

June 1, 1994

Re: Farmer v. Brennan, No. 92-7247

Mr. Justice,

With the benefit of a few days distance on the draft, I have a few final suggestions before it circulates:

[1] On page 3, in the first sentence of the only full paragraph on that page, delete the word "undoubtedly."

[2] On page 4, I recommend that you revise the summary of the Court's holding in Wilson v. Seiter to read:

The Court in *Wilson v. Seiter*, 501 U. S. 294 (1991), held that any pain and suffering endured by a prisoner which is not formally a part of his sentence — no matter how severe or unnecessary — will not be held violative of the Cruel and Unusual Punishments Clause unless the prisoner establishes that some prison official intended the harm.

[3] On page 4, the last full sentence should read:

A prisoner may experience punishment when he suffers "severe, rough, or disastrous treatment," see, e.g., Webster's Third New International Dictionary 1843 (1961), regardless of whether a state actor intended the cruel treatment to chastise or deter.

[4] On page 5, footnote 2 should be moved to the text as a separate paragraph with a transition sentence that reads:

The Court's unduly narrow definition of punishment blinds it to the reality of prison life. Consider, for example, a situation in which one individual

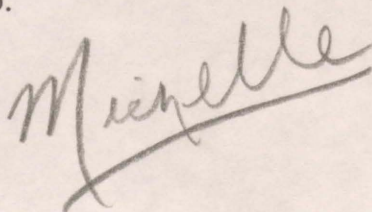
[5] On pages 5-6, the carry-over sentence should read:

In view of this obvious fact, there is no reason to believe that, in adopting the Eighth Amendment, the Framers intended to prohibit cruel and unusual punishments only when they were inflicted intentionally.

[6] On pages 6-7, the carry-over sentence should be separated by a period rather than a semi-colon. A new sentence should begin:

. . . *Wilson*, 501 U. S., at 310 (White, J., concurring). It also, however, demonstrated a commitment

That's it! I think it's ready to go.



May 25, 1994

Mr. Justice,

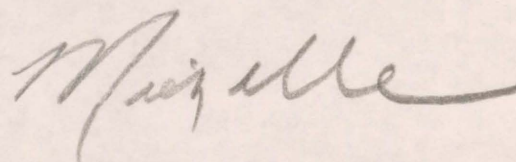
Here is a final draft of your concurring opinion in Farmer v. Brennan, No. 92-7247. Of course, I would be happy to make any changes or revisions you think appropriate.

Margalle

May 25, 1994

Mr. Justice,

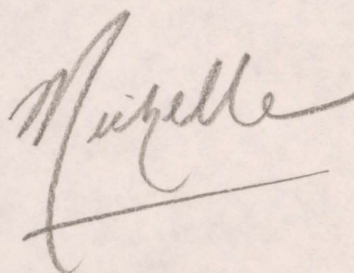
Here is a draft of *Farmer*. I have a few more edits and revisions to make which I will give you tomorrow morning. I thought you might want to have this close-to-final draft tonight, though. Have a good evening and I'll see you at breakfast.

A handwritten signature in dark ink, appearing to read "Michelle". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

May 25, 1994

Mr. Justice,

I write merely to remind you that I will be providing you with a revised, final draft of Farmer v. Brennan, No. 92-7247, later this morning. Most of the changes will be stylistic, not substantive.

A handwritten signature in cursive script, appearing to read "Michelle", with a horizontal line drawn underneath the name.

April 18, 1994

Re: Farmer v. Brennan, No. 92-7247

Mr. Justice,

According to my records, you have not circulated a statement to the Court indicating that you intend to write separately in this case. If you remember, this case involves the rape of a transsexual inmate in a maximum security federal prison. Justice Souter circulated a draft opinion a few weeks ago for which he recently attained five votes. The opinion holds that a plaintiff must establish that prison officials were subjectively aware of the risk to an inmate in order to make out an Eighth Amendment claim; it thus rejects the objective standard, which would render prison officials liable for risks about which they "should have known" because they were so obvious.

✓ Although I continue to believe that adoption of an objective standard would be the superior approach, I think that you should join this opinion and write a separate concurring statement. The statement should put the best spin on the Court's holding and point out the human side of this case; that is, the statement should point out the real dangers of prison rape and draw a legal road-map for those prisoners who have been placed unnecessarily at risk of violence in prison. There is good language buried in the opinion, and you should make clear that you are joining the opinion on the understanding that that language will be read broadly.

If you agree with this recommendation, you probably should circulate a statement to the conference indicating your intent to write separately.

Michelle

March 7, 1994

Re: Farmer v. Brennan, No. 92-7247

Mr. Justice,

As you mentioned earlier today, Justice Souter recently circulated a lengthy and wordy draft opinion in the above case. I am not persuaded by it. I continue to believe that the subjective definition of the "deliberate indifference" standard is incorrect and inconsistent with the Court's precedents. Cf. City of Canton v. Harris, 489 U. S. 378 (1989) (defining "deliberate indifference" as disregard of an "obvious risk"). "Deliberate indifference" should be an objective standard, satisfied by proof that a prison official "failed to act in the face of an unjustifiably high risk of harm that was either known or so obvious that it should have been known." As the draft opinion candidly acknowledges, see draft op. 9, that is the standard for recklessness under the civil law generally. But the draft opinion rejects the civil recklessness standard in favor of the subjective, criminal recklessness standard. Under the criminal recklessness standard, prisoners must establish that an official disregarded a risk of harm of which he actually was aware in order to state an Eighth Amendment claim. See Draft Op. 10 ("the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference"). In other words, the test adopted by the draft opinion would allow a prison official to argue to the jury that although a particular risk of harm was plainly obvious, and a reasonable prison official would have been aware of it, he wasn't.

