Florida Law Review

Volume 51 | Issue 1 Article 14

January 1999

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Recommended Citation

Erin R. Schatz, *Deliberate Indifference: Is There More to Cruel and Unusual Punishment than the Wanton Infliction of Unnecessary Pain?*, 51 Fla. L. Rev. 171 (1999).
Available at: https://scholarship.law.ufl.edu/flr/vol51/iss1/14

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DELIBERATE INDIFFERENCE: IS THERE MORE TO CRUEL AND UNUSUAL PUNISHMENT THAN THE WANTON INFLICTION OF UNNECESSARY PAIN?

Jones v. State, 701 So. 2d 76 (Fla. 1997)

*Erin R. Schatz**

Petitioner was an inmate in a Florida prison awaiting his execution.[1] Seeking a determination that Florida's electric chair was a cruel and unusual punishment in violation of the Eighth Amendment[2] to the United States Constitution,[3] he petitioned to invoke the Supreme Court of Florida's all writs jurisdiction.[4] As proof of his contention, Petitioner referred to the most recent malfunction[5] in Florida's electric chair.[6] After conducting two evidentiary hearings,[7] the trial court reasoned that Florida's electric chair did not wantonly inflict unnecessary pain, and was therefore not cruel and unusual.[8] In an appeal to the Supreme Court of Florida, Petitioner contended[9] that the trial judge should not have limited the inquiry

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* To my family, whose love, guidance, and support I will always cherish.

1. Jones v. State, 701 So. 2d 76 (Fla. 1997).

2. Additionally, Petitioner contended that his Fourteenth Amendment due process rights were violated. *See id.* at 76.

3. The Eighth Amendment to the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

4. *See* Jones v. Butterworth, 691 So. 2d 481 (1997).

5. *See Jones*, 701 So. 2d at 76. During the execution of Pedro Medina on March 25, 1997, smoke and flames came out from under the headpiece. *See id.* at 86 (Shaw, J., dissenting).

6. *See id.*

7. First, the Supreme Court of Florida relinquished jurisdiction to the trial court for a hearing on the claim that Florida's electric chair was cruel or unusual punishment. *See Butterworth*, 691 So. 2d at 482. The trial court was to review testimony of engineering experts, medical experts and other witnesses in order to make a decision. *See id.* Then, after the inmate's petition was denied, he appealed and the Supreme Court of Florida again relinquished jurisdiction to the trial court to provide petitioner with an opportunity to inspect electrocution equipment, as well as gain access to other evidentiary items and witnesses. *See* Jones v. Butterworth, 695 So. 2d 679, 681 (Fla. 1997).

8. *See Jones*, 701 So. 2d at 77. The trial judge made five significant conclusions of law upon which the Supreme Court of Florida based its decision. *See id.* First, cruel or unusual punishment was defined as the wanton infliction of unnecessary pain. *See id.* Second, Florida's electric chair, in past executions, did not to wantonly inflict unnecessary pain, and was therefore constitutional. *See id.* Third, Florida's future executions also will not be cruel and unusual. *See id.* at 78. Fourth, Florida's electric chair at the time of the action was not cruel or unusual. *See id.* Finally, the court noted that it was up to the legislature, not the judiciary, to adopt lethal injections and abandon the electric chair. *See id.*

9. There were actually six additional points on appeal. First, Petitioner appealed the trial

Published by UF Law Scholarship Repository, 1999

to proof that an electrocuted person experienced pain and should have considered the prison officials' deliberate indifference to the prisoner's well being.[10] The Supreme Court of Florida denied Petitioner's claim and HELD, that Florida's electric chair does not involve torture, a lingering death, or the infliction of unnecessary and wanton pain and is therefore constitutional.[11]

Historically, when the United States Supreme Court has examined Eighth Amendment claims, the Court has focused on both the effect of the punishment in question as well as the actions of prison officials.[12] When scrutinizing the punishment's effect, the Court sometimes focuses on a prisoner's pain, suffering, and the degree of torture involved in the punishment.[13] In other instances, the Court also includes a measurement of the punishment against society's evolving standards of decency.[14] Although the Court varies its focus when examining a punishment's effect,[15] the Court has been more consistent when examining the behavior of prison officials.[16] Specifically, the Court considers whether a prisoner's claim is based upon an accidental harm to the prisoner as opposed to an intentional injury inflicted by state officials.[17]

