(5)

No. 92-7247

IN THE
Supreme Court of the United States
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 OF PETITIONER

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(Appointed by this Court)
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QUESTION PRESENTED

Does the "deliberate indifference" standard adopted in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), govern Eighth Amendment claims regarding failure to protect prisoners from assault?

LIST OF PARTIES

The petitioner Dee Farmer is a prisoner currently confined at the Federal Correctional Institution in Florence, Colorado. Respondent Michael J. Quinlan was sued in his official capacity as Director of the Bureau of Prisons. The current Director is Kathleen M. Hawk. Respondent Calvin Edwards was sued in his official capacity as Regional Director of the Bureau of Prisons.[1] Larry E. DuBois was also sued in his official capacity as Regional Director of the Bureau of Prisons. The current Regional Director is Patrick R. Kane. Respondent Edward Brennan was sued individually and in his official capacity as warden of the Federal Correctional Institution in Oxford, Wisconsin. The current warden at Oxford is John McHurley. Dennis Kurzydlo was sued individually and in his official capacity as case manager at Oxford. N.W. Smith was sued individually and in his official capacity as the Correctional Services Administrator of the Bureau of Prisons.

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[1] Respondent Edwards was the Warden at the United States Penitentiary in Terre Haute, Indiana at the time of the relevant events in this case. *See infra* n.12, n.18.

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OPINIONS BELOW

The unreported order of the United States Court of Appeals for the Seventh Circuit, entered on August 7, 1992, is reprinted in the Joint Appendix (hereinafter "J.A.") separately filed. J.A. at 127. The unreported trial court opinion is also reprinted in the Joint Appendix. J.A. at 120.

JURISDICTION

Petitioner filed this action on August 20, 1991. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The district court granted respondents' motion for summary judgment on March 20, 1992. Petitioner filed a notice of appeal on April 4, 1992. The United States Court of Appeals for the Seventh Circuit issued an order denying petitioner leave to appeal *in forma pauperis* and summarily affirming the district court on August 7, 1992. On November 1, 1992, the Honorable John Paul Stevens, Circuit Justice for the Seventh Circuit, granted an application to extend until January 4, 1993 the time for filing a petition for writ of certiorari. The petition was filed on January 1, 1993, and the Court granted the petition and the motion for leave to proceed *in forma pauperis* on October 4, 1993. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. Facts

Petitioner was admitted to the Federal Bureau of Prisons (hereinafter BOP) on August 5, 1986. At the time of her[2] commitment, petitioner was a pre-operative transsexual. She had undergone treatment for silicone breast implants and unsuccessful surgery to have her testicles removed.[3] Moreover, she was taking estrogen hormone pills to ensure a female appearance.[4]

Prior to the time of the incident at issue in this case, the BOP had housed petitioner in several different facilities. In the majority of those facilities, the BOP segregated petitioner from the general population.[5] On March 9, 1989, petitioner was transferred from the Federal Correctional Institution in Oxford, Wisconsin (hereinafter FCI-Oxford) to the United States Penitentiary in Terre Haute, Indiana (hereinafter USP-Terre Haute), a maximum security penitentiary, following a disciplinary charge for "attempting to give anything of value to another" based on petitioner's use of a credit card to order fruit baskets and flowers by the prison telephone.[6] The trans-

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[2] Petitioner was born a male but, due to her transsexual status, she will hereinafter be referred to with feminine pronouns in accordance with her preference.

[3] *Farmer v. Haas, Brennan and DuBois*, No. 90-1088, 1991 U.S. App. LEXIS 3549, at *1 n.1 (7th Cir. March 1, 1991) (prior case filed by petitioner); *see infra* n.20.

[4] Declaration of Dee Farmer (hereinafter Farmer Declaration), J.A. at 107 ¶ 7.

[5] Petitioner alleges that she was held in administrative detention at USP-Lewisburg, FCI-Petersburg, FCI-El Reno, FCI-Oxford, and, initially, at USP-Terre Haute. Farmer Declaration, J.A. at 107 ¶¶ 5, 6, 8, 10; *see also* Answer of Defendants, J.A. at 71 ¶¶ 46, 56, 58, 67, 68. Respondents admit that petitioner was held in administrative detention throughout her incarceration at USP-Lewisburg. Answer of Defendants, J.A. at 71 ¶ 46.

[6] Disciplinary Hearing Officer's Report, J.A. at 19, 22; *see also* Kurzydlo Declaration, J.A. at 15 ¶ 7. Although respondent Kurzydlo

fer order was prepared by respondent Kurzydlo, case manager at Oxford, and signed by respondent Warden Brennan for submission to respondents DuBois and Smith.[7] It recommended that petitioner be placed in a maximum security penitentiary with higher security provisions than at FCI-Oxford, notwithstanding that, as stated by respondents, "none of the disciplinary infractions involved violent behavior" by petitioner.[8]

Petitioner was initially housed in administrative segregation at USP-Terre Haute, but was subsequently released to general population housing on March 23, 1989. Petitioner alleges that on April 1, 1989, while in her assigned cell, she was approached by a prisoner who demanded that she have sexual intercourse with him. Petitioner further alleges that when she refused, the prisoner repeatedly punched her in the face, pushed her, and kicked her with his feet, revealing a homemade knife stuck in his sneaker. According to petitioner's declaration, her clothing was torn off as her attacker held her down on the bed and forcibly raped her.[9] Petitioner further alleges that her attacker threatened to murder her if she reported him.[10] She reported the incident one week later.

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specifically cited petitioner's use of the telephone as the reason for the transfer, he also noted at disciplinary charge for "Engaging in a Sexual Act" for which petitioner had not yet received a due process hearing. Request for Transfer, J.A. at 32, 33. In addition, petitioner had previously been charged with "possession, introduction or use of any narcotics," "counterfeiting or forging," "lying or providing a false statement to a staff member," "stealing" and "insolence." BOP Progress Report, J.A. at 28-29.

[7] Amended Complaint, J.A. at 43 ¶ 82; Answer of Defendants, J.A. at 71 ¶ 82.

[8] Answer of Defendants, J.A. at 71 ¶ 63.

[9] Farmer Declaration, J.A. at 107 ¶ 24.

[10] Amended Complaint, J.A. at 43 ¶ 91.

Acting without counsel,[11] petitioner filed a complaint on August 20, 1991 and an amended complaint on December 13, 1991 [12] seeking an injunctive order that the BOP place petitioner in a co-correctional facility [13] and not in a penitentiary setting. Petitioner further sought compensatory and punitive damages for "mental anguish, psychological damage, humil[i]ation, a swollen face, cuts and bruises to her mouth and lips and a cut on her back, as

[11] Petitioner proceeded *pro se* until the appointment of counsel by this Court on November 1, 1993.

[12] The defendants named in the complaint, along with the positions they held at the time and their involvement in petitioner's placement in general population at USP-Terre Haute, are as follows: Michael Quinlan, the Director of the BOP, allegedly failed to establish and implement an effective policy for the housing and designation of transsexual offenders, Quinlan Declaration, J.A. at 96, Amended Complaint, J.A. at 43 ¶¶ 6, 34, Farmer Declaration, J.A. at 107 ¶ 21; Larry DuBois, Regional Director of the North Central Region of the BOP at the time of petitioner's transfer to USP-Terre Haute, authorized the transfer of petitioner to USP-Terre Haute, DuBois Declaration, J.A. at 8 ¶ 1, Amended Complaint, J.A. at 43 ¶¶ 14, 84, Answer of Defendants, J.A. at 71 ¶ 82; N.W. Smith, Correctional Services Administrator of the North Central Region of the BOP at the time of petitioner's transfer to USP-Terre Haute, also authorized the transfer of petitioner to USP-Terre Haute, Smith Declaration, J.A. at 10 ¶ 1 Answer of Defendants, J.A. at 71 ¶ 82; Edward Brennan, Warden at FCI-Oxford, signed the order for petitioner's transfer to USP-Terre Haute, Brennan Declaration, J.A. at 13 ¶ 5; Dennis Kurzydlo, case manager at FCI-Oxford, prepared the Request for Transfer Memorandum recommending that petitioner be transferred to a penitentiary, Kurzydlo Declaration, J.A. at 15 ¶ 7; and Calvin Edwards, Warden at USP-Terre Haute at the time of petitioner's transfer and Regional Director of the North Central Region of the BOP at the time of the filing of petitioner's complaint, was responsible for the care of prisoners at USP-Terre Haute and allegedly allowed petitioner's placement in the general population, Edwards Declaration, J.A. at 93, Amended Complaint, J.A. at 43 ¶ 97. *See also* Amended Complaint and Farmer Declaration, generally.

