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No. 92-7247

In the Supreme Court of the United States

OCTOBER TERM, 1993

DEE FARMER, PETITIONER

v.

EDWARD BRENNAN, WARDEN, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether, under the Eighth Amendment to the Constitution, petitioner is entitled to damages or an injunction against various federal prison officials responsible for transferring him to, or assigning him within, a prison facility where he was sexually assaulted by another inmate.

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OPINIONS BELOW

The judgment of the court of appeals (J.A. 127-128) and the opinion and order of the district court (J.A. 120-126) are unreported.

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,[1] and was granted on October 4, 1993. J.A. 129. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] On November 2, 1992, Justice Stevens granted petitioner's application for an extension of time within which to file a petition for certiorari until January 4, 1993.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment of the United States Constitution provides:

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

STATEMENT

1. Petitioner is currently serving a twenty-year sentence in the federal prison system for credit-card fraud.[2] J.A. 24-25, 107. Petitioner is a biological male, but considers himself a "pre-operative transsexual." J.A. 43, 49-51. See also *Farmer* v. *Haas*, 990 F.2d 319, 320 (7th Cir. 1993). Because petitioner is a biological male, he has been incarcerated in all-male federal correctional facilities while serving his sentence. *Id.* at 320.[3]

During the period relevant to this case, the federal prisons were assigned a security level from one to six (level one being minimum security and level six being maximum security). J.A. 34. Prior to the time of the incident at issue in this case, petitioner was housed in various facilities within the federal Bureau of Prisons (BOP) system. J.A. 107-111. From March, 1987, to January, 1988, petitioner was incarcerated at the Federal Correctional Institution (FCI) in Petersburg, Virginia, a security level-four institution. J.A. 34, 110. While incarcerated at Petersburg,

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[2] Petitioner has also been convicted and sentenced to thirty years in prison by the State of Maryland for theft and attempted theft. J.A. 25.

[3] Because petitioner is a biological male, the government uses the male pronouns "him" and "he" to refer to petitioner in its brief.

petitioner was placed in the general prison population. J.A. 110. However, he was frequently placed temporarily in "administrative detention" for committing disciplinary violations (including credit-card fraud). J.A. 24, 26, 57, 58-59.

In January, 1988, petitioner was transferred for disciplinary reasons to the FCI in Oxford, Wisconsin, another level-four institution. J.A. 26, 34, 112. Again, petitioner was housed with the general prison population. J.A. 61. While at Oxford, petitioner again committed numerous disciplinary violations. His offenses included purchasing merchandise over the telephone and credit-card fraud. J.A. 15-16, 19-29. He was also charged with having sexual relations with another inmate while knowingly carrying the Human Immunodeficiency Virus (HIV).[4] See also *Farmer* v. *Moritsugu*, 742 F. Supp. 525 (W.D. Wis. 1990).

In response to petitioner's numerous violations and charges, the FCI-Oxford officials requested that he be transferred for disciplinary reasons. In the transfer request, the warden stated that FCI-Oxford officials believed "that [petitioner] requires the security and supervision offered at a Penitentiary." J.A. 32.[5] The BOP's regional office approved the transfer request and, in March, 1989, petitioner was transferred to

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[4] Petitioner was later found guilty of this charge. See *Farmer* v. *Cowan*, No. 90-1670, 1992 U.S. App. LEXIS 4918 (7th Cir. Mar. 18, 1992) (a per curiam unpublished order).

[5] Respondent Kurzydlo, an FCI-Oxford official, recommended that petitioner be placed in a level-five penitentiary. The official explained that "[petitioner] had been given two opportunities to function in a Security level '4' institution, but became a management problem due to his failure to abide by the rules at both institutions." J.A. 37.

the USP in Terre Haute, Indiana, also a level-four institution. J.A. 34, 64-65. Like all new inmates, petitioner was initially placed in administrative detention while the institution's "unit team" decided what housing placement was appropriate. J.A. 94. See also 28 C.F.R. 522.10 *et seq.* (procedures for classification of new inmates); 28 C.F.R. 522.20 *et seq.* (procedures for intake screening of new inmates). Following an assessment by Terre Haute personnel, petitioner was placed in the general prison population at Terre Haute. J.A. 94. Petitioner does not claim in this action that he ever asked to be kept in administrative detention or protective custody at Terre Haute, that he objected to being placed with the general prison population, or that he advised any Terre Haute official that he felt threatened or in danger. *Ibid.*

Petitioner alleges that on April 1, 1989, he was sexually assaulted by another inmate. J.A. 115-116. On April 7, 1989, petitioner was placed in administrative detention at the direction of the Regional BOP Office because his status as a high-risk HIV-positive inmate posed a danger to others. J.A. 94-95, 123. There is no allegation that petitioner was subjected to any additional physical assaults after his placement in administrative detention at USP-Terre Haute.