The Court first examined whether an accidental harm constituted a cruel and unusual punishment in *Francis v. Resweber*.[18] In *Francis*, a prisoner was placed in the electric chair for execution but, as a result of a mechanical malfunction, did not die.[19] A new death warrant was then issued for a subsequent execution to take place at a later date.[20] The prisoner petitioned

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court's ruling on his objection to a witness' testimony. *See id.* Second, he appealed the denial of his objection to expert testimony. *See id.* Next, he appealed the judge's refusal to consider evidence that Florida's executions are unusual since many states do not use the electric chair anymore. *See id.* at 79. Petitioner also contended that his attorney-client privilege was violated. *See id.* He further attacked numerous evidentiary rulings. *See id.* at 80. In addition, he contended that he did not receive a fair hearing because the trial judge was biased. *See id.*

10. *See id.* at 79.

11. *See id.*

12. *Compare* Hudson v. McMillan 503 U.S. 1, 10 (1992) (citations omitted) (holding that punishments violate the Eighth Amendment if they are "incompatible with the evolving standards of decency that mark the progress of a maturing society" or if they involve the unnecessary and wanton infliction of pain) *with Jones*, 701 So. 2d at 79 (holding that the proper Eighth Amendment test is one which involves torture or a lingering death or the wanton infliction of unnecessary pain).

13. *See Jones*, 701 So. 2d at 79.

14. *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976).

15. *See supra* text accompanying note 12.

16. *Compare Estelle*, 429 U.S. at 106 (applying the deliberate indifference standard) *with* Farmer v. Brennan, 511 U.S. 825, 834-38 (1994) (applying the deliberate indifference standard).

17. *See, e.g.*, Francis v. Resweber, 329 U.S. 459, 463-64 (1946).

18. *See id.* at 462, 464.

19. *See id.* at 460.

20. *See id.* at 461. The second attempt at executing the prisoner was to take place six days

the Court, contending[21] that a second punishment would constitute a lingering death since he already experienced psychological strain during the first failed execution.[22] The issue before the Court was whether a second execution constituted a violation of the Eighth Amendment.[23]

In denying the petitioner's claim,[24] the Court examined the effect of the punishment[25] on the prisoner as well as the actions and intentions of the prison officials who inflicted the punishment.[26] When examining the effect of the punishment, the Court declared as unconstitutional those punishments which wantonly inflict pain upon a prisoner.[27] When examining the prison officials' actions, the Court reasoned that an unforeseeable accident did not render a punishment unconstitutional if the punishment alone was not cruel and unusual.[28] Therefore, since the Court deemed the first failed execution to be an unforeseeable accident, the Court held that the second execution would not constitute a cruel and unusual punishment.[29]

Based on *Francis*, the Court in *Estelle v. Gamble*[30] formulated a standard that examined the prison officials' intention in relation to the harm suffered by the prisoner.[31] In *Estelle*, the respondent was an inmate who injured his back[32] while performing prison work.[33] Alleging that he received inadequate medical treatment and, as a result, continued to suffer pain, the

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later. *See id.*

21. The petitioner also contended that a second execution would violate the United States Constitution's Due Process Clause and the double jeopardy provision. *See id.* The Court held that there was no due process violation since the Court could not protect everyone from accidents nor prevent accidents from occurring. *See id.* at 465.

22. *See id.* at 464.

23. *See id.* at 463.

24. The court actually denied all of the petitioners claims: the Eighth Amendment claim, the Fourteenth Amendment Due Process claim, and the double jeopardy claim. *See id.* at 462-63, 465.

25. "Effect of the punishment" terminology is used to separate the standards that courts use to judge Eighth Amendment cases into two categories: (1) the effect of the punishment; and (2) the actions or omissions of the prison officials. "Effects" include the wanton infliction of pain, torture, or a lingering death, for example.

