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No. 92-7247

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1993

DEE FARMER, PETITIONER

-v-

EDWARD BRENNAN, WARDEN, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE MONTANA DEFENDER PROJECT SUGGESTING REVERSAL

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INTEREST OF AMICUS CURIAE

The Montana Defender Project is a program of the School of Law at the University of Montana. Since 1966, the Montana Defender Project has represented inmates in the Montana Prison system in civil rights and post-conviction litigation. This brief amicus curiae is filed with the consent of the parties.

ARGUMENT

THIS COURT SHOULD ADOPT A STANDARD OF LIABILITY THAT IS LESS THAN THAT APPLIED BY THE SEVENTH CIRCUIT AND DIFFERENT FROM THAT APPLIED IN THE NINTH AND THIRD CIRCUITS

The deliberate indifference standard, first announced in *Estelle v. Gamble*, 429 U.S. 97 (1976), should be scrapped. The standard has proven too imprecise in the context of a prison society. This Court should incorporate objective standards that measure the variables of knowledge,

risk, harm, and burden of eliminating the risk. Objective standards may also be applied in the context of a prison riot.

Inmate upon inmate assaults pervade prison society. Assaults in prison have risen from 10,508 in 1989 to 12,189 in 1990 to 14,635 in 1991. U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics, 1992*, §6.124 (Kathleen Maguire, Ann L. Pastore, and Timothy J. Flanagan, eds., 1993); U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics, 1991*, §6.139 (Kathleen Maguire, Ann L. Pastore, and Timothy J. Flanagan, eds., 1992). Assault reports under-count the true level of violence because there is an unwritten code of silence that deters inmates from reporting assaults. *See, Alberti v. Heard*, 600 F. Supp. 443, 450 (S.D. Tex. 1984) (code of silence results in most violent acts in prison going undetected). *See also* Dinitz, *Are Safe and Humane Prisons Possible?*, 5 Australian & New Zealand J. Criminology 3, 4

(1981). Inmate rape, inmate sexual assaults, and inmate prostitution, by which strong inmates victimize the weak, are commonplace events. This circumstance has been known to this Court for at least a decade. *See, United States v. Bailey*, 444 U.S. 394, 420-24 (1980) (Blackmun, J., dissenting); *cf.*, *Ingraham v. Wright*, 430 U.S. 651, 669 (1977) ("Prison brutality . . . is 'part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny") (*dicta*).

Inmate sexual assaults are common enough to warrant serious action and consideration by prison authorities. The Eighth Amendment "requires that inmates be furnished with the basic human needs, one of which is 'reasonable safety.'" *Helling v. McKinney*, 113 S.Ct. 2475, 2480-81 (1993). When an inmate assault is foreseeable, prison authorities should be held to a higher standard of care than that set out in *Estelle*, depending upon officials' knowledge and the de-

gree of risk of an assault.[1]

In *Estelle*, this Court was faced with the task of demarking the line between negligence and conduct that amounted to "unnecessary and wanton infliction of pain." 429 U.S. at 104. This Court held that deliberate indifference to serious medical needs of prisoners violated the Eighth Amendment. *Id.* *Estelle* explained that deliberate indifference would include intentional denial or delay of access to medical care, intentional interference with treatment, or medical "treatment" that amounted to indifference. *Estelle*, 429 U.S. at 104-05.