2. On August 20, 1991, petitioner filed this civil action against the Director (J. Michael Quinlan) and Regional Director (Calvin Edwards*) of BOP in their official capacities, and four Bureau officials in their individual and official capacities. J.A. 45-49; D. Ct. Record Item 27 (Amended Complaint), at 1-2. The four defendants sued in their official and individual

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* Mr. Edwards was the warden at the Terre Haute Penitentiary when the alleged sexual assault occurred.

capacities were: Larry E. DuBois, who was Regional Director of the BOP North Central Region, which encompasses FCI-Oxford; N.W. Smith, a correctional services administrator in the Bureau's regional office, who was involved in the approval of the request for petitioner's transfer to USP-Terre Haute; Edward Brennan, warden at FCI-Oxford, who requested the transfer; and Dennis Kurzydlo, a case manager at FCI-Oxford. J.A. 47-49. Petitioner alleged that, despite knowing that USP-Terre Haute was a violent institution with a history of inmate assaults, and that petitioner, as a pre-operative transsexual, was particularly vulnerable to sexual attack by other inmates, the respondents participated in the decision to transfer him to that institution in violation of his rights under the Eighth Amendment to the Constitution. J.A. 65-67. He sought compensatory ($100,000) and punitive damages ($100,000) against the four individual respondents under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). J.A. 69. Petitioner also sought an injunction requiring BOP to place him in a "co-correctional facility" (i.e., one housing both sexes) and barring the Bureau from confining him in any "penitentiary." *Ibid.*

3. After the parties submitted various declarations, see J.A. 8-15, 41-102, 105-107, respondents moved for summary judgment. Petitioner filed a cross-motion for summary judgment and also filed a motion under Fed. R. Civ. P. 56(f), claiming that additional discovery was necessary to oppose respondents' summary judgment motion. J.A. 120-121. The government filed a motion for a protective order staying discovery until the court resolved the issue of qualified immunity. J.A. 121. The district court then denied petitioner's Rule 56(f) motion, holding that petitioner had not shown that the documents requested

were necessary to oppose the motion. J.A. 120-121.[3] Without ruling on qualified immunity, the court then granted summary judgment in favor of respondents on all claims. J.A. 120-126.

The district court held that prison officials "are liable under the Eighth Amendment if they had actual knowledge of a threat to an inmate's safety and failed to take action to prevent the danger." J.A. 124. The court further stated that a prisoner normally proves actual knowledge by showing that he complained to prison officials about a specific threat of harm. The court opined that an official will only be held liable if the failure to prevent an attack was "deliberate or reckless in a criminal sense." *Ibid.*

The court found that there was no evidence that the respondents had any reason to believe that the USP-Terre Haute officials could not adequately address petitioner's safety needs. Nor did any respondent have knowledge of a specific threat to petitioner's well-being at USP-Terre Haute. J.A. 123. Further, the court found that there was no evidence that petitioner had ever expressed any concern about his safety to any of the respondents. J.A. 123-124. Accordingly, the court granted summary judgment in favor of respondents.

4. Petitioner appealed to the Seventh Circuit. That court summarily affirmed, without opinion. J.A. 127-128.

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[3] In denying the discovery motion, the court also explained that the documents requested by petitioner "were not to be filed until after both [petitioner's] dispositive motion and brief in opposition to defendants' motion for summary judgment" were due to be filed. J.A. 121.

SUMMARY OF ARGUMENT

1. In *Wilson* v. *Seiter*, 111 S. Ct. 2321, 2323 (1991), this Court acknowledged that the Eighth Amendment proscription against cruel and unusual punishment protects prisoners against certain deprivations suffered during imprisonment, including inadequate "protection * * * afforded against other inmates." *id.* at 2326-2327. When a prison official is sued regarding an inmate's attack on another inmate, however, the official cannot be held liable unless the plaintiff establishes that his claim satisfies both the "subjective" and "objective" requirements for an Eighth Amendment violation.

a. To meet the "objective" element, a plaintiff must prove that there was "sufficient harm" attributable to the actions of the government official. See *Hudson* v. *McMillian*, 112 S. Ct. 995, 999-1000 (1992). In the context of this case, a prisoner can establish a violation of his rights under the Eighth Amendment if he shows he is incarcerated under conditions creating an unreasonably high risk that he will suffer serious harm or injury at the hands of other inmates. Cf. *Helling* v. *McKinney*, 113 S. Ct. 2475, 2481-2482 (1993). In the prison context, the meaning of "unreasonably high risk" is different from the meaning of that term in society generally, as prisons can never be made entirely free of the danger that inmates may attack others. To be actionable, the risk of inmate assault must rise significantly above the level that is ordinarily prevalent in facilities housing dangerous offenders, and be "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling*, 113 S. Ct. at 2482. A prisoner can establish

that he was exposed to an unreasonable risk of harm in a variety of ways; he need not invariably demonstrate that he was specifically threatened with injury by another identified inmate.

b. A deprivation does not constitute "punishment" in the constitutional sense unless inflicted by an official acting with a sufficiently "culpable state of mind." *Wilson*, 111 S. Ct. at 2322, 2327. See also *Helling* v. *McKinney*, 113 S. Ct. at 2481-2482; *Whitley* v. *Albers*, 475 U.S. 312, 320 (1986). Therefore, to satisfy the "subjective" element of an Eighth Amendment claim, an inmate complaining of authorities' failure to protect him from harm at the hands of other inmates must prove, at a minimum, that the official from whom he seeks damages acted with "deliberate indifference" to the danger posed by the threat of inmate violence. See, *e.g.*, *Wilson*, 111 S. Ct. at 2326-2327. See also *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976); *Manarite* v. *City of Springfield*, 957 F.2d 953, 955 (1st Cir.), cert. denied, 113 S. Ct. 113 (1992). To act with "deliberate indifference" towards potential assault by other inmates, a prison official must know of the risk of harm to which an inmate is exposed, or he must actively avoid such knowledge, see, *e.g.*, *McGill* v. *Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992), and he must fail to take readily available action to prevent the harm from occurring.