[13] The BOP formerly operated co-correctional facilities which housed male and female prisoners in separate areas, but allowed coeducational programming.

well as some bleeding" resulting from the assault.[14] Petitioner alleged that each of the respondents knew that petitioner, "who has a feminine appearance, . . . would be sexually assaulted at USP-Terre Haute . . ." [15]

B. Cross-Claims for Summary Judgment

The respondents moved for summary judgment on February 18, 1992. Through their accompanying declarations, all but one respondent generally denied any actual knowledge of the risk of sexual assault facing petitioner.[16] Respondent Brennan, Warden at FCI-Oxford at the time of petitioner's transfer to USP-Terre Haute, did not address whether he knew of the risk to petitioner; instead, he attempted to deny personal involvement in the transfer.[17] Generally speaking, respondents' declarations did not address the question of whether respondents should have known of the risk to petitioner created by her placement in general population at USP-Terre Haute.[18]

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[14] Amended Complaint, J.A. at 43 ¶ 90.

[15] Amended Complaint, J.A. at 43 ¶¶ 92-97; Farmer Declaration, J.A. at 107 ¶ 26.

[16] Smith Declaration, J.A. at 10 ¶ 3; Edwards Declaration, J.A. at 93 ¶¶ 4, 5, 6; Quinlan Declaration, J.A. at 96 ¶ 5; DuBois Declaration, J.A. at 8 ¶ 3; Brennan Declaration, J.A. at 13 ¶ 6; Kurzydlo Declaration, J.A. at 15 ¶ 11.

[17] Respondent Brennan's declaration contained the following:

> [T]o the best of my knowledge, I had no direct personal involvement in any of the matters alleged in [petitioner's] Complaint, *except for signing the Transfer Order* dated March 7, 1989. This order authorized transfer of inmate Farmer from FCI, Oxford to United States Penitentiary, Terre Haute, Indiana for disciplinary purposes.

Brennan Declaration, J.A. at 13 ¶ 5 (emphasis added).

[18] The two arguable exceptions were the declarations of USP-Terre Haute Warden Edwards and FCI-Oxford Case Manager Kurzydlo. Edwards' declaration states as follows:

> I had no reason to believe that inmate Farmer could not function safely within the general population at USP-Terre

Petitioner filed a cross-claim for summary judgment and affidavit in opposition to respondents' summary judgment motion and a brief for summary judgment.[19] Petitioner alleged that her transsexuality was known to the BOP by virtue of her feminine appearance, documentation in BOP records, and prior litigation.[20] Indeed, respondents conceded in their Answer to the Complaint that the BOP's "medical and psychiatric personnel diagnosed plaintiff as transsexual" and that "records comp[il]ed and maintained

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Haute, and I believe the unit team acted appropriately in its determination of placement.

Edwards Declaration, J.A. at 93 ¶ 7.

However, when Edwards was the warden at USP-Lewisburg, he had affirmatively argued that housing petitioner in general population at USP-Lewisburg would pose a serious risk of harm. *See Farmer v. Carlson*, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988); *see also infra* discussion at 7-8.

Respondent Kurzydlo, case manager at FCI-Oxford at the time of petitioner's transfer, declared as follows:

> In my professional opinion, the correctional staff at USP Terre Haute were well equipped to handle the problems and needs presented by this inmate, and I relied upon my evaluation and recommendation to transfer Farmer from FCI, Oxford to USP Terre Haute.

Kurzydlo Declaration, J.A. at 15 ¶ 10.

[19] Affidavit of Dee Farmer, J.A. at 105; Plaintiff's Cross-Claim for Summary Judgment, dated March 18, 1992; Plaintiff's Memorandum in Support of Cross-Claim for Summary Judgment, dated March 18, 1992; Preliminary Opposition to Defendants' Motion for Summary Judgment, dated March 18, 1992.

[20] Farmer Declaration, J.A. at 107 ¶¶ 4-7, 13, 15, 16, 19. In a prior, separate action, petitioner had challenged the Bureau's failure to provide medical treatment for her transsexualism. *Farmer v. Haas, Brennan and DuBois*, No. 90-1088, 1991 U.S. App. LEXIS 3549 (7th Cir. March 1, 1991). In reversing the district court's grant of summary judgment for defendants, the Court of Appeals found that respodents Brennan and DuBois had knowledge of petitioner's transsexualism based upon her treatment history and diagnosis by medical personnel at the BOP. *Id.* at *17. Indeed, the Court noted that defendants Brennan and DuBois "conceded that they were well aware of Farmer's condition." *Id.* at *6.

by the Bureau of Prisons describe plaintiff as a non-violent, passive aggressive individual who projects feminine characteristics." [21]

Petitioner also alleged that respondents knew of the risk of harm she confronted as a transsexual in an all-male penitentiary.[22] She pointed to a psychological report prepared by the BOP in August 1986 which "stated that [petitioner] would be subject to a great deal of sexual pressure . . . because of [her] youth and feminine appearance." [23] She also noted that respondents had admitted in their answer that transsexual prisoners present "unique management problem[s]" for prison officials and cited to a BOP Health Service Manual which provided that transsexuals were to be placed in co-correctional facilities.[24] In addition, petitioner cited an earlier case she had brought against the BOP and respondent Edwards, who was then warden of USP-Lewisburg,[25] where petitioner

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[21] Answer of Defendants, J.A. at 71 ¶¶ 25, 26, 86. Petitioner's transsexualism was also documented for prison officials at FCI-Oxford through a psychological questionnaire completed in February 1988 and an "administrative remedy" filed by petitioner with respondent Brennan requesting medical treatment. Farmer Declaration, J.A. at 107 ¶¶ 4, 11. Petitioner further alleged that respondents Brennan, Kurzydlo, DuBois, Smith and Edwards were on notice of petitioner's transsexuality based upon disciplinary charges filed against her at FCI-Oxford for, *inter alia*, wearing her T-shirt off one shoulder and attempting to introduce female hormones into the institution. Farmer Declaration, J.A. at 107 ¶ 16.

[22] Farmer Declaration, J.A. at 107 ¶¶ 4, 6, 8, 11-14, 21.

[23] Farmer Declaration, J.A. at 107 ¶ 4.

[24] Amended Complaint, J.A. at 43 ¶ 30; Farmer Declaration, J.A. at 107 ¶ 21. The respondents' answer admitted this, but alleged that the manual provision had been changed. Answer of Defendants, J.A. at 71 ¶ 28, 30.

[25] At the time of the events involved in this action, respondent Edwards was warden of USP-Terre Haute. He had previously been warden of USP-Lewisburg. The BOP rates USP-Lewisburg one security level higher than USP-Terre Haute. Both institutions are

was housed at the time.[26] In that case, the district court cited respondent Edwards' declaration which, in turn, had adopted the following staff report, which was addressed to petitioner, in justifying her placement in administrative segregation:

> Where a threat to security exists, staff may take reasonable steps to alleviate a threat. In your case, *institutional staff finds that a situation exists which may endanger your life in the general population.* While steps are being taken to move you to a facility where extra security will not be necessary, *it is appropriate to keep you separated from anyone who may harm you.*

See Farmer v. Carlson, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988) (emphasis added) (hereinafter *Carlson*). The district court in *Carlson* deferred to prison officials' decision to place petitioner in administration segregation at USP-Lewisburg, reasoning that "clearly, placing plaintiff, 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 and to plaintiff in particular." *Id.*

In addition to her cross-claim for summary judgment and her opposition to respondents' motion for summary judgment, petitioner filed a motion and an accompanying affidavit pursuant to Fed. R. Civ. P. 56(f) requesting an extension of time to file a comprehensive motion in opposition.[27] Petitioner argued that respondents' failure to provide discovery pursuant to her second request for production of documents prevented her from establishing that respondents should have known of the risk of harm she faced in the general population at USP-Terre Haute:

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maximum security penitentiaries, unlike the facilities at FCI-Oxford and FCI-El Reno.

[26] Farmer Declaration, J.A. at 107 ¶ 6.

[27] Motion by Plaintiff Per Rule 56(f), J.A. at 103; Affidavit of Dee Farmer, J.A. at 105.