The draft opinion does, however, contain some good language that may, as a practical matter, narrow the gulf between the objective and subjective standards. For example, the draft opinion states that:

"Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite a substantial risk of serious harm. . . . Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Draft Op. 15-16.

This language comes close to conflating the two standards, allowing proof of actual knowledge of a risk through circumstantial evidence of "obviousness." But even with this helpful language, a prison official still would be free to argue to the jury that despite the obviousness of the risk, he wasn't actually aware of it.

Justice Souter's clerk (Julius Genachowski) has encouraged me to recommend to you to join the opinion and to write a separate concurrence emphasizing the "good" language in the opinion. In his view, this opinion will not harm plaintiff prisoners so long as it is clear that circumstantial evidence of "obviousness" can support a finding of actual knowledge. Moreover, he argues, since the draft opinion does not affirm the decision below, but rather remands for further discovery, you could join the opinion and still be consistent with the position you took at Conference. The reason Justice Souter's clerk is so anxious for you to consider joining the opinion is that Souter is afraid that he will lose a few of the conservative votes because of the passage quoted above. He fears a substantially more conservative and restrictive standard will be adopted by the conservatives if five votes can't be mustered up for this "middle-ground."

I think it is likely that some of the more conservative Justices will place pressure on Souter to eliminate the language suggesting that proof of actual knowledge can be established through circumstantial evidence of an obvious risk. If that happens, it may make sense for you to concur and write separately, giving the best possible spin to the opinion. But I think you should wait to see how things play out before making a decision. If Justice Souter gets his five votes, then you should dissent. The standard adopted in the draft opinion is wrong, and you should join it only to prevent a greater evil from taking hold.

Michelle

January 12, 1994

Re: Farmer v. Brennan, No. 92-7247

Mr. Justice,

I have a couple of comments with respect to oral argument in Farmer. First, the important issue in this case is not whether the decision below is affirmed or reversed, but how, exactly, "deliberate indifference" is defined. Conceivably, the Court could affirm the decision below and adopt the "actual knowledge" test proffered by the government and still reach a reasonable result if the Court allows a plaintiff to establish actual knowledge by proof of an obvious risk. As petitioner explained in rebuttal, the real question is whether a plaintiff must prove facts which create an obvious risk, or whether the plaintiff must prove that the defendants actually understood that those facts created an obvious risk. A standard which allows prison officials to escape liability whenever they assert that they did not understand that the facts which created an obvious risk — actually created an obvious risk, places far too high a burden on plaintiffs (who will often be proceeding pro se) and will insulate exceptionally dangerous prison conditions from judicial review. Thus, regardless of whether the Court holds that "actual knowledge" is somehow an element of the subjective "deliberate indifference" standard, the Court must allow plaintiffs to establish an Eighth Amendment claim by proof of a risk so obvious that prison officials must have been aware of it — even if they deny it.

Second, the petitioner's brief led me to believe that the district court had considered and rejected the evidence that one of the respondents knew of the risk to petitioner because of the previous court case involving petitioner's administrative segregation. At oral argument I realized

that this was mistaken, and that much of the evidence in petitioner's brief was not available to the district court. Thus, contrary to my statement in my bench memo, it is not clear that this case should be remanded even if the government's "actual knowledge" test is adopted.

Third, the government's statement at oral argument that only 1% of prisoners are subject to assault in federal prisons is both outrageous and absurd. The prevalence of rape in prisons has been documented in numerous court cases, see, e.g., Jones v. Diamond, 636 F.2d 1364, 1372 (CA5 1981), and has been the subject of at least one congressional hearing.¹ Because of the nature of the offense, inmates rarely report their victimization to the authorities. Jones, 636 F.2d, at 1372. As explained in one recent article discussing the prevalence of rape in jail:

"Victims are disinclined to report these attacks, due to internal and external pressures. In addition to the feelings of shame suffered by anyone who is raped, prison victims of homosexual attack perceive a 'loss of manhood,' and a shattering of their self-esteem. . . . Victims are also threatened with violent reprisals or additional sexual assaults by the original attacker and by other inmates, and thus discouraged from reporting the attacks. . . . Prison 'etiquette' is such that any prisoner who 'squeals' on a fellow inmate risks severe retribution from the other prisoners. . . . Even if a victim overcomes these internal and external pressures and chooses to report an assault, the prison system offers him little relief. Prison officials rarely attempt to protect victims from further attacks, and some commentators have even suggested that actions of prison officials make homosexual rape easier to commit."²

Indeed, thirty-six inmates testifying at U.S. Senate hearings on sexual crimes in prison reported having seen or heard approximately seventy-five sexual attacks. Four of those testifying had been victims of rape. In 1974, it was estimated that of the forty-six million Americans who will be arrested at some time in their lives, ten million will be raped while in prison. See C. Weiss

¹ Investigation of Juvenile Delinquency in the United States, part 20, Conditions in Juvenile and Young Offender Institutions: Hearings on S. Rs. 48 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 4691 (1971).

² D. Siegal, Rape in Prison and Aids: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter, 44 Stan. L. Rev. 1541, 1545-1546 (1992).