2. Petitioner's suggestion that an official inflicts "cruel and unusual" punishment if the risks to which the official exposes the inmate are the type of which the official "should have known" is at odds with this Court's construction of the Eighth Amendment in *Wilson* v. *Seiter*, *supra*, in which it held that persons in authority must act with "deliberate indifference" to prisoners' safety or well-being. The term "deliber-

ate" mandates a knowing or conscious choice by the official being sued. Cf. *City of Canton* v. *Harris*, 489 U.S. 378, 388-389 (1989). Deliberate indifference and a subjectively culpable state of mind are only demonstrated when an official is actually aware of facts showing the existence of an unreasonable risk, but consciously and deliberately chooses to ignore the risk. An official's failure to respond to a risk of which he was not aware, but only should have been aware, does not violate the Eighth Amendment.

3. The application of a "negligence" standard of liability to prison officials charged with assigning inmates within the federal prison system is inappropriate because decisions concerning prisoner placement require officials to make subjective, complex, and highly individualized judgments. Adoption of a negligence standard would expose prison officials to potential liability from innumerable claims that officials underestimated the dangers faced by certain categories of prisoners, and courts might use hindsight to review prison officials' good faith judgments concerning inmate assignments within the prison system. To make officials liable for such errors in judgment would transform the Eighth Amendment into a "font of tort law to be superimposed" upon the administration of the federal prison system. See *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986).

4. In satisfying the "subjective" component of the standard for Eighth Amendment liability, an inmate can attempt to prove a prison official's "actual knowledge" that the prisoner was at unreasonable risk of attack in a variety of ways. An inmate need not show that he notified authorities of a specific and highly credible threat or circumstance placing him at risk. He can also attempt to use circumstantial

evidence to convince the finder of fact that officials must have had knowledge of a risk because it was "obvious." Such a method is consistent with the decision in *City of Canton* v. *Harris*, 489 U.S. 378 (1989), in which the Court adopted a "deliberate indifference" standard in the context of a claim against a municipality for failure to train city police to safeguard citizens' constitutional rights. The Court in that case suggested that the existence of an obvious risk can provide strong circumstantial evidence that an official who was in a position to perceive a risk was in fact aware of it. See, *e.g.*, *id.* at 390 & n.10; see also *Wilson* v. *Seiter*, 111 S. Ct. at 2325.

5. Although a remand to consider the relevant factual issues might be appropriate in this case, see *Helling* v. *McKinney*, 113 S. Ct. at 2481-2482, respondents submit that the Court should affirm the judgment. The only respondents potentially liable for damages (those sued in their individual capacities) are alleged to be liable solely because of their participation in the decision to transfer petitioner to USP-Terre Haute, where petitioner was allegedly attacked. Petitioner nowhere alleges any reason for believing that these officials, who had no direct responsibility for administering the Terre Haute institution, would have had knowledge of conditions within that institution regarding danger to transsexual inmates sufficient to meet petitioner's burden of demonstrating their actual knowledge and deliberate indifference under the Eighth Amendment standard. Since prison officials who transfer an inmate to another institution have every reason to believe that the transferee institution will take whatever steps are necessary—including placement in administrative detention—to protect an inmate from a known danger of attack, it

is, moreover, extremely unlikely that such a factual basis would be present. As to the two respondents sued in their official capacities and thereby liable only for prospective injunctive relief, petitioner's claim would appear to be foreclosed by his assignment to administrative detention status because of his high-risk HIV-positive condition, J.A. 94-95; 123, as well as by the absence of any allegation by petitioner that administrative detention status poses any continuing threat of physical injury to him.

ARGUMENT

I. A PRISON OFFICIAL CAN BE HELD LIABLE UNDER THE EIGHTH AMENDMENT FOR FAILING TO PROTECT AN INMATE FROM ASSAULT BY OTHER INMATES ONLY IF THE OFFICIAL HAD ACTUAL KNOWLEDGE THAT THE INMATE WAS SUBJECT TO AN UNREASONABLY HIGH RISK OF ASSAULT AND REFUSED TO TAKE READILY AVAILABLE STEPS TO ALLEVIATE THAT RISK