In *Whitley v. Albers*, 475 U.S. 312 (1986), this Court was presented with the question of the standard to apply when prison officials are required to act to protect inmates, staff, and property threatened by rioting inmates. This Court

[1]This Court has noted previously that something less than express intent to inflict pain but more than ordinary lack of due care is necessary to constitute cruel and unusual punishment. *Whitley v. Albers*, 475 U.S. 312, 327 (1986).

observed:

> The deliberate indifference standard articulated in *Estelle* was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities. Consequently, "deliberate indifference to a prisoner's serious illness or injury," *Estelle, supra*, at 105, can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.
>
> *Whitley* at 320

In *Whitley*, this Court declined to apply the deliberate indifference standard, asking instead "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-21. In *Hudson v. McMillian*, 112 S. Ct. 995 (1992), this Court further explained its holding in *Whitley*:

> What is necessary to establish an "unnecessary and wanton infliction of pain, we said [in *Whitley*], varies according to the nature of the alleged constitutional violation. 475 U.S. at 320. For example, the appropriate inquiry when an inmate alleges that prison

> officials failed to attend to serious medical needs is whether the officials exhibited "deliberate indifference." See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). This standard is appropriate because the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns. *Whitley*, *supra* at 320.
>
> By contrast, officials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force. Despite the weight of these competing concerns, corrections officials must make their decisions "in haste, under pressure, and frequently without the luxury of a second chance." 475 U.S. at 320. We accordingly concluded in *Whitley* that application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"
>
> *Hudson*, 112 S. Ct. at 998.

Finally, in *Wilson v. Seiter*, 111 S.Ct. 2321 (1991), this Court addressed the question of what state of mind must be shown in order to establish that prison conditions violate the Eighth Amendment. There the Court held that "wanton-

ness of conduct does not depend upon its effect upon the prisoner", *Wilson*, 111 S.Ct. at 2326, but upon the constraints upon the official and that conditions of confinement would be measured against the deliberate indifference standard.

This line of cases establishes a spectrum of standards. When the prison's interest is paramount, as in a prison riot, *Whitley*, 475 U.S. at 321, a higher standard is applied. When the inmate's interest "ordinarily does not conflict with competing administrative concerns," a lesser standard of liability, deliberate indifference, is applied.

In the case of inmate assaults, the interests of the prison in maintaining security and its "obligation to take reasonable measures to guarantee the safety of the inmates," *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984), are congruent with the inmate's interest in avoiding the assault. *See*, *Hendricks v. Coughlin*, 942 F.2d 109, 112 (2d Cir. 1991) (ensuring inmate safety aids in the maintenance of order in the prison). In such an instance, adopting a standard of

liability less stringent than deliberate indifference does not implicate competing institutional interests.

When an inmate is confined, the government strips him of the means to protect himself. It forbids him access to means of self-defense. It blocks all avenues of escape from attack. It forces the inmate to rely solely upon the agents of the government for protection. *Davidson v. Cannon*, 474 U.S. 344, 349 (1986) (Blackmun, J., dissenting). Yet the government does more. An inmate who defends against an assault risks the most extreme punishments meted out by the criminal justice system.[2]

[2]At least fourteen states impose higher punishment for assaults or homicides committed in prison. *See*, Hawaii Stat. § 707-701 (1993) (death sentence may be imposed where inmate commits homicide while serving life sentence without parole); N.H. Rev. Stat. § 630:1(d) (1993 Supp.) (same); Ala. Crim. Code § 13A-5-40(a)(6) (1993) (death sentence may be imposed where inmate commits homicide while serving life sentence); Ark. Code Ann. § 5-10-101(a)(6) (1993) (same); Miss. Code Ann. § 97-3-19(2)(b) (1993 Supp.) (same); Del. Code Ann. 11 § 4209(e)(1)a (1993) (death sentence may be imposed for homicide committed while confined); Ga. Code Ann. § 17-10-30(b)(9) (1993) (same); Idaho Code Ann. §

The mere use of the undefined terms "deliberate indifference" and "malicious or sadistic imposition of pain" makes it difficult for the courts to apply these standards to the particular facts of the case before them.[3] Adopting a

18-4003(e) (1993) (same); Ohio Rev. Code Ann. § 2929.04-(A)(4) (1993) (same); Ore. Rev. Stat. Ann. § 163.095(2)(b) (1993) (same); McKinney's N.Y. L. Ann. § 125.27(1)(a)(iii) (1993) (same); Burns' Ind. Stat. Ann. § 35-50-2-9 (b)(9),(10) (1993) (aggravating circumstance that permits imposition of death penalty); Ill. Comp. Stat. Ann. Ch. 720 § 5/9-1(b)(10) (1993) (same); Mont. Code Ann § 46-18-220 (1993) (incarcerated inmate who commits homicide or aggravated assault may be sentenced to death or life imprisonment).