✓ & D. Friar, *Terror in the Prisons* (1974). Thus, there can be little doubt that rape (not even considering other forms of assault) is rampant in our country's prison system.

* * *

✓ Whether or not this case comes out the right way will depend on how the opinion is written; the votes at Conference may not shed too much light on whether a good result has been reached. If it turns out that the majority opinion does not adopt a definition of "deliberate indifference" which allows prisoners to sue for injunctive relief when prison officials fail to take readily available measures to alleviate an obvious risk, I recommend that you write a separate dissent, a dissent reminiscent of your dissent in Bailey. This is an important issue, one that the Court should not brush off lightly.

Michelle

1
SHC

Grant SHC

+

prisoner facing a transsexual prisoner who was beaten and raped. Having been granted leave to proceed in forma pauperis on the same day, petr is eligible for appointment of counsel under Supreme Court Rule 39.

Alvin J. Bronstein graduated from New York Law School. In 1952, he was admitted to practice in New York and, in 1963, was admitted to practice before this Court. Counsel avers that he has "extensive federal appellate experience in cases involving the rights of prisoners" and has argued several cases before this Court, including *Estelle v. Haynes*, 427 U.S. 236 (1976); *Bloch v. Rutherford*, 466 U.S. 576 (1984); and *Hydson v. McMillan*, 113

October 29, 1993 Conference
List 5, Sheet 1, Page 24

No. 92-7247

DEE FARMER

Motion of Petitioner for
Appointment of Counsel

petr's choice of counsel and is already familiar with the facts v.

EDWARD BRENNAN

petr effectively before the Court.

There is no response.

SUMMARY: Petr requests that the Court appoint Alvin J. Bronstein as her attorney under Supreme Court Rule 39.

On October 4, 1993, the Court granted cert in this case to determine whether prison administrators can be held liable under the Eighth Amendment proscription against cruel and unusual punishment, as defined by this Court in *Wilson v. Seiter*, 115 L.Ed.2d 271 (1991), when they "knew or should have known" of the

danger facing a transsexual prisoner who was beaten and raped. Having been granted leave to proceed in forma pauperis on the same day, petr is eligible for appointment of counsel under Supreme Court Rule 39.

Alvin J. Bronstein graduated from New York Law School. In 1952, he was admitted to practice in New York and, in 1963, was admitted to practice before this Court. Counsel avers that he has "extensive federal appellate experience in cases involving the rights of prisoners" and has argued several cases before this Court, including Montanye v. Haymes, 427 U.S. 236 (1976); Block v. Rutherford, 468 U.S. 576 (1984); and Hudson v. McMillian, 112 S.Ct. 995 (1992), in which he was appointed by the Court to represent an incarcerated pro se petr.

As petr is entitled to counsel, the motion for appointment of counsel should be granted. Because Alvin J. Bronstein is petr's choice of counsel and is already familiar with the facts of the case, he appears to be the person most likely to represent petr effectively before the Court.

There is no response.

October 25, 1993

Willis (LO)

Grant. SHC 10/25/93

SUMMARY

The Third Circuit affirmed the district court's holding that respondents' decision to place petitioner, a transsexual, in the general population of a maximum security, all-male prison was not "deliberately indifferent" to her safety because they did not have actual knowledge of the risk of rape. Reversed and remanded.

No. 92-7247

Dee Farmer

v.

Edward Brennan, Warden, et al.

Cert to CA7 (Coffey, Flaum, Ripple)

To be Argued Wednesday, January 12, 1994

CONTENTS

SUMMARY	1
I. FACTS AND PROCEEDINGS BELOW	2
II. CONTENTIONS	3
A. <u>Petitioners</u>	3
B. <u>Amici Curiae</u> in Support of Petitioners	11
C. <u>Respondent</u>	12
D. <u>Amici Curiae</u> in Support of Respondent	17
E. <u>Petitioner's Reply</u>	18
III. DISCUSSION	21
IV. CONCLUSION	26
Pool Memo	28

January 10, 1994

Michelle

SUMMARY

The Third Circuit affirmed the district court's holding that respondents' decision to place petitioner, a transsexual, in the general population of a maximum security, all-male prison was not "deliberately indifferent" to her safety because they did not have actual knowledge of the risk of rape. Reverse and remand.

During the period relevant to this case, the federal prison system assigned a security level from one to six (level one being minimum security and level six being maximum security). From March 1987 to January 1988, petitioner was incarcerated at the Federal Correctional Institution (FCI) in Petersburg, Virginia, a security level four institution. While incarcerated there, petitioner was initially placed in the general prison population, but spent most of her time in "administrative detention." (It is unclear whether petitioner was placed in administrative detention because of her transsexual status or because of disciplinary violations). In January 1988, petitioner was transferred to the FCI in Oxford, Wisconsin, another four-level institution, and housed with the general prison population. While at Oxford, petitioner was again charged with numerous disciplinary violations, including one charge of having sexual relations with another inmate while knowingly carrying the Human Immunodeficiency Virus (HIV).

After petitioner accumulated numerous disciplinary charges, FCI-Oxford officials requested that she be transferred to a "Penitentiary." The Federal Bureau of Prisons' (BOP) regional office approved the transfer, and, in March, 1989, petitioner was transferred to

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

I. FACTS AND PROCEEDINGS BELOW

Petitioner is a transsexual who is currently serving a 20-year sentence in an all-male federal prison for credit-card fraud. Petitioner is a biological male, but has undergone treatment for silicone breast implants and unsuccessful surgery to have her testicles removed.¹ In addition, at the time of the incident at issue in this case, she was taking estrogen hormone pills to ensure a female appearance.