A. The Objective And Subjective Components Of An Eighth Amendment Claim

In addressing the circumstances in which prison officials could be regarded as inflicting "cruel and unusual punishment[]" in violation of the Eighth Amendment, this Court in *Wilson* v. *Seiter*, 111 S. Ct. 2321, 2322, 2327 (1991), acknowledged that the Eighth Amendment protects against "some deprivations that were not specifically part of the sentence but were suffered during imprisonment." 111 S. Ct. at 2323. Thus, prisoners can claim violations of their rights under the Eighth Amendment from "cruel and unusual" conditions of confinement, including inadequate food, clothing, warmth, medical care, or "pro-

tection * * * * afforded against other inmates." See *id.* at 2326-2327. The lower courts have recognized that the failure of prison officials to protect prisoners against violence at the hands of other inmates can give rise to claims of a violation of Eighth Amendment rights. See, *e.g.*, *Morgan* v. *District of Columbia*, 824 F.2d 1049, 1057 (D.C. Cir. 1987) ("a prisoner has a constitutional right to be protected from the unreasonable threat of violence from his fellow inmates"); *Meriwether* v. *Faulkner*, 821 F.2d 408 (7th Cir.) (same), cert. denied, 484 U.S. 935 (1987); *Cortes-Quinones* v. *Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.) (same), cert. denied, 488 U.S. 823 (1988).

The Court in *Wilson* stated, however, that not all deprivations that prisoners suffer at the hands of prison officials constitute Eighth Amendment violations, see 111 S. Ct. at 2324. See *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986) ("[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny"). The Eighth Amendment addresses "punishment." An inmate does not suffer "punishment" in the constitutional sense unless the deprivation is inflicted by an official acting with a sufficiently "culpable state of mind." *Wilson*, 111 S. Ct. at 2323, 2327. This Court explained in *Wilson* that the "intent" requirement was "not the predilection of this Court," but was imposed by the Eighth Amendment, "which bans only cruel and unusual *punishment*." 111 S. Ct. at 2325. Thus, in the prison context, where pain or injury inflicted upon an inmate "is not formally meted out *as punishment* by statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify [as punishment under the Eighth Amendment]." 111 S. Ct. at 2325.

Accordingly, the *Wilson* Court recognized that a valid claim for deprivation of rights guaranteed under the Eighth Amendment contains *both* a "subjective" and an "objective" component. When a prison official is sued regarding an inmate's attack on another inmate, the official therefore cannot be held liable unless the plaintiff establishes that his claim satisfies both the subjective and objective requirements for an Eighth Amendment violation. To meet the "objective" element, a plaintiff must prove that there was "sufficient harm" attributable to the actions of the government official. See *Hudson* v. *McMillian*, 112 S. Ct. 995, 999-1000 (1992). To satisfy the "subjective" element, the plaintiff must demonstrate that the responsible official acted with a "culpable state of mind." *Wilson*, 111 S. Ct. at 2322, 2327. See also *Helling* v. *McKinney*, 113 S. Ct. 2475, 2481-2482 (1993); *Whitley*, 475 U.S. at 320.

B. The Failure Of Prison Officials To Protect A Prisoner From Inmate Assaults Does Not Violate The Eighth Amendment Unless The Prisoner Has Been Exposed To An Unreasonable Risk Of Attack By Other Inmates

In *Helling* v. *McKinney*, 113 S. Ct. at 2481, the Court held that a prisoner could establish the objective element of an Eighth Amendment claim by proving that his exposure to passive cigarette smoke in prison created "an unreasonable risk of serious damage to his future health." The principle articulated in *Helling*, if translated into the context of this case, suggests that a prisoner can establish a violation of his rights under the Eighth Amendment if he shows that he is incarcerated under conditions creating an unreasonably high risk that he will suffer serious harm

or injury at the hands of other inmates. In the prison context, however, the meaning of "unreasonably high risk" is different from the meaning of that term in society generally. Prisons are inherently dangerous places. See *Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984). Within the volatile prison community, prison officials are required to protect the prison staff, visitors, and the inmates themselves. *Id.* at 526-527. In determining whether a prison risk is unreasonably high, it must be compared to the level of risk ordinarily acceptable in that type of penal institution.

Moreover, the threat of assault by another inmate is not like the risk of a static prison condition. Compare *Helling* v. *McKinney*, *supra* (addressing the risk posed by second-hand or "passive" smoke). Inmate violence is often random and unpredictable, and may depend on the temporary presence of particularly violent individuals. Such violence can never be fully controlled, despite prison officials' best efforts. See *e.g.*, *Bruscino* v. *Carlson*, 854 F.2d 162 (7th Cir. 1988) (detailing inmate violence at USP-Marion), cert. denied, 491 U.S. 907 (1989). Because day-to-day life in prisons housing violent offenders exposes inmates to a possibility of violence that may be present despite reasonable measures on the part of prison officials to ensure security, the risk of inmate assaults that is inevitably present in such facilities is not sufficient to satisfy the objective component of the Eighth Amendment. Rather, to be actionable, the risk of inmate assaults must rise significantly above the level that is ordinarily prevalent in facilities housing dangerous offenders. The level of risk to which the complaining inmate is exposed must also "be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk."

Helling, 113 S. Ct. at 2482. Such a risk of violence is not ordinarily shown by pointing to isolated incidents; it may be established by showing that assaults can be expected to occur with sufficient frequency to put the prisoner in pervasive fear for his safety. To demonstrate an unreasonable risk of serious injury, the prisoner need not invariably demonstrate that he was specifically threatened with injury by another identified inmate—although such a threat, if credible, would tend to prove that the prisoner suffered exposure to an unreasonable risk of attack. A prisoner can also establish that he was exposed to an unreasonable risk of harm, for example, by showing that he belongs to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates. See *Martin* v. *White*, 742 F.2d 469, 474 (8th Cir. 1984); *Withers* v. *Levine*, 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980).

