes prison conditions would lead to different conclusions. Like any term in the law prison conditions is not self-defining. An evaluation of the holding in *Wilson* therefore turns on an evaluation of Justice Scalia's and Justice White's definitions of the term "prison conditions." If the term covers any act or conduct by prison officials in addition to the present existing state of the prison or its officials which is directed at either an individual or to the entire prison population, then the majority's opinion is the proper conclusion. If instead, the term simply refers to the existing state of the prison in relation to all inmates, then the concurrence's analysis follows.

For purposes of an Eighth Amendment analysis, Justice Scalia distinguished the criminal's "per se" sentence from the imposition of that sentence. Justice Scalia simply stated that "[i]f the pain inflicted is not formally meted out *as punishment* by the statute or sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."[106] Although he did not state what the pain can qualify for, the inference must be drawn from his analysis that he is characterizing any conduct, act or present existing state of the prison which is taken after and in response to the imposed sentence as all that could qualify as punishment. Justice Scalia's reasoning appears to progress as follows: the Eighth Amendment prohibits only cruel and unusual punishment; punishment, by definition, carries an intent to punish; the per se sentence is punishment because it is intended to punish the criminal after and in response to his wrongdoing; everything beyond the per se sentence is the prison conditions; but not all prison conditions are punishment; therefore, in order to be considered punishment and thus subject to Eighth Amendment scrutiny the activity must carry with it an intent. Presumably, by definition punishment involves an intent to punish, therefore the sentence imposed on a convicted criminal certainly involves an intent to punish. But Justice Scalia suggested, without ever expressly so stating, that pain which results from, but is not an express part of the sentence does not necessarily involve the intent to punish. In order to qualify as punishment, there must be this intent to punish. If Justice Scalia's characterization of prison conditions is correct, the intent requirement is, at a minimum, understandable.

At the outset of his analysis in *Wilson*, Justice Scalia reviewed *Estelle v. Gamble*[107] in order to invoke the principle that deprivations

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106 *Id.* at 2325 (emphasis in the original).

107 429 U.S. 97 (1976).

which prisoners suffered during imprisonment, but which were not specifically part of the sentence, are subject to the Cruel and Unusual Punishment Clause of the Eighth Amendment.[108] Characterizing *Estelle* as a conditions case allowed Justice Scalia to use it to support his analysis. *Estelle* involved an inmate's allegations that he did not receive adequate medical care at the prison.[109] The concurrence pointed out, however that *Estelle* involved an allegation of specific conduct directed at one individual and not as a lack of medical care in general.[110] Justice Scalia responded that "if an individual is deprived of needed medical treatment, that is a condition of his confinement, whether or not the deprivation is inflicted on everyone else."[111] If, as Scalia interpreted it, *Estelle* is a conditions case, then it does support his intent requirement, because the *Estelle* Court found that there was no constitutional violation because there was no evidence of deliberate indifference by prison officials to the prisoners' needs.[112]

Justice Scalia next examined *Rhodes*,[113] the double-celling case, which looked only at objective factors[114] to determine that there was no constitutional violation.[115] He used *Whitley* to qualify *Rhodes*'s objective standard.[116] According to him, Rhodes did not dismiss the intent requirement, rather *Whitley* "made clear" that intent is still a required element.[117] It is undeniable that *Whitley* expressly stated that a negligent omission is not sufficient to establish an Eighth Amendment violation.[118] Instead, the resolution of *Whitley* was premised on the prison guard's lack of intent to punish.[119] Shooting the prisoner was obviously not a part of the sentence imposed, therefore, according to Justice Scalia, it constitutes conditions of his confinement. But, Justice Scalia's analysis continued, because the guard did not intend to punish the prisoner, the shooting could not constitute punishment. It was only Justice Scalia's characterization of a prison guard's act of shooting a prisoner as a

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108 *Wilson*, 111 S. Ct. at 2323.

109 *Estelle*, 429 U.S. at 98.

110 *Wilson*, 111 S. Ct at 2330 (White, J., concurring).

111 *Id.* at 2325 n.1.

