ORIGINAL

No. 92-7247

(3)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DEE FARMER, PETITIONER

v.

EDWARD BRENNAN, WARDEN, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly granted summary judgment to the defendant prison officials on the ground that petitioner, a prison inmate, did not show that the officials were deliberately indifferent to his safety.

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OPINIONS BELOW

The judgment order of the court of appeals, Pet. App. 1A-2A, is not reported. The order of the district court, Pet. App. 3A-9A, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1992. The petition for a writ of certiorari was filed on January 1, 1993, and is therefore jurisdictionally out of time. 28 U.S.C. 2101(c); Sup. Ct. Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a federal prisoner, filed a complaint in the United States District Court for the Western District of Wisconsin alleging that respondents, certain federal prison officials, had subjected him to cruel and unusual punishment in violation of the Eighth Amendment. The district court granted summary judgment for the prison officials. The court of appeals summarily affirmed. Pet. App. 1A-2A.

1. Petitioner was convicted of conspiracy to commit credit card access device fraud, in violation of 18 U.S.C. 1029, and he was sentenced to 20 years' imprisonment. At that time petitioner, a transsexual, was preparing for a sex-change operation.[1] In 1987, while incarcerated at the federal prison in Petersburg, Virginia, petitioner received psychiatric care for his condition and was placed in administrative detention for safety reasons. See Farmer v. Carlson, 685 F. Supp 1335 (M.D. Pa. 1988). In 1988, petitioner was transferred to the federal prison at Oxford, Wisconsin. In 1989, the prison recommended that petitioner be transferred to another institution after he was found guilty of violating prison regulations. On March 9, 1989, petitioner was transferred to the federal prison at Terre Haute, Indiana. On April 1, 1989, petitioner was allegedly assaulted by another inmate. On April 7, petitioner was placed in administrative

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[1] Petitioner was born a male, but considers himself to be female. See Farmer v. Haas, No. 91-2484 (7th Cir. Apr. 2, 1993) (unrelated case involving petitioner).

detention pending a hearing concerning his HIV-positive status. Pet. App. 5A-7A.

2. Petitioner filed a civil action alleging that respondents violated his Eighth Amendment right to be free from cruel and unusual punishment when they transferred him to the Terre Haute prison where he was sexually assaulted by another inmate. The six respondents included Edward Brennan, the Oxford prison warden; Calvin Edwards, the Terre Haute prison warden; Dennis Kurzydlo, a unit manager at the Oxford prison who had recommended petitioner's transfer to the Terre Haute prison; Larry DuBois, a regional director of the Federal Bureau of Prisons; N.W. Smith, the Correctional Services Administrator of the North Central Region of the Federal Bureau of Prisons; and J. Michael Quinlan, the Director of the Federal Bureau of Prisons. Pet. App. 5A-6A.

The district court granted summary judgment for respondents. The court stated that respondents were not deliberately indifferent to petitioner's safety, because they did not know that petitioner would be subjected to an assault at Terre Haute prison. The court found that petitioner had not advised respondent Edwards that he was concerned for his safety and that Edwards "had no reason to believe that [petitioner] could not function safely within the population at USP-Terre Haute." Pet. App. 6A. The court also stated that none of the other respondents "had actual knowledge that there was a threat to [petitioner's] safety at USP-Terre Haute," ibid, and that they "did not know that [petitioner] would be in imminent danger of attack if he were

transferred to USP-Terre Haute," because petitioner "never expressed any concern for his safety to any of the defendants." Id. at 7A-8A.

The court of appeals summarily affirmed the district court's decision. Pet. App. 1A-2A.

ARGUMENT

Petitioner contends (Pet. 7-18) that respondents subjected him to cruel and unusual punishment by transferring him to a prison where he was sexually assaulted by another inmate. In particular, petitioner contends that the district court used the wrong standard to determine whether respondents were "deliberately indifferent" to his safety in prison. Although petitioner correctly observes that the courts of appeals appear to have adopted different standards for establishing deliberate indifference in failure-to-protect cases, the depth of the disagreement is uncertain and, in any event, petitioner would not prevail regardless of which standard is applied. This Court's review therefore would not be warranted even if this case were not jurisdictionally out-of-time.