C. The Failure Of Prison Officials To Protect A Prisoner From Inmate Assaults Does Not Violate The Eighth Amendment Unless The Officials Act With Deliberate Indifference To An Unreasonable Risk Of Attack By Other Inmates

1. Even if an inmate demonstrates the existence of an "objectively" unreasonable threat or risk of serious injury through assault by other inmates, he still must satisfy the *subjective* component of the Eighth Amendment, which "mandate[s]" an "inquiry into a prison official's state of mind." *Wilson*, 111 S. Ct. at 2324. In the context of a civil suit against a prison official based on dangerous prison conditions, the Court in *Wilson* held that the minimum requisite "culpable mental state" with which the official acts is "deliberate indifference" to the condition to which

the complaining prisoner is exposed. See *Wilson*, 111 S. Ct. at 2326-2327. See also *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976); *Manarite* v. *City of Springfield*, 957 F.2d 953, 955 (1st Cir.), cert. denied, 113 S. Ct. 113 (1992). Likewise, where the condition of which a prisoner complains is the failure to protect him from harm at the hands of other inmates, the inmate must prove, at a minimum, that the official from whom he seeks damages acted with "deliberate indifference" to the danger posed by the threat of inmate violence.[8]

Although deliberate indifference "does not require a finding of express intent to harm," *Berry* v. *City of Muskogee*, 900 F.2d 1489, 1495 (10th Cir. 1990), it does involve "more than ordinary lack of due care for the prisoner's interests or safety." *Whitley*, 475 U.S. at 319. To act with "deliberate indifference" towards potential assault by other inmates, the prison official must know of the risk of harm to which an inmate is exposed, or he must actively avoid such knowledge, see, *e.g.*, *McGill* v. *Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992), and he must fail to take readily available action to prevent the harm from occurring. Only then does the official possess the subjectively "callous" and "wanton" state of mind necessary to inflict "punishment." See *Wilson*, 111 S. Ct. at 2326; see also *Duckworth* v. *Franzen*, 780 F.2d 645, 653 (7th Cir. 1985) ("[p]unishment implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can

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[8] There would, of course, also be liability if the official acted or refused to act with the intention that an inmate suffer serious harm at the hands of another inmate or inmates.

be inferred from the defendant's failure to prevent it"), cert. denied, 479 U.S. 816 (1986).

In sum, to prove "deliberate indifference" in the context of a prisoner's claim of official failure to protect him from prison violence, a plaintiff must demonstrate that:

> (1) the defendant-official knew of an unreasonably high risk of serious physical harm to an inmate from other prisoners;
>
> (2) the defendant-official had the ability to act or refrain from acting so as to significantly decrease the unreasonable risk; and
>
> (3) the defendant nonetheless did not use readily available means to protect the inmate or avoid the danger.

See also *Manarite*, 957 F.2d at 956; *McGill*, 944 F.2d at 347-351; *DesRosiers* v. *Moran*, 949 F.2d 15, 19 (1st Cir. 1991); *Doe* v. *Sullivan Co.*, 956 F.2d 545, 555 (6th Cir.), cert. denied, 113 S. Ct. 187 (1992).

2. Petitioner (Pet. Br. 15-27) contends that it is unnecessary for a prison official being sued under the Eighth Amendment to possess "actual knowledge" of an unreasonable danger to an inmate; rather, it is sufficient if the risks to which the inmate was exposed were the type of which the official "should have known." See, *e.g.*, *Young* v. *Quinlan*, 960 F.2d 351 (3d Cir. 1992). Instead of inquiring whether the official acted recklessly in disregarding a serious risk of which he had actual knowledge, petitioner would only ask whether the danger is one of which a reasonable prison official ordinarily would have been aware. Accordingly, petitioner asks this Court to adopt an "objective," "reasonable person" test for Eighth

Amendment liability in these cases. See Pet. Br. 16-17, 20-21, 26-27.

Petitioner's approach is directly at odds with this Court's construction of the Eighth Amendment in *Wilson* v. *Seiter*, *supra*. Petitioner argues in effect that purely *objective* conditions—such as a high probability that certain inmates will be exposed to attack in a particular institution—could be enough to trigger Eighth Amendment liability by the responsible official, regardless of whether the official was actually aware of the risk. In *Wilson*, the petitioner and his amici similarly argued that an Eighth Amendment violation should not invariably turn upon the knowledge possessed by the responsible official if the objective prison conditions were themselves inhumane, or otherwise cruel and unusual. See, *e.g.*, Brief for the United States at 14-21 in *Wilson*. In response, this Court squarely rejected this purely "objective" approach to an Eighth Amendment violation. *Wilson*, 111 S. Ct. 2325-2328. This Court held instead that even if conditions are objectively inhumane or cruel, a plaintiff must still establish the official's "knowledge" of the conditions to which the prisoner is exposed. *Id.* at 2325. Thus, the inquiry into the official's mental state is a "subjective" test, not, as petitioner suggests, an objective inquiry. The focus of the "subjective component" of the Eighth Amendment is on the defendant-official's actual knowledge, not on what an objectively reasonable official should have known.

