CASE NO. 14-30067

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ELZIE BALL; NATHANIEL CODE; JAMES MAGEE,

Plaintiffs-Appellees,

v.

JAMES M. LEBLANC, SECRETARY, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY; ANGELIA NORWOOD, WARDEN OF DEATH ROW; LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,

Defendants-Appellants.

Appeal from The United States District Court,
Middle District of Louisiana, Case No. 3:13-cv-00368
Hon. Brian A. Jackson

APPELLEES' PETITION FOR PANEL REHEARING

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

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STATEMENT IN SUPPORT OF PANEL REHEARING

The panel's decision affirming in part and vacating in part the decision of the district court should be revisited for four key reasons: (1) extensive evidence in the record from Plaintiffs' expert and other relevant sources demonstrated the necessity of an 88° maximum heat index; (2) the panel considered an issue that Defendants had waived; (3) even if the issue was not waived, the facts in the record show why relief should extend to the Death Row tiers; and (4) the panel's remand instructions would require the district court to further intrude into the administration of the prison. All of these matters should be corrected in the interest of justice, and merit rehearing under Fed. R. App. P. 40 and 5th Circuit Rule 40.2.

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STATEMENT OF COURT PROCEEDINGS AND DISPOSITION

In 2013, Plaintiffs filed suit alleging that the extreme heat they suffered as a condition of their confinement violated their Eighth Amendment rights. The district court ordered collection of heat index data on Death Row (the "Data").

Defendants were sanctioned for discovery misconduct in two areas: (1) modifying Death Row facilities in "bad faith" while the court ordered Data was being recorded and (2) failing to disclose "the cost of installation of air-conditioning" on Death Row despite having "put the cost of installing air-conditioning at issue." ROA.5059-5109.

The district court held a three-day trial and conducted a site visit of Death Row. In its 102-page ruling, the district court found that Defendants were deliberately indifferent to substantial risks of serious harm to Plaintiffs' health caused by the extreme heat levels on the tiers. ROA.5003-5012; ROA.5019-5044.

In crafting an injunction (the "Injunction"), the district court adopted expert recommendations to establish a maximum heat index of 88ºF[1] on the tiers and ordered Defendants to develop a plan to achieve this objective. ROA.5053. Defendants' proposed plan used existing ductwork with air conditioning units. The district court ordered it be implemented virtually unchanged. ROA.6839.

Defendants appealed, asserting that the district court had erred in finding an

[1] All following references to temperature or heat index are in degrees Fahrenheit.

Eighth Amendment violation and that the Injunction violated the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. This Court stayed the Injunction pending appeal. The panel upheld the district court's finding of an Eighth Amendment violation, vacated the Injunction, and remanded for *Gates*-type relief (i.e. water, ice, showers, fans, etc.).

STATEMENT OF RELEVANT FACTS

In 2006, Louisiana constructed a new Death Row facility at Angola. ROA.4968. The 25,000 square foot facility includes four housing wings, each of which contains two housing tiers (the "tiers") where inmates' cells are located. ROA.4968. Six of these constitute Death Row. Air conditioning is provided in all areas except the tiers where inmates are housed. ROA.2831, ROA.4968-69. Instead, the tiers have a ventilation system that uses "outside air" to ventilate the space. ROA.4970, ROA.4973, ROA.5732. "Heat alerts" at Angola are issued when the outdoor temperature exceeds 90º, and these alerts are issued daily in the summer. ROA.5740. The facility's architect stated the temperature and humidity in the cells are "subject to" the conditions outside of the facility, and it "would not be any cooler inside than it is outside." ROA.4973-4974, ROA.5730-5732.

The Data showed that the "heat index *inside* the tiers were . . . the same or higher than . . . *outside* the tiers." ROA.4979-4980. The heat index on each tier exceeded 104º at various times. For extended periods, the heat index did not drop

below 99º, including five consecutive days on Tier G and three on Tier C.[2]

Plaintiffs are incarcerated on Death Row and collectively suffer from hypertension, diabetes, hepatitis, high cholesterol, and depression and are required to take various medications to treat their conditions. It is undisputed that Plaintiffs are frequently moved between tiers. ROA 5053.[3] Plaintiffs are confined to their cells for 23 hours per day. ROA.4970.[4] Plaintiffs have extremely limited access to ice and their drinking water is lukewarm. Plaintiffs' single daily shower is maintained between 100º and 120º and therefore cannot lower body temperature. ROA.4971. The tiers are equipped with one non-oscillating 30-inch fan for every two inmates. ROA.4970. The fans do not provide equal air flow to each cell. ROA.4996. The "windows" on the tiers are louvers, do not open wide, and do not provide for the same air flow as traditional windows. ROA.4970.

