

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 03-60529

WILLIE RUSSELL, et al.

PLAINTIFFS-APPELLEES

VS.

ROBERT L. JOHNSON, et al.

DEFENDANTS-APPELLANTS

**On Appeal from the United States District Court
for the Northern District of Mississippi**

BRIEF OF PLAINTIFFS-APPELLEES

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STATEMENT OF JURISDICTION

Plaintiffs-Appellees do not contest Defendants-Appellants' jurisdictional statement.

STATEMENT OF THE ISSUES

1. Are Mississippi prisoners barred from seeking prospective relief in federal court from conditions that violate the Eighth Amendment except through a petition by the last class counsel in *Gates v. Collier* to reopen and enforce the *Gates* decree? 2. Did the District Court err in finding that Plaintiffs had exhausted administrative remedies?

3. Were the District Court's findings that Defendants have consciously disregarded serious risks to Plaintiffs' physical and mental health clearly erroneous?

4. When a district court grants prospective relief following trial and the defendants do not move for immediate termination, must the court make the same particularized, provision-by-provision "narrowness-need-intrusiveness" analysis required by 18 U.S.C. § 3626(b)(3) on motions to terminate pre-existing prospective relief?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

In 1972, the District Court for the Northern District of Mississippi entered a broad remedial decree concerning the conditions of confinement in Mississippi State Penitentiary, ordering reforms in such areas as mail censorship, racial discrimination, corporal punishment, failure to protect, inappropriate classification, overcrowding, inadequate medical care, inhumane conditions of punitive confinement, and deficient physical plant facilities. *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974). The decree was modified and amended at various times over the years. *See, e.g., Gates v. Collier*, 390 F. Supp. 482 (N.D. Miss. 1975), *aff'd*, 525 F.2d 965 (5th Cir. 1976). Finally, in February 1998, more than a quarter-century after the entry of the original *Gates* decree, the District Court entered an “Amendatory Order Finally Dismissing State Corrections Facilities,” ordering that the portion of the *Gates* decree applicable to state prison facilities be “hereby removed from the inactive docket of this Court and finally dismissed.” [RE Tab L at ¶¶ 1, 3] On July 12, 2002, Plaintiffs filed suit on their own behalf and that of the other death-sentenced prisoners confined to Unit 32 of Mississippi State Penitentiary at Parchman. [R1:1-21]¹ The

¹Record citations are in the form RX:YYY, with X representing the volume number and YYY representing the page

prisoners alleged that the conditions of their confinement, including dangerously high temperatures, pervasive filth, uncontrolled mosquito infestation, grossly inadequate lighting, grossly inadequate mental health care, and constant exposure day and night to the raving of severely psychotic prisoners in adjoining cells, subject them to significant risks of serious physical and mental illness. [*Id.*] Plaintiffs moved for class certification. [R2:197] Chief Judge Glen H. Davidson assigned the case for all purposes to United States Magistrate Judge Jerry A. Davis, noting Judge Davis' long experience with *Gates*-related litigation and that all parties consented to Judge Davis' exercise of jurisdiction in this case. [R2: 204]

Defendants moved to dismiss for failure to exhaust administrative remedies. [R2: 236-269] Plaintiffs presented proof that before filing suit lead plaintiff Willie Russell had fully exhausted administrative remedies on each of the issues raised in the Complaint. [PRE, R2:271-299] The District Court found that Russell had exhausted administrative remedies, and ruled that in a class action the PLRA's

number. Citations to the Record Excerpts for Brief of Defendants/Appellants are preceded by "RE." Citations to the Record Excerpts for Brief of Plaintiffs/Appellees are preceded by "PRE."

exhaustion requirement was satisfied by a showing that at least one class member had exhausted administrative remedies with respect to each claim raised by the class. [RE Tab G; R3:456-457] The District Court consolidated the case with *Gates v. Collier* and certified a subclass of *Gates* consisting of all current Death Row inmates housed in Unit 32. [RE Tabs E, F; R3:403, 404]

Plaintiffs' experts toured Death Row in August 2002 [R3:301-390], and again in February on the eve of trial. [R4:126, R6:650] The trial was held February 13-15, 2003. Dr. Susi Vassallo, a physician board-certified in emergency medicine,² testified that the excessively hot environment of Death Row subjects all of the prisoners to a high risk of severe illness and death from heat-stroke.

²Dr. Vassallo, a faculty member of the Department of Surgery and Division of Emergency Medicine at New York University School of Medicine and a medical toxicologist at the New York Regional Poison Control Center, has lectured extensively on thermoregulation and hyperthermia (heat illness) and has authored the "Thermoregulatory Principles" chapter of the definitive textbook on medical toxicology, Goldfrank's Toxicologic Emergencies. [R5:306-308]

[R5:305-39] Dr. Terry Kupers, a board-certified psychiatrist with special expertise in prisoners' mental health issues,³ testified that a combination of extreme conditions on Parchmans' Death Row – including isolation, squalor, stench, dangerously excessive heat, mosquitos, inadequate light, grossly inadequate mental health care, lack of access to exercise, and constant exposure to the pandemonium created by severely psychotic prisoners -- causes complete psychiatric breakdown in prisoners with previous mental illness, and induces mental illness in others. [R5:368-460] He described the treatment of the severely

³Dr. Kupers has a medical doctorate degree from UCLA School of Medicine and a Masters Degree in Social Psychiatry. He is a Professor at the Wright Institute Graduate School of Psychology and a Fellow of the American Psychiatric Association. He is co-chair of the American Association of Community Psychiatrists' Committee on Persons with Mental Illness Behind Bars and a Fellow of the American Orthopsychiatric Association. He has published two books on mental health in prison, and provides consultation and training for environmental health agencies and correctional agencies. [R5:361-363]

mentally ill prisoners on Death Row as resembling “the snake pits of the 1940s and ‘50s.” [R5:391-392; 397] James Balsamo, an environmental health and safety expert,⁴ testified that the excessive heat, filth, uncontrolled insect and mosquito infestations, malfunctioning toilets, and grossly inadequate lighting on Death Row subject the prisoners to significant health and safety risks. [R4:20-201] Vincent

⁴Mr. Balsamo, a Master of Science, Master of Public Health, and Master of Healthcare Administration, is a Certified Safety Professional, Registered Sanitarian, and Diplomate Laureate of the American Academy of Sanitarians. He is Director of Environmental Health and Safety and Assistant Professor of Environmental Health Sciences at Tulane University, specializing in Institutional Environmental Health and Safety, in the School of Public Health and Tropical Medicine. [R4:22-23]

Nathan, a corrections expert,⁵ testified that the conditions on Parchman's Death

⁵Mr. Nathan has been appointed by federal judges to serve as special master and court monitor in cases involving conditions in state prison systems and jails in Ohio, Georgia, Texas, New Mexico, and Puerto Rico. He has served as an independent court-appointed expert and as a consultant for state departments of corrections regarding prison conditions and operations. The U.S. Department of Justice has employed Mr. Nathan to assist in the development of core standards for jails that hold prisoners of the INS, the U.S. Marshal Service or the Federal Bureau of Prisons. The Department of Justice has retained him to conduct conditions investigations. He has provided technical assistance and training to correctional facilities on behalf of the National Institute of Corrections. He was professor and dean at the College of

Row are among the very worst that he has ever seen in a high security prison or death row, and that “virtually every environmental condition, every physical condition, ha[s] the effect of causing continuing pain far beyond discomfort, a condition I can only describe as hellish.” [R6:654-656] He testified that there is no penological need for these horrendous conditions, that they create extreme safety and security risks for prisoners and staff [R6:656-661], and that the facility is “a disaster waiting to happen” and “a setting in which no prisoner – no prisoner – should be incarcerated.” [R6:697]

On May 21, 2003, the District Court entered a Memorandum Opinion [R3:477-493], finding that conditions on Death Row violate the Eighth Amendment in several respects. The Court directed the Defendants to address these violations by such means as providing adequate cleaning supplies; continuing efforts to control mosquitos; upgrading lighting; repairing malfunctioning toilets; preparing a written preventive maintenance plan; providing access to daily showers, fans, and ice during extremely hot weather; improving mental health care; and providing separate housing for extremely psychotic prisoners. [R3:488-489] The District Court ordered Defendants to “report their progress in meeting the remedial actions ordered by the court,” and to “advise the court of any security problems raised by the remedial actions that the court may not have anticipated.” [R3:490]

On May 30, Plaintiffs timely filed a motion under Federal Rule of Civil Procedure 52(b) for supplemental findings. [R3:494-499] On June 18, the District Court issued Supplemental Findings. [R3:529-530] The court reiterated that Plaintiff Russell had exhausted administrative remedies, and cited to the record in support of this finding. [R3:529] The court also issued a finding, based on the entire record, that “the prospective relief ordered on May 21, 2003, was narrowly drawn to correct the violations of federal rights identified in the Memorandum

Law at the University of Toledo and is now
a visiting member of the faculty of the
University of Toledo Department of
Criminal Justice. [R6:633-645]

Opinion and extended no further than necessary. Moreover, the ordered relief was tailored in the Court's opinion to be the less intrusive means of correcting the violations." [R3:529-529A] On June 6, while Plaintiffs' Rule 52(b) motion was pending, Defendants filed a notice of appeal and a motion for a stay pending appeal. [RE Tab B] The District Court denied the stay, but extended to July 21 "the time for the defendants to report to the court their progress in complying with the court's order" and to "advise the court of less intrusive alternatives and security concerns not previously considered." [RE Tab H] The District Court further amplified its previous orders as follows:

One of the purposes of the report to the court was to consider if there were less intrusive ways to correct the problems noted by the court's opinion, as well as considering security issues not noted by the court. The court will modify its previous remedial order if convinced that there are less intrusive means or if there are unsurmountable security problems.⁶

Without waiting for the District Court's ruling on the parties' additional submissions, Defendants filed a motion in this Court for a stay, which the Court granted. [RE Tab J,K] The Court ordered that the appeal be expedited. [RE Tab K]

B. Statement of Facts

1. Excessive Heat

The heat on Death Row is so extreme during the summer months that it puts

⁶July 16, 2003 Order, attached as Exhibit E to Appellees' Opposition to Motion for a Stay Pending Appeal.

the prisoners at high risk for heat stroke, which can occur rapidly and with no warning. [R5:319-320] The likely rate of mortality from heat stroke is 50 percent; people who survive it are often left with permanent neurological damage.

