IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. 92-7247

DEE FARMER,

Petitioner,

vs.

EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS, N.W. SMITH, MICHAEL QUINLAN and CALVIN EDWARDS,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner Dee Farmer, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in the United States District Court for the Western District of Wisconsin. Petitioner's affidavit in support of this motion is attached hereto.

DEE FARMER
UNITED STATES MEDICAL CENTER
FOR FEDERAL PRISONER'S
1900 West Sunshine Street
Post Office Box 4000
Springfield, Missouri 65808

In Propria Persona

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No.

DEE FARMER,

Petitioner,

vs.

EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS,
H.W. SMITH, MICHAEL QUINLAN and CALVIN EDWARDS,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

I, DEE FARMER, declare that I am the petitioner in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay the fees, cost or give security therefor, I state that because of my proverty, I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present in my Petition for A Writ of Certiorari to the Supreme Court of the United States is setforth in said petition submitted herewith.

In further support of this application, I answer the following questions:

1. Are you presently employed? Yes ___ or No X

   a. If the answer is "yes" state the amount of your salary or wages per month, and give the name and address of your employer. (list both gross and net salary)

b. If the answer is No, state the date of last employment and the amount of the salary and wages per month which you recieved.

$5.00 a month (2/91 Prison job)

2. Have you recieved within the past twelve months any money from any of the following sources?

a. Business, profession or other form of self-employment? Yes___ No X

b. Rent payments, interest or dividends? Yes___ No X

c. Pensions, annuities, or life insurance payments? Yes___ No X

d. Gifts or inheritemce? Yes___ No X

e. Any other sources? Yes___ No X

If the answer to any of the above is "yes" describe each source of money and state the amount recieved from each during the past twelve months.

3. Do you own any cash, or do you have money in checking or savings accounts? (include funds in prison accounts) Yes___ No X

4. Do you own or have any interest in any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No X

If the answer is "yes," describe the property and state it's approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

N/A

I declare under the penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. § 1746.

Executed on Jan. 1, 1993

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

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* Dee Farmer expresses appreciation to Raissa Lerner, Havard Law Student, and Wayne B. Alexander of Odyssey for their assistance in the preparation of this brief.

QUESTION PRESENTED FOR REVIEW

In the case involving the rape of a transsexual federal prisoner, can prison administrators be held liable under the Eighth Amendment proscription against cruel and unusual punishment, as defined by this Court in Wilson Vs. Seiter, 115 L.Ed.2d 271 (1991), when they "knew or should have known" of the danger facing a transsexual prisoner placed into the population of a violent maximum security penitentiary, where she was brutally beaten and raped, or may liability only be found if they have "actual knowledge" of the impending harm?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No.

DEE FARMER,

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EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS, N.W. SMITH, MICHAEL QUINLAN and CALVIN EDWARDS,

Respondents.

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

Petitioner Dee Farmer, plaintiff[1] in the District Court and appellant in the Court of Appeals, respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment in Farmer vs. Brennan, et als. No. 92-1772 (7th Cir. Aug. 7, 1992).

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[1] Farmer prefers the use of feminine pronouns for self-description, and the Court of Appeals previously respected her choice. Farmer vs. Haas, et als., No. 90-1038 slip op. at 1 n.1 (7th Cir. Mar. 1, 1991) Pet. App. 10A-13A.

OPINIONS BELOW

The Court of Appeals opinion is unreported and reproduced at pp. 1A-2A of the Appendix of this Petition (hereinafter "Pet. App."). The opinion of the United States District Court for the Western District of Wisconsin is unreported and reproduced at Pet. App. 3A-9A.

JURISDICTION

The Court of Appeals decision was issued on Aug. 7, 1992. Petitioner having forgone the right to Request for Rehearing and Suggestion for Rehearing En Banc, judgment was entered on August 7, 1992. This Court's jurisdiction arises under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides, "excessive bail shall not be required, nor cruel and unusual punishment inflicted."