1. In Wilson v. Seiter, 111 S. Ct. 2321 (1991), this Court held that a prisoner claiming that the conditions of his confinement constitute cruel and unusual punishment must make both an objective showing -- that the deprivation was sufficiently serious -- and a subjective one -- that the prison officials acted with "deliberate indifference." Id. at 2326; see also Hudson v. McMillian, 112 S. Ct. 995, 999-1000 (1992). One of the

conditions of a prisoner's confinement, the Court noted in Wilson, is the "protection he is afforded against other inmates," 111 S. Ct. at 2326-2327. Accordingly, an inmate seeking to establish an Eighth Amendment violation based on a prison official's failure to protect him must prove the official's "deliberate indifference."

The Court originally formulated the "deliberate indifference" standard in considering an Eighth Amendment claim that prisons officials failed to attend to an inmate's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). The Court has not elaborated on the meaning of the "deliberate indifference" standard in a case in which an inmate claims that prison officials failed to prevent another inmate from violently or sexually assaulting him. The courts of appeals, however, have taken different approaches to that issue.

In McGill v. Duckworth, 944 F.2d 344 (1991), cert. denied, 112 S. Ct. 1265 (1992), the Seventh Circuit held that the "deliberate indifference" standard requires the inmate to show that prison officials "had actual knowledge of the threat" to the inmate, that the attack "was readily preventable," and that, instead of preventing the attack, the prison officials "allowed [the attack] to proceed." Id. at 349. The court of appeals stated that the inmate will normally prove that the prison officials had actual knowledge by showing that the inmate notified prison officials "about a specific threat to his safety." Ibid. The court rejected the argument that an inmate can establish

"deliberate indifference" by showing that the prison officials should have known of the threat.[2] Ibid. See also Pacelli v. DeVito, 972 F.2d 871, 875-876 (7th Cir. 1992) (rejecting the "should have known" standard in the context of a claim that officials failed to release an individual in response to a writ of habeas corpus); DesRosiers v. Moran, 949 F.2d 15, 19 (1st Cir. 1991) (deliberate indifference standard requires actual knowledge of preventable, impending harm in context of claim that officials denied an inmate needed medical care).

On the other hand, in Young v. Quinlan, 960 F.2d 351, 361 (1992), the Third Circuit held that an inmate can establish deliberate indifference on the part of a prison official when the official "knows or should have known of a sufficiently serious danger to the inmate." The court stated, however, that in the context of the Eighth Amendment, the term "should have known" does not mean mere negligence; it requires that prison officials failed to appreciate a great and apparent risk, such that they exhibited an absence of concern for the inmate. Ibid. As the court explained, the test requires

> 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 recognize the necessity for preventative action; the risk * * * of injury

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[2] The court of appeals held that, because the inmate in that case had not complained to officials, he could not show their actual knowledge of the threat to his safety. 944 F.2d at 349. The court reserved the question whether a prison official could be held liable for deliberately avoiding knowledge of the threat. Id. at 351 (drawing analogy to "ostrich" instruction in criminal law).

> 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.

Id. at 361 (citations and internal quotation marks omitted).[3]

As the facts of Young illustrate, even under the Third Circuit's "should have known" test, it is not enough for an inmate to allege that he was assaulted in a prison in which he faced a risk of violence; he must show that the prison officials failed to protect him after he complained about specific threats to his safety. The inmate in Young had sued various prison officials after he was allegedly sexually assaulted by other inmates at the federal prison in Lewisburg, Pennsylvania, following his transfer from a lower-security federal prison in Seagoville, Texas. The Third Circuit held that summary judgment was improper as to some of the Lewisburg prison officials to whom