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). From March 1987 to January 1988, petitioner was incarcerated at the Federal Correctional Institution (FCI) in Petersburg, Virginia, a security level four institution. While incarcerated there, petitioner was initially placed in the general prison population, but spent most of her time in "administrative detention." (It is unclear whether petitioner was placed in administrative detention because of her transsexual status or because of disciplinary violations). In January 1988, petitioner was transferred to the FCI in Oxford, Wisconsin, another four-level institution, and housed with the general prison population. While at Oxford, petitioner was again charged with numerous disciplinary violations, including one charge of having sexual relations with another inmate while knowingly carrying the Human Immunodeficiency Virus (HIV).

After petitioner accumulated numerous disciplinary charges, FCI-Oxford officials requested that she be transferred to a "Penitentiary." The federal Bureau of Prison's (BOP) regional office approved the transfer, and, in March, 1989, petitioner was transferred to

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

USP-Terre Haute in Indiana, also a level-four institution, and placed in the general prison population. Petitioner did not object to being placed in the general population or indicate to any official that she believed herself to be in danger.

On April 1, 1989, petitioner was brutally raped by another inmate. On April 7, 1989, petitioner was placed in administrative detention at the direction of the Regional BOP Office because of her status as a high-risk HIV-positive inmate.

Petitioner, acting without counsel, filed this civil action on August 20, 1991, against the Director and Regional Director of BOP in their official capacities, and four Bureau officials in their individual and official capacities. Petitioner alleged that each of the respondents knew that petitioner "who has a feminine appearance, . . . would be sexually assaulted at USP-Terre Haute," and that their failure to protect her from that evident danger violated her rights under the Eighth Amendment. She sought an injunctive order requiring BOP to place her in a "co-correctional facility" (i.e., a facility housing both sexes) as well as punitive and compensatory damages against the four individual respondents under Bivens v. Six Unknown Federal Agents, 403 U. S. 388 (1971).

On February 18, 1992, respondents moved for summary judgment. Through their accompanying declarations, all but one respondent generally denied actual knowledge of the risk of sexual assault facing petitioner. Petitioner filed a cross-claim for summary judgment and an affidavit in opposition to respondent's summary judgment motion. Petitioner alleged that her transsexuality was known to the BOP by virtue of her feminine appearance, documentation in BOP records, and prior litigation. Petitioner further alleged that respondents knew of the risk of harm she confronted as a transsexual in an all-male

penitentiary. She pointed to a psychological report prepared by BOP in August 1986 which explained that petitioner would be subject to a great deal of sexual pressure because of her youth and feminine appearance, and to a former BOP Health Service Manual which provided that transsexuals were to be placed in co-correctional facilities. She further noted that respondents had admitted in their Answer that transsexual prisoners present "unique management problem[s]" for prison officials. And, perhaps most persuasively, petitioner cited an earlier case she had brought against the BOP and respondent Edwards, when Edwards was the warden of USP-Lewisburg (where petitioner was temporarily housed). In that case, respondent Edwards submitted a declaration to the district court which, in turn, had adopted a staff report addressed to petitioner, justifying her placement in administrative segregation because of her transsexual status. The district court quoted respondent Edwards' declaration, which adopted the staff report, as follows:

"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 prison 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). The district court in Carlson deferred to prison officials' decision to place petitioner in administrative 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, petitioner filed a motion under Fed. R. Civ. P. 56(f), claiming that additional discovery was necessary to oppose

respondents' summary judgment motion. 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 of USP-Terre Haute.

The district court [W.D. Wis., Shabaz] denied petitioner's Rule 56 motion and granted summary judgment to respondents on March 23, 1992. Relying on a Seventh Circuit decision, McGill v. Duckworth, 944 F.2d 344, 349 (CA7 1991), the district court held that respondents were not liable under the Eighth Amendment because they did not have actual knowledge that she was in potential danger. According to the district court, since petitioner had not expressed concern for her safety to any of the respondents, respondents were not "deliberately indifferent" to her safety. The Seventh Circuit summarily affirmed without opinion.

II. CONTENTIONS

A. Petitioners: [1] It is well established that Eighth Amendment imposes an affirmative duty to provide reasonable safety to those confined by the State. See, e.g., DeShaney v. Winnebago County Dept. of Social Services, 489 U. S. 189, 199-200 (1989) ("when 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 well-being"); Helling v. McKinney, 113 S.Ct. 2475, 2480-81 (1993) ("[i]t is cruel and unusual punishment to hold convicted prisoners in unsafe conditions"). This affirmative duty arises from the fact that prison officials control every aspect of prisoners' confinement, including food, clothing, shelter, medical care, and reasonable safety. In Wilson v. Seiter, 111 S.Ct.

2321, 2324 (1991), this Court made clear that the Eighth Amendment is violated whenever prison officials display "deliberate indifference" to prison conditions of confinement. This case asks the Court to explain what "deliberate indifference" means.