The district court's personal observation was that "the windows, fans, and cell vents did not provide a cooling effect or relief from the heat conditions in the tier." ROA.4995. Other evidence confirmed that the relief upheld in *Gates v. Cook*, 323 F.3d 323 (5th Cir. 2004) would not remove the unreasonable risks to Plaintiffs' health and could even exacerbate the risk of heat-related illness.

[2] *See* ROA.4981-4993 (district court summary of the Data); JOINT_EX_1 (the Data).
[3] *See also* ROA.5677 (Code was housed on H-tier at time of trial, and had previously been housed on F- and C-tiers); ROA.5747 (Ball was housed on H-tier at time of trial, and had previously been housed on C-, F-, and G-tiers); ROA.6203 (Magee was housed on A-tier at time of trial, and had previously been housed on C-tier).
[4] A description of Plaintiffs' cells is in the record at ROA.4968-72.

ROA.5015; PLS_EX_127-037.

Dr. Vassallo, a leader in the field of thermoregulation, the ability of the body to deal with environmental heat, stated that the only way to remove the extreme risk of heat related illness is through an 88º maximum heat index. Pl_Ex_99.

ARGUMENT AND AUTHORITIES

I. Plaintiffs Provided Extensive Evidence to Show why an 88º Maximum Heat Index is Necessary.

A. The Opinion of Plaintiffs' Expert as to the Necessity of Establishing an 88º Maximum Heat Index was Uncontroverted.

Dr. Susi Vassallo's expert recommendations, adopted by the district court, differ from the panel decision's characterization in two key ways. It was uncontested that: (1) even healthy Death Row inmates are at a substantial risk of serious harm as a result of the extreme heat, and (2) establishing an 88º maximum heat index was the only way to remove the unreasonable risk of serious injury, paralysis, or death because the *Gates*-type relief ordered by this Court would not be sufficient. These misunderstandings were fundamental to the Injunction being modified, thereby warranting rehearing.

The record makes clear that the extreme heat levels on Death Row create significant problems for many, if not all, of the Death Row inmates. In its opinion, this Court "emphasize[d] . . . that the finding of substantial risk regarding a heat-related injury is tied to the individual health conditions of these inmates." Slip Op. at 10, n.6. While the plaintiffs' health conditions increase their individual risks of

suffering heat-related illness, Dr. Vassallo testified and the district court made the factual finding that even healthy people are at risk under the conditions present on Death Row. ROA.5008 (stating that "everybody is at risk of serious harm in heat conditions like those in the Death Row tiers" including a "young, healthy individual"). The district court noted that "her testimony was largely uncontroverted." ROA.5011.

Indeed, Dr. Vassallo's testimony at trial was unequivocal that a maximum heat index of 88º is necessary to remedy the substantial risk of serious harm. ROA.4959-4960, n.8 (citing Dr. Vassallo's testimony based on National Oceanic and Atmospheric Administration charts and medical literature). *See also* ROA.6032-6036 (morbidity and mortality from heat rises exponentially at 88º heat index), ROA.6039-6040, ROA.6057, ROA.6062-6063.

This Court overlooked Dr. Vassallo's testimony that although *Gates*-type remedial measures can lessen the risk, the risk of serious harm remains substantial even with these remedial measures in place. ROA.6048 (by Dr. Vassallo: "[T]he idea that just ice and showers is somehow a substitute or adequate for the treatment of impending heat stroke is just inaccurate."), ROA.6049 (by Dr. Vassallo: "[C]ommon sense and being a doctor and having seen many, many heat strokes in my life, tell me that that [referring to cold showers and ice] is not good enough.").

The district court explicitly adopted this recommendation in fashioning relief.[5]

This Court's misapprehension of Dr. Vassallo's expert opinion materially affected the outcome of this appeal because it was the Court's basis for finding that since the provision of the types of relief ordered in *Gates* is sufficient to address the substantial risk of serious harm to the plaintiffs, a maximum 88º heat index was unnecessary. Rehearing is warranted to uphold the district court's establishment of an 88º maximum heat index.

B. Plaintiffs Presented Significant Evidence of Society's Contemporary Standards of Decency upon which the District Court Relied in Fashioning the Relief.