[3]*Compare, City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 270 (1987) (§ 1983 liability against a municipality may be premised on failure to train amounting to "reckless disregard for or deliberate indifference to" individuals' rights) (O'Connor, J., joined by Rehnquist, C.J., White, J., and Powell, J., dissenting from dismissal of writ of certiorari); *DesRosiers v. Moran*, 949 F.2d 15, 19 (1st Cir. 1991) (knowledge of risk of impending harm that is easily preventable and failing to then act to prevent it constitutes deliberate indifference); *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981) (grossly negligent conduct creates a presumption of deliberate indifference); *Shaw v. Strackhouse*, 920 F.2d 1135, 1145 (3d Cir. 1990) (deliberate indifference requires a showing that the state actor was recklessly indifferent, grossly negligent, or deliberately or intentionally indifferent) (dicta); *Davidson v.*

standard such as "gross negligence" or "recklessness" or "reckless indifference" serves only to further muddy these cloudy waters.

Before there can be cruel and unusual punishment,

O'Lone, 752 F.2d 817, 828 (3d Cir. 1984) ("We thus reaffirm that actions may be brought in federal court under § 1983 when there has been infringement of a liberty interest by intentional conduct, gross negligence or reckless indifference, or an established state procedure"); *Doe v. Taylor Ind. School Dist.*, 975 F.2d 137, 149 (5th Cir.1992), *reh'g, en banc, granted*, 987 F.2d 231 (1993) (jury could find that supervisors' nonfeasance "was not merely negligent, but grossly negligent, reckless, or deliberately (consciously) indifferent; that [their] toleration of Stroud's alleged misconduct for so long communicated their tacit condonation of his malfeasance"); *Wade v. Haynes*, 663 F.2d 778, 780-82 (8th Cir.1981) (deliberate indifference can be inferred from evidence of defendant's constructive knowledge); *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc) (constructive knowledge); *Berry v. City of Muskogee*, 900 F.2d 1489, 1496 (10th Cir. 1990) (disregard of known or obvious risk very likely to result in violation of rights); *Hayesworth v. Miller*, 820 F.2d 1245, 1261-62 (D.C. Cir. 1987) (gross negligence may suffice); *with*, *Pressly v. Hutto*, 816 F.2d 977, 979 (4th Cir. 1987) ("deliberate or callous indifference of prison officials to specific known risks of such harm . . . ."); *Marsh v. Arn*, 937 F.2d 1056, 1061 (6th Cir. 1991) (actual knowledge of a genuine risk of injury to the plaintiff where officials refuse to take steps to protect the plaintiff from injury)

there must be "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 104. In the context of the Eighth Amendment, wantonness is the standard to which "deliberate indifference" or "maliciously or sadistically for the very purpose of causing harm" is applied. *Whitley*, 475 U.S. at 321. In the prison context, this Court may adopt a more predictable and objective standard than that of deliberate indifference by looking to the degree of knowledge of prison officials, the risk of a harmful event, the degree of harm likely to result from the event, and the burden that eliminating that risk imposes upon the prison. These four parameters provide an objective formula for determining when prison officials have acted wantonly.

We can identify four recognizable points on the knowledge spectrum: (1) Actual knowledge; (2) Actual knowledge inferred; (3) Constructive knowledge; and (4) Negligent failure to investigate. A prison official will have actual knowledge, for example, when he is present as an

incident begins or when he knows that an assault will take place at a particular time and place. Actual knowledge can be inferred from past events (such as history of inmate-inmate assaults sufficient to confer knowledge of a degree of risk) or from credible warnings lacking specificity of time and place. Constructive knowledge contemplates a lesser quantum or quality of information. For example, the fact that we know generally that inmates assault other inmates constitutes constructive knowledge. Finally, negligent failure to investigate is just that -- it contemplates an absence of knowledge that could have been obtained through reasonable investigation.