STATEMENT OF THE CASE

A. The Facts

Petitioner Dee Farmer, a federal prisoner was committed to the custody of the Attorney General of the United States for a twenty-year term of imprisonment imposed for access device fraud.[2] At the time of her incarceration Farmer was a pre-

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2 Farmer was sentenced in the District of Maryland for offenses under Title 18, Section 1029.

operative transsexual (preparing for sex reassignment surgery) who had silicone implants, had attempted to have surgical castration and was recieving conjugated estrogen hormone pills.

Farmer commence serving her sentence within the Federal Bureau of Prisons institutions. On November 7, 1986 she was committed to the United States Penitentiary, Lewisburg, Pennsylvania (hereinafter "USP-Lewisburg"). Farmer spent her entire stay at USP-Lewisburg in administrative detention. Because "placing [Farmer], a twenty-one year old transsexual, into the general population at Lewisburg, a Level Five security institution, could pose a significant threat to internal security in general and to [Farmer] in particular." (quoting Farmer v. Carlson, 685 F. Supp. 1335, 1342 (M.D.Pa. 1988)).

Subsequently, Farmer was transferred to the Federal Correctional Institution, Oxford, Wisconsin (hereinafter "FCI-Oxford"). Prior to her arrival at FCI-Oxford and during her confinement there Farmer recieved disciplinary reports for violating prison rules. All of the disciplinary reports involving Farmer were of a nonviolent and nonaggressive nature. In fact, the majority of the disciplinary reports related to Farmer's transsexualism. For example, she recieved several disciplinary reports for attempting to introduce into the prison, or manipulate prison medical staff into prescribing for her, female hormones. Some reports involved attempts to fraudulently order, or recieve without authorization, female clothing, make-up, etc. Others pertained to her wearing prison garb in what may best be described as a feminine manner.

Consequently, prison officials, who are the respondents in

this Court, recommended that Farmer be transferred to a maximum security prison. These prison officials designated, transferred and imprisoned Farmer at the United States Penitentiary, Terre Haute, Inidana (hereinafter "USP-Terre Haute").[3]

On March 23, 1989 Farmer was released into the general population at USP-Terre Haute. On April 1, 1989 approximately one week later, during the late evening hours, an inmate known to Farmer only as "D.C.", entered her cell and demanded that she have sex with him. When she refused he punched her in the face, knocking her back up against the steel prison locker and into the cell's barred window. He continued to punch her, while she continously tried to grab his hands. At which time he said, "if you don't let my hands go I will use my feet." Despite, Farmer's pleas the assailant raised his foot and began kicking her, revealing a homemade knife stuck in the side of his sneaker. Becoming even more frightened after seeing the knife, the assailant with less resistance from Farmer proceeded: tearing Farmer's clothing from her, holding her down on the bunk, and forcibly raping her anus.

Farmer was confined in administrative segregation, where she remained, until being transferred to a lesser security institution.

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3 It must be noted that prison officials admitted that the penitentiary would not offer Farmer needed additional security or benifits that was not present at FCI-Oxford.

B. Course of Proceedings and Disposition Below

Farmer filed a pro se complaint in the United States District Court for the Western District of Wisconsin (Shabaz, J.), alleging that respondents at FCI-Oxford and elsewhere had been deliberate indifferent to her saftey by recommending, designating, transferring and confining her in a violent maximum security penitentiary, resulting in her being brutally beaten and raped. Jurisdiction was based upon the presence of a federal question, under 28 U.S.C. § 1331, in that the action was a Bivens-type claim under the Constitution. The District Court granted Farmer leave to proceed in forma pauperis.

In Farmer's complaint, affidavits and other supporting documentation she showed that respondents were deliberate indifferent to her saftey, because they were fully knowledgable of her transsexualism, and the danger of placing her, or any similarly situated transsexual prisoner, in a violent "penitentiary environement" where violent, aggressive and maximum security offenders are housed. It was further presented by Farmer that the respondents were knowledgable of the frequent assualts, fights and other acts of violence within USP-Terre Haute prison population, including sexual assualts. And that narcotic drugs, alcohol and numerous known violent and aggressive homosexual rapist permeate the prison population. Moreover, it was documented that respondents were knowledgable that numerous prisoners, who are not transsexual, request protection at USP-Terre Haute, because of fear for their lives in the violent general population of the prison.