In determining whether the risks associated with extreme heat levels are "socially acceptable," Slip Op. at 19, the Court overlooked multiple sources cited by the district court demonstrating that the conditions on Death Row—even if additional ice, cool showers, and other such remedies as the Court suggests are offered—violate society's contemporary standards of decency.[6] These sources

[5] This Court suggested that a maximum heat index of 88º was not "necessary" because "Plaintiff's own expert, Dr. Vassallo, explained that there are many acceptable remedies short of facility-wide air conditioning." Slip Op. at 19-20. To the contrary, the district court clearly credited Dr. Vassallo's expert opinion that the risk of serious injury increases exponentially to an unreasonable level when the heat index exceeds 88º. Dr. Vassallo's expert report merely suggested alternative measures that, if establishing a maximum heat index was impermissible, could reduce—but would not be sufficient to remove—the unreasonable risk of heat-related illness. Pl_Ex_99. Dr. Vassallo unequivocally stated that *Gates*-type relief would be insufficient. ROA.6039-6040, ROA.6048-6049, ROA.6057, ROA.6062-6063.

[6] The Court's "socially acceptable" standard, Slip Op. at 19, appears to refer to the Supreme Court's decision in *Helling v. McKinney*, which states that an unreasonable risk occurs where

included "approximately thirty-four statutes, regulations, policies, procedures, directives, and standards from approximately twenty-three states, including the State of Louisiana." ROA.4954. The cited provisions mandate temperature ranges and/or comfort requirements in public facilities including adult correctional facilities outside Louisiana, and residential, health, juvenile detention, and animal care facilities inside Louisiana. ROA.2901-3186; ROA.4954-4956; Pl_Exs. 1-30.

This Court also overlooked additional citations in the district court's opinion of multiple relevant public health guidelines. These guidelines explicitly recommend that extreme heat must be addressed by accessing areas that are air-conditioned. ROA.5015. "[A]ccording to FEMA, '[c]onditions that can induce heat-related illnesses include stagnant atmospheric conditions and poor air quality . . . also, asphalt and concrete store heat longer and gradually release heat at night, which can produce higher nighttime temperatures . . .'" ROA.5014. The Centers for Disease Control "cautions that electric fans will not prevent heat-related illnesses when the temperature is in the high 90s." ROA.5015.

The Court also overlooked the testimony of Defendants' expert Henry C. "Trey" Eyre, III, and Plaintiffs' expert David Garon that conditions on Death Row are extremely unusual within their professional field. ROA.6311 (By the Court:

"society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." 509 U.S. 25, 36 (1993).

"[T]here's no requirement to install air-conditioning in, say, office buildings?" By Mr. Eyre: "Good luck staffing it though."); ROA.5977 (Mr. Garon stated that of more than 2,000 projects he has worked on, "none" have had only natural ventilation without mechanical cooling in areas that house human beings).

II. Arguments Considering the Scope of the Injunction were Waived by Defendants.

This Court's decision quotes statements made by the district court at the beginning of trial noting that the lawsuit was not an effort to seek relief beyond the three plaintiffs. This Court asserts, "It is unclear why the district court changed its mind when it fashioned the injunction." Slip Op. at 20. However, the district court made factual findings that "it is uncontested that Defendants may move any Death Row inmate to a different tier and/or cell at any time" and therefore "a remedy aimed at ameliorating the heat conditions throughout the Death Row facility is necessary to adequately vindicate Plaintiffs' rights, and is not overbroad." ROA.5053.[7] The panel aims to invalidate this finding on the basis that an action brought under the PLRA may not lead to relief that incidentally affects individuals beyond the individual plaintiffs, though this notion conflicts with Supreme Court case law and the decisions of other circuits. See Appellees' Petition for Rehearing

[7] This decision erroneously states the highest recorded temperature for the monitoring period as 107.79. Slip Op. at 4, n.5. Because Defendants can and do move the Plaintiffs and other men on Death Row between tiers at their discretion, all the Death Row tiers are relevant to these Plaintiffs. ROA.5053. The highest temperature recorded on the tiers, as noted by the district court, was 110.3 degrees, recorded on two separate tiers. ROA.4984, ROA.4989.

En Banc ("Rehearing En Banc") § I(B).