[R5:321] During the week of the August 8 tour of Death Row, the average daily Heat Index ranged from 101 to 140 degrees Fahrenheit. [R4:34] Even the lowest levels in this range create extreme risk of heat cramps and heat exhaustion; the higher levels in this range create extreme danger of imminent heat stroke. [R4:33-35] On the day of the tour, which was the coolest day that week, the Heat Index was 101 degrees Fahrenheit, and even at 10 PM that night, there were temperature readings in the cells of 90 degrees. [R4:33] Dr. Vassallo and Mr. Nathan, both of them Texans accustomed to extreme heat [R3:355, R6:684], each spent a few minutes in a cell during the August tour. Mr. Nathan testified that the heat in the cell “was simply unbearable. One couldn't draw a breath. I became almost panicked[.]” [R6:684] Dr. Vassallo testified, “you absolutely could not breathe, and it really made you wonder how somebody could tolerate being in there and keep control of themselves.” She described the heat as “inhuman.” [R5:314-15]

Dr. Vassallo testified that, given these conditions and Defendants' failure to provide even the most basic cooling mechanisms, it is inevitable that a Death Row prisoner will die of heat stroke or another heat-related illness, and it is merely a

matter of luck that this has not happened yet. Indeed, when air temperature exceeds about 88 degrees Fahrenheit, death and illness from all causes increase, and the prisoners are at heightened risk from their pre-existing medical conditions such as high blood pressure, asthma, and coronary artery disease. [[R5:335-39]

Although all the prisoners are at significant risk for heat stroke in the extreme conditions on Death Row, many of them are at especially heightened risk. [R5:326-330] Among these are the mentally ill [R5:322-24, 327], the elderly, those who are obese or emaciated, those with insomnia, diarrhea or fever [R5:322, 323, 328], and those who take blood pressure and other common medications that impair the body's ability to maintain a normal body temperature. [R5:323-25, 327-28]

The heat-related illnesses on Death Row go undiagnosed by Defendants' medical staff, who never consider the heat as a factor in any of the inmates' medical problems even though sick call requests during the summer months contain many complaints of symptoms typical of heat-related illness. [R5:330-35] There is no triage system, and prisoners see a doctor, if at all, between five days and three weeks after they submit a sick-call request; in the interim vital signs are not taken and complaints of symptoms of heat-related illnesses are not evaluated. [R5:331-35]. By far the most effective method for preventing heat stroke is

access to air conditioning, which has been shown to decrease the risk of death from heat stroke by 80 percent during urban heat waves; even being in an air-conditioned area for an hour or two a day significantly decreases the risk of heat-stroke. [R5:336-37] Since they have no access to air conditioning, the prisoners need to be able to cool down their bodies through other means, including a fan in each cell in addition to fans at the top and back of the tier; access to cooling showers at least once a day; access to ample cold drinking water in the cells; and access to shade and water while in the exercise pens [R5:337-39]. Mr. Balsamo agreed that fans during the summer for these prisoners are “an absolute necessity,” not a luxury, and that prisoners whose medical conditions predispose them to heat-related illnesses need daily showers and the provision of ice throughout the day. [R4:120-21]

2. Uncontrolled Mosquito and Insect Infestation

The problem of dangerously excessive heat on Death Row is severely exacerbated by the lack of mosquito and pest control. Insects swarm in the prisoners’ food and in their beds, and a prisoner must choose between opening his window for relief from the stifling heat, or closing the window and covering his entire body as protection from mosquitoes. [R4:264-66; R6:657; R4:35-36] The combination of heat and mosquitoes results in chronic sleep-deprivation [R5:401,

403]; sleep-deprivation induces mental illness, worsens existing mental illness [R5:398-99], and heightens the risk of heat-stroke. [R5:323]. The uncontrolled mosquito infestation subjects the prisoners to an increasing risk of contracting West Nile virus. [R4:35-36] The severe mosquito problem in Unit 32 is caused by the lack of a regular and thorough pest control program, damaged window screen frames, and substandard screens. [R4:46-52, 114-19] To abate the problem, the screens must be replaced with 18 gauge mesh or better, seals must be replaced, and a regular thorough pest control program enforced. [*Id.*]

3. “Ping-pong” Toilets

Essentially all of the cells on Death Row have “ping-pong” toilets, which means that fecal and other matter flushed from the toilet in one cell bubbles up into the toilet in the adjoining cell. [R4:52-53; R4:252-53; R4:290-91; R5:626-27; Plaintiff’s Exhibit 3 at 44] This problem exposes the prisoners to a significant risk of contagion from aerosolized microorganisms of fecal matter. [R4:53-54] The malfunction has existed for more than a decade, and Defendants were aware of it from the time Unit 32 was constructed and even before it was occupied. [R4:229, 230; R6:765, 819] The Mississippi State Department of Health characterizes these malfunctioning toilets as a “critical problem requiring immediate attention,” and has reiterated this warning to Defendants in each of its annual inspections of the Unit 32 toilets for the past eleven years. [R4: 55-57; Plaintiffs’ Exhibit 3 at 44]

4. Grossly Inadequate Mental Health Care and Psychosis-Inducing Conditions of Confinement

Three of the Death Row prisoners are extremely psychotic, six or eight more

are very psychotic, twenty more have very serious mental illness, and at least half have very significant mental illness. [R5:369-70, 407] Profound isolation and idleness combine with extreme squalor, stench, filth, excessive heat, mosquito and insect infestation, and grossly inadequate mental health care to create an environment highly toxic to mental health. [R5:405-07] These conditions actually induce psychosis. [R5:392-93] Prisoners who are not already mentally ill become mentally ill and those on the verge of illness are pushed over the edge. [R5:393, 396-408, 414-16]

A number of the severely psychotic Death Row prisoners are incapable of maintaining their personal hygiene, and are left to smear their cells with excrement and garbage, throw feces down the hall, flood the tier, and shriek day and night. [R5:369, 392] The treatment of these prisoners is cruel and grossly unacceptable by any medical standards. [R5:392- 93] They need nursing hospital care, including bathing, which Unit 32 staff cannot provide. [R5:393-94] Their treatment on Death Row "boils down to warehousing people with severe mental illness." [R5:370]

These psychotic prisoners are housed on the tiers along with all the other prisoners. Defendants also house other severely mentally ill prisoners who are not death-sentenced (the so-called "state prisoners") among the Death Row prisoners, as punishment, and these severely disturbed prisoners also smear feces and scream.

[R5:399-400] Constant exposure to their extreme behaviors causes the other prisoners chronic insomnia, which leads to mental disorders and exacerbates existing ones. [R5:369-70, 392, 398-99, 401-02, 404, 431] Their presence also creates a management problem that dangerously lessens security on Death Row.

[R6:694]

Every week, Defendants rotate prisoners into cells that have just been occupied by severely psychotic inmates, where garbage, urine, feces, and dried ejaculate remain encrusted on the walls, floor, toilet, ceiling, and bars; the new tenant is not even given access to cleaning supplies to cope with the squalor. [R4:255-56; R5:368; R4:75-78] This practice of weekly moving prisoners into filthy cells serves no legitimate security purpose but is simply a means of punishing inmates who for one reason or another have upset staff. [R6:669-72] One prisoner who was moved into such cell was finally given a piece of a towel and a little disinfectant to use on the bars where food is passed through, after five hours of pleading with guards for cleaning supplies. [R5:403] He spent most of the night scrubbing the cell, and then washed himself and his clothing since he was contaminated with the excrement, but a corrections officer told him to take down the clothesline or get written up. [R5:403-04]

The mental health care provided to Death Row prisoners is grossly

inadequate. [R5:370] Prisoners seldom see mental health staff. [R5:373-74] Any interaction with them is conducted at the cell front [R5:386], where prisoners cannot tell the psychiatric assistant anything of substance since other prisoners and guards can hear them. [R5: 386-87] The medical charts and mental health charts for death row prisoners are grossly deficient. [R5:373-74] Notes in charts are infrequent and many merely indicate that due to time constraints a patient was not seen. [R5:374] Defendants have a policy requiring 90-day mental health evaluation, but nothing is done as a result of these evaluations, no matter what the prisoners' psychiatric state. [R5:414] The purpose of comprehensive mental health evaluations in isolated confinement is to determine whether the prisoner is breaking down under the stress of isolation and should be moved. [R5:413] Defendants' failure to take mental health histories makes these evaluations worthless for purposes of screening for mental health problems. [R5:613-14]

Monitoring of psychiatric medications is very sporadic. [R5:380] Failure to monitor these medications is dangerous and potentially life threatening due to their toxicity and side effects. [R5:380-82] Corrections staff rather than medical personnel dispense the prisoners' medications, which violates all medical standards. [R4:248; R5:390] Prisoners sometimes go for months without prescribed medication, receive the wrong medication, or miss several days of

medication. [R5: 391; R4:247-48] Such mishandling of psychiatric medications is extremely dangerous, since discontinuing them can induce psychotic breakdowns. [R5:391]

