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N-X gone forward

CFR w/v/t Grant
SC 3/21/93

4X 3 PRY PPS

Response received
5/10/93:

SC

NOW GRANT.

Please see attached
supplemental
note of find

9/27
6.1.23

SC 5/21/93

6/4 2.1.16

Record received,
STILL GRANT -
Please see attached
note. SC 7/7/93

PRELIMINARY MEMORANDUM

March 26, 1993 Conference
List 2, Sheet 1 (Page 6)

No. 92-7247-CFX

Dee Farmer (transsexual
prisoner transferred to
violent maximum security
penitentiary)

Cert to CA7 (Coffey,
Flaum, Ripple)

v.

Edward Brennan, et al.
(correctional officers)

Federal/Civil Timely

1. Summary: Pro se petr is a transsexual¹ who was transferred to a maximum security prison for various nonviolent prison rule infractions and placed in the general prison population. Petr - predictably - was raped and beaten by another inmate at the maximum security facility. Petr brought a Bivens

¹ Because petr wishes to be referred to as a woman, I will do so in this memo.

Response received

2

action against the correctional officers involved in transferring her and in charge of the maximum security prison, for placing her in such obvious danger without providing any accompanying security measures to protect her. Applying CA7's "knowledge" test of deliberate indifference articulated in McGill v. Duckworth, 944 F.2d 344, 349 (CA7 1991), summary judgment was granted resps and summarily affirmed on appeal. Though there is no published lower ct opinion, there is a clear split on the scienter requirement for Eighth Amendment violations, and this case demonstrates clearly and effectively the outrageous consequences of CA7's standard. I recommend CFR.

2. *Facts and Decisions Below:* Petr was a federal prisoner, sentenced to a 20-year term for fraud under 18 U. S. C. §1029. At the time of incarceration, petr was a pre-operative transsexual who had silicone implants and was receiving estrogen hormone pills. On November 7, 1986, petr was incarcerated in the federal penitentiary in Lewisburg, Pennsylvania. She was kept in administrative detention the entire time of her incarceration in Lewisburg, because "placing [petr], 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 [petr] in particular." Farmer v. Carlson, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988).

Prison officials apparently admitted that the penitentiary to which she was transferred would not offer petr needed additional security.

Subsequently, petr was transferred to the federal correctional institution in Oxford, Wisconsin. While in the Oxford facility, petr received disciplinary reports for prison rules violations, all of which were of a nonviolent nature, such as attempting to order female clothing and asking prison staff to prescribe female hormones for her. In response to this conduct, resps recommended that petr be transferred to a maximum security prison. These officials designated the federal penitentiary in Terre Haute Indiana, where petr was then transferred.²

On March 23, 1989, petr was released into the general prison population at Terre Haute. About one week later, an inmate entered her cell, beat her, kicked her, threatened her w/ a homemade knife, and forcibly sodomized her. Petr brought a Bivens action alleging and attempting to demonstrate w/ documentation that resps were deliberately indifferent to her safety. She alleged that the officials were fully knowledgeable of her transsexuality as well as of the frequency of sexual assault and other violence w/in the Terre Haute prison population.

Dct [W.D. Wisconsin; Shabaz] granted summary judgment to resps: Petr's response to resps' motion for summary judgment was to be filed not later than March 9, 1992. On March 9, resps received a document entitled "Rule 56(f) motion in response to .

² Prison officials apparently admitted that the penitentiary to which she was transferred would not offer petr needed additional security.

Response received

4

defendants' untimely motion for summary judgment." This document requested that resps' motion for summary judgment be denied until petr received resp Quinlan's response to her second request for documents which was to be filed not later than March 14, 1992. Since these documents, not shown necessary to oppose resps' motion for summary judgment, were not to be filed until after petr's dispositive motion and brief in opposition to resps' motion for summary judgment, petr's Rule 56(f) motion is denied.

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

This ct finds that there is no genuine dispute as to any of the following material facts. Petr is an inmate confined at the U.S. Medical Center for Federal Prisoners, Springfield, Missouri. Petr was confined at the Oxford facility from January 27, 1988 until March 9, 1989. [Describes the various positions of the resps as correctional officers, wardens and directors at the various prisons where petr was incarcerated.]