26. *See id.* at 462, 463-64.

27. *See id.* at 463-64.

28. *See id.* at 464.

29. *See id.*

30. 429 U.S. 97 (1976).

31. *See Estelle*, 429 U.S. at 97, 102-03, 105-06.

32. Specifically, an item fell onto his back while he was unloading a truck. *See id.* at 99. He was treated by doctors for several months. *See id.* at 99-101. He was brought to the prison disciplinary committee for refusing to work. *See id.* at 101. Although he told the committee that he could not work because he was still in pain, the committee placed him in solitary confinement and he alleged that his medical needs were not tended to sufficiently. *See id.* at 99-101.

33. *See id.*

respondent claimed that his punishment was cruel and unusual.[34] The Court stated that the punishment would be cruel and unusual if the prison officials' actions or omissions were sufficient to indicate a deliberate indifference to the prisoner's serious medical needs.[35]

In evaluating the prisoner's claim, the *Estelle* Court built upon the same two considerations addressed by the *Francis* Court.[36] First, in addition to those punishments which involved the infliction of unnecessary pain, the *Estelle* Court declared that punishments incompatible with society's evolving standards of decency are also unconstitutional.[37] Expanding the *Francis* Court's interpretation of the Eighth Amendment beyond those punishments which wantonly inflict pain, the *Estelle* Court therefore deemed unconstitutional any punishment that would be repugnant to mankind.[38] Second, when examining the intention of prison officials, the *Estelle* Court looked to *Francis* for the proposition that an inadvertent failure to provide adequate medical care was not cruel and unusual.[39] Specifically, a prisoner would have to allege deliberate indifference to serious needs in order to have a valid Eighth Amendment claim.[40]

After the Court articulated this deliberate indifference standard in *Estelle,* the Court then interpreted its application in *Farmer v. Brennan.*[41] In *Farmer,* the petitioner was a preoperative transsexual who was incarcerated with other males even though he displayed overtly feminine characteristics.[42] After being beaten and raped, the petitioner filed a complaint alleging that prison officials were deliberately indifferent to the risk that a transsexual inmate would be vulnerable to sexual attacks if incarcerated with other males.[43]

At issue in *Farmer* was whether prison officials acted with deliberate indifference and thus violated the Eighth Amendment.[44] The petitioner argued that deliberate indifference exists even in situations where prison

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34. *See id.* at 101.

35. *See id.* at 106.

36. *See id.* at 102-03, 105.

37. *See id.* at 102-03.

38. *See id.* at 105-06.

39. *See id.* The *Estelle* court paralleled its facts to the facts of *Francis* and reasoned that just as an "innocent misadventure" in *Francis* did not render the second execution cruel and unusual, neither would the situation before the *Estelle* Court be cruel and unusual.

40. *See id.* at 104-05. The Court noted that if prisoners were intentionally denied treatment, the punishment would be cruel and unusual. *See id.* The prisoner simply failed to show that the prison official acted with deliberate indifference to his needs. *See id.*

41. 511 U.S. 825 (1994).

42. *See id.* at 829. Although he was preoperative, the prisoner underwent estrogen therapy and had an unsuccessful surgery to remove his testicles. *See id.* He wore women's clothing, and wore them in a feminine manner. *See id.*

43. *See id.*

44. *See id.* at 832.

officials are unaware of a substantial risk of harm provided they should have been aware of it.[45] Disagreeing with the petitioner's interpretation,[46] the Court asserted that deliberate indifference exists only if the official acted or failed to act while having knowledge[47] of a substantial risk of harm to the prisoner.[48] The Court therefore emphasized the necessity of a prison official's culpable state of mind.[49] The Court also reasoned that the alleged deprivation must be sufficiently serious such that it might lead to the denial of "the minimal civilized measure of life's necessities."[50] Reasoning that prison officials were unaware of the risk of harm to transsexual inmates, the Court denied the petitioner's claim.[51]