5. Lack of Physical Exercise

Regular vigorous physical exercise is extremely important for the physical health as well as the mental health of prisoners: It is essential for preventing and controlling mental deterioration, high blood pressure, and other chronic illnesses. [R5: 436-38, 399; R6:705] The prisoners are locked 24 hours a day in their small cells, except for access to the outdoor exercise cages for an hour, four or five days a week; however, the exercise cages are completely unshaded, there is no access to water, and no shoes are allowed other than plastic shower-thongs. [R4:270-71, 277-78; R5:408-09; R6:672-73] With no shade the exercise cages are dangerously hot, and physical exertion without access to water creates a great risk of heat stroke. [R5:338-39] The shower sandals make it difficult or impossible to exercise vigorously. [R4:278, R5:399, 408-09, 436-38; R6:672-73]

6. Grossly Inadequate Lighting in the Cells

Lighting in the Death Row cells is drastically below minimally acceptable levels and far too dim for reading, personal hygiene and cell cleaning, especially for older inmates. [R4:82-83, 123] Rather than the minimum of 20 foot-candles of

illumination needed for these tasks, there are only two to four foot-candles in typical cells; in some cells there is less than one foot-candle. [R4:83] The lack of adequate light for reading and writing causes further mental health deterioration. [R5:433-34].

7. Lack of Maintenance and Preventive Maintenance

The tiers on Death Row are filthy. Foul water from flooded toilets and rain-water leaks into the cells from overhead, runs down the walls, and contaminates the inmates' living space. [R4:59, 77-78, R4:253-54] The walls and hallways are encrusted with excrement flung from the cells by psychotic prisoners. [R4:59] Paint is peeling off the walls, which are filthy from bottom to top. [R4:59, 61-62] The ports in the cell doors through which the prisoners' food trays are pushed are encrusted with filth. [R4:67-69] The inmates are provided with a bucket of water and a mop once a week to clean their cells, and when they beg and plead they can get a brush to clean the toilet, but they do not get cleaning supplies that are adequate to clean their cells. [R4:75-76] There is only one bucket and mop for twenty cells, and the bucket contains no soap or sanitizing agent and the water is not changed as the bucket is passed from the first cell to the twentieth, so that mopping results not in cleaning but in spreading the dirt from the previous cells. [R4:76-78; 5:403-04] Defendants painted one tier just before Plaintiffs' experts arrived for the August tour [R4:29-30], and intensively cleaned and painted the

remaining tiers just before the experts arrived for the February tour, yet there was already water leakage in the freshly painted cells [R4:128-29]; fresh paint was “a band-aid fix” as the underlying problems had not been addressed. [R4:61-62]

There is no written preventive maintenance program [R4:94, 113-114], and these problems will not be solved unless such a program is implemented. [R4:129]

Sheets and clothes are returned from the laundry dirty and foul smelling. [R4:259-60; R4:84-85] Consequently, the majority of the prisoners hand-wash the laundry in their cells, using the bar of soap they are issued for personal hygiene, even though this is a rule infraction subjecting them to discipline. [R4:260-61; R5:403-04] The problem stems from an improperly- run central laundry facility and Defendants’ failure to use the necessary chemical agents to sanitize the laundry. [R4:85-86] Plaintiffs’ expert brought this problem to Defendants’ attention in June 2001, a year and a half before the trial. [R6:834]

The operating systems regularly break down, and when they break down on Death Row it takes an inordinate length of time to get them operating again, because there are no written maintenance and preventive maintenance programs and no system for monitoring air, water, and mechanical systems. [R4:88-97, 128] There are water outages on Unit 32 several times a year. [R4:266-67] For an entire week of very hot weather there was a breakdown in both the potable water

system and the waste water system at Unit 32, leaving the inmates without water to flush toilets, for personal hygiene, showers, cleaning the Unit, and without even adequate drinking water [R4:90-93, 267-69]; it was “[l]ike living inside a sewer.” [R4:268] These water outages, which affect toilets, water temperatures, sanitizing of dishes, fire suppression capability, and a number of other functions, could have extremely serious if not catastrophic medical and safety consequences. [R4:130-31]

STANDARD OF REVIEW

Questions of fact are reviewed for clear error. *Davis Oil Co. v. Milk*, 873 F.2d 774, 777 (5th Cir. 1989). A district court’s evaluation of the credibility of expert witnesses is reviewed for clear error, and its determination to credit such testimony is a question of fact. *U.S. v. Garcia Albrego*, 141 F.3d 142, 170 (5th Cir. 1998) (reviewing for clear error the trial court’s evaluation of conflicting expert testimony regarding the probable effects of certain drugs); *Henderson v. Norfolk S. Corp.*, 55 F.3d 1066, 1069 (5th Cir. 1995) (“A district court’s assessment of relative credibility of opposing expert witnesses is entitled to deference.”)

Whether prison officials consciously disregarded a substantial risk of serious harm to prisoners’ health or safety is a question of fact. *See Farmer v. Brennan*, 511 U.S. 825, 842 (1994). The ultimate question of whether the facts found by the

trier of fact violate the constitution is reviewed *de novo*. *Alberti v. Klevenhagen*, 790 F.2d 1220, 1225 (5th Cir.), *clarified on other grounds*, 799 F.2d 992 (5th Cir. 1986).

Whether the District Court erred in declining to interpret an order of its predecessor as barring Plaintiffs from seeking prospective relief other than through a petition to reopen *Gates v. Collier* is reviewed for abuse of discretion. *See Abshire v. Seacoast Products, Inc.*, 668 F.2d 832, 837-38 (5th Cir. 1982). Whether this Court's decisions bar Plaintiffs from seeking equitable relief except through a petition to reopen *Gates v. Collier* is a question of law, and hence reviewed *de novo*. *See Harris v. Angelina County, Tex.*, 31 F.3d 331, 333-34 (5th Cir. 1994).

Whether Plaintiff Russell exhausted administrative remedies pursuant to Defendants' administrative remedy program is a mixed question of fact and law and thus is reviewed *de novo*. *Cf. Days v. Johnson*, 322 F.3d 863, 866 (5th Cir. 2003) (stating that the Court reviews *de novo* a district court's dismissal on the pleadings for failure to exhaust administrative remedies).

Whether the District Court's findings satisfied the requirements of the PLRA turns on construction of 18 U.S.C. § 3626 and hence is reviewed *de novo*. *Castillo v. Cameron County, Texas*, 238 F.3d 339, 347 (5th Cir. 2001).

SUMMARY OF ARGUMENT

It was well within the District Court's discretion to allow Plaintiffs to bring a new suit to litigate their claims, rather than requiring them to petition through the former *Gates* class counsel to reopen the *Gates* decree, which was finally dismissed in 1998. In *Gates v. Cook*, 234 F.3d 221 (5th Cir. 2000), *reh'g denied*, 253 F.3d 707 (2001), this Court rejected the argument that only the last class counsel in *Gates v. Collier* could represent Parchman prisoners seeking prospective relief, and this Court has never suggested that a finally-dismissed state-wide decree bars new cases for prospective relief. Indeed, this Court's decisions in *Long v. Collins*, 917 F.2d 3, 4-5 (5th Cir. 1990), and other cases show that there is no such bar. *See* Point I.

Defendants' claim that Plaintiffs did not exhaust administrative remedies and that the District Court did not require proof of exhaustion is insubstantial. The record proves, and the District Court held, that before filing suit class representative Willie Russell exhausted administrative remedies on every issue in the Complaint pursuant to Defendants' administrative remedy program. *See* Point II.

The District Court's findings that Defendants consciously disregarded significant risks to Plaintiffs' mental and physical health, amply supported by the competent testimony of highly qualified medical, psychiatric, environmental health

and safety and corrections experts and by other witnesses and documentary evidence, are not clearly erroneous. Credible expert testimony established that these toxic conditions put all of the prisoners at high risk of lethal heat-stroke and other serious physical illnesses, cause severe sleep deprivation in all the prisoners, push prisoners with relatively mild mental illness into psychosis, and cause already psychotic inmates to become even more severely ill, and the District Court's decision to credit this testimony is amply supported and not clearly erroneous. *See* Point III.

Defendants' claim that the District Court erred in not making a particularized narrowness-need-intrusiveness analysis of the relief ordered, on a provision-by provision basis, is based on a misreading of 18 U.S.C. § 3626 and of *Castillo v. Cameron County, Texas*, 238 F.3d 339 (5th Cir. 2001). *Castillo* requires district courts to make such findings when denying a motion to terminate existing relief under 3626(b)(3). *Id.* at 354. Neither *Castillo* nor any other decision of this Court requires district courts to make these particularized findings when granting or approving new relief. When granting new relief, the district courts are merely required to make the finding set forth in § 3626(a)(1). The District Court made that finding. *See* Point IV.

I. NEITHER ANY DISTRICT COURT ORDER IN *GATES* NOR ANY DECISION BY THIS COURT BARS MISSISSIPPI PRISONERS FROM SEEKING PROSPECTIVE RELIEF EXCEPT THROUGH A PETITION TO REOPEN *GATES*

The District Court entered an order in 1998 that the *Gates* decree be

removed from the court's inactive docket and finally dismissed,⁷ without prejudice to a petition by *Gates* class counsel to reopen. Defendants insist that the District Court's intention was to ensure that "the sole, exclusive mechanism by which prison condition challenges seeking equitable relief as to state facilities could proceed" would be by petition to reopen by former *Gates* class counsel Ronald Welch, Esq. *See* Defs. Br. 22; *see also* Defs. Br. 3-4. They further argue that this Court's decisions require such a result. Defs. Br. at 21-24.