Petitioner's "should have known" approach ignores the "deliberateness" requirement of the "deliberate indifference" standard. The term "deliberate" mandates a knowing or conscious choice by the official being sued. Cf. *City of Canton* v. *Harris*, 489 U.S.

378, 388-389 (1989). Deliberate indifference and a subjectively culpable state of mind are only demonstrated when an official is actually aware of facts showing the existence of an unreasonable risk, but consciously and deliberately chooses to ignore the risk. See, *e.g.*, *Duckworth* v. *Franzen*, 780 F.2d at 653. If an official is in fact unaware of facts showing an unreasonable danger or threat to an inmate, then he cannot be held to have made a conscious or deliberate choice to ignore the danger or threat. An official's failure to respond to a risk of which he was not aware[9] cannot violate the Eighth Amendment.

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[9] Some lower courts have recognized that "willful blindness" may be treated as a species of knowledge satisfying the *Wilson* "deliberate indifference" standard. See *McGill*, 944 F.2d at 351 ("Going out of your way to avoid acquiring unwelcome knowledge is a species of intent. Being an ostrich involves a level of knowledge sufficient for conviction of crimes requiring specific intent."); *Manarite* v. *City of Springfield*, 957 F.2d at 956. The "willful blindness" principle is reflected in the definition of "knowledge" in the Model Penal Code:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

Model Penal Code § 2.02. This Court relied on that definition, for example, in *Turner* v. *United States*, 396 U.S. 398, 416 & n.29 (1970), to hold that the defendant in that case "knew" that the heroin he possessed came from a foreign country, even if he lacked "specific knowledge" of its source and trajectory, because "he was aware of the 'high probability' " that the heroin came from abroad. See also *Leary* v. *United States*, 395 U.S. 6, 46 n.93 (1969); see generally Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191 (1990). In the context of prison assaults, an official might be charged with "knowledge" of an unreasonable danger, even if he does

3. The application of a "negligence" standard of liability to prison officials charged with assigning inmates within the federal prison system is especially inappropriate, because decisions concerning prisoner placement require officials to make subjective, complex, and highly individualized judgments. In determining where an inmate is to be confined, officials must exercise professional judgment to balance the peculiar needs of the prisoner, the available resources for housing prisoners, and the interest in security of other inmates and the prison system as a whole.[10] Inmates are often transferred to stricter facilities to ensure adherence to prison disciplinary rules or to remove an inmate from surroundings that he has learned to manipulate. This Court has therefore recognized that, in making subjective judgments regarding discipline and security, prison officials must be granted a "wide-ranging deference."[11] See *Bell* v.

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not possess specific information concerning the risk at issue, if he deliberately avoids acquiring such knowledge or harbors a high degree of suspicion that the risk exists.

[10] BOP regulations provide that all BOP staff "screen newly arrived inmates to ensure that Bureau health, safety, and security standards are met." 28 C.F.R. 522.20. Following an assessment of the inmate's physical and mental "health status and history," 28 C.F.R. 524.11, 524.12, BOP personnel must determine whether "there are nonmedical reasons for housing the inmate away from the general population." 28 C.F.R. 522.21. BOP staff are authorized to classify as "protection cases," and to place in administrative detention, any inmate who the staff has "good reason to believe * * * is in serious danger of bodily harm." 28 C.F.R. 541.23(a)(8) and (b).

[11] Although placement in administrative detention (rather than the general population) is one way of safeguarding prisoners from attack by other inmates, petitioner has, in fact,

Wolfish, 441 U.S. 520, 547 (1979); see also *Hewitt* v. *Helms*, 459 U.S. 460, 474 (1983); *Whitley*, 475 U.S. at 321-322. As long as a security measure is taken in good faith and for a legitimate purpose, "neither judge nor jury" may "freely substitute their judgment for that of officials who have made a considered choice." *Whitley*, 475 U.S. at 322.

If the standard for Eighth Amendment liability is whether an official responsible for prisoner assignments "should have known" of an unreasonable danger of attack, then courts might use hindsight to review prison officials' good-faith judgments concerning the placement of individual prisoners. Within federal prison facilities, there are many categories of inmates who might be subject to a heightened risk of attack by others. A male inmate who is small or effeminate, known as an informant, a member of a gang, convicted of an unpopular offense (such as child molestation), outnumbered by members of another race, or who has been attacked in the past, could claim that prison officials committed an error in judgment by underestimating the danger that he faced. See *e.g.*, *McGill*, 944 F.2d at 350. To make officials liable for such errors in judgment would

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challenged his assignment to administrative detention in the past. When petitioner was incarcerated at USP-Lewisburg, a level-five institution, he spent all of his time there in administrative detention because of the concern that his presence in the general population at that prison would create a threat to internal security. See *Farmer* v. *Carlson*, 685 F. Supp. 1335 (M.D. Pa. 1988). Petitioner sued various BOP officials, arguing that his confinement to administrative detention at USP-Lewisburg violated the Eighth Amendment and deprived him of his right to due process of law. *Id.* at 1341-1344.

transform the Eighth Amendment into a "font of tort law to be superimposed" upon the administration of the federal prison system. See *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986).