Similarly, Petitioner in the instant case brought a claim based on the deliberate indifference of prison officials.[52] In examining the effect of the punishment on the prisoner, the instant court defined a cruel and unusual punishment as one which involves torture, a lingering death, or the infliction of unnecessary and wanton pain.[53] Because there was no evidence of pain in Florida's executions, the court held that the punishment was not cruel and unusual.[54] In examining the prison officials' actions or omissions, the instant court interpreted deliberate indifference as requiring the unnecessary and wanton infliction of pain.[55] Since evidence existed that Florida's executions did not result in pain to the victims, the court found no merit to Petitioner's claim that prison officials acted with deliberate indifference.[56]

Relying on the trial court's findings of facts, the instant court additionally noted that prior to the malfunction noted in Petitioner's claim,

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45. *See id.* at 836-37. The petitioner urged the Court to adopt a civil law standard of recklessness. *See id.*

46. *See id.* at 837. The petitioner urged the Court to adopt an objective test of deliberate indifference whereby recklessness on the part of prison officials would satisfy deliberate indifference. *See id.* at 836-37. The Court, however, applied a subjective test. *See id.* at 837.

47. *See id.* Although the prisoner wanted recklessness to satisfy the standard, the Court stated that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Id.*

48. *See id.* The respondent asked the court to apply a criminal law approach to recklessness. *See id.* Additionally, the Court stated that the requirement of a culpable state of mind follows from the principle that only the unnecessary and wanton infliction of pain violates the Eighth Amendment. *See id.* at 834. However, the Court stated that there are two requirements of deliberate indifference: (1) the alleged deprivation must be serious and (2) the prison officials must have a culpable state of mind. The court did not state that pain is a requirement. *See id.*

49. *See id.*

50. *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

51. *See id.* at 850.

52. *See* Jones v. State, 701 So. 2d 76, 79 (Fla. 1997).

53. *See id.*

54. *See id.*

55. *See id.* at n.2.

56. *See id.* at 79.

there had been no other malfunctions in the last seventeen executions.[57] Justice Shaw, in a strong dissent, instead took into account the last eighteen executions, as opposed to the last seventeen, and noted that there were two complications.[58] Justice Shaw argued that this record, therefore, compelled finding that Florida's electric chair is unconstitutional.[59] Justice Shaw further reasoned that the harm to the prisoners was in the form of excessive mutilation and brutalization.[60] Specifically, Justice Shaw relied on prior findings of fact to describe that smoke and flames emanated from the victims' heads and that the victims received first, second and third degree burns.[61] Asserting that Florida's executions have an eleven percent failure rate, Justice Shaw concluded that there is a limit to the "constitutional tolerance for error."[62]

The trend from *Francis* to *Farmer* suggests that when courts examine the behavior of prison officials, they adhere to the deliberate indifference standard.[63] On the other hand, when courts examine the effect of a punishment on the prisoner, they vary in their approach.[64] Some courts focus on the degree of unnecessary pain,[65] while others include a measurement of the punishment against society's evolving standards of

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57. *See id.* at 77.

58. *See id.* at 87 (Shaw, J., dissenting).

59. *See id.* (Shaw, J., dissenting).

60. *See id.* (Shaw, J. dissenting). Justice Shaw, describing the malfunctions, stated:

> In two out of eighteen executions, . . . the condemned prisoner was engulfed in smoke, flames, and the odor of burning material—which some observers described as the stench of burning or roasting flesh—when the switch was pulled. The head of one prisoner (Tafero) was burned and charred, his face was seared by flames, and his eyebrows, eyelashes, and facial hair were burned. The head of another (Medina) was burned and charred and his face was scalded.

Id. (Shaw, J., dissenting).

61. *See id.* (Shaw, J., dissenting).

62. *Id.* (Shaw, J., dissenting).

63. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 106 (1976) (holding that deliberate indifference of prison personnel to a risk of serious harm is a violation of the Eighth Amendment); *see also Farmer*, 511 U.S. at 828 (holding that a prison official's deliberate indifference to a serious risk of harm to a prisoner violates the Eighth Amendment).