It is not at all apparent from the language of the order that Judge Senter intended, as Defendants insist, to create a permanent bar to new suits for equitable relief by Mississippi prisoners. It is more plausible that by removing the case from the court's inactive docket, and finally dismissing it without prejudice to a

⁷Defendants twice incorrectly state that in finally dismissing *Gates*, Chief Judge Senter ordered that the case be removed from the court's "active" docket. Defs' Br. at 3, 21. He said no such thing, but instead twice explicitly stated that the case was to be removed from the court's *inactive* docket. *See* RE Tab L at ¶ 1, 3.

petition to reopen, Judge Senter intended simply to provide an option to bringing a new suit. But whatever Judge Senter's intention may have been, Judge Davis, his successor in the *Gates* litigation, is now the authorized interpreter of that order. Judge Davis did not abuse his discretion by rejecting Defendants' interpretation, which clashes with the Fifth Circuit cases upon which Defendants rely and with several other decisions of this Court.

A. Defendants' Interpretation of the *Gates* Order of Final Dismissal Clashes With the District Court's Interpretation

Defendants' interpretation of the District Court's Order of Final Dismissal is at odds with the District Court's own authoritative interpretation of that order. When Chief Judge Senter took senior status he assigned *Gates* to Judge Davis, with the consent of the parties. [R3:478] The current Chief Judge assigned Plaintiffs' case to Judge Davis as well, with the consent of the parties, because of Judge Davis' long experience handling *Gates*-related litigation. [R2:204] Thus, it was for Judge Davis to determine the effect, if any, of the *Gates* decree on Plaintiffs' case. See *Abshire v. Seacoast Products, Inc.*, 668 F.2d 832, 837-38 (5th Cir. 1982) ("[t]he successor judge has the same discretion as the first judge to reconsider the order"). Judge Davis deemed Plaintiffs' suit to be perfectly compatible with *Gates*, and determined that any residual purpose to be served by

the *Gates* decree had been served by consolidating the case with *Gates* and certifying the plaintiff class as a sub-class of *Gates* (“Inclusion of this sub-class in the general class action is appropriate and promotes judicial economy and consistent results.”) [RE Tab D] Defendants do not explain how Judge Davis’ decision to proceed in this manner, rather than by re-opening the *Gates* decree and modifying that decree based on new evidence, prejudices them in any way. Although they insist that only Ronald Welch, Esq., can represent Mississippi prisoners seeking prospective relief, there is not the slightest indication in the record that Mr. Welch himself ever objected to Plaintiffs’ representation by other counsel in this case.

B. Defendants’ Interpretation of the *Gates* Order of Final Dismissal Clashes With this Court’s Decisions

It was not an abuse of discretion for the District Court to reject Defendants’ interpretation of the order of final dismissal. This Court’s decisions implicitly recognize that Mississippi prisoners seeking equitable relief from the conditions of their confinement are *not* restricted to petitions to reopen *Gates*. *See, e.g., Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999) (holding that a pro se prisoner’s complaint seeking injunctive relief from inhumane conditions stated nonfrivolous Eighth Amendment claims, and remanding for trial without requiring a petition to

reopen *Gates*); *Moore v. Mabus*, 976 F.2d 268 (5th Cir. 1992) (vacating dismissal of a prisoner complaint regarding the HIV Unit at Parchman, and remanding for appointment of qualified counsel, without reference to *Gates*).

Furthermore, this Court has already rejected Defendants' argument that Mississippi prisoners may seek prospective relief only through previous *Gates* class counsel Ronald Welch, Esq. See *Gates v. Cook*, 234 F.3d 221 (5th Cir. 2000), *reh'g denied*, 253 F.3d 707 (2001) (holding that Mississippi HIV-positive prisoners had a right to substitute undersigned counsel, the National Prison Project of the ACLU, as their class counsel, in place of the former *Gates* class counsel Ronald Welch, in order to pursue injunctive relief concerning the conditions of their confinement).

The cases on which Defendants rely, *Gillespie v. Crawford*, 858 F.2d 1101 (5th Cir. 1988) (en banc), and *Long v. Collins*, 917 F.2d 3, 4-5 (5th Cir. 1990), do not support Defendants' position. In *Gillespie*, this Court entered an order pursuant to its supervisory authority over the ongoing state-wide decree in *Ruiz v. Estelle*, which for more than twenty years, through various modifications, governed conditions of confinement in the Texas prison system. This Court held that individual class members would be allowed to assert equitable claims only by urging further action through the class representatives or by intervention in the

class action, since allowing individual suits “would interfere with the orderly administration of the [Ruiz] class action and risk inconsistent adjudications.” *Gillespie*, 858 F.2d at 1103. In *Long v. Collins*, this Court explained that the bar on separate injunctive cases by individual Texas prisoners would exist “until the *Ruiz* injunction is lifted or modified.” 917 F.2d at 5. If *Gillespie* and *Long* were ever a bar to suit by Mississippi prisoners, that bar ceased to exist when *Gates* was finally dismissed. *See also Ruiz v. United States*, 243 F.3d 941, 953 (5th Cir. 2001) (stating, in the context of urging the district court to terminate the *Ruiz* consent decree, that “[i]f any of the present prisoners have need for some kind of help, they can file another law suit against the Texas Prison System[.]”) (Garza, R., specially concurring).

II. THE DISTRICT COURT DID NOT ERR IN FINDING THAT PLAINTIFFS EXHAUSTED ADMINISTRATIVE REMEDIES

Defendants claim that the District Court “refus[ed] to require that the inmates comply with the [PLRA’s] exhaustion requirement prior to filing and pursuing this civil action” [Defs.’ Br. at 26]. This is simply incorrect. The Complaint alleged, and Plaintiffs demonstrated, that before filing suit Plaintiff Willie Russell exhausted administrative remedies on every issue presented in the Complaint. Defendants never refuted this evidence, and the District Court twice

found that Mr. Russell had in fact exhausted administrative remedies.

Defendants' administrative remedy program [PRE, R2:274-281] provides that a prisoner may file an "emergency grievance," defined as a grievance relating to matters in which "disposition according to the regular time limit" would either "(a) subject the offender to substantial risk of personal injury," or "(b) cause other serious and irreparable harm to the Offender." An emergency request "shall be handled as expeditiously as possible" and shall be reviewed by the Commissioner or his designee. [PRE , R2:278] If a grievance submitted as an emergency is ruled not to be any emergency, "it shall be returned to the grievant specifying that fact, with reasons," and notifying the inmate that "the grievance may be resubmitted as a regular grievance." [*Id.*] A request for an administrative remedy cannot be rejected for technical reasons or matters of form without notice to the prisoner as to the reasons, and the offender must be allowed five days from the date of rejection to file his corrected grievance. [PRE, R2:275-276] No more than 90 days from initiation to completion of the administrative remedy process shall elapse, and expiration of time limits without receipt of a written response entitles the offender to move to the next step in the process. [PRE, R2:279]

Following this procedure, Plaintiff Russell exhausted administrative remedies. On January 31, 2002, Plaintiff's counsel delivered to MDOC

Commissioner Robert L. Johnson, a document captioned “Emergency Request by Inmate Willie C. Russell for an Administrative Remedy Concerning Conditions on Death Row,” complaining that these conditions deprived the Death Row prisoners of “such basic human needs as minimally adequate sanitation, ventilation, light, shelter, and access to medical care,” and requesting a meeting to discuss these problems in an effort to avoid litigation. [PRE, R2:282-283]. MDOC neither rejected this request for an administrative remedy on technical grounds or for matters of form, nor ruled that it was a non-emergency, nor advised Russell to resubmit it as a regular grievance. [PRE, R2:271] MDOC’s Commissioner, Defendant Robert L. Johnson, evidently deemed it to be a legitimate and appropriate use of the grievance program, and agreed to meet with Plaintiff’s counsel to discuss the issues raised in the January 31 grievance. [PRE, R2:272]

On March 8, Plaintiff Russell’s counsel provided the Commissioner with a memorandum discussing Plaintiffs’ grievance in greater detail [PRE, R2:272, 284-287], and spelling out every issue later addressed in the Complaint. [R1:1-20] On March 12, the Commissioner met with Plaintiff’s counsel concerning Russell’s grievance. [PRE, R2:272] For the next three months, negotiations continued. [*Id.*] On April 1, Plaintiffs’ counsel asked the Commissioner to respond by May 1 to the most urgent items. [PRE, R2:272, 288-290] On April 15, the Commissioner

responded that MDOC had addressed or intended to address certain of the inmates' complaints, but denied that the other problems required amelioration. [PRE, R2:272, 291-292] On June 14, Plaintiffs' counsel asked the Commissioner for a substantive response to all the issues raised in the Emergency Request, the March 8 memorandum and the March 12 meeting. [PRE, R2:72, R2:295-298] On June 18, the Commissioner advised Plaintiffs' counsel that he had decided to revise one of the policies to which Plaintiffs objected, but he did not address any of the other issues raised in the grievance. [PRE, R2:273, 299] Plaintiffs received no further response. [PRE, R2:273] They filed suit on July 12, 2002, more than 90 days after submission of the Emergency Request for Administrative Remedy.