112 *Estelle*, 429 U.S. at 107.

113 Rhodes v. Chapman, 452 U.S. 337 (1981).

114 The Court held that double-celling the inmates did not violate the constitution because it did not lead to "inadequate food, medical care or sanitation" within the prison nor did it lead to an increase in prison violence. *Id.* at 348.

115 *Wilson*, 111 S. Ct at 2324.

116 *Id.*

117 *Id.*

118 Whitley v. Albers, 475 U.S. 321, 329 (1986).

119 *Id.*

condition of imprisonment that allowed him to utilize *Whitley* as support for his contention.

In contrast, Justice White viewed conditions as "themselves *part of the punishment*, even though not specifically meted out by a statute or a judge."[120] Justice White seemingly implied that conditions to which a prisoner is subject are an unavoidable result of his sentence. His analysis distinguished conditions cases from specific acts directed at individual prisoners.[121] He emphasized that the only conditions cases which the Court analyzed are *Hutto V. Finney*[122] and *Rhodes v. Chapman*.[123] According to Justice White, *Louisiana ex rel. Francis v. Resweber*,[124] *Estelle*[125] and *Whitley*[126] each involved challenges to specific acts directed at individual prisoners and therefore, were not conditions cases.[127] Any intent requirement which those cases required are inapplicable to conditions cases.

Neither definition is logically faulty, but Justice White's concurring opinion did not stretch to define conditions in a manner contrary to common sense. Common sense directs that anything that happens behind those prison bars that pertains to the existing state of the prison is a condition of the imprisonment. This would include, for example the size of the cell, food, clothing, general medical care, and the temperature of the the facilities. In sum, this translates into everything that the factfinder expects to exist at the prison when the sentence is imposed. Justice Scalia's definition of prison conditions defies common sense. He establishes a dichotomy between the "per se" sentence and everything else which includes not only the existing state of the prison but everything that happens behind the prison bars such as shooting an inmate and and individual's access to medical care. But, his definition includes the caveat that the "everything else" can only be punishment if it carries an intent to punish. Although a common sense interpretation is not a constitutional mandate, when a word is defined in a way that is con-

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120 *Wilson*, 111 S. Ct. at 2328 (White, J., concurring) (emphasis in the original).

121 *Id.* at 2330. (White, J., concurring).

122 437 U.S. 678 (1978). *Hutto* involved allegations that the conditions in a prison constituted cruel and unusual punishment. The Supreme Court held that confinement in a punitive isolation cell for an indeterminate period was not, in and of itself, cruel and unusual but that the length of punitive isolation in conjunction with a filthy overcrowded cell, a diet of gruel and the relatively worse condition of the punitive isolation cell in relation to the prison did constitute cruel and unusual punishment. *Id.* at 867.

123 452 U.S. 337 (1981).

124 329 U.S. 459 (1947).

125 429 U.S. 97 (1976).

126 475 U.S. 312 (1986).

127 Wilson v. Seiter, 111 S. Ct. 2321, 2330 (1991) (White, J., concurring).

tradicted by common sense, the conclusion must be reached that the definer is stretching to reach a predetermined outcome.

The dichotomy established by Justice Scalia in the majority opinion seems awkward because it appears self-evident that any action or conduct taken in response and as a part of the imposed sentence necessarily involves an intent to punish. Justice Scalia said that "[i]f the pain inflicted is not formally meted out *as punishment by the statute or the sentencing judge*, some mental element must be attributed to the inflicting officer before it can qualify."[128] Justice Scalia denied the purpose of an imprisonment sentence. It is impossible to distinguish prison conditions from the sentence. A criminal defendant is sentenced to serve time in a prison. The purpose of imprisonment is to punish the convicted for the crime he has committed. Thus, what the prisoner encounters in the conditions of his confinement are part and parcel of his sentence. There is no need to look for an additional intent to punish when considering the constitutionality of the conditions because the intent to punish has already been established by virtue of the fact that the criminal has been sentenced to imprisonment. If the imposed sentence involves an intent to punish, it necessarily follows that the resulting conditions of that sentence also involve the same intent to punish, thereby making Justice Scalia's requirement of an additional intent to punish superfluous and subject to questioning his intentions regarding the outcome of the case.