[2] The Court has already defined "deliberate indifference" in the context of municipal liability under 42 U. S. C. §1983. See City of Canton, Ohio v. Harris, 489 U. S. 378 (1989). In Canton, the Court held that a failure to train employees could constitute a municipal policy under Monell v. New York City Dept. of Social Services, 436 U. S. 658 (1978), if the municipality was "deliberately indifferent" to constitutional rights. This Court should apply the Canton standard in cases like this one, where prison officials allegedly have shown "deliberate indifference" to the prisoner's conditions of confinement.

[3] Under Canton, 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. Canton clearly holds that officials are deliberately indifferent when they ignore or fail to protect individuals from an obvious risk, even if a particular person's exposure to the risk was not directly known to them.

[4] A risk created by the failure to protect a prisoner may be "obvious" for several reasons. First, the 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. 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 should 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. Of course, some risks may be "obvious" but so trivial that they do not support a constitutional claim of deliberate indifference. Thus, as a threshold matter, there must be some allegations that the conduct of prison officials "pose[s] an unreasonable risk of serious damage to . . . future health." See Helling, 113 S.Ct., at 2481. 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.

[5] An Eighth Amendment violation involves both an objective and subjective component. The subjective component 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. When certain risks are "obvious," an official's failure to act on them can properly be characterized as deliberately indifferent. See Wilson, 111 S.Ct., at 2325 (citing Canton, 489 U. S., at 390 n. 10).

[6] "Wanton" is a term often used to sum up the subjective element of an Eighth Amendment claim. Wilson, 111 S.Ct., at 2326. In Smith v. Wade, 461 U. S. 30, 40 n.8

(1983), the Court canvassed the meaning of "wantonness" in the context of a punitive damages instruction:

"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 injury after the discovery of the peril, or under the circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure." *Id.* (emphasis added).

Canton's definition of deliberate indifference is consistent with this understanding of "wantonness." It is precisely because deliberate indifference falls within this 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 anomalous if "deliberate indifference" had one meaning with respect to municipal liability and another with respect to Eighth Amendment challenges. No Supreme Court case has suggested that the definition of "deliberate indifference" applied in Canton does not apply to other uses of the term.

[7] In Wilson, this Court applied the same Eighth Amendment standard to both injunctive and damages actions. Wilson, 111 S.Ct., at 2324–25. Thus, it is likely that the deliberate indifference standard adopted by the Court in this case will also apply to injunctive action, as well as to all types of conditions of confinement cases, including those involving medical care. If the standard is set too high, injunctive relief will become unavailable and prisoners will be left without any meaningful remedy to secure freedom from their harm.

[8] The Canton standard, unlike the Seventh Circuit standard, guarantees that a federal court will have the power to address a pattern of conduct. A pattern of dangerous

conduct or a series of dangerous incidents renders obvious the need to take action without proof of actual knowledge on the part of the prison officials.

[9] Prison officials will not be exposed to inordinate liability under the Canton standard. The Canton standard itself requires "a high degree of fault." 498 U.S., at 396 (O'Connor, J., concurring in part and dissenting in part). Moreover, 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. Fitzgerald, 457 U. S. 800, 818 (1982).

[10] Corrections staff also have an "available resources" defense. In Youngberg v. Romero, 457 U. S., at 323, the Court held that an official "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."

[11] This Court has shown a willingness to give deference to the decisions of prison officials when they make formal policy relying on their special expertise regarding prison security, see, e.g., Pell v. Procunier, 417 U. S. 817, 824 (1974), or when the need for split-second decision making is required, as in a prison riot. In such situations, greater deference may be showed prison officials. But where, as here, the claim is that the officials failed to exercise their judgment and expertise, a constitutional challenge arises from the failure of prison official to protect prisoners from obvious hazards.

[12] The Seventh Circuit standard relied upon below is a criminal recklessness standard requiring actual knowledge of impending harm. A criminal recklessness standard of

this kind would inappropriately shield prison officials from responsibility in a variety of circumstances. For example, it would immunize prison officials' failure to adopt a procedure for identification of prisoners with tuberculosis, if it is found that they did not know that such a failure would lead to harm in a particular case, notwithstanding the fact 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 in a particular case. The Seventh Circuit standard thus encourages prison officials to take refuge in the zone between "ignorance of obvious risks" and "actual knowledge of risks," thereby rewarding inattention by prison officials to prisoner safety.

[13] This case should be remanded to give petitioner an opportunity to show that, based on respondents' knowledge of her transsexual status, her placement in general population in a high security facility posed an obvious and unreasonable risk. 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. 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 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 female guards. Petitioner requests a remand to attempt to prove that the danger to her, as a transsexual, in general population at a maximum security prison was "obvious" to respondents. Indeed, it is hard to imagine a circumstance in which the risk of sexual assault would be more obvious.

[14] With the exceptions of two 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 petitioner in the 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. Carlton, suggesting that he should have known that placing her in the general population at Terre Haute posed an unreasonable risk. Thus, there was a material dispute of fact regarding whether these two respondents should have known of the risk facing petitioner.

[15] Whether the other respondents should have known of the risk also remains to be determined by the trier of fact. Petitioner opposed summary judgment in part because 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" for petitioner's safety. Petitioner urges the Court to remand to the district court so that the correct standard may be applied and discovery may proceed.