Based on this evidence, the District Court denied Defendants' motion to dismiss and found that Russell had exhausted his administrative remedies. [R3:456-457]⁸ In its post-trial supplemental findings, the District Court reiterated

⁸The District Court held that exhaustion by a single class member on each of the issues in the case is sufficient. [RE Tab G] That legal conclusion was correct. *See, e.g., Jackson v. District of Columbia*, 254 F.3d 262-268-69 (D.C. Cir. 2001);

that Russell had exhausted administrative remedies, as reflected in the record. [R3:579] Defendants studiously ignore Russell’s January 31 Emergency Grievance, focusing instead on an unrelated grievance that Russell had submitted earlier. *See* Defs. Br. at 27-28. The record, however, leaves no room for this maneuver. The Complaint spells out that Plaintiffs rely on the January 31 grievance [R1:18 ¶65]; Plaintiffs relied on that grievance in opposing Defendants’ motion to dismiss [R2:271]; and the District Court credited Plaintiffs’ proof regarding that same grievance in finding, pretrial and post-trial, that Russell had exhausted administrative remedies before filing suit. [RE Tabs G, I]

Unwilling to address the District Court’s actual rulings that Plaintiff Russell had exhausted administrative remedies, Defendants focus exclusively on dicta in the court’s May 21 Memorandum Opinion that to require exhaustion in this case would be “a matter of form over substance,” and “futile,” since *Gates* had been ongoing since 1971. Def. Br. at 26. This dicta merely acknowledges that Plaintiffs could have chosen to petition the court to reopen *Gates* rather than file a new lawsuit – in which case, of course, exhaustion of administrative remedies would

Lewis v. Washington, 265 F. Supp. 2d 939, 942 (N.D. Ill. 2003). Defendants have not challenged that holding on appeal.

presumably have been unnecessary.⁹ Instead, Plaintiffs filed a new case after exhausting administrative remedies and the District Court not only ruled pretrial that Russell had exhausted administrative remedies, it reiterated this finding post-trial. The alternative rationale that the District Court offered was superfluous.

III. THE DISTRICT COURT’S FINDINGS THAT DEFENDANTS CONSCIOUSLY DISREGARDED SUBSTANTIAL RISKS OF

⁹42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought" with respect to prison conditions "until such administrative remedies as are available are exhausted." On its face, this provision does not apply to litigation to enforce an existing decree for prospective relief. *Cf. Castillo v. Cameron County, Texas*, 238 F.3d 339, 354 (5th Cir. 2001) (holding that § 3626(a)(3) of the PLRA does not apply to a court's decision to continue an existing injunction, because the language "no court shall enter" an order shows that it applies only to newly-entered relief).

SERIOUS HARM TO PLAINTIFFS' PHYSICAL AND MENTAL HEALTH ARE NOT CLEARLY ERRONEOUS

A. Deliberate Indifference to a Substantial Risk of Serious Injury Violates the Eighth Amendment, As Does the Wanton and Unnecessary Infliction of Pain, With or Without Physical Injury

Defendants' contention that there can be no Eighth Amendment violation without proof that the conditions at issue have caused serious physical injury, *see* Defs. Br. at 30-31, is contrary to Supreme Court precedent. Prisoners prove an Eighth Amendment violation when they show that they were incarcerated under conditions posing a substantial risk of serious harm to their health or safety, and that officials acted or failed to act with deliberate indifference, that is, with conscious disregard for that risk. *Farmer v. Brennan*, 511 U.S. at 834, 839-840. Unsafe conditions that "pose an unreasonable risk of serious damage to [a prisoner's] future health" may violate the Eighth Amendment even if the damage has not yet occurred and may not affect every prisoner exposed to the conditions. *Helling v. McKinney*, 509 U.S. 25, 30, 33 (1993). Prison officials may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year" merely because no harm has yet occurred, and a "remedy for unsafe conditions need not await a tragic event." *Id.*; *accord*, *Farmer*, 511 U.S. at 845.

Conditions that have “a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise” violate the Eighth Amendment in combination, even if the conditions separately would not be unconstitutional. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991). Further, “the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of ‘grue’ might be tolerable for a few days and intolerably cruel for weeks or months.” *Hutto v. Finney*, 437 U.S. 678, 686-687(1978). Corrections officials’ treatment of prisoners also violates the Eighth Amendment, whether or not it causes physical injury, when it ““offend[s] contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.”” *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (*quoting Gates v. Collier*, 501 F.2d at 306) (holding that Alabama prison officials violated the Eighth Amendment by handcuffing a prisoner to a hitching post, thereby knowingly subjecting him to a substantial risk of physical harm, unnecessary pain from the handcuffs, unnecessary exposure to the heat of the sun, prolonged thirst, taunting, and a deprivation of bathroom breaks that created a risk of discomfort and humiliation; such treatment violates the “basic concept underlying the Eighth Amendment, which is nothing less than the dignity of man.”); *see also Hutto v. Finney*, 437 U.S.

at 685.

Here, Plaintiffs are subjected without relief to excessive heat, uncontrolled mosquito infestations, pervasive squalor, lack of access to exercise, and the constant raving of psychotic prisoners; separately and in combination, these conditions pose serious risks to their mental and physical health, deprive them of sleep, and wantonly inflict unnecessary pain. This Court's decisions recognize that such conditions are sufficiently serious to implicate the Eighth Amendment. *See e.g., Harper v. Showers, supra*, 174 F.3d 716, 720 (noting that sleep is a basic human need and holding that a prisoner's allegations that his placement in cells next to psychiatric patients who screamed, beat on metal toilets, flooded cells and threw feces, depriving him of cleanliness, sleep, and peace of mind, stated a nonfrivolous Eighth Amendment claim); *McCord v. Maggio*, 927 F.2d 844 (5th Cir. 1991) (prisoner's confinement in a roach-infested, windowless, unlighted cell into which rainwater and backed-up sewage leaked and in which he was forced to sleep on a wet mattress on the floor violated the Eighth Amendment); *Bienvenu v. Beauregard Parish Police Jury*, 705 F.2d 1457 (5th Cir. 1983) (allegations of confinement in a cold, rainy, roach-infested cell with inoperative, scum-encrusted washing and toilet facilities, stated an Eighth Amendment claim).

B. ACA Accreditation Is Not Proof Of Constitutionally Adequate

Conditions

Defendants rely heavily on Parchman's accreditation by the American Correctional Association (ACA) as proof that conditions at the facility do not violate the Eighth Amendment. *See, e.g.*, Defs. Br. at 1-15, 18, 30-32, 45, 47, 51. Plaintiffs proved that ACA accreditation was of marginal if any significance in this case. The ACA accreditors reviewed Defendants' written policies but not their actual practices, did not inspect the facility in the summer when some of the most major problems are evident, inspected it only after it had just been cleaned and painted, did not have the expertise of Plaintiffs' experts, provided little if any evidence of testing or measurements, and made only vague general findings without any supporting details. [R6:687-694] Further, ACA standards do not even cover major areas at issues in Plaintiffs' case. [R5:612] The District Court properly held that ACA accreditation does not show that conditions are constitutionally adequate. *See Ruiz v. Johnson*, 37 F. Supp. 2d 855, 924-25 (S.D. Tex. 1999), *reversed and remanded on other grounds by Ruiz v. United States*, 243 F.3d. 941 (noting that both sides' experts "recognized the limitations of ACA accreditation," and that there are "a number of examples where a prison system was accredited by the ACA, but was, nevertheless, held by a court to be operating in an unconstitutional fashion").

C. The Heavy Burden of Persuading the Court that the Challenged Conduct Cannot Reasonably Be Expected to Recur Lies With the Party Asserting Mootness

Defendants suggest that by cleaning the facility on the eve of trial, and announcing during trial that they intend to make further improvements, they have mooted Plaintiffs' claims. *See, e.g.*, Defs. Br. at 37 ("cells were generally clean at the time of trial"); 45 n. 12 ("at trial MDOC officials were again hopeful that the water calibration system had been corrected"). A case may become moot "if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 170 (2002) (citations omitted). However, "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness." *Id.* Defendants have not carried that burden.

D. Where There Are More Than One Permissible Views of the Evidence, the Fact-Finder's Choice Among Them Cannot Be Clearly Erroneous

Defendants generally contest the District Court's findings that Defendants consciously disregarded substantial risks to Plaintiffs' physical and mental health. However, as shown below, those findings are not clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two

permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.”).

1. The District Court's Findings on Excessive Heat Are Not Clearly Erroneous

The District Court found that “the probability of heat-related illness is extreme” for the Death Row prisoners. [R3:481] To abate this risk, the court ordered that “[i]f the heat index reaches 90 degrees or above, the defendants will insure that each cell is equipped with a fan, that ice water is available to each inmate, and that each inmate may take one shower during each day when the heat index is 90 degrees or above.” [R3:488]

Defendants contend that this provision must be vacated because “the Constitution does not mandate comfortable prisons.” Defs. Br. at 40 (quoting *Rhodes v., Chapman*, 452 U.S. 337, 349 (1981)). However, the district court properly credited the testimony of Dr. Vassallo, Dr. Kupers, and James Balsamo that access to these modest cooling measures during extreme summer temperatures is not a luxury but a medical necessity to abate the high risk of heat stroke and other severe and potentially fatal heat-related illnesses. [R4:121-122, R5:336-340, R5:453] The determination of whether conditions present a risk of death, based on a weighing of the evidence and testimony at trial, is a question of fact reviewed

deferentially for clear error. *See Henderson*, 55 F.3d at 1069.