> The documents responsive to my production request are necessary for the preparation of my response to the defendants' motion for summary judgment. . . . The documents are expected to show that each defendant had knowledge that USP-Terre Haute was and is, a violent institution with a history of sexual assaults, stabbings, etc. The evidence is further expected to show that each defendant showed reckless disregard for my safety by designating me to said institution knowing that I would be sexually assaulted.[28]

C. Lower Court Opinions

The district court denied petitioner's Rule 56 motion and granted summary judgment to respondents on March 23, 1992. Since petitioner had not actually expressed concern for her safety to any of the respondents, the district court concluded that respondents had no knowledge of any potential danger to petitioner and were therefore not deliberately indifferent to her safety.[29]

In reaching its holding, the district court relied on *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992) (hereinafter *McGill*), which, in turn, had relied on *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (hereinafter *Franzen*). In defining "deliberate indifference," both *McGill* and *Franzen* adopted a "*criminal* recklessness" standard: prison officials are liable for failure to protect an inmate only if they "had *actual knowledge* of impending harm easily preventable,

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[28] Affidavit of Dee Farmer, J.A. at 105 ¶ 3.

[29] District Court Order, J.A. at 120, 124. In its order, the district court made no reference to the declaration of respondent Brennan, the warden of FCI-Oxford who signed petitioner's transfer order on March 7, 1989. *See* Brennan Declaration, J.A. at 13 ¶ 5. As stated above, Warden Brennan's declaration did not deny knowledge of the risk of sexual assault facing petitioner.

so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Franzen*, 780 F.2d at 653 (emphasis added); *accord McGill*, 944 F.2d at 348.[30] In applying the actual knowledge standard, the district court thus treated the issue of whether respondents should have known of the risk of harm confronting petitioner as legally irrelevant to petitioner's Eighth Amendment claim.

The court of appeals denied petitioner's motion for leave to appeal *in forma pauperis* and summarily affirmed the district court's order on August 7, 1992.

SUMMARY OF THE ARGUMENT

This Court has previously determined that when prison officials are deliberately indifferent to their affirmative duty to protect the physical safety of prisoners, they violate the Eighth Amendment. This case asks the Court to define that deliberate indifference standard.

This task is simplified because the Court has already defined deliberate indifference, albeit in a different context. In *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) (hereinafter *Canton*), this Court held that municipalities are liable under 42 U.S.C. § 1983 when policymakers are deliberately indifferent. The deliberate indifference standard adopted in *Canton* requires the municipality to take action in response to obvious risks that are likely to result in the violation of constitutional rights.

The *Canton* deliberate indifference standard should be adopted in failure to protect cases because this standard effectuates the meaning and purpose of the Eighth Amendment. On the one hand, the *Canton* standard, in conjunction with the various other defenses available to prison

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[30] The *McGill* court specifically stated that a prisoner normally proves actual knowledge by showing that he complained to prison officials about a specific threat to his safety. 944 F.2d at 349.

staff, will impose monetary liability only in very limited circumstances, that is, only when prison officials have ignored obvious and significant risks that were in their power to address. On the other hand, the *Canton* standard will ensure that federal courts retain the power to grant injunctive relief when prison officials ignore obvious risks, such as those posed by a potential tuberculosis epidemic or a serious fire hazard.

The *Canton* standard was adopted to reflect the doctrinal requirement that municipal liability for "policy" should be imposed only when the municipality has made a "deliberate" choice. Accordingly, it is an "intent" standard, reflecting the lowest degree of culpability within the legal category of "deliberate" states of mind. It therefore meets the doctrinal requirement expressed in *Wilson v. Seiter*, 111 S.Ct. 2321 (1991), that Eighth Amendment liability for cruel and unusual "punishment" should be imposed only when "some form of intent" is shown.

The *Canton* standard, and not the "criminal" standard of deliberate indifference adopted by the court below, is the proper intent standard for this case. The criminal standard substantially overlaps with the "malicious and sadistic" intent standard that this Court has adopted for Eighth Amendment use of force cases but has rejected in connection with failure to protect and other conditions of confinement cases. The *Canton* standard, but not the criminal standard, is also consistent both with the traditional usage of deliberate or "conscious" indifference that this Court drew on in *Estelle v. Gamble*, 429 U.S. 97 (1976), and with the deliberate indifference standard used by the great majority of lower federal courts in Eighth Amendment failure to protect cases.

Because respondents were granted summary judgment under the wrong standard for deliberate indifference, this case should be remanded for petitioner to have an opportunity to prove that placing a transsexual prisoner, who

is female in demeanor and appearance, in general population in an otherwise all-male, violent institution posed an obvious—and in this case overwhelming—risk of sexual assault.

ARGUMENT

I. PRISONERS' EIGHTH AMENDMENT RIGHT TO REASONABLE SAFETY IS VIOLATED WHEN PRISON OFFICIALS ARE DELIBERATELY INDIFFERENT TO THEIR SAFETY

A. Prison Administrators Have a Duty to Protect Prisoners

"[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 199-200 (1989).[3] In *DeShaney*, this Court articulated the principle that the Constitution imposes an affirmative duty to provide reasonable safety to those confined by the State:

> The rationale for the principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs, *e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. . . . The affirmative duty to protect arises . . . from the limitation which it has imposed on his freedom to act in his own behalf. *See Estelle v. Gamble*, [429 U.S. 97, 103 (1976)].

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[3] *See also Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982); *Hutto v. Finney*, 437 U.S. 678, 685-86 (1978).

489 U.S. at 200 (other citations omitted) (emphasis added).[32]

The Eighth Amendment specifically incorporates this affirmative duty to provide prisoners with reasonable safety:

> The [Eighth] Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is reasonable safety. It is cruel and unusual punishment to hold convicted prisoners in unsafe conditions.

Helling v. McKinney, 113 S.Ct. 2475, 2480-81 (1993) (citations and internal quotation marks omitted); *accord Youngberg v. Romeo*, 457 U.S. 307, 316-17 (1982).

This affirmative duty arises from the fact that prison officials control every aspect of prisoners' confinement. They control all of the factors that affect prisoners' safety such as housing, prisoner movement within the facility, and the level of staffing and services available to prisoners, while they prohibit prisoners from taking measures to protect themselves:

> Having incarcerated the individuals, stripped them of all means of self-protection, and foreclosed access to private aid, the state is constitutionally required to provide prisoners with some protection from the dangers to which they are exposed.

Morgan v. District of Columbia, 824 F.2d 1049, 1057 (D.C. Cir. 1987) (citing *Washington v. District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986)).[33]

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[32] The *Estelle* Court referred to the common law notion embedded in "contemporary standards of decency" that "[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." *Estelle v. Gamble*, 429 U.S. at 103-04.

[33] *Accord Young v. Quinlan*, 960 F.2d 351, 361-362 (3rd Cir. 1992); *Redman v. County of San Diego*, 942 F.2d 1435, 1444-45

B. The Failure to Protect Prisoners Violates the Eighth Amendment When it Amounts to Deliberate Indifference

This Court's cases establish that the Eighth Amendment is violated by conduct that involves the unnecessary and wanton infliction of pain. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). To meet that standard, a prisoner must show both an "objective component" regarding the seriousness of the conditions and a "subjective component." *Wilson v. Seiter*, 111 S.Ct. 2321, 2324 (1991). Proof of the subjective component, which the Court has described as "a culpable state of mind" and as "some form of intent," *id.* at 2324-25, is required in order to show that the challenged conduct was "wanton."

The determination of what conduct can properly be described as "wanton" varies depending on the nature of the Eighth Amendment claim. The use of force by prison staff violates the Eighth Amendment only if force is used "maliciously and sadistically." *Whitley*, 475 U.S. at 320-21; *see also Hudson v. McMillian*, 112 S.Ct. 995, 999 (1992). In contrast, the Eighth Amendment standard applicable to claims regarding medical care requires a lesser showing: the Eighth Amendment is violated if prison officials display "deliberate indifference to a prisoner's serious illness or injury." *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). *Wilson* extended the "deliberate indifference" standard to all prison conditions of confinement. 111 S.Ct. at 2326-27. In particular, *Wilson* held that Eighth Amendment claims of failure to protect the prisoner's safety are governed by the deliberate indifference standard. *Id.*

(9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 972 (1992); *Fisher v. Koehler*, 692 F. Supp. 1519, 1559 (S.D.N.Y. 1988), *later proceeding aff'd*, 902 F.2d 2 (2d Cir. 1990) (upholding finding of constitutional violation and remedy).