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[3] The Third Circuit stated (960 F.2d at 360) that it agreed with the standard for establishing deliberate indifference set forth in Redman v. County of San Diego, 942 F.2d 1435 (9th Cir.) (en banc), cert. denied, 112 S. Ct. 972 (1991). In that case, the Ninth Circuit applied a "known or should have known" standard in the context of dangers facing pretrial detainees. The inmate's suit in Redman was based on the Due Process Clause, not on the Eighth Amendment, and, although the Redman court relied on Eighth Amendment cases in formulating its approach, it recognized that the two contexts may raise distinct concerns. 942 F.2d at 1440 n.7 ("The due process clause provides a different standard for pretrial detainees than does the eighth amendment's proscription against 'cruel and unusual punishment' for convicted prisoners * * * ."); id. at 1443 (reserving whether Eighth Amendment inquiries "are appropriate for claims brought by pretrial detainees under the Due Process Clause"). Cf. Davidson v. Cannon, 474 U.S. 344, 348 (1988) (mere negligence is insufficient for liability under the Due Process Clause for a prison official's failure to protect one inmate from another). The ultimate test applied by the Redman court is murky; in any event, because that case applied the Due Process Clause, it does not squarely conflict with the decision here. .

petitioner had complained about the repeated sexual assaults by other inmates. 960 F.2d at 362-363. But the court of appeals held that summary judgment was proper as to the Bureau of Prisons officials and the Seagoville prison officials who had not been notified of the specific threats to the inmate's safety. Id. at 358 n.14.

In light of the Third Circuit's relatively stringent requirements for proving that prison officials should have known of the risk of harm, the significance of its purported disagreement with the Seventh Circuit's standard is unclear. For example, even if petitioner's claim were evaluated under the Young standard, he would not be entitled to any relief. Unlike the inmate in Young, petitioner did not express his concern about his safety to any prison official, much less the ones in the prison in Terre Haute where the sexual assault allegedly occurred. Pet. App. 7A-8A. For that reason, none of the respondents had any reason to believe that there was a substantial danger to petitioner. Moreover, the difference between the Third and Seventh Circuit approaches may be further diminished by the Seventh Circuit's suggestion that it would treat the intentional failure to acquire information about a risk to an inmate as equivalent to actual knowledge. See note 2, supra. In the absence of clarification of the contours of the "deliberate indifference" standards

followed in the Third and Seventh Circuits, this Court's intervention would be premature.[4]

In any event, petitioner would not have prevailed even under a relaxed version of the "should have known" standard. The district court specifically concluded in this case that petitioner did not meet the "should have known" standard with respect to the warden of the Terre Haute prison. The court found that "[d]efendant Edwards had no reason to believe that [petitioner] could not function safely within the population at USP-Terre-Haute." Pet. App. 6A. There is no basis for a different finding as to the other respondents, who had a less direct relationship to petitioner. In sum, under any standard, petitioner did not prove that respondents were deliberately indifferent to his safety, and the district court properly granted summary judgment dismissing his claim.

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[4] To the extent that other courts of appeals have addressed the issue since this Court's decision in Wilson v. Seiter, supra, they have not formulated clear standards. See, e.g., Northington v. Jackson, 973 F.2d 1518, 1525 (10th Cir. 1992) ("the failure to protect inmates from attacks by other inmates may rise to an Eighth Amendment violation if the prison officials[']conduct amounts to an obdurate and wanton disregard for the inmate's safety"). Pre-Wilson decisions are also inconclusive. See, e.g., Marsh v. Arn, 937 F.2d 1056, 1069 (6th Cir. 1991) (in context of Bivens action, canvassing case law on deliberate indifference and concluding that "a reasonable person in 1985, and perhaps even today, would have had trouble determining whether [the official's] conduct violated the eighth amendment").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1993

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, by first-class mail, postage prepaid, this 10th day of MAY, 1993.

DEE FARMER
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1805
DA

William C. Bryson

WILLIAM C. BRYSON
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May 10, 1993