Defendants claim that the record is “uncontradicted” that “no Unit 32-C inmate has ever suffered heat exhaustion or any serious heat-related illness or injury because of the conditions on the tier.” Defs. Br. at 40. They further claim that their medical expert, Parchman’s medical director Dr. Bearry, testified “in uncontradicted fashion that there had been no cases of heat exhaustion or heat stroke.” Defs. Br. at 41. These assertions are patently untrue. Dr. Vassallo testified that Death Row inmates have certainly suffered heat-related illnesses, and that these go undiagnosed by Defendants’ medical staff. [R5:330-335] Dr. Bearry himself acknowledged that he was “certainly not an expert like Dr. Vassallo,” and he frankly acknowledged that there was nothing in Dr. Vassallo’s testimony regarding the risks for, and consequences of, heat-related illness with which he disagreed. [R5:355-358] Indeed, Dr. Bearry had little or no grasp of basic concepts regarding heat-related illness. [R5:334] The District Court did not abuse its discretion in crediting Dr. Vassallo rather than Dr. Bearry.

The District Court also credited the testimony of Plaintiffs’ experts that Defendants have failed to take adequate preventative measures to reduce the risk of serious heat-related illness or death by providing the Death Row prisoners access to external cooling mechanisms. Of the many measures proposed by the experts

to abate these risks,¹⁰ the District Court selected three, which the experts testified were critical in the absence of air conditioning and which the court found to be the least intrusive: a fan for each cell and access to daily showers and ice water.

Defendants argue that the District Court exceeded its authority in ordering relief from the heat because in *Woods v. Edwards*, 51 F.3d 577 (5th Cir. 1995), this Court upheld summary judgment on a prisoners' Eighth Amendment claim regarding excessive heat. Defs. Br. at 41-42. In *Woods*, however, the plaintiff "failed to present medical evidence of any significance nor has he identified a basic human need that the prison has failed to meet." 51 F.3d at 581. Defendants also rely on *Davenport v. DeRobertis*, 844 F.2d 1310 (7th Cir. 1988), in which the Seventh Circuit found that one shower a week for prisoners in punitive segregation did not violate the Constitution because three showers a week was merely a "cultural amenity." *Id.* at 1316-17. By contrast, in this case credible expert testimony established that, in the absence of access to air conditioning, daily showers during excessively hot weather are *medically* required to lessen the

¹⁰See R5:336-340 (Dr. Vassallo);

R4:121-122 (James Balsamo); R5:453

(Dr.Kupers); R6:481 (Vincent Nathan).

serious risk of grave illness.

Finally, Defendants make assertions of fact to this Court about the burdens and risks of providing daily showers, ice, and fans, *see* Defs. Br. at 42 n. 10, which they did not present at trial and upon which they did not give the District Court the opportunity to rule.¹¹ It is not for this Court but for the District Court to determine in the first instance whether Defendants' factual assertions concerning costs and burdens are credible.

¹¹Defendants' post-trial objections are not consistent with their trial testimony. Defendant Epps testified at trial that as Department of Corrections Commissioner he would "absolutely not [have] any problem" with supplying commissary fans to Death Row prisoners, so long as someone else would donate the money for them. [R6:851-852]

2. The District Court's Findings on Lack of Mosquito Control Are Not Clearly Erroneous

The District Court credited the testimony of Plaintiffs' environmental health and safety, medical, psychiatric and correctional experts that Defendants' pest control program is so inadequate that it causes significant health and safety risks, especially in combination with extreme summer heat. *See supra* at 10-11. The District Court noted that mosquitoes in the Mississippi Delta are a problem that cannot be eliminated, but found that nonetheless "the problem must be addressed and the impact lessened, especially with the incidence of West Nile virus, a mosquito-born disease, increasing in Mississippi." [R3:487] The Court chose what it viewed as the least intrusive means for abating the risks: It ordered Defendants to "continue their efforts at mosquito eradication and pest control" and to "insure that all cell windows are repaired and screened with 18 gauge window screen or better." [*Id.* at 489] This was the standard that Plaintiffs' expert testified was necessary to keep out mosquitoes. [R4:51-52]

Defendants do not contend that this remedy is overly intrusive; indeed, Defendants' maintenance supervisor agreed that the screens ought to be replaced with a smaller-gauge mesh, and said that they would be replaced eventually although there were no immediate plans to do so. [R4:105:9-106:4] Defendants contend, however, that Plaintiffs' expert testified that at the time of the trial none of the screens needed replacing. Defs. Br. at 43. This is simply a mis-statement of the testimony: Plaintiffs' expert testified that *all* the screens needed replacing because the substandard mesh cannot keep out mosquitoes. [R4:46-52, 114-119]

3. The District Court's Findings on Malfunctioning Toilets Are Not Clearly Erroneous

The District Court ordered Defendants to “insure that the problem of ‘ping-pong’ toilets in Unit 32 as a whole is addressed” and to “provide to the court within 60 days the details of a plan to eradicate this problem.” [R3:489] There was ample evidence to support this remedial measure. *See supra* at 11-12.

Defendants insist that this problem is not serious enough to amount to an Eighth Amendment violation because there is no proof that it has resulted in medical injury. Defs. Br. at 44-45 No such proof is required: It is enough to warrant relief that the ping-pong toilets expose the prisoners to a significant health hazard. [R4:53-54] The Mississippi State Department of Health has warned the Defendants every year for the past eleven years that these malfunctioning toilets in Unit 32-C are a critical public health problem requiring immediate attention. [R4:55-57] Further, even apart from the clear health risk, the District Court was correct in deciding that “[n]o one in a civilized society should be forced to live under conditions that force exposure to another person’s bodily wastes.” [R3:483] *See Despain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001) (“Exposure to human waste, like few other conditions of confinement, evokes both the health concerns

emphasized in *Farmer* and the more general standards of dignity embodied in the Eighth Amendment”); *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990) (“courts have been especially cautious about condoning conditions that include an inmate’s proximity to human waste”); *Palmer v. Johnson*, 193 F.3d 346, 349-352 (5th Cir. 1999) (not allowing a prisoner to use a bathroom during a 17-hour outdoor confinement with 49 other inmates and telling him that his only option was to urinate and defecate in the field where he was confined implicates the Eighth Amendment; certain prison conditions are “so base, inhuman and barbaric” that they violate the Eighth Amendment, *quoting Novak v. Beto*, 453 F.2d 661, 665 (5th Cir. 1971)). *Cf. Hope v. Pelzer*, 536 U.S. at 738 (the “basic concept underlying the Eighth Amendment” is “nothing less than the dignity of man,” *quoting Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

Defendants argue that they cannot be ordered to correct the problem because the toilets “have been and will continue to be the subject of corrective efforts by MDOC personnel,” Defs. Br. at 45, and “at trial MDOC officials were again hopeful” that the problem had been corrected. *Id.* at n. 12. In fact, the problem had *not* been corrected at the time of trial [R4:251-254; R5:621-624; R5:625-627], despite Defendants’ actual awareness for more than a decade that the problem is urgent. [R4:229, 230; R6:765, 819]

4. The District Court’s Findings on Mental Health Care Are Not Clearly Erroneous

Defendants argue that there was “no demonstrated constitutional violation”

in the area of mental health. Defs. Br. at 48. The record overwhelmingly refutes this assertion. The District Court found that the severely psychotic prisoners housed on Death Row “scream at night, throw feces, and generally make life miserable for the inmates and guards at Unit 32-C;” that the severely mentally ill prisoners are merely being “warehoused,” in some cases medicated but with “essentially no other mental health services;” that “the mental health care afforded the inmates on Death Row is grossly inadequate;” that the conditions to which they are subjected “are enough to weaken even the strongest individual;” that “what mental health services are provided generally take place at the inmate’s cell within hearing of other inmates and guards;” that “comprehensive mental health evaluations are consistently inadequate;” that prisoners are “prescribed psychotropic drugs with only sporadic monitoring,” which “can result in life threatening situations due to the toxicity of these drugs;” and that appropriate housing of the severely mentally ill is needed to “help address the issues of excessive noise and sanitation problems caused by severely psychotic inmates.” [R3:485-486]. There was ample evidence to support these findings. *See supra* at 12-15.

Defendants complain that the District Court was without authority to order them to “insure that the new vendor for medical services complies with the ACA

and the National Commission on Correctional Healthcare medical and mental health standards,” because prison officials “had already determined” that the new vendor will be required to comply with these standards. Defs. Br. at 47 (citing Defendants’ testimony that “we’re going to require that”). The bald assertion “we’re going to require that” is insufficient to show that Defendants have in fact ensured compliance with the standards. “The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness.” *Laidlaw*, 528 U.S. at 170.

Defendants suggest that there was no constitutional violation because “the central focus of the PLRA is upon the physical manifestation of serious harm, not on mental or emotional problems standing alone,” and Plaintiffs did not prove a “pattern of suicides, suicide attempts, or of infliction of injury on others due to deliberately untreated mental health problems.” Defs. Br. at 49-50 & n.15. No such proof was required. Prison officials violate the Eighth Amendment when they act with deliberate indifference to a prisoner’s serious mental health needs, which are no less objectively serious than physical health needs. *See e.g., Partridge v. Two Unknown Police Officers of City of Houston, Tex.*, 791 F.2d 1182, 1187 (5th Cir. 1986); *accord, Domino v. Texas Dept. of Criminal Justice*, 239 F.3d 752 (5th Cir. 2001). While Section 1997e(e) of the PLRA provides that “[n]o federal civil

action may be brought by a prisoner ... for mental or emotional injury suffered while in custody without a prior showing of physical injury," it does not prohibit prospective relief in such cases. *Harper v. Showers*, 174 F.3d at 719.