II. PRISON OFFICIALS ARE DELIBERATELY INDIFFERENT WHEN THEY FAIL TO ACT IN RESPONSE TO OBVIOUS AND UNREASONABLE RISKS

A. This Court Defined Deliberate Indifference in *Canton* to Encompass Obvious Risks

The Court has already defined "deliberate indifference" with regard to questions of municipal liability under 42 U.S.C. § 1983. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) (hereinafter *Canton*). In that case, the Court held that a failure to train employees could constitute a municipal policy under *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), if the municipality was deliberately indifferent to constitutional rights:

> [I]t 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 inadequacy *so likely to result in the violation of constitutional rights*, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.[10]

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[10] For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), can be said to be "*so obvious*," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been *plainly obvious* to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

Canton, 489 U.S. at 390 (emphasis added). Justice O'Connor's opinion, concurring in part and dissenting in part, agreed with this formulation and added the following:

> Where a § 1983 plaintiff can establish that *the facts available to city policymakers put them on actual or constructive notice* that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied. Only then can it be said that the municipality has made "a deliberate choice to follow a course of action . . . from among various alternatives."
>
> * * * *
>
> In my view, it could be shown that the need for training was obvious in one of two ways. First, a municipality could fail to train its employees concerning *a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face.*
>
> * * * *
>
> Second, I think municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could *put the municipality on notice* that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements. The lower courts that have applied the "deliberate indifference" standard we adopt today have required a showing of a pattern of violations from which a kind of "tacit authorization" by city policymakers can be inferred.

Id. at 396-97 (emphasis added) (citations omitted).

Accordingly, deliberate indifference for constitutional purposes encompasses the failure of government officials or entities to respond to a substantial risk of constitutional violations when: 1) they know about the risk; 2) they are on constructive notice of the risk; or 3) the risk is "obvious" to the relevant officials given the positions they occupy and the duties they and their subordinates perform.

Two main points emerge from the *Canton* majority and concurring opinions. First, the relevant inquiry involves the officials' actual or constructive notice of a threat to the class of persons within the scope of the risk. Second, the Court's reference to an "obvious" need for training indicates that the plaintiff need not prove that the officials realized that the risk of harm to the class of potential plaintiffs required action. If a risk to a class of persons is obvious, officials or entities may be held liable for the failure to protect members of that class, even if a particular person's exposure to the risk was not directly known to them.

Canton thus cannot be reconciled with an argument that in order for officials to be deliberately indifferent, plaintiff must prove that the officials knew of a threat to a particular person. Insofar as the district court in this case applied an "actual knowledge" standard, it applied a rule that is significantly more restrictive than *Canton*'s standard, and is therefore erroneous.

Under *Canton*, a risk created by the failure to protect a prisoner may be "obvious" for several reasons. First, a risk may be obvious because it was specifically communicated to the defendants. In this category would be credible reports by the intended victim of threats made to him or her.

A second category of "obvious" risks would include cases in which prisoner assaults were so common in particular circumstances that prison officials would have to be charged with knowledge that placing a prisoner in that circumstance would lead to an unreasonable risk of assault. *Cf. Ramos v. Lamm*, 639 F.2d 559, 572-73 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (because of inadequate staff and poor facility design, violence and fear permeated the prison population and the efforts of many prisoners were "directed at merely staying alive while they serve[d] their sentences").

Third, a risk may be so obvious that a federal court need not wait for the inevitable tragedy to occur prior to affording injunctive relief. For example, a federal court must be able to enjoin a prison from providing prisoners with contaminated water or infected blankets because the unreasonable risk from such actions is obvious even before any sickness occurs.[34] Similarly, mingling aggressive and victim-prone prisoners in an open dormitory, or failing to supervise high-security prisoners, should be subject to injunctive relief before the first prisoner dies. *Cf. Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 560-61 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988) (finding deliberate indifference with regard to murder of mentally ill prisoner housed in general population; officials had failed to follow court order requiring segregation and treatment of mentally ill prisoners).

Of course, some risks may be "obvious" but so trivial that they do not support a constitutional claim of deliberate indifference. As a threshold matter, therefore, there must be some allegations that the conduct of prison officials (either by omission or commission) "pose[s] an unreasonable risk of serious damage to . . . future health" and thus violates the objective component of the Eighth Amendment. *See Helling*, 113 S.Ct. at 2481. That standard is easily met in this case by petitioner's allegation that respondents' decision to place her in the general population of a maximum security prison predictably led to her assault and rape.

Finally, under *Canton*, when a defendant is on notice of an obvious and unreasonable risk of harm, the defendant must take those steps reasonably within his or her power to address the risk. It is precisely that failure to act in the face of an obvious risk that petitioner has challenged in this case.

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[34] *See* discussion in *Helling v. McKinney*, 113 S.Ct. 2475, 2480-81 (1993).

B. The *Canton* Standard Is Consistent with the Eighth Amendment Mental Element Requirement

As noted above, an Eighth Amendment violation involves both an objective and subjective component. The subjective component of an Eighth Amendment prison conditions claim requires proof of "some mental element" on the part of the "inflicting officer." This is because the word "punishment" in the text of the Amendment itself implies a deliberate act or choice. *Wilson v. Seiter*, 111 S.Ct. at 2325.

The *Canton* standard meets this state of mind requirement. Indeed, *Canton*'s reasoning concerning the "policy" requirement is parallel to *Wilson*'s reasoning regarding the word "punishment."

> [M]unicipal liability under § 1983 attaches where —and only where—a deliberate choice to follow a course of action is made from among various alternatives by city policymakers. Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality—a "policy" as defined by our prior cases—can a city be liable for such a failure under § 1983.

489 U.S. at 389 (internal quotation marks and citations omitted).[35] Thus, the essential element of deliberate choice is common to the reasoning of both *Canton* and *Wilson*.

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[35] The *Canton* majority recognized the tension in finding that a municipality's disregard of risks was deliberate:

> The issue in a case like this one . . . is whether [a] training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." *It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees.*

489 U.S. at 390 (emphasis added). This apparent tension highlights that "deliberate indifference" is a legal term of art. *Cf. Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) ("deliberate indifference" is an "oxymoron").

Wilson itself acknowledged this correspondence. Immediately after its reference to "some form of intent," the Court added, "*cf. Canton v. Harris*, 489 U.S. [at 390 n.10]." 111 S.Ct. at 2325. The citation is to the *Canton* footnote, quoted above at 15, which refers to risks that are "so obvious" that policymakers' failure to act on them can properly be characterized as deliberately indifferent. Thus, *Wilson* itself supports the view that the *Canton* standard constitutes "some form of intent." [36]

Wilson, in referring to "some form of intent," uses "intent" as a legal term of art encompassing a range of mental states. It does so consistently with the traditional understanding of "intent" in American jurisprudence. Deliberate indifference— also referred to as "conscious" indifference—is treated as equivalent to "willful," "wanton," or "reckless" conduct. It is classified as a "quasi-intent" standard qualitatively different from ordinary lack of care "which is so far from a proper state of mind that it is treated in many respects" as equivalent to actual intent to do harm. Prosser & Keeton, *The Law of Torts* § 34 at 212-13 (5th ed. 1984).[37] The "usual meaning" of "will-

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[36] *See also City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 268-69 (1987) (O'Connor, J., dissenting), suggesting that the deliberate indifference standard incorporates a cognitive element that negligence, even heightened negligence, lacks:

> [I]n my view the "inadequacy" of police training may serve as the basis for § 1983 liability only where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain. The "causation" requirement of § 1983 is a matter of statutory interpretation rather than of common tort law. Analogy to traditional tort principles, however, shows that the law has been willing to trace more distant causation when there is a cognitive component to the defendant's fault than when the defendant's conduct results from simple or heightened negligence.

(Citation omitted).

[37] *Canton* distinguishes its deliberate indifference standard from gross negligence. *See* 489 U.S. at 388 n.8.

ful," "wanton," or "reckless" is that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." Conscious indifference or willfulness is established when a defendant "has proceeded in disregard of a high and excessive degree of danger, *either known to him or apparent to a reasonable person in his position.*" *Id.* at 213-14 (emphasis added);[38] *cf. Canton*, 489 U.S. at 396 (O'Connor, J., concurring in part and dissenting in part) (when policymakers have actual or constructive notice that a particular omission is substantially certain to lead to constitutional violations, municipality has made a "deliberate choice").