B. Amici Curiae in Support of Petitioners:

1. Brief for D.C. Prisoners' Legal Services Project: The criminal recklessness standard articulated by the Seventh Circuit is tantamount to a requirement of malice and is, therefore, in conflict with Wilson v. Seiter, 111 S.Ct. 2321 (1991). This standard is poorly suited to remedy the wide range of cruel prison conditions subject to the deliberate

indifference standard. Many cruel prison conditions arise from the failure of the institution as a whole, and no one individual bears a share of the blame sufficient to be guilty of criminal recklessness. A pertinent example is the spread of tuberculosis currently facing many prisons. The Seventh Circuit's standard would likely send the lower courts on a fruitless search for guilt and actual knowledge and render them unable to remedy grave prison conditions. Because the Canton standard was developed in the context of municipal liability, it is well suited for determining the "mental state" of institutions like prisons.

2. Brief of the Montana Defender Project: Because of the rising incidence of inmate assaults in American prisons, this Court should substitute an objective test for the deliberate indifference standard. This objective test should make it illegal for a prison official to fail to protect an inmate from any danger when the official has actual knowledge, constructive knowledge, or fails to investigate a likely danger.

3. Brief of Stop Prisoner Rape: [long and detailed discussion of the rising incidence of prison rape and the particular dangers of institutional apathy given AIDS].

C. Respondent (SG): [1] 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. See Helling v. McKinney, 113 S.Ct. 2475, 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. Because inmate violence is often random and unpredictable, 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.

[2] 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.

[3] Even if an inmate demonstrates the existence of an "objectively" unreasonable risk of serious injury through assault by other inmates, he still must satisfy the "subjective" component of the Eighth Amendment, which mandates an "inquiry into a prison official's state of mind." Wilson, 111 S.Ct., at 2324. In Wilson, the Court held that a prison official must demonstrate "deliberate indifference" to the condition to which the complaining prisoner is exposed in order to state an Eighth Amendment claim. Id., at 2326–2327. Although deliberate indifference does not require a finding of express intent to harm, 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 the inmate is exposed (or

he must actively avoid such knowledge), 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.

[4] In sum, to prove "deliberate indifference" in this case, petitioner must demonstrate that: [1] the official knew of an unreasonably high risk of serious physical harm to an inmate from other prisoners; [2] the 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.

[5] Petitioner's proposed standard, which requires the district court to consider whether the danger is one that a reasonable prison official ordinarily would have been aware, is directly at odds with this Court's construction of the Eighth Amendment in Wilson v. Seiter. 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 regardless of whether the official was actually aware of the risk. In Wilson, this Court squarely rejected this purely "objective" approach to an Eighth Amendment violation. Wilson, 111 S.Ct., at 2325–2328. The focus of the "subjective component" of the Eighth Amendment is on the official's actual knowledge, not on what an objectively reasonable official should have known.

[6] Petitioner's "should have known" approach ignores the "deliberateness" requirement of the "deliberate indifference" standard. If an official is 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 cannot violate the Eighth Amendment.

[7] The application of a "negligence" standard of liability in this context is particularly inappropriate because the placement of prisoners require officials to make subjective, complex, and highly individualized judgments. In making subjective judgments regarding discipline and security, prison officials must be granted a "wide-ranging deference." See Bell v. Wolfish, 441 U. S. 520, 547 (1979). A "should have known" standard may encourage courts to use hindsight to review prison officials' good-faith judgments concerning the placement of individual prisoners. 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).

[8] 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." A subjective actual knowledge standard does not, however, preclude a plaintiff from attempting to convince the finder of fact that officials "must have had knowledge" of a risk because it was obvious. Typically, an inmate will demonstrate knowledge of danger by showing that the inmate notified the official of a highly credible threat or circumstance placing him at risk. But a plaintiff may also attempt to prove through circumstantial evidence that the official had actual knowledge of the risk or threat at issue. 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 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 official had knowledge of the risk.

[9] Although the "must have known" and "should have known" tests for liability, if applied to "obvious" risks, will often lead to the same result, they are nevertheless distinct. For example, even if the risk that a certain inmate would be assaulted was "obvious" because 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 (because he was under a mistaken impression that the risk would be slight) would bar Eighth Amendment liability.

[10] The Canton majority's discussion of "obvious" risks is not inconsistent with this actual knowledge standard. The Court's discussion of "obviousness" in Canton is best read as suggesting a method for inferring subjective knowledge, rather than as adopting a "should have known" standard.

[11] In order to recover under an actual knowledge standard, petitioner would have to show, at the very least, that respondents acted to effectuate her 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. While there may be some factual issues which might be best dealt with on remand, we submit that the record developed in the district court does support an affirmance of the decision of the court of appeals. The only respondents potentially liable for damages in this case are alleged to be liable solely

because of their participation in the decision to transfer petitioner to USP-Terre Haute. 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. 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 her assignment to administrative detention status because of her high-risk HIV-positive condition, as well as by the absence of any allegation by petitioner that administrative detention status poses any continuing threat of physical injury to her. Given these circumstances, the decision below may be affirmed.

D. Amici Curiae in Support of Respondent:

1. Brief of (30?) States: Stripped of its rhetoric, petitioner's argument is that prison officials have a mandatory obligation under the Eighth Amendment, solely because of petitioner's status as a transsexual, either to house her separately from a penal institution's general inmate population or to confine her in a hypothetically "safe" institution. The Eighth Amendment does not create a constitutional cause of action enabling prisoners to seek judicial review of whether prison officials made the right housing assignment decision. Inmate housing decisions are difficult and complex, and depend ultimately on the collective judgment of experienced administrators concerning the best assignment for each inmate. In this arena, the Eighth Amendment requires the application of a heightened deliberate indifference standard. Such a standard should impose liability only when the risk of injury is

so obvious and likely to result in harm that the officials' actions lack any good faith basis and give rise to an intent to injure. A lesser standard, requiring administrators to sequester certain groups of inmates to protect them from the dangers found in all prisons will compel prison officials throughout the country either to find special housing for large categories of prisoners in the already severely overcrowded state and federal prison systems, or to face strict liability for failing to do so. The Eighth Amendment does not compel such hard choices.