On January 25, 1989, petr was found guilty at a disciplinary hearing in the Oxford facility of Attempting to Give Anything of Value to Another. Disciplinary sanctions included a recommendation for a disciplinary hearing. A few days later, resp Dennis Kurzydlo prepared petr's progress report and on February 6, 1989 requested

SC 3/21/93

5

that petr be transferred to USP-Terre Haute. Resp Kurzydlo believed the USP-Terre Haute was "well equipped to handle the problems and needs presented by [petr]." Petr never personally or in writing advised resp Edwards that she [petr] was concerned for her safety. Resp Edwards had no reason to believe that petr could not function safely w/in the population at USP-Terre Haute. None of resps had actual knowledge that there was a threat to petr's safety at USP-Terre Haute. After the alleged sexual assault, petr was placed in administrative detention pursuant to a directive from the North Central Regional Office pending a hearing concerning her HIV positive status.

Petr claims that her 8A rights were violated by resps when they transferred her to USP-Terre Haute. The failure of prison officials to protect an inmate from assault by another inmate may violate an inmate's 8A rights if the officials were deliberately indifferent to a strong likelihood of attack. Meriweather v. Faulkner, 821 F.2d 408, 417 (CA7 1987), cert. denied, 108 S. Ct. 311 (1987). Prison officials are liable under 8A if they had actual knowledge of a threat to an inmate's safety and failed to take action to prevent the danger. McGill v. Duckworth, 944 F.2d 344, 349 (CA7 1991). A prisoner normally proves actual knowledge of impending harm by showing that she complained to prison officials about a specific threat to her safety. Id.

Resps did not know that petr would be in imminent danger of attack if she were transferred to USP-Terre Haute. Petr never expressed any safety concerns to any of the resps. Accordingly, petr's 8A rights were not violated and resps' motion for summary judgment will be granted.

CA7 summarily affirmed w/o opinion.

3. *Contentions:* Petr: CA7's decision conflicts w/ decisions of CA3 and CA9 and conflicts w/ this Ct's cases prohibiting unnecessary and wanton infliction of pain upon prisoners.

In McGill, on which the dct relied in this case, CA7 reversed the dct's holding that the 8A allows liability to be imposed on prison officials, "when [they] disregard a substantial risk of danger that either . . . [they should have known] or would be apparent to a reasonable person in [their] position." See McGill, 944 F.2d, at 348. CA7 found that the "should have known" approach does not satisfy the culpable state of mind requirement, the subjective component of the 8A as defined by this Ct in Wilson v. Seiter, 111 S. Ct. 2321 (1991).

CA3 considered and rejected CA7's position in Young v. Quinlan, 960 F.2d 351, 360-361 (CA3 1992):

"Since Wilson, there has been a split among the circuit courts regarding the quantum of knowledge possessed by a prison official, necessary to satisfy the deliberate indifference requirement. In Colburn v. Upper Darby Township, 946 F.2d 1017 (CA3 1991) ('Colburn II'), we held that the Fourteenth Amendment imposes an obligation on government officials who know or should know of an inmate's particular vulnerability to suicide, not to act with reckless indifference to that

vulnerability. . . . Consistent with our approach in Colburn II, the Ninth Circuit Court of Appeals has held that a prison official is deliberately indifferent for purposes of the Eighth Amendment when he 'knows or should know' of the danger facing the inmate. See Redman v. County of San Diego, 942 F.2d 1435, 1443 (CA9 1991), quoting Colburn v. Upper Darby Township, 838 F.2d 663, 669 (CA3 1988). On the other hand, the Seventh Circuit Court of Appeals has held, after Wilson, that liability should only be imposed on prison officials if they had 'actual knowledge of impending harm,' and has rejected liability for prison officials who merely 'should have known' of danger to an inmate. McGill v. Duckworth, 944 F.2d 344, 348 (CA7 1991). Because we agree with Redman that it is appropriate to use the same standard under the Fourteenth and Eighth Amendment here, Redman, 942 F.2d, at 1442, we hold that a prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate."

In Wilson v. Seiter, this Ct held that there is an objective and a subjective component to the 8A. The objective component relates to the seriousness of the deprivation or harm. Being subjected to rape and beating easily satisfies the objective component. See Youngberg v. Romeo, 457 U. S. 307 (1982). [See also Hudson v. McMillian, 112 S. Ct. 995 (1992).] The subjective component relates to culpability of the govt actor. The circuit courts are divided over what the prison officials' level of culpability must be to render them liable for violating 8A. CA1, for example, considers the culpability condition satisfied if prison officials knew or should have known of a substantial risk of danger that would be apparent to a reasonable person in the officials' position. Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 559-560 (CA1 1988).