The argument that relief should be limited to the three plaintiffs, however, was waived. See Rehearing En Banc § I(B)(1). Because this question was never argued below or briefed, and in light of Defendants' explicit repudiation of this argument during the hearing, this Court should not have included it in its opinion.

III. Even if not Waived, Facts on Record Show why the Relief Should Apply to the Death Row Tiers.

A. The Record Evidence Contained Multiple Illustrations of the Extent of the Risk Beyond the Three Plaintiffs.

This Court also overlooked significant evidence on the record with respect to additional inmates who suffer substantial risk of serious harm. First, Defendants maintain a heat precaution list of prisoners who Defendants admit are at increased susceptibility to heat-related illness. ROA.5805-5806 (discussing the "heat precaution list" advising "death row supervisors" of "people … they're supposed to monitor … because of their risk of heat-related illness.")[8] At the time of trial that list included 31 inmates on Death Row. Pl_Ex_130. Furthermore, Plaintiffs submitted to the district court administrative complaints from eleven other

[8] The District Court found that the Defendants failed to make this list comprehensive including by omitting Plaintiff James Magee. ROA.5032-5034. In *Graves v. Arpaio*, the Court concluded that "Given that Sheriff Arpaio does not know which pretrial detainees are taking medications that affect the body's ability to regulate heat, limiting relief to that category of pretrial detainees would have been impracticable" 623 F.3d 1043, 1050 (9th Cir. 2010).

prisoners, many citing concerns related to heat related illnesses.[9] The record is replete with evidence that increased risk of serious harm for heat-related illness is widespread on Death Row.

[9] For example, on Aug. 4, 2010, Daniel Blank complained of the excessive heat contributing to daily symptoms of tiredness, loss of appetite, light-headedness, dizziness, nausea, stomach distress, vomiting, and loss of sleep. PLS_EX_128-0001. On Aug. 10, 2012, Darrell Draughn complained of the excessive heat on Death Row contributing to loss of sleep and causing him to sleep on the ground. Mr. Draughn also complained of the heat exacerbating his high blood pressure and heart problems. PLS_EX_128-0010. On May 30, 2012, Dustin Dressner complained of the excessive heat on Death Row contributing to uncontrollable sweating, headaches, severe cramps, and the need to consume salt to replenish from the sweat. Mr. Dressner complained of the heat exacerbating his high blood pressure. PLS_EX_128-0101. On Oct. 3, 2012, Greg Brown complained of the excessive heat on Death Row causing headaches and severe cramps. Mr. Brown also detailed the shortcomings of the ice provisions on Death Row. At the time of his complaint, Mr. Brown was on medication to lower his blood pressure and cholesterol. PLS_EX_128-0166. On Sept. 13, 2012, Henry Anderson complained of sweating, headaches, cramps, and trouble sleeping caused by excessive heat on Death Row. Mr. Anderson reported that he was on blood pressure medication. Mr. Anderson also detailed the shortcomings of the ice provisions on Death Row. PLS_EX-128-0248. On Aug. 24, 2012, Jeffrey Clark complained of extreme heat on Death Row causing uncontrollable sweating, cramps, dizziness, headaches, and trouble sleeping. Mr. Clark also complained of the poor availability of ice on Death Row. PLS_EX_128-0337. On June 19, 2012, Jessie Hoffman complained of the extreme heat on Death Row causing bumps and a rash to break out on his hands, and dehydration. Mr. Hoffman also complained of the shortcomings of the ice provisions on Death Row. PLS_EX_128-0427. On Aug. 28, 2012, Michael Garcia complained of the extreme heat on Death Row causing difficulty sleeping, heat rashes, and the need to strip down to underwear to manage body temperature. Mr. Garcia also reported an episode of heat exhaustion resulting in vomiting, dizziness, and fainting. PLS_EX_128-0517. In July 2012, Terrance Carter complained of extreme heat on Death Row causing excessive sweating, headaches, cramps, dizziness, and near fainting. Mr. Carter had high blood pressure at the time of the complaint. Mr. Carter also complained of the shortcomings of the relief provided by the ice and showers on Death Row. PLS_EX-128-0643. In July 2012, Willie Tart complained of extreme heat on Death Row causing dizziness, headaches, sweating, and loss of sleep. Mr. Tart complained of the shortcomings of the ice provisions and fans on Death Row in offering relief from the heat, and also reported the need to soak his clothes in water before laying down for sleep. PLS_EX_0711. On Sept. 11, 2007, Abdullah Hakim El-Mumit complained of the heat and poor air quality on Death Row. PLS_EX_128-0745.