This view is also supported by *Smith v. Wade*, 461 U.S. 30 (1983), which in the context of a punitive damages instruction, canvassed the meaning of "wantonness" (a term the Court characterized as relatively free of ambiguity or confusion):

> Wanton means reckless—without regard to the rights of others . . . . Wantonly means causelessly, without restraint, and in reckless disregard of the rights of others. Wantonness is defined as a licentious act of one man towards the person of another, without regard to his rights; it has also been defined as the conscious failure by one charged with a duty to exercise due care and diligence to prevent an

[38] This reliance on tort law is not inconsistent with the Court's expressed concern that the Constitution not become a "font of tort law." *Paul v. Davis*, 424 U.S. 693, 701 (1976). The Court's concern in *Paul* was that the interest asserted by the plaintiff was simply not one that the Constitution protects. By contrast, the right to personal safety in prison is at the heart of the interests protected by the Eighth Amendment. *See supra* § I.A. The concepts and definitions of tort law underlie much of constitutional adjudication. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 187 (1961) (liability under § 1983 is "a species of tort liability").

> injury after the discovery of the peril, *or under circumstances where he is charged with a knowledge of such peril*, and being conscious of the inevitable or probable results of such failure.

Id. at 40 n.8 (emphasis added) (quoting 30 *American and English Encyclopedia of Law* 2-4 (2d ed. 1905)) (emphasis added). Under the Eighth Amendment, *"wanton"* is the term that sums up the subjective element of the claim. *Wilson*, 111 S.Ct. at 2326. *Smith* shows that a formulation virtually identical to the *Canton* standard is part of the long-settled and accepted understanding of "wanton." Thus, *Canton's* definition of deliberate indifference is one of the "culpable states of mind" that may support a claim under the Eighth Amendment.

In short, deliberate indifference is a "culpable state of mind," albeit less culpable than the "very high state of mind" required in use of force cases. *Wilson*, 111 S.Ct. at 2326. It is precisely because deliberate indifference falls within the category of "intentional" states of mind that it was adopted in *Canton* to distinguish acts that are chargeable to municipalities as "policy" from acts that are not so chargeable. Moreover, it would be deeply anomalous if "deliberate indifference" had one meaning with respect to municipal liability and another with respect to Eighth Amendment challenges.[39] No Supreme Court

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[39] In *Collins v. City of Harker Heights, Tex.*, 112 S.Ct. 1061, 1069 (1992), the Court noted the distinction between using deliberate indifference as the substantive standard for liability under the Eighth Amendment and using the standard for identifying whether a municipality was constitutionally responsible for acts of its agents. In *Collins*, however, the purpose of drawing the distinction was not to suggest that there are two distinct meanings for the term "deliberate indifference." Rather, the purpose was to point out that a constitutional violation does not arise simply because a municipality was deliberately indifferent; a municipality is only liable when the deliberate indifference leads to a violation of a constitutional right. In *Collins*, no constitutional right was infringed. *Id.*

case has suggested that the definition of "deliberate indifference" applied in *Canton* does not apply to other uses of the term. Indeed, as set forth below, the Court's Eighth Amendment decisions consistently support application of the *Canton* standard.

C. The *Canton* Standard Appropriately Reflects the Purposes of the Eighth Amendment

In *Wilson*, this Court applied the same Eighth Amendment standard to both injunctive and damages actions. 111 S.Ct. at 2324-25. It is likely, therefore, that the deliberate indifference standard adopted by the Court here will also apply to injunctive actions, as well as to all types of conditions of confinement claims, including those involving medical care. *Id.* at 2326. Accordingly, the Eighth Amendment standard adopted in this case can and should take into account the fact that prisoners must often rely on injunctive relief to safeguard their well-being in institutional settings.[40] If the standard is set too high, injunctive relief will become unavailable and prisoners will be left without any meaningful remedy to secure their freedom from harm.

The *Canton* standard is the appropriate standard for determining whether injunctive relief to a class of pris-

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[40] Courts have recognized the violent conditions to which prisoners are subjected in the absence of institutional protection. *See, e.g., Redman v. County of San Diego*, 942 F.2d 1435, 1444-45 (9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 972 (1992); *Morgan v. District of Columbia*, 824 F.2d 1049, 1057-58 (D.C. Cir. 1987); *Fisher v. Koehler*, 692 F. Supp. 1519, 1560 (S.D.N.Y. 1988), *later proceeding aff'd*, 902 F.2d 2 (2d Cir. 1990) (upholding finding of constitutional violation and remedy) (widespread violence by aggressive inmates); *LaMarca v. Turner*, 662 F. Supp. 647, 663 (S.D. Fla. 1987), *aff'd in relevant part*, 995 F.2d 1526, 1538 (11th Cir. 1993) (widespread rape and assaults by inmates on inmates); *Holt v. Sarver*, 309 F. Supp. 362, 377 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971), *later proceeding, Hutto v. Finney*, 437 U.S. 678 (1978) (nightly sexual assaults, fights and stabbings committed by "creepers" and "crawlers" against fellow inmates).

oners is justified under the Eighth Amendment because, unlike the Seventh Circuit standard, it guarantees that a federal court will have the power to address a pattern of conduct:

> In institutional level challenges to prison health care, systemic deficiencies can provide the basis for a finding of deliberate indifference. A series of incidents closely related in time may disclose a pattern of conduct amounting to deliberate indifference.

Rogers v. Evans, 792 F.2d 1052, 1058-59 (11th Cir. 1986) (citation omitted). The "series of incidents" and "pattern of conduct" constitute deliberate indifference because in such circumstances, just as in *Canton*, the pattern renders obvious the need to take action without proof of actual knowledge on the part of prison officials. At the same time, the standard urged by petitioner will not expose prison administrators to inordinate liability for the simple reason that the *Canton* standard itself requires "a high degree of fault." 489 U.S. at 396 (O'Connor, J., concurring in part and dissenting in part).[41]

Moreover, in addition to the protection directly provided by the *Canton* standard, existing doctrine already provides prison officials with significant protection against undue liability. For example, the "good faith" qualified immunity defense protects government employees from the threat of liability when they carry out their duties in accordance with a reasonable understanding of existing law, but nonetheless violate the constitutional rights of those with whom they deal. *See, e.g., Harlow v. Fitz-*

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[41] In *McGill v. Duckworth*, the Seventh Circuit argued that a "should have known" standard approaches "absolute liability" because staff always know that there is a risk of assault in prison. 944 F.2d at 348. However, the very large body of prisoner assault cases decided under the "should have known" formulation takes as its starting point that "the state is not obliged to insure an assault-free environment" and that it is only "the *unreasonable* threat of violence" that violates the Eighth Amendment. *See Morgan v. District of Columbia*, 824 F.2d at 1057 (emphasis added).

gerald, 457 U.S. 800, 818 (1982) (government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known).

Furthermore, beyond the general "good faith" immunity defense to damages, corrections staff share with other institutional staff an additional good faith defense. In an action in which an individual plaintiff seeks damages, the inability of a particular defendant to take effective action is a defense to liability:

> In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability.

Youngberg v. Romeo, 457 U.S. at 323 (citation omitted).[42]

In addition, other possible reasons for a standard higher than *Canton* are inapplicable. For example, courts are traditionally reluctant to second-guess prison officials' handling of urgent problems such as prison riots that require "split-second" decisions made hastily by administrators and officers acting without the benefit of hindsight. *Whitley*, 475 U.S. at 320, 322; *Dudley v. Stubbs*, 489 U.S. 1034, 1038-39 (1989) (O'Connor, J., dissenting).[43]

Similarly, this Court has given deference to the decisions of prison officials where they make formal policy

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[42] The Seventh Circuit reasoned that the "should have known" standard would "allow[] plaintiffs to tax employees of the prison system with the effects of circumstances beyond their control." *McGill v. Duckworth*, 944 F.2d at 349. *Youngberg* demonstrates why this argument is erroneous.

[43] *Whitley* explicitly applied a higher standard under the Eighth Amendment to use of force cases because of the need for greater deference to official discretion in this area.

decisions relying on their special expertise regarding prison security. *See, e.g., Pell v. Procunier*, 417 U.S. 817, 824 (1974) (media challenge to restrictions on prisoner interviews).

This case, however, involves neither a prison riot, with its need for split-second decisions, nor a policy judgment, with its suggestion of reasoned deliberation. To the contrary, the claim of petitioner and others in her position is that the respondents *failed* to exercise their judgment and expertise, and that petitioner was injured as a result. When a constitutional challenge arises from the failure of prisoner officials to execute their duties, heightened deference is not required.

For these reasons, the standard petitioner proposes appropriately balances the affirmative duty to protect the lives and health of prisoners. Anything else would render that duty a chimera.