4. Petitioner's principal objection to an actual knowledge standard is that it will permit a prison official to escape liability even when a threat or unreasonable risk of assault is "obvious." Pet. Br. 26-27. However, a subjective actual knowledge standard does *not* preclude a plaintiff from attempting to convince the finder of fact that officials must have had knowledge of a risk because it was obvious. Actual knowledge can be proven in a variety of ways. Typically, an inmate will demonstrate knowledge of danger by showing that the inmate notified the official of a specific and highly credible threat or circumstance placing him at risk. See *McGill*, 944 F.2d at 349; *James* v. *Milwaukee County*, 956 F.2d 696, 700 (7th Cir.), cert. denied, 113 S. Ct. 63 (1992). A plaintiff may also attempt to prove through other types of circumstantial evidence that the defendant-official had actual knowledge of the risk or threat at issue. See *James* v. *Milwaukee County*, 956 F.2d 696, 700 (7th Cir. 1992) (citing cases). For example, if there is evidence that an unreasonable risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus "must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk. See *Swofford* v. *Mandrell*, 969 F.2d 547, 550-551 (7th Cir. 1992); *James*, 956 F.2d

at 700. See also *Wilson*, 111 S. Ct. at 2325 ("[t]he long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent"). Although the "must have known" and the "should have known" tests for liability, if applied to "obvious" risks, will often lead to the same result, they are nevertheless distinct. Thus, even if the risk that a certain inmate would be assaulted was "obvious"—in that, for example, similar attacks were extremely commonplace—and even if a prison official was in a position to know of the risk, a finding by the trier of fact that the official actually did not know of the risk (*e.g.*, because he was under a mistaken impression that the risk was slight) would bar Eighth Amendment liability.

5. In *City of Canton* v. *Harris*, 489 U.S. 378 (1989), this Court considered the question of when a municipality could be held liable under 42 U.S.C. 1983 for inadequate training of police to safeguard citizens' constitutional rights. The Court explained that a municipality could be found to be "deliberately indifferent" to the need for training where the failure to provide such training was "so likely" to result in a violation of constitutional rights that the need for such training was "obvious." *Canton*, 489 U.S. at 390. From this statement in *Canton*, petitioner deduces that, in an Eighth Amendment case, if the risk of injury or the threat to an inmate is "obvious," there is no need to inquire into whether the defendant-official was actually aware of it. See Pet. Br. 15-26. Rather, officials can be charged with "constructive knowledge" that "placing a prisoner in that circumstance would lead to an unreasonable risk of assault." *Id.* at 17.

The *Canton* majority's discussion of "obvious" risks, see 489 U.S. at 390 & n.10, is not inconsistent

with the actual knowledge standard outlined above. As previously discussed, the existence of an obvious risk can provide strong circumstantial evidence that an official who was in a position to perceive the risk was in fact aware of it. Similarly, the Court's discussion in *Canton* of the circumstances making the need to train "obvious" is compatible with a standard of "deliberate indifference" that permits knowledge to be inferred from appropriate circumstances, rather than a standard that permits liability to be imposed on the basis of a conclusion that the actor "should have known" of the risk, whether or not actual knowledge could ultimately be established.[12]

The Court's analysis in *Canton* is not, in any event, wholly applicable to the situation before the Court here. In *Canton*, there was little question that the responsible municipal officials were aware of certain *facts* concerning the tasks that city police officers would be called upon to perform in the course of their duties. See 489 U.S. at 390 n.10 (stating that "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

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[12] That the Court's discussion of "obviousness" in *Canton* is best read as suggesting a method for inferring subjective knowledge, rather than as adopting an objective standard of "constructive knowledge," is buttressed by the Court's citation to *Canton* in *Wilson* v. *Seiter*. The *Wilson* Court relies on the decision in *Canton* for the proposition that circumstances going to the "obviousness" of a risk—such as "[t]he long duration of a cruel prison condition"—may make it easier to prove knowledge on the part of prison officials, see 111 S. Ct. at 2325. The *Wilson* Court does not suggest that the Court in *Canton* would have held the municipality liable even absent any awareness by city officials of the conditions giving rise to the need to train police to safeguard constitutional rights.

to allow them to accomplish this task."). The only question in *Canton* was whether knowledge of these facts made the need to train police in the use of deadly force so "obvious," as a matter of judgment, that the city could be held liable for failing to do so. See 489 U.S. at 390 n.10 ("[T]he need to train officers in the constitutional limitations on the use of deadly force * * * can be said to be 'so obvious' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights."). The question in this case, in contrast, is not whether the need to take action should be considered "obvious" because of "facts"—*i.e.*, the presence of a risk to certain inmates —of which officials are acknowledged to be aware. Rather, the question here is whether the prison officials are aware of the facts establishing the risk in the first place.

II. THE JUDGMENT BELOW SHOULD BE AFFIRMED

Petitioner alleges that respondents in this case violated his Eighth Amendment rights by transferring him to an institution in which he was in serious danger of violent sexual assault. In order to recover under the correct constitutional standard, discussed in Part I of this brief, petitioner would be required to show, at the very least, that respondents acted to effectuate his transfer with actual knowledge that petitioner would, in fact, be subject to a substantially increased and unreasonably high risk of violent sexual attack at the new institution, and that respondents effectuated the transfer with deliberate indifference to that risk.