Risk refers to the probability of the occurrence of an event. That risk may range from great to slight or non-existent. It has no reference to harm, which is measured on a separate scale. (For example, a slight risk of a shooting nevertheless can, if it occurs, result in serious harm.)

The degree of harm serves a dual role. First, the

level or nature of harm provides the objective determination of whether there has been an infliction of pain for Eighth Amendment purposes. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Jordan v. Gardner*, 986 F.2d 1521, 1525-26 (9th Cir. 1993). Second, where the degree of harm that is likely to result from the risked occurrence is high, the prison official may be more culpable.

The final element, important in the Eighth Amendment context, is the element of burden of eliminating or avoiding the risk. It is this element that this Court has focussed on in the *Whitley/Hudson-Estelle/Wilson* spectrum of cases. When inmates riot, prison officials may be compelled to make decisions "in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, *above*, 475 U.S. at 320. They are faced with competing concerns for safety of inmates and safety of prison staff, visitors, and administrative personnel. *Id.* The constraints facing the official, which this Court has deemed material to the ques-

tion of wantonness, *Wilson*, *above*, 111 S.Ct. at 2326, constitute the burden of eliminating the risk of harm to inmates.

Applying this scheme to *Whitley*'s facts, we learn this. A prison official would have at least constructive knowledge that sending armed officers to quell a riot poses a slight to great risk (depending upon their training) of serious harm to inmates involved in the riot. However, the burden of eliminating the slight risk is heavy -- for example, sending in unarmed officers may result in serious harm to other inmates or staff.

Changing the facts, if the same official knows that because of officers' expressed intent to injure inmates or because of their lack of training, that there is great risk of serious harm, that official should be liable because the burden of eliminating the risk is slight. Indeed, the official should ensure that officers' instructions (i.e. rules of engagement) are clear.

In the realm of prison conditions, the same approach

is highly workable. An Eighth Amendment violation arises under *Wilson* when prison officials have actual knowledge or actual knowledge inferred of conditions that deprive "the minimal civilized measure of life's necessities," *Wilson*, *above*, 111 S.Ct. at 2324; *Rhodes* at 349,[4] coupled with constructive knowledge that the conditions in question fall short of the "minimal measure" threshold. In the conditions context, the question of risk arises only when the prison decides to embark upon a course which could deprive inmates of the minimal civilized measure of life's necessities. This approach also satisfies *Wilson*'s objection to distinguishing between "one-time" or "short-term" events and "systemic" or "continuing" conditions. *Wilson*, 111 S.Ct. at 2325. The test may be applied to either set of conditions.

Likewise, in the case of medical care, delayed treat-

[4]This minimal level of conditions also constitutes the threshold level of conditions that inflict pain under *Rhodes*' objective prong of Eighth Amendment analysis.

ment for a hang nail has consequences different from delayed treatment for a heart attack. Where the degree of harm from the risked occurrence is great, prison officials' actions or their failure to act may be considered "wanton." When we speak of the fourth element -- the burden upon the institution of preventing the risk (or the concomitant utility of not preventing the risk) -- as an example the need to treat inmates with more severe medical problems can justify delaying treatment of inmates with less severe medical problems.

In the case at bar, in the context of inmate assaults the application of the four element test becomes less problematic and turns largely upon the defendants' degree of knowledge. The element of burden on the institution is all but a nullity because the interest of the institution in preserving security and its "duty to take reasonable measures for the prisoners' own safety", *Washington v. Harper*, 494 U.S. 210, 225 (1990); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984), is congruent with the inmate's interest in avoiding

the risk of harm. That is, when the institution acts to prevent an assault, it carries out its institutional mission.