D. The Criminal Recklessness Standard Adopted Below Conflicts With the Purposes of the Eighth Amendment

In contrast to *Canton*, the Seventh Circuit standard of criminal recklessness or actual knowledge would inappropriately shield prison officials from responsibility in a variety of circumstances. It would immunize prison officials' failure to adopt a procedure for identification of prisoners with tuberculosis if it is found that they did not actually know that such a failure would lead to harm in a particular case, notwithstanding that the risk of harm is obvious. Similarly, it would immunize prison officials' failure to adopt any fire-safety measures, if it is found that they did not actually know of the unreasonable risk of fire in a particular case. It would also immunize prison officials' decision to house a young, slight, first-time offender in a general population cell with a prisoner with a history of predatory sexual crimes against cellmates, so long as it is found that the officials did not actually know of the

threat of assault in that case. *Cf. Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 972 (1992).

Precisely because the same standard will apply to both damages and injunctive claims, the Seventh Circuit standard would allow prison officials to wait until prisoners have actually contracted tuberculosis, or until fires have broken out, or until a vulnerable prisoner at obvious risk is actually attacked or tells prison officials that he has been threatened, before they could be required to take any action. In each of these examples, the risk is so great as to be obvious yet the Seventh Circuit standard would not authorize damages or injunctive relief unless prison officials actually knew of the risk.

Far from simply immunizing the inadvertent or negligent actions of prison officials, the Seventh Circuit standard encourages prison officials to take refuge in the zone between "ignorance of obvious risks" and "actual knowledge of risks." Adoption of a standard that creates such a refuge rewards inattention by prison officials to prisoner safety.[44] This is particularly inappropriate in an environment where prison rules and operations deprive prisoners of the capacity to make their own decisions regarding personal safety, *see supra* § I.A. Under such circumstances, this Court should not adopt a standard that *discourages* prison officials from recognizing risks of harm.[45]

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[44] Petitioner recognizes that some cases adopting a criminal recklessness standard indicate that an "ostrich-like" failure to acquire knowledge is to be treated as the equivalent of actual knowledge. *See, e.g., McGill v. Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992). But proof that prison officials deliberately avoided knowledge will be extraordinarily difficult. A requirement of such proof could prevent federal courts from intervening in injunctive actions where failure to intervene will entail massive human suffering, as in the tuberculosis example.

[45] This is not to suggest that the standard imposes liability for negligent inattention. Neither the *Canton* standard nor the criminal standard imposes such liability. In light of this, the Court should

III. PRIOR DECISIONS OF THIS COURT, AND THE GREAT MAJORITY OF THE OPINIONS OF THE COURTS OF APPEALS, SUPPORT APPLICATION OF THE *CANTON* DELIBERATE INDIFFERENCE STANDARD

A. This Court's Eighth Amendment Cases Support Application of the *Canton* Standard

1. *Estelle v. Gamble*

The Court first applied the deliberate indifference standard to Eighth Amendment jurisprudence in *Estelle v. Gamble*, 429 U.S. 97 (1976), holding that deliberate indifference to serious medical needs of a prisoner violates the Eighth Amendment. *Estelle* did not directly define "deliberate indifference," other than by stating that it is more than negligence.[16] Rather, *Estelle* relied on and endorsed the standard adopted by a number of lower court decisions:

> The Courts of Appeals are in essential agreement with this standard [for deliberate indifference]. All agree that mere allegations of malpractice do not state a claim, and, while their terminology regarding what is sufficient varies, their results are not inconsistent with the standard of deliberate indifference.

Id. at 106 n.14.

The Court then cited cases from the lower courts, starting with *Page v. Sharpe*, 487 F.2d 567 (1st Cir. 1973). That case held that a denial of medical care to a prisoner is actionable only if the complaint alleges either

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reject the criminal standard because, unlike the *Canton* standard, the criminal standard actively *discourages* vigilance.

[16] Petitioner does not argue that merely negligent failure to protect violates the Constitution. This Court has already held that such negligence does not violate the Due Process Clause. *Davidson v. Cannon*, 474 U.S. 344 (1986). *Wilson v. Seiter* removed any doubt that the same rule applies under the Eighth Amendment. 111 S.Ct. 2321.

an intent to harm the prisoner or "an injury or illness so severe *or obvious* as to require medical attention." *Id.* at 569 (emphasis added). Thus, the case endorsed what would now be considered the *Canton* standard. The *Estelle* Court also cited a footnote from *Newman v. Alabama*, 503 F.2d 1320, 1330 n.14 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975), in which the *Newman* court indicated that an Eighth Amendment violation regarding prison medical care requires "evidence of rampant and not isolated deficiencies . . . due to callous indifference." The court did not indicate that actual knowledge was required to establish "callous indifference." The court's reference to rampant or systemic [47] medical deficiencies is consistent with *Canton*, which, as noted, held that deliberate indifference can be shown when employees "so often violate constitutional rights" that the need for action is "obvious." *Canton*, 489 U.S. at 390 n.10.

The *Estelle* Court also cited *Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir. 1976), which held as follows:

> A prisoner states a proper cause of action when he alleges that prison authorities have denied reasonable requests for medical treatment in the face of an *obvious* need for such attention where the inmate is thereby exposed to undue suffering or the threat of tangible residual injury.

(Footnote omitted) (emphasis added).

Finally, the *Estelle* Court cited *Dewell v. Lawson*, 489 F.2d 877, 881-82 (10th Cir. 1974), in which the plaintiff brought an Eighth Amendment action alleging that the sheriff had failed to establish proper procedures and to train personnel, with the result that the diabetic plaintiff suffered brain damage following arrest. These facts are quite similar to the facts in *Canton* itself; nothing in the *Dewell* facts suggests that the sheriff knew of the plain-

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[47] *See also Newman*, 503 F.2d at 1331-32.

tiff's particular circumstances and consciously failed to take action in that particular case. Rather, as in *Canton*, plaintiff's claim suggested indifference to the danger created to a class of persons that defendants should have known would inevitably be at risk.

Thus, *Estelle*, in adopting the deliberate indifference standard, relied on an established understanding in the lower courts [48] that is substantially identical to the standard later articulated in *Canton* and is also consistent with the above-described tort law understanding of the terms "willful," "wanton," and "reckless," and the concept of "conscious indifference." *See supra* § II.B. This understanding, and these cases, cannot be reconciled with the "actual knowledge" standard applied by the Seventh Circuit.

2. *Whitley v. Albers*

In *Whitley v. Albers*, 475 U.S. 312 (1986), this Court held that, in all cases that involve conduct not purporting to be punishment, the conduct must be "wanton" in order to violate the Eighth Amendment. Furthermore, whether conduct is wanton must be determined "with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Id.* at 320.

The Court went on to hold that the "deliberate indifference" standard applicable to Eighth Amendment claims of failure to attend to serious medical needs, set forth in *Estelle*, does not apply to prison use of force claims. Rather, in use of force cases, the issue is "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 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973)).

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[48] The other cases cited in note 14 of *Estelle* are at least consistent with the *Canton* standard.

Significantly, in explaining what the "maliciously and sadistically" standard of *Whitley* meant, the Court cited *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986), which adopted the criminal recklessness standard at issue in this case. *Whitley*, 475 U.S. at 321. This citation highlights the fact that the standard for use of force adopted in *Whitley* blurs significantly with the criminal recklessness standard adopted below.[49] The *Whitley* Court stated that application of the use of force standard includes a determination of "whether the use of force . . . evinced such wantonness with respect to the unjustified infliction of harm *as is tantamount to a knowing willingness that it occur*." 475 U.S. at 321 (emphasis added). When one acts with *Franzen*'s *actual knowledge* of the risk of harm, one also acts with *Whitley*'s "knowing willingness that [the harm] occur."

Accordingly, in order to preserve the *Whitley* distinction between the higher standard applicable to use of force cases on the one hand, and failure to protect and other conditions of confinement cases on the other, this Court should reject the Seventh Circuit deliberate indifference standard.[50]

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[49] In *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992), the court stated that actions taken *because* of the likely harm are done with deliberate indifference, whereas those taken *in spite of* the harm are not. This characterization of the criminal recklessness standard is entirely indistinguishable from the use of force standard adopted in *Whitley*. One acts *because* of the likelihood of harm when one acts out of a motivation to bring about the harm, and the action is therefore taken "maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-21.