64. *Compare Francis*, 329 U.S. at 463 (reasoning that the infliction of unnecessary pain in the executions of prisoners is cruel and unusual) *with Estelle*, 429 U.S. at 102, 103 (reasoning that punishments incompatible with evolving standards of decency or those which involve the unnecessary and wanton infliction of pain are unconstitutional) *and* Hudson v. McMillian, 503 U.S. 1, 10 (1991) (reasoning that punishments incompatible with evolving standards of decency as well as those involving the unnecessary and wanton infliction of pain are unconstitutional) *and Jones*, 701 So. 2d at 79 (defining a cruel and unusual punishment as one which involves torture, a lingering death, or the wanton infliction of unnecessary pain).

65. *See Jones*, 701 So. 2d at 79.

decency.[66] The instant court's analysis of Petitioner's claim halted as soon as the court noted that the recent malfunction caused no pain to the victim.[67] However, the instant court misinterpreted *Farmer's* requirements of deliberate indifference and therefore did not apply the correct test of deliberate indifference.[68]

Farmer lists two requirements for the test of deliberate indifference.[69] The first requirement is that the prison officials' alleged deprivations must be serious.[70] Sufficiently serious deprivations are those that deny "minimal civilized measures of life's necessities."[71] The second requirement is that prison officials must have a culpable state of mind.[72] Nowhere in the opinion does the *Farmer* Court articulate the requirement of the wanton infliction of unnecessary pain.[73]

The instant court utilized a narrow definition of deliberate indifference, one which considered only the level of pain and torture in the punishment.[74] In doing so, the instant court made it impossible to apply the *Farmer* test of deliberate indifference since it had already declared that the malfunctions caused no pain to the victims.[75] The correct application of this standard is vital since a finding of deliberate indifference on the part of prison officials, by definition, renders a punishment cruel and unusual in violation of the Eighth Amendment.[76]

Even if the instant court had correctly interpreted the deliberate indifference standard, it probably still would have come to the same conclusion since the court based its opinion on an incomplete set of facts.[77]

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66. *See Hudson*, 503 U.S. at 10; *see also Estelle*, 429 U.S. at 102-03.

67. *See Jones*, 701 So. 2d at 79. The court stated that, "[t]here was substantial evidence . . . that executions in Florida are conducted without any pain whatsoever, and this record is entirely devoid of evidence suggesting deliberate indifference to a prisoner's well-being on the part of state officials." *Id.*

68. *Compare Farmer*, 511 U.S. at 834 (holding that the two requirements for prison officials to be liable for deliberate indifference are: (1) a sufficiently serious deprivation and (2) a culpable state of mind) *with Jones*, 701 So. 2d at n.2 (stating that the *Farmer* test for deliberate indifference requires the unnecessary and wanton infliction of pain for an Eighth Amendment violation).

69. *See Farmer*, 511 U.S. at 834.

70. *See id.*

71. *See id.*

72. *See id.* The Court simply refers to the requirement of unnecessary and wanton infliction of pain, but never states it as a requirement for deliberate indifference. *See id.*

73. *See id.*

74. *See Jones*, 701 So. 2d at 79.

75. *See id.* at n.2. "The *Farmer* opinion also points out that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Id.*

76. *See Estelle*, 429 U.S. at 106. The Court stated that deliberate indifference on the part of prison officials results in a cruel and unusual punishment in violation of the Eighth Amendment. *See id.*

77. A more thorough opinion would have acknowledged that there was another malfunction

As Justice Shaw noted in his dissent, there had been two malfunctions in the past eighteen executions.[78] The majority, however, based its opinion on a record which revealed only one malfunction in the past seventeen executions.[79] Applying the deliberate indifference standard to facts revealing only one malfunction, the instant court could have logically concluded that there was no deliberate indifference to a risk of serious harm to the prisoner.[80] Looking to *Francis* and *Estelle*, the instant court would have probably reasoned that one malfunction out of seventeen was an unforeseeable accident.[81] As the Court reasoned in *Francis* and *Estelle*, one unforeseeable inadvertent occurrence is not substantial enough to render an otherwise constitutional punishment unconstitutional.[82]