CA7's requirement of actual knowledge means that if prison officials, w/o checking the prison records, place a prisoner who is in the Federal Witness Protection Program in confinement w/ the persons from whom he is supposed to be protected, resulting in the prisoner's being murdered, the officials would not be liable because they had no "actual knowledge" of the danger. Similarly wrong is CA7's holding that placing petr, a transsexual prisoner, in a violent maximum security penitentiary environment, resulting in her being brutally beaten and raped, did not expose prison officials to liability, because they had no "actual knowledge" that petr would be raped.

This Ct has implicitly held that to disregard a substantial risk that was either known or should have been known satisfies the 8A culpable state of mind component. In Canton v. Harris, 489 U. S. 378 (1989), this Ct held that a municipality could be held liable for inadequate police training if the inadequacy amounted to a policy of deliberate indifference. In a recent inmate-inmate assault case, which Wilson cites as an example of the culpability standard, a ct held that deliberate indifference is shown "if there is an obvious unreasonable risk of violent harm to a prisoner or group of prisoners which is known to be present or should have been known, and [the prison officials] were outrageously insensitive or flagrantly indifferent to the situation and took no significant

Cruel and Unusual Punishment Clause.

action to correct or avoid the risk of harm" Morgan v. District of Columbia, 824 F.2d 1049, 1058 (CA DC 1987).

Another case cited w/ approval in Wilson is Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d, at 559-560, in which CA1 upheld a jury verdict against Puerto Rico's director of penal institutions and its corrections administrator for transferring a psychotic prisoner to a grossly overcrowded general population facility that provided no mental health care. The prisoner was murdered. The superintendent was held liable for failing to have the prisoner's file reviewed promptly by any professional staff to determine whether the prisoner needed to be segregated. Similarly, a transsexual prisoner in a violent maximum security penitentiary was as much if not more obviously at risk than the psychotic prisoner above.

CA7's approach turns on the expense of prisons and the lack of control that officers have in prison. The cost defense is no defense, and CA7's depiction of the powerlessness of prison officials is not accurate: The Seventh Circuit picture of prison officials as turnkeys standing outside the prison gates, fences and walls ensuring that no prisoners escape, but helpless to do anything about the rape, murder, stabbings, beatings, drug use, extortion, etc., that occur regularly inside the prison is a far cry from the truth. And equally as far from the guarantees of the Cruel and Unusual Punishment Clause.

Prison officials should have known that recommending, designating, transferring and confining petr, an overtly feminine transsexual prisoner, in a violent penitentiary environment, would result in her being assaulted and raped. Resps confined petr for her nonviolent and nonaggressive disciplinary infractions, and rape is not a punishment that prison officials can expose or subject a prisoner to for violating prison rules. CA7's "knowledge" standard

4. Discussion: I think petr is correct and that CA7's culpability standard is inappropriate, for the reasons that petr articulates in her discussion. This is a particularly egregious case, because petr apparently looked like a woman [had silicone implants and had been ingesting estrogen], and was placed among violent men with a history of sexual violence. This Ct has held that women may be excluded - consistent with Title VII - from positions as prison guards in the sort of environment in which petr found herself, because such an environment is an inherently dangerous place for a woman whose very "womanhood" places her in danger. Dothard v. Rawlinson, 433 U. S. 321 (1977). How much more dangerous is such an environment, then, for an inmate who looks like a woman but is anatomically a man? It should have been obvious to any prison guard that petr would be sexually assaulted if she were not provided with appropriate security. It seems particularly troubling that, according to the dct's description of the undisputed facts, the prison official who assigned petr to the

new prison thought that the maximum security prison was "well equipped to handle the problems and needs presented by [petr]." When the problems and needs of petr included a propensity for wearing feminine clothing and taking estrogen, this sounds very close to a sentence of rape.

Although there is no opinion from CA7, it is clear that this case presented no issue only because of CA7's "knowledge" standard for 8A violations. Under a "should have known" standard, assuming that prison officials were aware of petr's gender condition, which they must have been, because her disciplinary violations arose from that very condition, summary judgment would have been completely inappropriate.

The only issue that may counsel against a grant is qualified immunity. However, this need not be dispositive, because CA7's approach may be so wrong that prison officials should not have relied upon it. As petr points out, this Ct in Wilson v. Seiter cited CA1's Cortes-Quinones as well as CADC's Morgan opinions w/ approval in announcing the deliberate indifference standard. Furthermore, the qualified immunity question will always be present when a prisoner has sued prison officials for inadequate protection from violence, and CA7 denies relief under McGill. Therefore, I recommend a CFR w/v/t grant.