[50] The standard urged by petitioner is consistent with the dissent from denial of certiorari in *Dudley v. Stubbs*, 489 U.S. 1034 (1989) (O'Connor, J.). In that case, the plaintiff, a prisoner, was beaten severely by a group of prisoners. Staff did not intervene, claiming that under the particular circumstances of the case they could not interfere because of the possibility that to do so would allow the

3. *Wilson v. Seiter*

Wilson v. Seiter, 111 S.Ct. 2321 (1991), held that the deliberate indifference standard applies to all Eighth Amendment prison conditions of confinement claims. *Id.* at 2326-27. Moreover, the Court specifically held that Eighth Amendment claims involving a failure to protect the prisoner are not subject to the higher standard applicable to use of force cases and are judged under the same deliberate indifference standard as medical claims:

> [W]e see no significant distinction between claims alleging inadequate medical care and those alleging inadequate "conditions of confinement." Indeed, the medical care a prisoner receives is just as much a "condition" of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, *and the protection he is afforded against other inmates*. . . . Thus . . . it is appropriate to apply the deliberate indifference standard articulated in *Estelle*.

Id. (emphasis added) (quotation marks and citations omitted).

In this connection, it is important to note that *Wilson* did not itself define the deliberate indifference standard; rather, it explicitly adopted the deliberate indifference standard articulated in *Estelle*. 111 S.Ct. at 2327. As

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prisoners pursuing the plaintiff to gain access to the prison arsenal and superintendent's office. *Id.* at 1034-35. Justice O'Connor dissented on the ground that the case should have been governed by the *Whitley* malice standard rather than the deliberate indifference standard applied by the lower court because the situation, like *Whitley*, involved the necessity of a split-second decision; indeed, the situation in *Dudley* was "arguably more dangerous" than the disturbance in *Whitley*. *Id.* at 1038.

Dudley involved the question of the appropriate place to draw the line between use of force and failure to protect claims. This case, which does not involve any allegations of use of force by prison officials, is obviously appropriately placed in the "failure to protect" category.

shown in § III.A.1. above, *Estelle* in turn relied on case law consistent with the *Canton* standard rather than the Seventh Circuit standard.

In addition, *Wilson*, 111 S.Ct. at 2327, cited with approval lower court authority consistent with Canton. The Court cited *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 560 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988), a prisoner assault case in which the court upheld a jury instruction that the defendants' failure to act could constitute deliberate indifference "in the sense that the official had knowledge of *or should have known of* a pervasive risk of harm to inmates." (Emphasis added). The Court also cited *Morgan v. District of Columbia*, 824 F.2d 1049, 1057-58 (D.C. Cir. 1987), also a prisoner assault case, in which liability was upheld based on an "obvious unreasonable risk of violent harm . . . which is known to be present or should have been known." [51]

The *Wilson* Court also cited with approval cases "routinely appl[ying] the 'deliberate indifference' requirement to claims of prisonwide deprivation of medical treatment." 111 S.Ct. at 2324 n.1 (citing *Toussaint v. McCarthy*, 801 F.2d 1080, 1111-13 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *French v. Owens*, 777 F.2d 1250, 1254-55 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986)). Such cases hold that deliberate indifference may be established by showing " 'repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff' or by showing 'systematic or gross deficiencies in staffing, facilities, equipment or procedures.' " *French v. Owens*, 777 F.2d at 1254 (quoting

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[51] *Cortes-Quinones* and *Morgan* are two of the five cases cited in *Wilson* to illustrate the deliberate indifference standard. The other three do not discuss the definition of deliberate indifference. *See Lopez v. Robinson*, 914 F.2d 486, 492 (4th Cir. 1990); *Givens v. Jones*, 900 F.2d 1229, 1234 (8th Cir. 1990); *LaFaut v. Smith*, 834 F.2d 389, 391 (4th Cir. 1987). All five cases are consistent with the *Canton* standard. Significantly, not a single one of the five cases applied a criminal recklessness standard.

Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)). They do not address the actual knowledge of prison officials; rather, they address the widespread or systemic character of objective conditions, which can make the risk of harm "obvious," *Canton*, 489 U.S. at 390, or can constitute "facts available to city policymakers [that] put them on actual *or constructive* notice" of the risk of constitutional violation. *Id.* at 396 (O'Connor, J., concurring in part and dissenting in part) (emphasis added).

Moreover, *Wilson* does not provide support for the Seventh Circuit standard. In reaching its decision to apply a criminal recklessness standard, *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992), relied on the *Wilson* Court's reference to *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986), which had adopted a criminal recklessness standard. However, *Wilson*'s reference to *Franzen* pertained to the general principle that the word "punishment" involves "some mental element." 111 S.Ct. at 2325. The reference appeared in Section I of the opinion, which addressed whether a "state of mind" requirement was even applicable to the case. *See id.* at 2323-26. The reference did not relate to the *content* of that mental element, an issue which was discussed in Section II of the *Wilson* opinion without any mention of *Franzen*. *See id.* at 2326-27. As the *Wilson* opinion did not even specify what standard *Franzen* adopted, it can hardly be interpreted to suggest agreement with that standard.

4. *Helling v. McKinney*

The central question in *Helling v. McKinney*, 113 S.Ct. 2475 (1993), was whether the Eighth Amendment encompasses threats of possible future harm to a prisoner's health, a question the Court answered in the affirmative. *Id.* at 2480. Indeed, the holding of *Helling* is that possible—but not certain—risks of harm to groups of

prisoners are actionable under the Eighth Amendment. For example, prison officials cannot expose prisoners as a group to an unreasonable risk of contagious disease or unsafe water without violating the Eighth Amendment. *See id.*

This portion of the *Helling* opinion was directed at the objective component of the Eighth Amendment—whether the challenged conditions were objectively deficient enough to deprive the prisoner of reasonable health or safety; it was not directed at the subjective state of mind component of deliberate indifference. However, if deliberate indifference requires that prison officials possess "actual knowledge of impending harm easily preventable" [52] before they have any responsibility to act, none of the discussion in *Helling* has any practical relevance. Under the Seventh Circuit's standard, proof of an unreasonable risk of future harm to the health or safety of a group of prisoners could never be deliberate indifference. By definition, such harm would not be "impending" and prison officials would not have actual knowledge that harm *necessarily* would come to any of the prisoners, much less a specific prisoner.[53] Thus, if the Seventh Circuit standard for deliberate indifference is correct, it was pointless for the Court to discuss the objective component in *Helling*, because the prisoner would always lose on the subjective component. For that reason, even though *Helling* does not deal directly with the state of mind component of Eighth Amendment claims, its analysis is consistent with the *Canton* definition of deliberate indifference, but not with the standard adopted in the Seventh Circuit.

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[52] *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 653 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986)).

[53] In addition, such harm may not be "easily preventable." To use one of *Helling*'s examples, ensuring a potable water supply might entail some difficulty or expense. Surely, prisoners may not be required to drink contaminated water for that reason. 113 S.Ct. at 2480.

B. The Majority of Lower Court Cases Has Applied a Formulation of Deliberate Indifference that Is Consistent with *Canton*

Something akin to the standard urged by petitioner has been adopted in the majority of circuits that have expressly addressed the issue of what standard applies to Eighth Amendment failure to protect claims. *See, e.g., Young v. Quinlan*, 960 F.2d 351, 361 (3d Cir. 1992) ("knew or should have known of a sufficiently serious danger"); *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 972 (1992) (knew or should have known of risk); *Berry v. City of Muskogee*, 900 F.2d 1489, 1496 (10th Cir. 1990) (deliberate indifference occurs when conduct or policy "disregards a known or obvious risk that is very likely to result in the violation of a prisoner's constitutional rights"); *Morgan v. District of Columbia*, 824 F.2d 1049, 1058 (D.C. Cir. 1987) ("knew or should have known" of "obvious unreasonable risk"); *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984) (reckless disregard shown by existence of pervasive risk of harm and failure by prison officials to reasonably respond to risk); *Stewart v. Love*, 696 F.2d 43 (6th Cir. 1982); *Wade v. Haynes*, 663 F.2d 778, 786 (8th Cir. 1981), *aff'd sub nom. Smith v. Wade*, 461 U.S. 30 (1983) (knew or should have known that attack highly foreseeable); *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (prisoner has right to reasonable protection and need not wait until actual assault before obtaining relief).[54]

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[54] The same is true of recent medical care cases. *See, e.g., DeGidio v. Pung*, 920 F.2d 525, 532 (8th Cir. 1990) (liability can be based on a "known or obvious risk"); *Miltier v. Beorn*, 896 F.2d 848, 851-52 (4th Cir. 1990) ("A defendant acts recklessly by disregarding a substantial risk of danger that is either known to the defendant or which would be apparent to a reasonable person in the defendant's position"); *Greason v. Kemp*, 891 F.2d 829, 839-40 (11th Cir. 1990) (warden who knew or should have known about inadequate psychiatric staffing could be held liable for consequences).