Defendants object that the Court ordered them to house separately and apart from all other inmates those inmates diagnosed with psychosis and severe mental health illness and that "only 'extreme deprivation' of minimal levels of health care can qualify for a conditions of confinement claim." Def. Br. at 49. This Court has already ruled that a prisoner's allegations that his placement in cells next to psychiatric patients who screamed, beat on metal toilets, flooded cells and threw feces, thereby depriving him of basic human needs for cleanliness, sleep, and peace of mind, stated a nonfrivolous 8th Amendment claim. *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999).

Defendants contend that the testimony of their witnesses concerning MDOC policies and practices refutes the testimony of Plaintiffs' expert that the mental health care is grossly inadequate. Defs. Br. at 51-52. However, the District Court found the testimony of Dr. Kupers and Plaintiffs' other witnesses more credible and persuasive than Defendants' testimony. Defendants also claim that ACA accreditation shows the constitutional adequacy of their medical and mental health care. Defs. Br. at 51-52. ACA accreditation certainly does not establish that

conditions at Parchman are constitutionally adequate, *see supra* at pp. 33-34, and cannot possibly establish that Defendants' mental health services are adequate since ACA standards do not even include a comprehensive mental health standard. [R5:612]

5. The District Court's Findings on Cell Lighting Are Not Clearly Erroneous

The District Court credited the testimony of James Balsamo that the typical cell has only 2 to 4 foot-candles of illumination, that some cells have only one foot-candle, and that 20 foot-candles is the minimum level necessary for reading, cell cleaning and personal hygiene. [R3:484] The Court ordered Defendants to "upgrade the lighting in Unit 32 as a whole to provide lighting in each cell equal to 20 foot-candles." [R3:489]

While Defendants concede that 20 foot-candles is the requisite minimum [R6:772], and do not contend that the existing lighting is constitutionally adequate, they do contend that they are already "in the process of upgrading cell lighting." Defs. Br. at 45. In fact, nothing in the record supports this assertion other than Defendant Sparkman's vague testimony that "we're working towards getting new lighting." [R6:745] Defendants admitted, furthermore, that although they previously used lights that did meet national standards, when they replaced those

fixtures they made a “bad decision” to replace them with fixtures that provide grossly inadequate illumination. [R6:831]

6. The District Court’s Findings On Sanitation Are Not Clearly Erroneous

The District Court credited the testimony of Plaintiffs’ witnesses that Defendants fail to regularly provide the prisoners with clean water and other basic cleaning supplies, and that Defendants routinely rotate the prisoners into cells left horrifically filthy by severely psychotic inmates, with food, feces, and dried ejaculate encrusted on the walls, floor, toilet, ceiling, and bars, and with drastically inadequate access to cleaning supplies. [R4:58-60, 63, 68-69, 75-78, 255-256; R5:403-404, R6:667] The court ordered Defendants to “insure that a cell to which an inmate is moved is clean prior to the move” and to provide inmates with “[a]dequate cleaning supplies and equipment” so that “they may clean their cells at least weekly.” [R3:488]

Defendants contend that nothing in the Eighth Amendment forbids their practice of routinely moving prisoners into the feces-encrusted cells of acutely psychotic prisoners, Defs. Br. at 36. This Court has already held that such conduct may violate the Eighth Amendment. *See Harper v. Showers, supra*, 174 F.3d at 716, 717, 720 (holding to be non-frivolous a Mississippi prisoner’s claim that

Defendants violated the Eighth Amendment by often moving him into filthy, feces-smearred cells that formerly housed psychiatric patients). Defendants further argue that “[not] even dirty or filthy conditions constitute the necessary ‘extreme deprivation’ of life’s necessities where minimal cleaning supplies are made available to inmates.” Defs. Br. at 38-39, citing *Green v. Ferrell*, 801 F.2d 765, 771 (5th Cir. 1986), and *Davis v. Scott*, 157 F.3d 1003. *Green* reaffirmed the principle that prisons must provide reasonably adequate sanitation; it reversed the portion of the judgment requiring the jail to provide hygienic materials in light of the district court’s findings that the jail provided hygienic materials upon request. 801 F.2d at 771. In *Davis*, also, the prisoner was given cleaning materials on request, and there was no evidence that the filthy conditions on this one isolated occasion caused any injury. Here, Defendants do not provide the necessary cleaning supplies. Furthermore, they deliberately move prisoners into cells left in horrendous condition by severely psychotic inmates, a practice which is not only degrading and psychically damaging [R5:402-404], but also deliberately punitive and entirely unnecessary for security [R6:666-672]. The Eighth Amendment “always stands as a protection” against “calculated harassment unrelated to prison needs.” *Harper v. Showers* 174 F.3d at 720, quoting *Hudson v. Palmer*, 468 U.S. 517, 530 (1984); *Hope v. Pelzer*, 536 U.S. 730, **738** (rejecting defendants’

purported security rationale and concluding that in shackling a prisoner to a hitching post despite the clear lack of an emergency, officials gratuitously inflicted wanton and unnecessary pain).

Defendants further argue that there is no Eighth Amendment violation because the cells were clean at the time of trial. Defs. Br. at 38. The District Court, however, credited Plaintiffs' testimony that just prior to the inspection tours and the trial Defendants put the Unit into an atypical state of relative cleanliness, without, however, implementing the written maintenance and preventive maintenance plans that are necessary to maintain acceptable sanitation. [R4:293-294; R4:257; R4:29-30, 59, 78, 87-90, 129; R5: 367-368]. Defendants have failed to carry their burden of clearly establishing that their wrongful conduct cannot reasonably be expected to recur. *Laidlaw*, 528 U.S. at 170.

7. The District Court's Findings On the Need for a Written Preventive Maintenance Plan Are Not Clearly Erroneous

The District Court ordered that a "general preventive maintenance schedule and program shall be reduced to writing within 60 days" of the Final Judgment. Defendants criticize this provision on two grounds: They contend that there has been "no demonstration of the objective and subjective components" of an Eighth Amendment claim to support such relief, and they assert that they have

already fully complied with this provision. Defs. Br. at 39. Both contentions are contradicted by the record.

The objective seriousness of the need for reducing to writing a preventive maintenance plan and Defendants' subjective awareness of the need for such a plan were amply demonstrated at trial. The risks of the squalid conditions and the constantly recurring break-down of the water, plumbing, and other operating systems were obvious, and Plaintiffs' environmental health and safety expert testified that unless a *written* plan is put in place and enforced, the same problems predictably will recur again and again [R4:114, 129], with grave if not catastrophic medical, health and safety consequences. [R4:130-131]

Defendants claim that "preventive maintenance and housekeeping plans [are] already in place." Defs. Br. at 39. Mr. Balsamo testified, based on his interviews with Defendants' maintenance director and facility engineer, that Defendants have no written preventive maintenance or maintenance plan. [R4:94, 113-114] Defendants testified that they have a "housekeeping plan," but they never actually produced one.¹² The District Court did not abuse its discretion in crediting Mr. Balsamo rather than Defendants on this point.

¹²Not one of the record cites which Defendants provide, *see* Defs. Br. at 39, citing to RE Tab Q and S, shows that they have a written maintenance or preventive maintenance plan.

8. The District Court's Findings On Lack of Access to Clean Clothes and Bedding Are Not Clearly Erroneous

The District Court found that prisoners' clothing and bedding are returned from the central laundry foul-smelling and dirty, and ordered Defendants to "insure that the proper chemical agents are used at the laundry so that inmates' laundry is returned clean and without a foul smell." [R3:484-485, 489] This finding and order are supported by the record. [R4:259-261; R4:84-86; R6:834].

Defendants argue that lack of access to clean laundry does not implicate the Eighth Amendment in the absence of proof that the deprivation has caused "serious medical harm," a proposition for which they cite *Green v. Ferrell*, 801 F.2d 765 (5th Cir. 1986). *See* Defs. Br. at 47. *Green* does not support that proposition. It reaffirmed the long-established principle that "[j]ails must provide 'reasonably adequate' sanitation," and reversed the portion of the judgment requiring the jail to provide laundry services because the prisoners were provided with detergent and allowed to wash their laundry in their cells. *Id.* at 771. Here, unlike in *Green*, the prisoners are subject to discipline for doing their laundry in their cells; their only option, without violating prison rules, is to send out laundry that is returned to them dirty and foul-smelling.

9. The District Court’s Findings That Access to Shoes, Shade and Water Are Necessary to Provide Adequate Opportunity for Exercise Are Not Clearly Erroneous

Defendants argue that because they comply with ACA standards regarding the frequency and duration of exercise there is no constitutional violation, and that deprivation of shoes, water and shade during exercise cannot violate the Eighth Amendment. Defs. Br. at 53-55. The District Court , however, credited the experts’ testimony that even if the frequency and duration of the exercise periods meets ACA standards, a combination of factors - lack of water, shade, and shoes - nevertheless effectively deprives Plaintiffs of meaningful opportunity for exercise. *See supra* at 15-16. *Compare Wilson v. Seiter*, 501 U.S. at 304-305 (citing restrictions on outdoor exercise combined with long lock-in times as an example of conditions combining to deprive prisoners of an identifiable human need).