On the other hand, if the instant court had applied the correct interpretation of the deliberate indifference standard to the facts noted in Justice Shaw's dissent,[83] the instant court might have held that the prison officials violated the Eighth Amendment.[84] *Francis*, *Estelle*, and *Farmer*, taken together, suggest that once a harm is no longer an accident, and prison officials therefore act or fail to act with a culpable mind,[85] a punishment is cruel and unusual.[86] Applying the correct interpretation of the deliberate indifference standard to the facts noted in the dissent,[87] the instant court could have considered the excessive mutilation of prisoners to be a denial of "the minimal civilized measure of life's necessities," and thus, a sufficiently serious harm.[88] Further, the instant court could have

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in Florida's electric chair just at the point where the trial court cut off the inquiry. *Cf. Jones*, 701 So.2d at 87 (Shaw, J., dissenting).

78. *See id.* (Shaw, J., dissenting).

79. *See id.* at 77.

80. *See generally Francis*, 329 U.S. at 464 (reasoning that an unforeseeable accident does not add an element of cruelty to a punishment).

81. *See id; see also Estelle*, 429 U.S. at 105 (suggesting that an accident alone is not enough to characterize a punishment as the wanton infliction of unnecessary pain).

82. *See Estelle*, 429 U.S. at 105; *see also Francis*, 329 U.S. at 464 (noting that one unforeseeable accident is not enough to render a punishment cruel and unusual if the punishment was not otherwise cruel and unusual).

83. Facts that reflected more than one malfunction in Florida's electric chair would have been more accurate. *See Jones*, 701 So. 2d at 87 (Shaw, J. dissenting).

84. *See Estelle*, 429 U.S. at 104, 105. Once prison officials are aware of a harm to a prisoner, it is no longer an "innocent misadventure" if it happens a second time. *See id.*

85. This "culpable mind" standard is simply the definition of the deliberate indifference standard. *See, e.g., Farmer*, 511 U.S. at 837.

86. *See id.* Once a prison official is aware of a harm to a prisoner and he acts or fails to act to eliminate that harm, he is acting with deliberate indifference. *See id.*

87. The dissent noted that two out of eighteen executions failed, and specified that this was therefore an eleven percent failure rate. *See Jones*, 701 So. 2d at 87 (Shaw, J., dissenting).

88. *Id.* at 88 (Shaw, J., dissenting). Justice Shaw's analysis suggests that he believes the record of malfunctions is contrary to evolving standards of decency. *See id.* (Shaw, J., dissenting). The sufficiently serious harm is one requirement under the *Farmer* interpretation of deliberate

determined that the prison officials had a culpable state of mind.[89] The first malfunction could have been interpreted by prison officials as an accident.[90] However, once two prisoners were seared and burned, prison officials were aware of a risk of serious harm to the victims, yet they continued to execute prisoners in Florida's electric chair.[91]

By incorrectly interpreting the deliberate indifference standard, the instant court made it nearly impossible for future petitioners to prove deliberate indifference on the part of prison officials. Additionally, the instant court deviated from Supreme Court precedent by factoring pain into the deliberate indifference standard. If there truly is a limit on the "constitutional tolerance for error,"[92] the instant court should certainly have given it tremendous weight in an area with such finality and irreversibility as the executions of prisoners. The instant court's conservative analysis leaves unanswered the question that asks when these malfunctions are no longer mere accidents "for which no man is to blame."[93] Furthermore, the instant court's misinterpretation of the deliberate indifference standard closes a door which, if left open, would allow the Supreme Court of Florida to declare Florida's electric chair unconstitutional in the future.

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indifference. *See Farmer*, 511 U.S. at 834.

89. The "culpable state of mind" parallels the second requirement under *Farmer's* "deliberate indifference" standard. *See id.*

90. *See Estelle*, 429 U.S. at 105. An accident is not enough to render an otherwise constitutional punishment unconstitutional. *See id.*

91. *See id.*

92. *See Jones*, 701 So. 2d at 87 (Shaw, J., dissenting).

93. *See Francis*, 329 U.S. at 462 ("Accidents happen for which no man is to blame.").