5. Recommendation: CFR w/v/t GRANT.

There is no response.

IFP status appears proper.

March 15, 1993

Colb

Opin. in Petn.

CFR

W/rit Grant.

usc 3/21/93

The original pool was recommending a writ of habeas corpus. This is the case in which the nonviolent transsexual prisoner was placed in the general male population at a maximum security prison where she was sexually assaulted. The issue is whether the prison's failure to protect a prisoner's safety under the culpability requirement of the Eighth Amendment includes circumstances in which prison authorities did not know but should have known of the threat facing the prisoner. I now recommend a writ.

The judgment of the court of appeals was entered on August 7, 1993. The cert petition was filed on January 1, 1993 and is therefore jurisdictionally out of time.

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

1. Although the SO uses the term "he" to describe petr, I will continue to use the term "she," as I did in my original SO, and as petr prefers, to avoid confusion. Petr was a pre-operative transsexual who had silicone implants and was receiving estrogen hormone pills.

May 21, 1993

Mr. Justice:

Re: Farmer v. Brennan, 92-7247

The SG's response has come in on this case in which I wrote the original pool memo recommending a CFR w/v/t grant. This is the case in which the nonviolent transsexual prisoner was placed in the general male population at a maximum security prison, where she was sexually assaulted. The issue is whether "deliberate indifference" to a prisoner's safety under the culpability requirement of the Eighth Amendment includes circumstances in which prison authorities did not know but should have known of the threat facing the prisoner. I now recommend a GRANT.

SG: The judgment of the court of appeals was entered on August 7, 1992. The cert petn was filed on January 1, 1993 and is therefore jurisdictionally out of time.

The dct granted summary judgment for resps, finding that resps were not deliberately indifferent to petr's safety, because they did not know that petr would be subjected to an assault at Terre Haute prison. The ct found that petr had not advised the warden at Terre Haute that she¹ was concerned for her safety and that the warden "had no reason to believe that [petr] could not function safely within the population at USP-Terre Haute." Pet. App. 6A. The ct also stated that none of the other resps "had actual knowledge that there was a threat to [petr's] safety at USP-Terre

¹ Although the SG uses the term "he" to describe petr, I will continue to use the term "she," as I did in my original memo and as petr prefers, to avoid confusion. Petr was a pre-operative transsexual who had silicone implants and was receiving estrogen hormone pills.

Haute," *ibid.*, and that they "did not know that [petr] would be in imminent danger of attack if [she] were transferred to USP-Terre Haute," because petr "never expressed any concern for [her] safety to any of the defendants." *Id.*, at 7A-8A.

Although petr correctly observes that the CAs appear to have adopted different standards for establishing deliberate indifference in failure-to-protect cases, the depth of the disagreement is uncertain and, in any event, petr would not prevail regardless of which standard is applied. This Ct's review therefore would not be warranted even if this case were not jurisdictionally out-of-time. *Id.*, at 361.

In McGill v. Duckworth, 944 F. 2d 344 (1991), cert. denied, 112 S. Ct. 1265 (1992), CA7 held that the "deliberate indifference" standard of Wilson v. Seiter, 111 S. Ct. 2321 (1991) requires the inmate to show that prison officials "had actual knowledge of the threat" to the inmate, that the attack "was readily preventable," and that, instead of preventing the attack, the prison officials "allowed [the attack] to proceed." 944 F. 2d, at 349. CA7 stated that the inmate will normally prove actual knowledge by showing that the inmate notified prison officials "about a specific threat to his safety." *Ibid.* See also DesRosiers v. Moran, 949 F. 2d 15, 19 (CA1 1991) (deliberate indifference standard requires actual knowledge of preventable, impending harm in context of a claim that officials denied an inmate needed medical care).

On the other hand, in Young v. Quinlan, 960 F. 2d 351, 361 (1992), CA3 held that an inmate can establish deliberate

indifference on the part of a prison official when the official "knows or should have known of a sufficiently serious danger to the inmate." The ct stated, however, that "should have known" does not mean mere negligence; it requires that prison officials failed to appreciate a great and apparent risk, such that they exhibited an absence of concern for the inmate. *Ibid.* "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." *Id.*, at 361 (citations and internal quotation marks omitted). [FN3: CA3 stated, 960 F. 2d, at 360, that it agreed w/ the standard for establishing deliberate indifference set forth in Redman v. County of San Diego, 942 F. 2d 1435 (CA9) (en banc), cert. denied, 112 S. Ct. 972 (1991).]