As the concurrence asserted, *Whitley*,[129] *Estelle*[130] and *Francis*[131] are distinguishable from both *Rhodes*[132] and *Hutto*[133] because prison conditions are distinguishable from acts or omissions directed at individual prisoners.[134] Conditions pertain to the present existing state of the prison, not to an act or omission of an act by an official. If an act was habitual, it might rise to the level of a condition of a prison, but, the nature of a specific act is that it occurred once and thus, hardly seems to qualify as a condition of a prison. *Whitley* involved the act of a prison official shooting an inmate as he was running up stairs.[135] The purpose of firing was not to punish the inmate, but rather to protect the guard who was still being held hostage. In *Estelle*, the inmate's allegation was the failure to provide

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128 *Id.* at 2325 (emphasis in the original).
129 Whitley v. Albers, 475 U.S. 312 (1986).
130 Estelle v. Gamble, 429 U.S. 97 (1976).
131 Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).
132 Rhodes v. Chapman, 452 U.S. 337 (1981).
133 Hutto v. Finney, 437 U.S. 678 (1978).
134 Wilson v. Seiter, 111 S. Ct 2321, 2330 (1991) (White, J., concurring).
135 Whitley v. Albers, 475 U.S. 312 (1986).

adequate medical care to him,[136] not as an existing condition of the prison but rather as the omission of a specific duty in one circumstance. Both cases involve a specific act or omission of the prison official, not an existing condition of the prison.

Justice Scalia claims that the Court in *Estelle* relied heavily on *Francis*[137] in which the second electrocultion after the first failed was deemed not to be cruel and unusual punishment.[138] Scalia appears to be mistaken on that point since *Estelle* quoted *Francis* only twice throughout the whole opinion; once as additional authority for the proposition that the Eighth Amendment prohibits the "unnecessary and wanton infliction of pain"[139] and a second time to support the *Estelle* Court's contention that an "unforeseeable accident" does not violate the constitution.[140]

Even if Scalia were correct, and *Estelle* did rely on *Francis*, Francis is not a conditions case. Francis involved one specific act directed at one specific individual. More importantly, the act of electrocution is a far cry from the conditions of a prison, rather, it is the actual sentence which "per se" involves an intent to punish. *Francis* is not a prison conditions case and hence, should have no bearing on *Wilson*. Justice Scalia's linking of *Estelle* to *Francis* suggests that the former, like the latter, is not a conditions cases. *Francis* involved an "unforeseeable accident" in that at the time of the sentencing, the future failure of the electrocution process was unknown. Likewise, *Estelle* involved an "unforeseeable accident" in that the sentencing judge or statute was unaware that the specific inmate would be hurt and then receive inadequate care. In both cases, the alleged acts were unforeseeable and not part of the imprisonment sentence.

Although the majority does not so concede,[141] the *Rhodes* Court specifically stated that it was addressing for the first time the applicable standard for prison conditions cases.[142] The *Rhodes* decision focused solely upon objective criteria.[143] Given the Court's explanation of what it was doing and the subsequent analysis, we must

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136 Estelle v. Gamble, 429 U.S. 97 (1976).

137 *Wilson*, 111 S. Ct. at 2323.

138 Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459 (1947).

139 *Estelle*, 429 U.S. at 102 (quoting *Francis*, 329 U.S. at 463).

140 *Id.* at 105 (quoting *Francis*).

141 *Wilson*, 111 S. Ct. at 2325 n.2.