E. Petitioner's Reply: [1] Respondents' brief makes several concessions that substantially narrow the issue presented in this case. First, and most importantly, respondents concede that the Seventh Circuit applied an unduly restrictive standard of "deliberate indifference." The Seventh Circuit criminal recklessness standard provides that

"punishment implies at a minimum, actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it."

Duckworth v. Franzen, 780 U. S. 645, 653 (CA7 1985) (emphasis added); McGill v. Duckworth, 944 F.2d 344 (CA7 1991). Respondents retreat from essentially every aspect of this standard. Indeed, respondents concede that the standard may be satisfied by circumstantial evidence, a form of proof the Seventh Circuit has not recognized. Second, respondents dispense with the Seventh Circuit's requirement that the harm be "impending," and substitute "readily preventable" for "easily preventable." Moreover, respondents do not dispute that "deliberate indifference" in the Eighth Amendment context is consistent with the meaning of that term adopted in Canton. Thus, respondents acknowledge that a plaintiff may establish deliberate indifference by proving that officials "must have had knowledge of a risk

because it was 'obvious.'" Respondents' Brief 9-10. (A logical extension of this position is that once a plaintiff produces sufficient evidence that a risk was obvious, the case, as a matter of law, will withstand summary judgment and must go to the trier of fact). Finally, contrary to the Seventh Circuit's position, respondents acknowledge that "deliberate indifference" does not necessarily require that the prisoner prove that he or she told prison officials of the threat of harm.

[2] Respondents' concessions leave only the following disagreement for this Court: whether or not actual knowledge of the dangerous conditions must be proved in order to establish an Eighth Amendment violation. Petitioner's position is that the "deliberate indifference" standard set forth in Canton is met once the plaintiff has proven that the defendants knew facts which rendered an unreasonable risk obvious; under such circumstances, the defendant should have known of the risk and will be charged with such knowledge as a matter of law. Respondents, in contrast, seek to shield prison officials from liability, no matter how obvious the risk of harm, if the district court finds plausible their statements that they did not actually know of the particular harm at issue. Thus, the disagreement between the parties pertains to the circumstance in which a defendant official fails to recognize an obvious and unreasonable risk of harm.

[3] State amici argue that petitioner urges a per se rule that a transsexual cannot be confined in general population. This is not accurate. Petitioner seeks an opportunity to prove that it was deliberate indifference in this case to fail to protect her in this maximum security facility. Amici's argument is equivalent to arguing that Helling v. McKinney, 113 S.Ct. 2475 (1993), stands for a per se rule that exposure to environmental tobacco smoke

violates the Eighth Amendment. Rather, Helling granted the plaintiff an opportunity to prove a constitutional violation under the standard articulated in that case. In this case, the petitioner was never given an opportunity to develop the record as to whether or not confining her in general population at Terre Haute posed an obvious and unreasonable risk.

[4] Amici's other central argument is that this Court should apply a heightened deliberate indifference standard in the specific area of prisoner safety. This argument is foreclosed, however, by Wilson v. Seiter, which explicitly stated that the same deliberate indifference standard applicable to medical claims and other conditions of confinement applies to failure to protect claims.

[5] This case must be remanded. Respondents concede that evidence that a risk is obvious may be introduced to show that respondents knew of the risk. Petitioner's discovery request was designed to elicit just such information. Moreover, there was ample evidence in the record, not considered by the district court, that respondents actually knew of the risk facing petitioner. Indeed the record shows that respondents knew of her transsexual status, and at least one respondent demanded that she be kept in administrative segregation in a different prison precisely because of the danger she faced as a result of her age and feminine appearance. Respondents' bald statements to the contrary cannot be dispositive. Thus, even under respondents' proposed standard, remand is required.

[6] Respondents are simply mistaken that they are no longer liable for prospective injunctive relief because of petitioner's assignment to administrative detention. Petitioner has since been transferred out of administrative detention into the general population at FCI-Florence, a medium security facility. Petitioner continues to be at risk of inappropriate

classification in BOP facilities, placing her in danger of future assaults by other prisoners. Moreover, subsequent remedial actions by prison officials do not automatically foreclose a prisoner's opportunity for injunctive relief without a factual determination by the district court as to future harm. Helling, 113 S.Ct., at 2481. In Helling, the plaintiff had been moved to another facility and thus was no longer the cellmate of a five-pack-a-day smoker, and the state prison system had adopted a smoking policy that restricted smoking to specifically designated areas. Nonetheless, this Court remanded the case to provide an opportunity to the plaintiff "to prove that he will be exposed to an unreasonable risk with respect to his future health or that he is now entitled to an injunction." Id., at 2482. Similarly, in this case, petitioner alleges a continued threat to her safety.