If the element of burden on the institution is a nullity, we are left with the elements of degree of knowledge, degree of risk, and degree of harm. For example, a prison official has at least constructive knowledge that placing a young, weak inmate with an inmate known to be an aggressive homosexual will result in a high risk of serious harm. *See*, *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc). When the risk of the occurrence and the harm likely to result are both great, prison officials' failure to act on constructive knowledge is irreversible. Whether prison officials place an inmate known to be "young and tender," with an inmate known to be an aggressive homosexual, *Redman*, *above*, or whether they place an inmate known to be a transsexual among inmates that they know to be dangerous and sexually assaultive, as in the case at bar, their actions must be viewed in that context. It should be no de-

fense that no harm was intended to Christians when throwing them to the lions because we could not say whether, on this particular occasion, the lions were hungry.

If we employ the Seventh Circuit's test, by the time prison officials have "actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm may be inferred from the defendant's failure to prevent it," *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991), the harm will likely have occurred.

Saying that prison officials have constructive knowledge that homosexual assaults and other violent acts occur in their institutions will not result in the imposition absolute liability under § 1983 without additional facts. These facts may include knowledge of prison conditions that contribute to inmate assaults coupled with a failure to remedy those conditions, *Wilson*, *supra*, or they could include knowledge of the nature of the inmate at risk or credible reports of threats to an inmate. *See*, *Wade v. Haynes*, 663 F.2d 778,

780-82 (8th Cir. 1981) (While there were no requests for help, deliberate indifference can be inferred from evidence of the plaintiff's susceptibility to assault, the cellmate's predilection, and the corresponding lack of due care).

Finally, this four part test does away with the "pure heart" defense. Requiring prison officials to take steps to protect inmates or to correct conditions when the requisite degrees of knowledge and risk exist would eliminate lip service as a defense to an inmate's claim.

The final question is, where among the permutations of these elements may the line be drawn to distinguish conduct that is wanton from conduct that is not? This question will be easy to answer in some cases and more difficult in others. For example, we can say that a prison administrator, faced with a decision to double-cell or build a new facility, has constructive knowledge that double-celling can result in some risk of increased inmate assaults. Depending upon the degree of risk (for example, it may be higher in maximum

security prisons than in minimum security prisons) her decision to double cell may or may not constitute a violation of the Eighth Amendment. However, if inmate assaults skyrocket as a proximate result of double-celling, it can be said that the failure to correct these conditions would constitute an Eighth Amendment violation. *Compare*, *Hovater v. Robinson*, 1 F.3d 1063, 1066 (10th Cir. 1993) (where jailer who raped female prisoner had not engaged in similar conduct in the past and where there was no history of similar conduct in the jail, no liability because no actual knowledge inferred); *with Jordan*, *above* (where prison had notice that female inmates had histories of sexual abuse, rape, and beatings, and had suffered injury from cross-gender search, it was deliberately indifferent where it permitted random cross-gender body searches knowing of the likelihood of harm and in the absence of the necessity for security purposes).

Nevertheless, when prison officials have constructive knowledge of a serious risk of great harm (such as rape or a

danger to life) to an inmate, then the failure to take measures to eliminate the risk should be considered wanton and therefore actionable under 42 U.S.C. § 1983 as a violation of the Eighth Amendment. In such an instance, prison officials' failure to exercise even slight care effectively condemns an inmate to the fate that awaits him.

CONCLUSION

The rising incidence of inmate assaults in American prisons and the ensuing victimization of more vulnerable inmates require Eighth Amendment scrutiny. This Court should substitute an objective test for the deliberate indifference standard of *Estelle*. Applying this four-part test to the case at bar, the Court should hold that the Court of Appeals and the District Court applied the incorrect standard. Summary judgement should be vacated and this case should be remanded.

Respectfully submitted,

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