The district court granted respondents motion for summary

judgment of dismissal, holding that "none of the defendants had actual knowledge that there was a threat to plaintiff's saftey at USP-Terre Haute." Pet. App. 6-A. The district court relied on the Seventh Circuit's holding in McGill v. Duckworth, 944 F. 2d 344, 349 (7th Cir. 1991) that prison officials are liable under the Eighth Amendment only if they had "actual knowledge" of a threat to an inmate's saftey, and fail to take preventive action. Thus, rejecting explicitly the proposition that the Eighth Amendment impose liability when prison officials "should have known" of a danger to an inmate's saftey, and fail to take preventive action.

Upon appeal to the Seventh Circuit, the district court judgment was summarily affirmed without opinion. Pet. App. 1A The Seventh Circuit affirmed the district court's decision despite the fact, that the respondents "knew or should have known" of the danger facing Farmer at USP-Terre Haute. Apparently, giving allegiance to it's holding in McGill that the Eighth Amendment does not impose liability upon prison officials who merely "should have known" of a danger to a prisoner's saftey.

REASONS FOR GRANTING THE WRIT

This case presents an important issue of constitutional law. The Seventh Circuit decision conflicts with decisions of the Third and Ninth Circuits, see Sup. Ct. R. 10.1(a), and conflicts with this Court's cases prohibiting unnecessary and wanton infliction of pain upon prisoners, see id. 10.1(c).

In McGill v. Duckworth, 726 F.Supp. 1144 (N.D.Ind. 1989) this district court recognized that,

> Under the Eighth Amendment a prison official can be found liable for failing to protect a prison inmate from an attack by another offender only if that official acts with "deliberate indifference." To prove "deliberate indifference", the [prison inmate] must prove by a preponderance of the evidence that a defendant prison official intentionally or recklessly disregarded a substantial risk of danger that was known to him or would have been readily apparent to a reasonable person in his position.
>
> * * * * * * * * * * * * * *
>
> A [prison official] acts with "deliberate indifference" when he knows of the danger or where the threat of violence is so pervasive that his knowledge may be inferred, yet he fails to enforce a policy or take other reasonable steps which may have been prevented the harm. A [prison official] acts recklessly or with "reckless disregard" when he disregards a substantial risk of danger that either is known to him or would be apparent to a reasonable person in his position.

Id. at 1143-49.

With this rudimentary principle of the Eighth Amendment in tact, the Indiana District Court in McGill concluded that certain inmates belonged to an identifiable group of individuals

for whom the risk of attack is so substantial and evident that prison officials failure to protect them from attack states a claim of deliberate indifference. The Court went on to point-out the Seventh Circuit's ruling that transsexual inmates housed in an all-male prison, face an apparent substantial risk of attack; thus, an identifiable group of inmates who prison officials must take reasonable steps to protect from harm. Meriwether Vs. Faulkner, 821 F. 2d 408, 417-18 (7th Cir.) cert. denied, 434 U.S. 935 (1987).

On cross-appeals the Seventh Circuit reversed the district court's holding that the Eighth Amendment allows liability to be imposed on prison officials, "when [they] disregard a substantial risk of danger that either . . . [they should have known] or would be apparent to a reasonable person in [their] position." See McGill Vs. Duckworth, 944 F.2d 344, 348 (7th Cir. 1991).

In it's rejection of the district court's "should have known" approach the Seventh Circuit said, "[p]risoners are dangerous (that's why many are confined in the first place). Guards have no control over the temperment of the inmates they supervise, the design of the prisons, the placement of the prisoners, and the ratio of staff to inmates. Some level of brutaility and sexual aggression among them is inevitable no matter what the guards do. Worse: Because violence is inevitable unless all prisoners, are locked in their cells 24 hours a day and sedated (a "solution" posing constitutional problems of it's own) it will always be possible to say that the guards "should have known" of the risk. Indeed they should and do." Id. at 348 The court concluded:

"[a]pplied to a prison, the objective "should have known" [is] rather a long distance from the Supreme Court's standards in Estelle and its offspring." Id. at 348 For these reasons, the Seventh Circuit found that the "should have known" approach does not satisfy the culpable state of mind, or subjective component of the Eighth Amendment as defined by this Court in Wilson Vs. Seiter, 115 L.Ed.2d 271 (1991).[4]

The Third Circuit Court of Appeals considered and rejected the Seventh Circuit's position:

> Since Wilson, there has been a split among the circuit courts regarding the quantum of knowledge possessed by a prison official, necessary to satisfy the deliberate indifference requirement. In Colburn v. Upper Darby Township, 946 F. 2d 1017 (3d Cir. 1991) ("Colburn II"), we held that the Fourteenth Amendment imposes an obligation on government officials who know or should know of an inmate's particular vulnerability to suicide, not to act with reckless indifference to that vunerability. See also Williams v. Borough of West Chester, 891 F. 2d 458 (3d Cir. 1989); Freedman v. City of Allentown, 853 F.2d 1111 (3d Cir. 1988). Consistent with our approach in Colburn II, the Ninth Circuit Court of Appeals has held that a prison official is deliberate indifferent for purposes of the Eighth Amendment when he "knows or should know" of the danger facing the inmate. See Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991), quoting Colburn v. Upper Darby Township, 838 F.2d 663, 669 (3d Cir. 1988). On the other hand, the Seventh Circuit Court of Appeals has held, after Wilson, that liability should only be imposed on prison officials if they had "actual knowledge of impending harm," and has rejected liability for prison officials who merely "should have known" of danger to an inmate. McGill v. Duckworth, 944 F. 2d 344, 348 (7th Cir. 1991). Because we agree with Redman that it is appropiate to use the same standard under the Fourteenth and Eighth Amendment here, Redman, 942 F. 2d at 1442, we hold that a prison official is deliberate indifferent when he knows or should have known of a sufficient serious danger to an inmate.

Young v. Quinlan, 960 F. 2d 344, 350-61 (3d Cir. 1992).[5]

In Wilson v. Seiter this Court held that there is an objective and subjective component of an Eighth Amendment violation. The objective component requires the deprivation or harm to be sufficiently serious as to be considered punishment. Whitley v. Albers, 475 U.S. 312 (1986); Hudson v. McMillian, ____ U.S. ____ (1991). And the subjective component requires prison officials responsible for the deprivation or harm to have acted with a sufficient sulpable state of mind.

"With respect to the objective component of an Eighth Amendment violation, Wilson announced no new rule." Hudson v. McMillian, ____ U.S. ____, ____ (1991). It has long been the law of the land that acts, such as rape, which are not a part of the inmate's prison sentence, are sufficiently serious to implicate the Eighth Amendment. "The Supreme Court held that the state had an affirmative duty to provide adequate medical care for prisoners since incarceration prevents an inmate from caring for himself. Estelle, 429 U.S. at 103-104, 97 S.Ct. at 290. In Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) the Court extended Estelle to impose a duty upon the state to provide involuntarily

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4 In McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991), the Seventh Circuit also rejected the position that certain inmates belong to identifiable groups of prisoners who are at an apparent substantial risk of harm; thus overruling it's decision in Meriwether v. Faulkner, 821 F2d 408, 417-18 (7th Cir.), cert. denied, 434 U.S. 935 (1987).

5 Young v. Quinlan involved the rape of a federal prisoner placed in a violent maximum security prison equivalent to the prison where Farmer was raped.

committed mental patients such services as are necessary to insure reasonable saftey ... from others. De Shaney by First v. Winnebago County Dept. of Social Services, 489 U.S. 189 ... (1989). [There is] no qualitative difference here where [Farmer], by reason of [her] incarceration, is wholly dependent upon prison officials for protection ..." Young v. Quinlan, 944 F. 2d 344, 361-362 (3d Cir. 1992) (internal quotations omitted).

The subjective component established in Wilson did not provide an affirmative guidance in determining the quantum of knowledge prison officials must possess to satisfy the Eighth Amendment culpable state of mind requisite. Consequently, the circuit courts have grappled with, and are divided over, the question of whether the subjective component requires prison offcials to have "actual knowledge", or if it is satisfied when they "should have known". It is not surprising that the circuit courts are in a discordancy over the culpable state of mind component, as the dissenting Justices in Wilson explained:

> Inhuman prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution such as a prison system.