These cases have fashioned a standard similar to that urged by petitioner. For example, in *Young v. Quinlan*, 960 F.2d 351, 361 (3d Cir. 1992), the court described the standard as follows:

> "should have known" [d]oes not refer to a failure to note a risk that would be perceived 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 recognize 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.

(Internal quotation marks and citation omitted).

The cases adopting a criminal recklessness standard for failure to protect cases are primarily from the Seventh Circuit. *See McGill*, 944 F.2d at 348, and cases cited therein; *see also Ruefly v. Landon*, 825 F.2d 792 (4th Cir. 1987); *LaMarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993). Even these courts have displayed some uneasiness with the reach of the criminal standard by indicating that, in some circumstances, prison officials' knowledge of a risk of harm can be inferred. For example, in *Goka v. Bobbitt*, 862 F.2d 646, 651 (7th Cir. 1988), the court stated that the risk of violence must be known to the defendants, but also stated that "[t]o establish an Eighth Amendment violation, Goka must show that the defendants either had actual knowledge of the threat to his safety or that the risk of violence was so substantial or pervasive that the defendants' knowledge *could be inferred.*" (Emphasis added). Similarly, in *LaMarca*, 995 F.2d at 1536-37, the court indicated that when the evidence "paint[s] . . . a picture that would be apparent to any knowledgeable observer, . . . [a]n *inference can be*

drawn" that the defendant knew of the risk of harm. (Emphasis added).

Furthermore, in those circuits in which some cases have adopted the criminal recklessness standard, other cases have adopted a standard similar to that urged by petitioner. *See, e.g., Miltier v. Beorn*, 896 F.2d 848, 851 (4th Cir. 1990) (medical care case); *Walsh v. Brewer*, 733 F.2d 473, 476 (7th Cir. 1984) (Eighth Amendment violated where assaults are pervasive or where plaintiff belongs to identifiable group of prisoners for whom risk of assault was serious problem of substantial dimensions); *Watts v. Laurent*, 774 F.2d 168, 172 (7th Cir. 1985), *cert. denied*, 475 U.S. 1085 (1986) (should have realized strong likelihood of attack); *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir.), *cert. denied*, 484 U.S. 935 (1987) (risk of assault based on plaintiff's transsexuality sufficiently serious to require defendants to take protective measures);[55] *Greason v. Kemp*, 891 F.2d 829, 839-40 (11th Cir. 1990) (medical care case).

IV. THIS CASE SHOULD BE REMANDED TO GIVE PETITIONER AN OPPORTUNITY TO SHOW THAT, BASED ON THE RESPONDENTS' KNOWLEDGE OF HER TRANSSEXUAL STATUS, HER PLACEMENT IN GENERAL POPULATION IN A HIGH SECURITY FACILITY POSED AN OBVIOUS AND UNREASONABLE RISK

To petitioner's knowledge, no prison official in this country has ever forced a female prisoner to be confined in general population in a violent, otherwise all-male, high security facility. Petitioner believes that such a transfer would never be made, because it is so obvious that such a transfer would expose the female prisoner to such a high likelihood of harm. Indeed, in *Dothard v. Rawlinson*, 433 U.S. 321, 336-37 (1977), the Court held that

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[55] In the Seventh Circuit, the earlier line of cases which adopted a standard similar to that urged by petitioner were overruled in *McGill*, 944 F.2d at 349.

being male was a bona fide occupational qualification for serving as a guard in an Alabama maximum security penitentiary precisely because of the risk of assault that would face women guards:

> There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison.
>
> * * *
>
> The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel.

Id. at 335-36.

The question therefore is whether the petitioner, whose appearance and demeanor are female, should be given an opportunity to demonstrate that it obviously exposed her to an unreasonable, indeed extraordinary, risk of sexual assault to place her in general population in a penitentiary that she alleged was known to be violent:

> A [transsexual prisoner] poses particularly serious management problems for prison officials. Given her transsexual identity and unique physical characteristics, her being housed with male inmates in a general population cell would undoubtedly create, in the words of the district court, "a volatile and explosive situation." Under such circumstances, it is unlikely that prison officials would be able to protect her from the violence, sexual assault, and harassment about which she complains.

Meriwether v. Faulkner, 821 F.2d 408, 417 (7th Cir. 1987), *cert. denied*, 484 U.S. 935 (1987) (citation omitted).

Petitioner alleged that all of the respondents knew her life would be endangered if she were transferred to Terre

Haute. With one exception,[56] the respondents denied that allegation. However, as noted in the Statement of the Case, another federal court, *relying on a declaration of respondent Edwards* in that case,[57] concluded as follows:

> Clearly, placing plaintiff, 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 plaintiff in particular.

Farmer v. Carlson, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988).

Petitioner requests a remand to attempt to prove that what was clear to the federal court in *Farmer v. Carlson* prior to her assault at Terre Haute should have been "obvious" to the respondents: forcing a transsexual into general population at a high security, allegedly violent, all-male institution subjected her to an unreasonable risk of assault. Indeed, it is hard to imagine a circumstance in which the risk of sexual assault would be more obvious.

As noted in the Statement of the Case, with the arguable exceptions of respondents Edwards and Kurzydlo, none of the respondents submitted any evidence addressing whether or not they should have known of an unreasonable risk to petitioner. Respondent Edwards claimed to have no reason to believe that there was a threat to

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[56] Mr. Brennan, the warden at FCI-Oxford, in his declaration filed in support of summary judgment, did not deny that he knew petitioner was likely to be assaulted at Terre Haute; he simply denied any personal involvement "other than signing the transfer order." J.A. at 13 ¶ 5. Given that the gravamen of petitioner's complaint was that the transfer exposed her to sexual assault, respondent Brennan's declaration cannot support summary judgment, even under the highly restrictive Seventh Circuit standard. For that reason, under whatever standard this Court adopts, this case must be remanded for trial regarding respondent Brennan.

[57] Edwards, the warden at USP-Lewisburg at the time, does not deny knowing that Farmer was placed in general population at Terre Haute. *See* Edwards Declaration, J.A. at 93.

petitioner in general population at USP-Terre Haute, yet he had previously claimed that there was a risk of harm to petitioner in general population at Lewisburg, another high security facility. Respondent Kurzydlo knew of petitioner's transsexual status and there was evidence in the record, including the decision in *Farmer v. Carlson*, 685 F. Supp. 1335 (M.D. Pa. 1988), suggesting that he should have known that placing her in general population at Terre Haute posed an unreasonable risk. Accordingly, there was a material dispute of fact regarding whether these two respondents should have known of the risk facing petitioner. Whether the other respondents should have known of the risk also remains to be determined by the trier of fact.

Moreover, petitioner opposed summary judgment indicating that she was attempting to obtain documents in discovery that would show that respondents knew that USP-Terre Haute was a violent institution with a history of sexual assaults, and that each respondent acted with "reckless disregard" to petitioner's safety. Discovery demonstrating that USP-Terre Haute was a violent institution with a pattern of sexual assaults could be highly relevant to showing that respondents should have known that petitioner, with specific characteristics that placed her at enormously increased risk for rape, should not have been transferred to general population at USP-Terre Haute. For these reasons, petitioner urges the Court to remand to the district court to allow discovery to proceed.[58]

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[58] Even if this Court upholds the Seventh Circuit "actual knowledge" standard, this case should be remanded. The district court held, and the Seventh Circuit summarily affirmed, that petitioner could not withstand summary judgment because respondents stated in affidavits that they did not know that petitioner was at risk of harm. However, petitioner alleged, and the facts indicated, that respondents *did* know that petitioner would be in danger. *See supra* Statement of the Case at 7-8. Their statements otherwise are not dispositive. Even under a criminal recklessness standard, "a defendant will rarely admit an awareness and conscious disregard of a risk [so] the trier of fact must examine objective

CONCLUSION

For the above reasons, petitioner urges this Court to reverse the decision of the court of appeals affirming the grant of summary judgment to the respondents, and to remand to the district court for trial.

Respectfully submitted,

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criteria." *Redman v. County of San Diego*, 942 F.2d 1435, 1450 (9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 972 (1992) (Thompson, J., and Alarcon, J., dissenting) (citing Prosser and Keeton, *The Law of Torts* 213 (5th ed. 1984)). "This requires an analysis of the surrounding circumstances, which include the context in which the defendant chooses a course of action and the obviousness of the risk resulting from the defendant's conduct." *Id.* Under the circumstances of this case, all factors indicate that, at a minimum, the issue of respondents' knowledge of the risk was disputed and the district court's entry of summary judgment was therefore erroneous.