As the facts of Young illustrate, even under CA3's "should have known" test, it is not enough for an inmate to allege that she was assaulted in a prison in which she faced a risk of violence; she must show that the prison officials failed to protect her after she complained about specific threats to her safety. The inmate in Young had sued various prison officials after he was allegedly sexually assaulted by other inmates at the federal prison in Pennsylvania, following his transfer from a lower-security federal prison in Texas. CA3 held that summary judgment was improper as to some of the Pennsylvania officials to whom petr had complained

about the repeated sexual assaults by other inmates. 960 F. 2d, at 362-363. But CA3 held that summary judgment was proper as to the Bureau of Prisons officials and the Texas prison officials who had not been notified of the specific threats to the inmate's safety. *Id.*, at 358 n. 14.

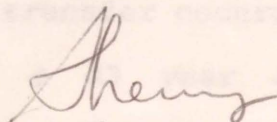
Even if petr's claim were evaluated under the Young standard, she would not be entitled to any relief. Unlike the inmate in Young, petr did not express concern about her safety to any prison official. Pet. App. 7A-8A. For that reason, none of the resps had any reason to believe that there was a substantial danger to petr. The dct specifically concluded in this case that petr did not meet the "should have known" standard w/r/t the warden of the Terre Haute prison, by finding that "defendant Edwards had no reason to believe that [petr] could not function safely within the population at USP-Terre Haute."

✓ Discussion: The SG is mistaken about the petn being jurisdictionally out of time. Justice Stevens extended petr's time to file up to and including January 4, 1993, and petr filed on January 1, 1993.

On the merits of the case, the SG appears to contend that because petr did not complain to any prison official about the threat of violence, that even CA3's "should have known" standard was not satisfied in this case. That clearly is not true. While many prisoners might have had to complain in order to call attention to their vulnerability to attack, petr was not such a

prisoner. Anyone would know that a transsexual would be in danger if placed in a general prison population. The dct's conclusion that the warden at the Terre Haute prison had no reason to believe that petr could not function safely in the prison population was not a factual assessment (as was the conclusion that resps did not actually believe that petr was in danger) but a legal conclusion drawn in the process of finding that the officials did not actually know of the danger. If the standard were CA3's "should have known" instead of CA7's "knew", it is clear that summary judgment would have been inappropriate. A lay person, CA3's measuring stick for purposes of the 8A, "would easily recognize the necessity for preventative action," 960 F. 2d, at 361, when an inmate who puts herself forward as a woman² but has a penis and testicles, is placed among the general prison population at a maximum security prison.

I therefore recommend that you vote to grant the petn in this case.

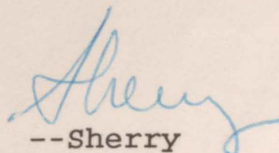

--Sherry

² The SG does not contest petr's description of herself as having silicone breast implants, petn at 3, or petr's description of her disciplinary violations as involving attempts to have female hormones prescribed or brought into the prison without authorization, along with attempts to order make-up and women's clothing, petn at 3.

against granting. I have the record July 7, 1993
Mr. Justice: interested in taking a look.

Re: Farmer v. Brennan, 92-7247, SL6, P23

Justice Stevens requested the record in this case, in which I have recommended a grant. As his clerk explains below, the record further supports a grant and I therefore continue to recommend that you vote to grant in this case.


--Sherry

No. 92-7247, SL6, P23. Justice Stevens called for the record in this case, which involves the proper standard for measuring "deliberate indifference" in failure-to-protect 8th Amendment cases. His concern was that Petr might have failed to allege that prison officials knew of her transsexual character at the time they made the transfer in question.

Petr's complaint does allege the requisite knowledge on the part of prison officials. Petr alleges that the transfer occurred "despite deft's knowledge that plaintiff was a 23 year old transsexual who had begun sex reassignment procedures prior to incarceration." Complaint Para. 1. Petr also alleges that in 1986, three years before the transfer at issue, prison officials determined that "because of her youth and feminine appearance, she would experience a good deal of sexual pressure." Complaint Para. 9.

The pool writer has recommended a grant in this case, and there appears to be no problem with the complaint that would

counsel against granting. I have the record in my office, if anyone is interested in taking a look.