Defendants claim that they cannot provide footwear because prisoners could use them as weapons or to escape. Defs. Br. at 54. However, Defendants already have a policy that inmates leaving the unit are to wear gym shoes, and it would require only a slight administrative effort for those same gym shoes to be made available to prisoners while they were in the outdoor exercise pens. [R6:675] The District Court tailored the remedy accordingly, ordering that shoes be made available only during exercise. [R3:489] Defendants did not offer any security or other rational at trial for denying access to water or shade during exercise, and

Plaintiffs' expert testified that there was none. [R6:673]¹³

IV. THE DISTRICT COURT'S FINDINGS SATISFY 18 U.S.C. §3626

18 U.S.C. § 3626(a) (1)(A) provides that a court “ shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.” The District Court found, “based on the entire record,” that the prospective relief it ordered met this standard. [R3:529-530]

¹³Now, however, Defendants claim that they cannot provide a shaded area since this would obstruct the view of the tower guards. *See* Defs. Br. at 54 n. 18. At trial, Defendants testified that by December 2003 perimeter towers will be dismantled and replaced by lethal perimeter fencing. [R6:776-777]. In any event, the Court should ignore a new factual claim on which the District Court has not had the opportunity to rule.

Defendants agree that the § 3626(a) standard governs this case, *see* Defs. Br. at 55, but they now contend, for the first time in this case, that the district courts are required “to make particularized findings, on a provision-by provision basis, that each requirement meets these standards, ” and that in the absence of such findings the case must be dismissed with prejudice. *See* Defs. Mem. at 56, citing *Castillo v. Cameron County, Texas*, 238 F.3d 339, 354 (5th Cir. 2001).

This argument should not be entertained, since Defendants never raised it in the District Court. *See infra*, Point A. Even if the argument is entertained it should be rejected, since Defendants misread §3626(a)(1) and *Castillo*. *See infra*, Point B. **A. Defendants Failed to Move for Immediate Termination and Never Argued in the District Court That §3626 Requires More Particularized Findings But Instead Forestalled Such Findings and They Should Not Be Permitted to Make Their “Particularized Findings” Argument for the First Time on Appeal**

Having forestalled additional findings regarding the narrowness-need-intrusiveness inquiry by seeking a stay before the Court could enter those findings, *see supra* at p. 7, Defendants now argue that the District Court must be reversed and the case dismissed with prejudice because the court’s narrowness-need-intrusiveness findings were not sufficiently particular. Defs. Br. at 19, 55-57. Section 3626(b)(2) explicitly provides that a party may move for immediate

termination of an order for prospective relief “in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”¹⁴ Defendants could have and should have moved under §3626(b)(2) for immediate termination of the newly-entered decree if they wished to challenge the District Court’s failure to make a “provision by provision analysis” of the narrowness-need-intrusiveness standard.¹⁵ Had they

¹⁴This is the same standard Congress mandated in § 3626 (a)(1) for the initial grant of prospective relief.

¹⁵It is doubtful that such findings are required on motions for immediate termination. *See infra* at 54 & n.16. The findings Congress required under 3626(b)(2) on motion for immediate termination are the same as the findings required under 3626(a)(1) when prospective relief is granted. Congress used different language, imposing additional requirements, for

made such a motion, rather than raising the argument for the first time in this Court, the District Court would have had an opportunity to decide whether, as Defendants now claim, such an analysis is required by statute or case law, and if so

findings under § 3626(b)(3) (termination after a period of years). This difference suggests that Congress intended to require more particularized findings when a court denies a motion to terminate a decree that has been in place for two years or more than when a court first grants prospective relief. This Court, however, has not yet decided this issue. *See Castillo*, 238 F.3d at 352-353 (deciding that the Court “need not determine whether it was necessary for the district court to expressly make the § 3626(b)(2) findings or if the findings may be implied from the court’s judgment,” since the decrees fell squarely within the termination provisions of 3626(b)(1), which mandates written findings on the record pursuant to § 3626(b)(3).

the district court would have had the opportunity to make that analysis.

Defendants should not be permitted to present an argument here which they did not present to the District Court. *See e.g., Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir.1993) (“As a general rule, this Court does not review issues raised for the first time on appeal.”(citations omitted)); *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985) (Issues raised for the first time on appeal “are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice.”); *McDonald's Corp. v. Watson*, 69 F.3d 36, 44-45 (5th Cir. 1995) (Court will not hear argument by defendants regarding lack of certain evidence for issuance of an injunction where defendants failed to argue the issue in the district court).

B. The District Court’s Findings Had to Satisfy 18 U.S.C. § 3626(a)(1), Not 3626(b)(3), and This Court Has Not Construed § 3626(a)(1) to Require a Provision by Provision Analysis of Narrowness-Need-Intrusiveness

“The PLRA ‘establishes standards for the entry and termination of prospective relief in civil actions challenging prison conditions.’” *Castillo*, 238 F.3d at 351 (quoting *Miller v. French*, 530 U.S. 327 (2000)). *Castillo* did not involve the standard for findings to support a grant of new relief, but rather the standard to support continuation of decrees entered several years earlier, which the

defendants had moved to terminate on the grounds, *inter alia*, that the district court had not made the requisite narrowness-need-intrusiveness findings. *Id.* at 352. Unlike the findings required by §3626(a) when a court initially “grants or approves” prospective relief, the findings required by § 3626(b) are applicable when a party brings a motion to terminate such relief. *Castillo*, 238 F.3d at 351-352. Section 3626(b) (1) provides that prospective relief is terminable upon motion after two years from the date of the order. Section 3626(b)(3) provides that such relief “shall not terminate if the court makes *written findings based on the record* that prospective relief *remains* necessary to correct a *current and ongoing* violation of the Federal rights, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.” 18 U.S.C. 3626(b)(3) (emphasis added). Thus, unlike § 3626(a)(1) findings, which are required to support the initial grant of prospective relief, § 3626(b)(3) findings, required on motions to terminate prospective relief after a term of years, must include “*written findings based on the record*” that the provisions continue to satisfy the need-narrowness-intrusiveness requirements of § 3626. *Castillo*, 238 F.3d at 353 (emphasis added).

As this Court noted in *Castillo* in construing other subsections of § 3626,

“[i]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.” *Castillo*, 238 F.3d at 356 (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994)). Here, too, it should be presumed that Congress acted intentionally when it inserted the requirement of “written findings based on the record” in the provision on termination proceedings, and omitted it from the provision on the initial entry of prospective relief. *See id.* at 356-57 (holding that consent decrees predating the PLRA which do not meet the requirements of §§ 3626(a)(1)(B) and (a)(3) are not terminable under § 3626(b) because “Congress did not explicitly [so] state”).

This interpretation also has the virtue of making the best practical sense of the differences in language, given the differences in procedural posture between an initial entry of relief under § 3626(a) and a motion for termination under § 3626(b)(3). In the termination context a decree has been entered some time earlier, often many years earlier, and portions of it may well have become superfluous or obsolete. The district court must hold an evidentiary hearing to determine what the conditions are at the time termination is sought, *Castillo*, 238 F.3d at 353, and “must make new findings about whether the relief currently complies with the need-narrowness-intrusiveness requirements, given the nature of the current

violations.” *Id.* at 354, quoting *Cason v. Seckinger*, 231 F.3d 777, 784-785 (11th Cir. 2000); *Ruiz v. United States*, 243 F.3d at 950-51 (noting that a court must “determine which aspects of the decree remain necessary to correct [the current and ongoing] violations”).¹⁶

¹⁶For all the same reasons, it is doubtful that the more particularized findings are required on motions for immediate termination. The findings Congress required under 3626(b)(2) on motion for immediate termination are the same as the findings required under 3626(a)(1) when prospective relief is granted. Congress used different language, imposing additional requirements, for findings under § 3626(b)(3) (termination after a period of years). This difference suggests that Congress intended to require more particularized findings when a court denies a motion to terminate a decree that has been in place for two or more years than

The situation is entirely different when, as here, a court initially enters relief. In such cases, the court has just conducted a trial regarding current conditions and has fashioned relief to correct exactly those violations. The District Court in this case conducted a trial, found violations, constructed remedies expressly to correct those violations, and made the findings required by the PLRA. “Trial judges are presumed to know the law and to apply it in making their decisions.” *Lambrix v. Singletary*, 520 U.S. 518, 532 n.4 (1997). The courts have always been required to narrowly tailor prospective relief to the constitutional violation the court has just

when a court first grants prospective relief. This Court, however, has not yet decided this issue. *See Castillo*, 238 F.3d at 352-353 (deciding that the Court “need not determine whether it was necessary for the district court to expressly make the § 3626(b)(2) findings or if the findings may be implied from the court’s judgment,” since the decrees fell squarely within the termination provisions of 3626(b)(1), which mandates written findings on the record pursuant to § 3626(b)(3).

identified, and the PLRA did not change that standard but merely codified existing law. *See Williams v. Edwards*, 87 F.3d 126, 133 n. 21 (5th Cir. 1996). Because the trial had just occurred, there was no occasion to compare relief designed to address earlier problems with the current conditions and explain provision by provision how the pre-existing relief continues to meet the requirements. *Compare Ruiz*, 243 F.3d at 950-51. Neither this Court nor any other court of appeals has construed § 3626 to mean that an initial grant of prospective relief is immediately terminable unless the court makes a “provision by provision analysis” of narrowness-need-intrusiveness when it grants new relief. And of course, even if such an analysis were required upon initial grants of relief, the remedy would not be reversal but remand for additional findings on the existing record. *See Ruiz*, 243 F.3d at 951-952 (rejecting defendants’ argument for dismissal with prejudice rather than remand for findings based on the existing record following a motion to terminate); *Castillo*, 238 F.3d at 353-355 (holding that where there was insufficient evidence in the record to support the required findings under § 3626(b)(3) on a motion to terminate, the case should be remanded for an evidentiary hearing to determine current conditions and make the required findings.).

CONCLUSION

This judgment of the District Court should be affirmed.

Respectfully submitted this 6th day of October 2003.

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