Petitioner made general allegations to this effect in his *pro se* complaint. Paragraph 1 of that com-

plaint first alleges that respondents violated his rights, "due to their deliberate indifference to her saftey [*sic*] arising from their inappropiate [*sic*] classification, designation and housing of her, as a transsexual, in a penitentiary that has a violent environment, knowing such would endanger her life and did indeed result in her being harass,[*sic*] threaten [*sic*] and sexually assualted [*sic*]." J.A. 43-44. With regard to petitioner's transfer to USP-Terre Haute, which is the immediate subject of this litigation, petitioner alleged that respondents "were aware that USP-Terre Haute is a penitentiary, with a violent environment, housing a majority of violent offenders with frequent incidents of assualts [*sic*], * * * [as] well as a history of murders, weapons, drugs, sexual assualts [*sic*], etc." and that "to place the plaintiff or any male-to-female peroperative [*sic*] transsexual, who has a feminine appearance, presents themselves mentally and physically as female, has been administered female hormones and had begun to prepare for Sex Reassignment Surgery would be sexually assualted [*sic*] at USP-Terre Haute, and through their actions or omissions permitted the plaintiff to be designated and housed at USP-Terre Haute." J.A. 65-66. In their declaration supporting their motion for dismissal, respondents either denied personal knowledge that petitioner would be subjected to an increased danger as a result of his transfer, denied responsibility for the transfer, or both. See J.A. 8-18, 93-102.

Respondents subsequently filed a motion for summary judgment. At the time this motion was acted upon by the district court petitioner had a pending second discovery request for production of documents.

In response to respondents' summary judgment motion petitioner moved, pursuant to Fed. R. Civ. P. 56(f), that the district court not act on the summary judgment motion because of his pending discovery request. In this Rule 56(f) motion, petitioner alleged that he was unable to respond to the summary judgment motion "because the materials necessary for the plaintiff's response is [*sic*] in the possession of the defendants." J.A. 103. In an affidavit attached to his response, petitioner alleged that the documents he had requested through the pending discovery request "are expected to show that each defendant had knowledge that USP-Terre Haute was and is, a violent institution with a history of sexual assault, 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." J.A. 105-106.

The district court denied petitioner's motion under Rule 56(f) and simultaneously granted respondents' motion for summary judgment. As to the Rule 56(f) motion, the court held that the documents sought by petitioner were "not shown by plaintiff to be necessary to oppose defendants' motion for summary judgment." J.A. 121.

Respondents submit that the Court should affirm these district court determinations. The only respondents potentially liable for damages in this case (those sued in their individual capacities) are alleged to be liable solely because of their participation in the decision to transfer petitioner *to* USP-Terre Haute, where petitioner was allegedly attacked. Petitioner nowhere alleges any reason for believing that these

officials, who had no direct responsibility for administering the Terre Haute institution, would have had knowledge of conditions within that institution regarding danger to transsexual inmates sufficient to meet petitioner's burden of demonstrating their actual knowledge and deliberate indifference under the Eighth Amendment standard. Although petitioner's affidavit, submitted in support of his Rule 56(f) motion, alleged that the documents he had requested through discovery "are expected to show" information bearing on such knowledge by each respondent, the affidavit does not offer any factual basis for that conclusion. Since prison officials who transfer an inmate to another institution have every reason to believe that the transferee institution will take whatever steps are necessary—including placement in administrative detention—to protect an inmate from a known danger of attack, it is, moreover, extremely unlikely that such a factual basis would be present. As to the two respondents sued in their official capacities, and therefore liable only for prospective injunctive relief, petitioner's claim would appear to be foreclosed by his assignment to administrative detention status because of his high-risk HIV-positive condition, J.A. 94-95, 123,[13] as well as by the absence of any allegation by petitioner that administrative

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[13] Under BOP regulations, an inmate may be placed in "controlled housing status" when there is "reliable evidence causing staff to believe that the inmate engages in conduct posing a health risk to others." 28 C.F.R. 541.61; see also 28 C.F.R. 541.62 *et seq.* (procedures for referring HIV positive inmates to controlled housing status). Petitioner's placement in administrative segregation, beginning in April, 1989, was based on his having had sexual relations with another inmate while knowingly carrying the HIV virus. See pages 3-4, *supra*.

detention status poses any continuing threat of physical injury to him.

The issues concerning the correctness of the district court's decisions on respondents' summary judgment motion and petitioner's Rule 56(f) response to that motion are specific and unusual factual ones involving the exercise of trial court discretion. The Court may therefore believe that they are most appropriately dealt with on remand, where the lower courts will have the full benefit of this Court's opinion in this case regarding the constitutional standard to be applied here. See, *e.g.*, *Helling* v. *McKinney*, 113 S. Ct. at 2481-2482. Respondents submit, however, that the record developed in the district court calls for affirmance of the decision of the court of appeals.

CONCLUSION

The judgment of the court of appeals summarily affirming the district court's grant of respondents' motion for summary judgment should be affirmed.

Respectfully submitted.

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