Wilson v. Seiter, ____ U.S. ____ (1991).

In the abstract, the dissenters are correct. But in practice, the lower courts have largely construded the "culpable state of

mind" to be satisfied, when prison officials knew or should have known of a substantial risk of danger that would be apparent to a reasonable person in his position. Cortes-Quinones v. Jimines-Nettleship, 842 F. 2d 556, 559-560 (1st Cir. 1988) The Seventh Circuit decision in McGill is the very eradication of the Eighth Amendment guarantee to be free from cruel and unusual punishment that the dissenters envisioned. Under the McGill decision, a prison official is only liable if he has "actual knowledge." This means that if prison officials without checking the prison records place a prisoner who is in the Federal Witness Protection program in an institution where the very persons he is supposed to be protected from are confined, resulting in his being murdered, they would not be liable because they had no "actual knowledge" of the danger. McGill rejects the propisition that they "should have known" by checking the records. Likewise, the Seventh Circuit, in accord with its' position in McGill, held that placing Farmer, a transsexual prisoner, in a violent maximum security penitentiary environment resulting in her being brutally beaten and raped, did not expose prison officials to liabilitiy, because they had no "actual knowledge" that Farmer was going to be raped. This ignores the fact, the risk of Farmer being raped was so substantial that prison officials "should have known", as it would have been apparent to a reasonable person in their position —— even a lay person.

The Third Circuit Court of Appeals explained that,

> should have known is a phrase of art with a meaining distinct from it's usual meaning in

> the context of law of torts ... should have known: [D]oes not refer to a failure to note a risk that would be percieved with the use of ordinary prudence. It connotes something more than a negligent failure to appreciate the risk ..., though something less than subjective appreciation of that risk. The "strong likelihood" of [harm] must be "so obvious that a lay person would easily recognise the necessity for " preventative action; the risk ... of injury must be not only great, but also sufficiently apparent that a lay custodian's failure to appreciate it evidences an absence of any concern for the welfare of his or her charges. (citations omitted)

Young v. Quinlan, 960 F. 2d at 361.

This Court has implicitly held that to disregard a substantial risk either known, should have been known, or apparent to a reasonable person satisfies the Eighth Amendment culpable state of mind component. In Canton v. Harris, 489 U.S. 378 (1989), this Court held that a municipality could be held liable for inadequate police training if the inadequacy amounted to a policy of deliberate indifference. It was observed that "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the adequacy so likely to result in the violation of constitutional rights, that policy-makers of the city can reasonably be said to have been deliberate indifferent to the need." Id. at 389-90.

In a recent inmate-inmate assualt case, which Wilson cites as an example of the standard, a federal appeals court held that deliberate indifference is shown "if there is an obvious unreasonable risk of violent harm to a prisoner or group of prisoners which is

known to be present or should have been known, and [the prison officials] were outrageously insensitive or flagrantly indifferent to the situation and took no significant action to correct or avoid the risk of harm ..." Morgan v. District of Columbia, 824 F. 2d 1049, 1058 (D.C. Cir. 1987).

Another case cited with approval in Wilson is Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556, 559-60 (1st Cir. 1988). In that case, which is similar to the case at bar, the circuit court upheld a jury verdict against the Puerto Rico's Director of Penal Institutions and it's Corrections Administrator for transferring a psychotic prisoner to a grossly overcrowded general population facility that provided no mental health care; the prisoner was murdered by other inmates. The jail superintendent was also held liable for failing to have the prisoner's file reviewed promptly by any professional staff to determine whether he needed to be segregated. Similarly, a transsexual prisoner transferred to a violent maximum security penitentiary that houses aggressive and violent offenders, including known violent homosexual rapist places the transsexual prisoner at as much, if not more, risk than a psychotic prisoner transferred to a facility without mental health care.

This Courts statement in Wilson that "the long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent" further implies that the Seventh Circuit's "actual knowledge" approach is faulty.