142 Rhodes v. Chapman, 452 U.S. 337, 344-45 (1981). The Court stated "[w]e consider here for the first time the limitation that the Eighth Amendment, which is applicable to the States through the Fourteenth Amendment, imposes upon the conditions in which a State may confine those convicted of crimes." *Id.*

143 *Id.* at 346.

conclude that prison conditions cases are to be decided on the bass of objective criteria. Likewise, *Hutto*, a case before *Rhodes* but also addressing the constitutionality of punitive isolation, focused on objective criteria.[144] Justice Scalia said that *Hutto* focused solely on objective criteria because punitive isolation necessarily involves an intent to punish and therefore, its use lends no support to the concurrence's argument.[145] But, as the concurrence correctly pointed out, the *Hutto* Court said "*[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.*"[146] Hence, contrary to Scalia's assertion,[147] its objective analysis is also applicable to conditions in a prison.

In addition to defining prison conditions contrary to common sense, Justice Scalia formulated a standard for determing whether conduct is cruel and unusual, that focuses on the wrong party. As the concurrence stated in *Rhodes*, "[i]n determining when prison conditions pass beyond legitimate punishment and become cruel and unusual, the 'touchstone is the effect upon the imprisoned.' "[148] Justice Scalia additionally asserted that different levels of "wantonness" of conduct are applicable to different situations in the prison. He said that "the wantonness" of conduct does not depend upon the effects on the prisoners.[149] Instead, it depends upon "the constraints facing the *official*."[150] Therefore, according to him, we need only concern ourselves with the prison officials' mental state and the constraints they face. This is an awkward starting point for an Eighth Amendment analysis. Punishment which is to be deemed cruel and unusual should not be dependent upon the prison officials. It should be completely dependent upon the effects on the inmates. If, as Justice Scalia said, there must be a determination as to whether the pain is inflicted with an intent to punish, to determine whether it is in fact cruel and unusual must rest on whether it is cruel and unusual in relation to the inmate without any regard to the official. For example, drawing and quartering a convicted criminal is cruel and unusual because it is an excessive punishment which does not comport with the dignity of man, not because of any sadistic intent on the part of the executioner.

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144 Hutto v. Finney, 437 U.S. 678, 686-87. (1978).

145 *Wilson*, 111 S. Ct. at 2325 n.2.

146 *Id.* at 2329 (White, J., concurring) (emphasis in the original) (quoting *Hutto*, 437 U.S. at 685).

147 *Wilson*, 111 S. Ct. at 2325 n.2.

148 Rhodes v. Chapman, 352 U.S. 337, 364 (1981) (J. Brennan, concurring) (quoting Laaman v. Helgemoe, 437 F.Supp. 269, 323 (D.N.H. 1977)).

149 *Wilson*, 111 S. Ct. at 2326.

150 *Id.* (emphasis in the original).

Justice Scalia's opinion also paves the way for an economic defense which should have no bearing on whether punishment is cruel and unusual. Although Justice Scalia claimed that the Court did not rule upon the validity of a lack of resources defense,[151] he implicitly ruled upon it. As the concurrence correctly pointed out, fiscal restraints on the part of the prison officials will defeat any allegation of an Eighth Amendment violation.[152] Lack of resources is a very real constraint which prison officials face. It is beyond their control and thus, implicates no intent to mete out punishment. No matter how minimal the level of subjective intent required, a lack of resources to improve a prison is the ultimate impossibility to improvements. For example, if an inmate alleges a lack of food provisions, the prison officials can constitutionally defeat the inmate's allegation by asserting their own lack of resources.

The lack of resources defense could be disastrous for both parties involved in an alleged Eighth Amendment violation.[153] If a constitutional violation is avoided for lack of resources, the prison officials will be unable to increase the funds allotted to them by the legislature who distributes the money. The prisoner, too is no better off because he continues to be subject to the poor conditions. This creates not only the possibility, but the probability that deplorable prison conditions will continue to exist with no end in sight only because of a lack of resources. Under Justice Scalia's analysis, neither party wins.

It is the legislature's responsibility to allot funds to the state prisons. Although, society's values are the province of the legislature,[154] it is the Court's duty to curb unconstitutional legislative acts. If horrendous prison conditions cannot be remedied due to a lack of funds and the Court has implicitly ruled that this is a valid defense, there never will be an improvement in conditions. Although the judicial branch must be wary of "overstepping" its bounds into the legislature's role, the judiciary is the only solution that inmates possess. The judiciary has a duty to curb unconstitu-

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151 *Id.*

152 *Id.* at 2330 (White, J., concurring).