B. Consideration of the Cost of the Relief Conflicts with Case Law and the District Court's Discovery Sanctions on Defendants.

This Court states the installation of air conditioning "of course is expensive." Slip Op. at 21. There is no evidence on this point in the record, due in part to Defendants' refusal to provide this information and the subsequent discovery sanctions. See ROA.5059-5109. Moreover, there is a well-established principle that cost is an insufficient basis upon which to allow a constitutional violation to continue. *See Smith v. Sullivan*, 553 F.2d 373, 378 (5th Cir. 1977) ("Inadequate resources can never be an adequate justification for depriving any person of his constitutional rights."); *Gates v. Collier*, 501 F.2d 1291, 1319 (5th Cir. 1974) ("Where state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage and the inability of the district court to order appropriations by the state legislature, have been rejected by the federal courts."). This Court should reconsider this issue.

IV. The Panel's Instructions on Remand Direct the District Court to Further Intrude into the Administration of the Prison.

This Court's suggested modifications to the remedies proposed by the Defendants and adopted by the district court are more intrusive and thus less favored by the PLRA. The PLRA's non-intrusiveness requirement for prospective relief enshrines the principle that courts are not to micromanage the operation of prisons. *See, e.g., Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) ("Courts must be

sensitive to . . . the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals," *citing Bell v. Wolfish*, 441 U.S. 520, 547-548 (1979); *see also Plata v. Schwarzenegger*, 603 F.3d 1088, 1095 (9th Cir. Cal. 2010) ("There is no doubt that one of the purposes of the [PLRA] was to restrict severely the intrusion of the judiciary into the operation of prisons," citing *Gilmore v. California*, 220 F.3d 987, 996-97 (9th Cir. 2000)). This Court has recognized the importance of deferring to prison officials' decisions on where to house inmates. *See, e.g.*, *Wilkerson v. Stalder*, 329 F.3d 431, 436 (5th Cir. 2003) (recognizing that inmates' placement in administrative segregation is "a matter left to prison officials" and that "prison officials should be accorded the widest possible deference in the application of policies and practices designed to maintain security and preserve internal order"); *Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1153 (9th Cir. 2004) (an injunction should not "require for its enforcement the continuous supervision by the federal court over the conduct of [state officials]."). Here, the remedies that the Court suggests—in addition to being insufficient to remedy the constitutional violation as discussed *supra*—require more micromanaging of the prison's operation of Death Row tiers than air conditioning.

The Court lists seven items that it characterizes as "acceptable remedies short of facility-wide air conditioning." Slip Op. at 19. These are: 1) order inmates

to special cells and do not allow the Defendants to move them; 2) divert cool air from the guards' pod into the tiers; 3) allow inmates to access air conditioned areas during their tier time; 4) allow access to cool showers at least once a day; 5) provide ample supply of cold drinking water and ice at all times; 6) supply personal ice containers and individual fans; and 7) install additional ice machines.

At least the first five of these suggested remedies would result in more judicial intrusion than the remedy created by the Defendants and ordered by the district court. *See Plata*; *O'Shea v. Littleton*, 414 U.S. 488, 501 (1974) (injunction should not "require for its enforcement the continuous supervision by the federal court"). Diverting air from the guards' pod into the tiers, as this idea was discussed at trial,[10] would involve opening doors and altering the facility's security design. Allowing some prisoners to access air conditioned areas during their tier time impacts the facility's operations. Furnishing access to cool showers would presumably have to allow prisoners one hot shower (for hygiene) and one cool shower (to reduce the risk of heat-related illness) every day. Likewise, ordering the prison to provide a certain amount of ice requires increased monitoring.

The Heat Remediation Plan, as proposed by Defendants and adopted by the district court, was in fact the least intrusive means of correcting the constitutional

[10] ROA.5974 (By Defendants' counsel: "Are there any variables that would cause the temperature on a tier to change, excluding an awning?" By Plaintiffs' expert Mr. Garon: "If you held the door open to the center hub for an extended period of time, that might do it.").

violation.

CONCLUSION

WHEREFORE, for the foregoing reasons, the panel should rehear the case.

/s/ Mercedes Montagnes
Mercedes Montagnes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 22, 2015, a copy of the foregoing has this date been served upon all parties through their respective counsel of record by operation of the Court's electronic filing system and has been filed electronically with the Clerk of the Court using the CM/ECF system.

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