The rationale offered by the Seventh Circuit for it's "actual knowledge" approach in McGill v. Duckworth, 944 F. 2d 344

(1991) is not only unsound in application, but also illogical. For example, the Court explains:

> The size of prisons, the number of separate areas, and so on, are in the hands of the state. Legislatures decide how many prisons to build (and how many guards per prisoner to hire); architects design the buildings; judges fill them. Crowding is epidemic, as taxpayers reluctant to foot the bill for increased space also clamor for longer sentences that may increase the prison population. Administrators in many states ... consequently are unable to house each inmate only with those of a similar status ... The "should have known" approach allows [prisoners] to tax employees of the prison system with the effects of circumstances beyond ther control.

McGill v. Duckworth, 944 F. 2d at 349 (7th Cir. 1991)

The Wilson majority rejected this cost defense, which the Seventh Circuit relies upon. In rejecting the criticism that a state of mind requirement would permit prison officials to escape liability on the ground that "fiscal constraints beyond their control prevent tje elimination of inhumane conditions" this Court held that such policy considerations could not affect the decision whether an intent requirement is implicit in the word "punishment". It then added that no "cost" defense was before it and it was aware of no case in which such a defense had been raised in prison deliberate indifference cases. Though, the prison officials in McGill do not raise a cost defense, the Seventh Circuit postulate the existence of such a defense in explaining it's "actual knowledge" approach. The Seventh Circuit does not recognize this Court's rejection in Wilson of a cost defense.

With regard to the Seventh Circuit's "beyond their control" rationale, in Cotes-Quinones v. Jiminez-Nettleship, supra., the prison murder case cited in Wilson and discussed above, the circuit court concluded that many factors were beyond prison officials control, but held that each defendant could be found deliberate indifferent based on their own actions and omissions in putiing a known psychotic prisoner in general population and not segregation, and in failing to provide for any system that would achieve result.

The Seventh Circuit decision in McGill, the "actual knowledge" appraoch, veritably casts prison officials as helpless agents of the state without any ability to relieve the overcrowding, violence, drug use, etc., which exist within the prisons. This is not true, of course. Prison officials can review prisoner's records and at least separate the extreme aggressive types from the extreme vulnerable types. There are many preventive steps prison officials can and often do implement to relieve the amount of violence, rape, drug use. suicide, etc., within the prisons. The Seventh Circuit picture of prison officials as turn-keys standing outside the prison gates, fences and walls ensuring that no prisoners escape, but helpless to do anything about the rape, murder, stabbings, beatings, drug use, extortion, etc., that occur regularly inside the prison is a far cry from the truth. And equally as far from the guarantees of the Cruel and Unusual Punishment Clause.

Prison administrators and officials are in a position to know what type of prisoners are in what institutions; and what danger exist in which prisons. Contrary to the Seventh Circuit

decision in McGill placing a young transsexual prisoner ——vulnerable to attack—— in a prison which houses violent, aggressive and maximum security prisoners, who are known homosexual rapist and drug users, is to disregard a risk of danger so substantial that the culpable state of mind or subjective component of an Eighth Amendment claim, as established in Wilson should be satisfied. Thus, prison officials "should have known" that recommending, designating, transferring and confining Farmer, an overtly feminine transsexual prisoner, in the violent penitentiary environment of USP-Terre Haute would result in her being assualted and raped. Though, the respondents confined Farmer at USP-Terre Haute because of her nonviolent and nonaggressive disciplinary infractions, rape is not a punishment that prison officials can expose or subject a prisoner to for violating prison rules.

This Court should grant certiorari here to explicitly rule that the culpable state of mind or subjective component of an Eighth Amendment claim is satisfied when prison officials disregard a substantial risk of danger that was known to them or should have been known; or would have been readily apparent to a reasonable person in their position and, further, to resolve the conflict between the Circuits.