153 In addition, a valid cost defense could be detrimental not only to inmates but also to the prison officials themselves. Prisons have only a finite amount of resources. If a constitutional violation could be found that was due to lack of resources and the cost defense was not valid, the State might be forced to increase the money allotted to a prison, thereby granting prison officials more money, personnel and resources which could also make the officials' jobs easier. Jeff Bleich, *The Politics of Prison Crowding*, 77 CAL. L. REV. 1125, 1127 (1989).

154 The Court in *Gregg* said that "the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards." Gregg v. Georgia, 428 U.S. 153, 175 (1975).

tional legislative activities. As Justice Brennan said in his concurring opinion in *Rhodes*, "[t]here is no reason of comity, judicial restraint, or recognition of expertise for courts to defer to negligent omissions of officials who lack the resources or motivation to operate prisons within the limits of decency."[155]

The question remains as to what an appropriate standard for conditions cases could be. Justice White merely alluded to the appropriate standard in a prison conditions case. He stated that "pain or other suffering that is part of the punishment imposed on convicted criminals is subject to Eighth Amendment scrutiny without regard to an intent requirement."[156] He then asserted that the conditions are part of the punishment,[157] thereby implicitly stating that all condition cases require an analysis which ignores subjective intent. Although Justice White never expressly states what is the appropriate Eighth Amendment test, he implicitly promotes a completely objective analysis. This assumption is easy to make due to Justice White's reliance upon *Rhodes* which demonstrated that the appropriate Eighth Amendment analysis is an objective determination.

Justice White ends his concurring opinion by stating "[t]he ultimate result of today's decision, I fear, is that 'serious deprivations of basic human needs'[158] will go unredressed due to an unnecessary and meaningless search for 'deliberate indifference.' "[159] Again, his immediate worry seems to be the deprivation of basic human needs which could reasonably be the touchstone of an Eighth Amendment analysis.

The Court has held that conditions which do not deprive an inmate of essential food, medical care or sanitation are not an Eighth Amendment violation.[160] An affirmative duty to provide the necessary human needs that is not qualified by a search for a subjective intent on the part of the prison officials is a standard that will provide superior guidance to lower courts than the standard set forth in *Wilson*. As the Court said in *Rhodes*, " 'Eighth Amendment judgements should neither be nor appear to be merely the subjective views' of judges."[161] Solely objective standards will provide for

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155 Rhodes v. Chapman, 452 U.S. 337, 362 (1981) (Brennan, J., concurring).

156 *Wilson*, 111 S. Ct. at 2328 (White, J., concurring).

157 *Id.* at 2328 (White, J., concurring).

158 *Id.* at 2331 (J. White concurring) (quoting *Rhodes*, 452 U.S. at 347)).

159 *Id.* at 2331 (J. White, concurring).

160 Rhodes v. Chapman, 452 U.S. 337, 348 (1981).

161 *Id.* at 346 (quoting Rummel v. Estelle, 445 U.S. 263, 275 (1980)).

an analysis that is not the subjective views of judges and hence a "better" constitutional interpretation.

V. Conclusion

The Court's decision requiring that an inmate show deliberate indifference on the part of the prison officials is both unneeded and unwarranted by past Eighth Amendment cases. The imprisonment sentence is impossible to distinguish from the actual imprisonment. Requiring an additional subjective intent will allow a myriad of defenses to an alleged Eighth Amendment violation, most importantly an economic defense. Since the judiciary is often the only savior for inmates, the majority opinion paves the way for grossly inadequate prison conditions to go unredressed. The Court's opinion also provides little guidance to lower courts in terms of who's subjective intent is at issue.

More importantly, the Court relied upon past Eighth Amendment cases that did not involve prison conditions. The Court denied the explicit holding of *Rhodes* to create a new standard for conditions cases. The Court expanded the common sense definition of the term "conditions" to include specific acts or omissions directed at individual prisoners in order to utilize past case law in support for its outcome.

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