CONCLUSION

The Court of Appeals affirmance of the district court's judgment that subjecting a transsexual prison to a substantial risk of rape does not satisfy the deliberate indifference standard, because prison officials were without "actual knowledge" of the impending

rape is contradictive of todays standards of human decency, which this Court has repeatedly held is guaranteed to prisoners through the Eighth Amendment. The Circuits utilizing the "actual knowledge" approach does so without logic or practical application, and strip prisoners of all expectations that they will not be subjected to substantial harm or deprivations of life necessities. Accordingly, Farmer respectfully requests that this Court issue a writ of certiorari to review and reverse the judgment of the Court of Appeals.

Respectfully submitted,

Dee Farmer

APPENDIX

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United States Court of Appeals jk

For the Seventh Circuit
Chicago, Illinois 60604

SUBMITTED: August 6, 1992
August 7, 1992

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

DEE FARMER, Plaintiff-Appellant, No. 92-1772 v. EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS, et. al., Defendants-Appellees.	] Appeal from the United] States District Court for] the Western District of] Wisconsin.]] No. 91 C 716] John C. Shabaz,] Judge.]

This matter comes before the court for its consideration upon the request for the following documents:

1. **PETITION FOR LEAVE TO FILE AND TO PROCEED ON APPEAL IN FORMA PAUPERIS"** filed herein on 5/28/92, by the appellant.

2. **"MOTION TO CONSOLIDATE CASES"** filed herein on 7/17/92, by the appellant.

This court has carefully reviewed the final order of the district court, the record on appeal and the appellant's motion. Based on this review, the court has determined that any issues which could be raised are insubstantial and the filing of briefs would not be helpful to the court's consideration of the issues. *See Mather v. Village of Mundelein*, 869 F.2d 356, 357 (7th Cir. 1989) (*per curiam*) (court can decide case on motions papers and record where briefing would be a waste of time and no member of the panel desires briefing or argument). Accordingly,

IT IS ORDERED that the appellant's motion for leave to proceed on appeal in forma pauperis is **DENIED** and the district court is summarily **AFFIRMED.**

(Over)

IT IS FURTHER ORDERED that the motion to consolidate cases is **DENIED AS MOOT.**

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

DEE FARMER,

Plaintiff,

v. ORDER

EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS, N. W. SMITH, MICHAEL QUINLAN and CALVIN EDWARDS, 91-C-716-S

Defendants.

Plaintiff Dee Farmer was allowed to proceed in forma pauperis on his Eighth Amendment claim against defendants Edward Brennan, Dennis Kurzydlo, Larry E. DuBois, N.W. Smith, Michael Quinlan and Calvin Edwards. Plaintiff alleges in his complaint that the defendants were deliberately indifferent to his safety when they transferred him to the United States Penitentiary, Terre Haute, Indiana (USP-Terre Haute) on March 9, 1989.

An amended scheduling order was entered in the above entitled matter on December 20, 1991 requiring dispositive motions to be filed not later than February 15, 1992. Defendants timely moved for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56, on February 18, 1992 the first work day after February 15, 1992. The defendants submitted proposed findings of fact and conclusions of law, affidavits and a brief in support of the motion.

Copy of this document has been mailed to the following: Pltf. Farmer & AUSA Van Hollen this 20 day of March, 19 92

By [signature]
Secretary to Judge John C. Shabaz

Plaintiff's response to defendants' motion for summary judgment was to be filed not later than March 9, 1992. On March 9, 1992 defendants received a document entitled, "Rule 56(f) motion in response to defendants' untimely motion for summary judgment". This document which was not received by the Court until March 18, 1992 requests that defendants' motion for summary judgment be denied until plaintiff receives defendant Quinlan's response to his second request for documents which was to be filed not later than March 14, 1992. Since these documents, not shown by plaintiff to be necessary to oppose defendants' motion for summary judgment, were not to be filed until after both plaintiff's dispositive motion and brief in opposition to defendants' motion for summary judgment, plaintiff's Rule 56(f) motion will be denied.

On March 17, 1992 defendants filed a motion for protective order staying discovery until their motion for summary judgment on the issue of qualified immunity has been decided. Defendants' motion for a protective order will be granted.

Plaintiff also filed a brief in opposition to defendants' motion for summary judgment, an affidavit and a cross motion for summary judgment on March 18, 1992. Although plaintiff's brief in opposition to defendants' motion for summary judgment and his cross motion for summary judgment are untimely they will be considered.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if

not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff is an inmate currently confined at the United States Medical Center for Federal Prisoners, Springfield, Missouri (USMCFP). He was confined at the Federal Correctional Institution, Oxford, Wisconsin (FCI-Oxford) from January 27, 1988 until March 9, 1989.

At all times material to this action defendant Edward Brennan was the warden and defendant Dennis Kurzydlo was a unit manager at FCI-Oxford. Defendant Calvin Edwards was the warden at USP-Terre Haute from December 1987 until May 1989.

At all times material to this action defendant Larry E. DuBois was the Regional Director and defendant N.W. Smith was the Correctional Services Administrator of the North Central Region, Federal Bureau of Prisons. Defendant J. Michael Quinlan was the Director of the Federal Bureau of Prisons.

On January 25, 1989 plaintiff was found guilty by a disciplinary hearing officer at FCI-Oxford of Attempting to Give Anything of Value to Another. Disciplinary sanctions included a recommendation for a disciplinary transfer. On January 31, 1989 defendant Kurzydlo prepared plaintiff's progress report and on February 6, 1989 he requested that plaintiff be transferred to USP-Terre Haute. Defendant Kurzydlo believed that USP-Terre Haute was well equipped to handle the problems and needs presented by plaintiff.

At the time of plaintiff's transfer on March 9, 1989 defendant Calvin Edwards was the warden at USP-Terre Haute. Plaintiff never personally or through correspondence advised defendant Edwards that he was concerned for his safety. Defendant Edwards had no reason to believe that plaintiff could not function safely within the population at USP-Terre Haute. None of the defendants had actual knowledge that there was a threat to plaintiff's safety at USP-Terre Haute.

On April 1, 1989 plainitff alleges that he was sexually assaulted by another inmate. On April 7, 1989 plaintiff was placed in administrative detention pursuant to a directive from the North Central Regional Office pending a hearing concerning his HIV positive status.

CONCLUSIONS OF LAW

Plaintiff claims that his Eighth Amendment rights were violated by the defendants when they transferred him to USP-Terre Haute on March 9, 1989. Since there is no genuine dispute of any material fact this case can be decided as a matter of law. The failure of prison officials to protect an inmate from assault by another inmate may violate an inmate's Eighth Amendment rights if the officials were deliberately indifferent to a strong likelihood of attack. Meriweather v. Faulkner, 821 F. 2d 408, 417 (7th Cir. 1987), cert. denied 108 S.Ct. 311 (1987).

Prison officials are liable under the Eighth Amendment if they had actual knowledge of a threat to an inmate's safety and failed to take action to prevent the danger. McGill v. Duckworth, 944 F. 2d 344, 349 (7th Cir. 1991). A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety. Id. The officials' failure to prevent an attack of an inmate must be deliberate or reckless in a criminal sense. Santiago v. Lane, 894 F. 2d 218, 221 (7th Cir. 1990).

Defendants did not know that plaintiff would be in imminent danger of attack if he were transferred to USP-Terre Haute.

Plaintiff never expressed any concern for his safety to any of the defendants. Since defendants had no knowledge of any potential danger to plaintiff, they were not deliberately indifferent to his safety. Accordingly plaintiff's Eighth Amendment rights were not violated and defendants' motion for summary judgment will be granted. Plaintiff's cross motion for summary judgment will be denied.

Plaintiff has filed motions for telephonic depositions, photographic discovery and to compel discovery. These motions must be denied as moot. Plaintiff's motions for extension of time to name witnesses, file documents and exclude certain evidence are also denied as moot.

ORDER

IT IS ORDERED that defendants' motion for a protective order is GRANTED.

IT IS FURTHER ORDERED that plaintiff's Rule 56(f) motion and cross motion for summary judgment are DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for telephonic depositions, photographic discovery and to compel discovery are DENIED as moot.

IT IS FURTHER ORDERED that plaintiff's motions to name additional witnesses, file documents and exclude certain evidence are DENIED as moot.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants and against the plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 20th day of March, 1992.

BY THE COURT:

JOHN C. SHABAZ
District Judge