III. DISCUSSION

[1] I am persuaded that this case must be remanded. Even if an "actual knowledge" test is adopted (and I don't think it should be), there is a material issue of fact regarding whether certain respondents knew that petitioner was at serious risk of sexual assault if placed in the general population. In particular, respondent Edwards submitted a declaration in an earlier case involving petitioner, asserting that petitioner's transsexual status made it necessary, in order to protect her from foreseeable harm, to place her in administrative detention. See Farmer v. Carlson, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988). While this case involved a different prison, that declaration, taken together with the BOP officials' failure to disclose petitioner's transsexual status when requesting the transfer to Terre Haute, leads me to believe that there were serious issues of material fact to be resolved — no matter which standard is applied.

[2] The issue of how, exactly, "deliberate indifference" should be defined is more difficult. This Court first applied the deliberate indifference standard to Eighth Amendment jurisprudence in Estelle v. Gamble, 429 U. S. 97 (1976), where it held 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, and citing lower court cases which suggested that it involved a conscious choice to ignore an obvious need or danger. See, e.g., Westlake v. Lucas, 537 U. S. 857, 859 (CA6 1976); Page v. Sharpe, 487 F. 2d 567 (CA1 1973).

Then, in Whitley v. Albers, 475 U. S. 312 (1986), the Court held that the "deliberate indifference" standard set forth in Estelle does not apply to prison use of force claims. In such 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." Id., at 320-21. Notably, in explaining what the "maliciously and sadistically" standard meant, the Court cited Duckworth v. Franzen, 780 F.2d 645, 652 (CA7 1985), cert. denied, 479 U. S. 816 (1986), which adopted the criminal recklessness standard at issue in this case. See Whitley, 475 U. S., at 321. In my view, this citation suggests that the Seventh Circuit's criminal recklessness standard is much closer to the "maliciously and sadistically" standard applicable in prison use of force cases than to the "deliberate indifference" standard applicable in medical and prison condition cases.

In Wilson v. Seiter, 111 S.Ct. 2321, this Court confirmed that the deliberate indifference standard applies to all Eighth Amendment prison conditions of confinement claims. Id., at 2326-27. Indeed, 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 inadequate 'conditions of confinement.' Indeed, the medical care of a prisoner 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).

That claims involving failure to protect prisoners would be subject to the same standard as claims involving medical care makes sense in view of prisoners' complete inability to provide for their own safety. Just as prisoners rely on prison officials and staff for their medical care, so too do they rely upon prison officials for their safety.

The amici in support of petitioner remind us that the prevalence of rape, assault, and murder in our Nation's prisons makes life behind bars a truly frightening and precarious experience. Unfortunately, it does not appear that prison conditions have improved in any relevant respect since you wrote your powerful dissent in United States v. Bailey, 444 U. S. 394, 419 (1980). As you explained so eloquently:

"The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking. . . . A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials are either disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system. Prison officials often are merely indifferent to serious health and safety needs of prisoners as well." Id., at 421.

The question these conditions raise is what is constitutionally intolerable and what is merely horrible. Certainly, prison officials require a good deal of latitude to make difficult

decisions regarding security and housing of prisoners. See Amici of States in Support of Respondent. Every time an inmate is assaulted or attacked, a constitutional claim does not lie. But far from connoting strict liability, the standard petitioner proposes (the "Canton standard") requires a conscious choice not to protect an individual from harm. Since respondents concede that petitioner did not have a duty to inform them of her fear, the real issue in this case is whether an inmate who has been the victim of a violent attack (or another hazardous condition) must prove that the official actually knew of the risk of harm, or whether it is sufficient to prove that the risk of harm was so obvious that the official's failure to act indicates deliberate indifference to the prisoner's safety.

I think that prisoners should not be required to prove that prison officials had actual knowledge of an unreasonable risk of danger in order to assert an Eighth Amendment claim. Aside from the fact that "actual knowledge" is an extraordinarily difficult standard to meet, this standard rewards the very "indifference" to brutality you condemned in Bailey. This indifference would not be so tragic if prisoners had some means of protecting themselves from the daily hazards of prison life. But they do not. As you explained in Bailey:

"It is society's responsibility to protect the life and health of its prisoners. '[W]hen a sheriff or a marshall [sic] takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, *this is our act*. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not. . . .'

"The reasons that support the Court's holding in Estelle v. Gamble lead me to conclude that failure to use reasonable measures to protect an inmate from violence inflicted by other inmates also constitutes cruel and unusual punishment. Homosexual rape or other violence serves no penological purpose. Such brutality is the equivalent of torture, and is offensive to any modern standard of human dignity. Prisoners must depend, and rightly so, upon prison administrators from abuse of this kind. . . .

"deliberate indifference" standard is too high and too unworkable to provide meaningful protection of inmates' safety and health.

"There can be little question that our prisons are badly overcrowded and understaffed and that this in large part is the cause of many of the shortcomings of our penal systems. This, however, does not excuse the failure to provide a place of confinement that meets minimal standards of safety and decency." Bailey, 444 U. S., at 423-424 (Blackmun, J., dissenting).

Your dissent in Bailey supports the view that the Eighth Amendment requires prison officials to respond to obvious risks of harm and to take reasonable steps to protect provide for inmates' safety.² While more formidable than I would prefer, the deliberate indifference standard defined in City of Canton, Ohio v. Harris, 489 U. S. 378 (1989), provides a reasonable and workable framework for evaluating claims of official failure to provide protection from inmate attacks. Under Canton, the danger must be "so obvious" and the failure to act "so likely to result in the violation of constitutional rights," that the officials can reasonably be said to have been deliberately indifferent to the risk of harm. Canton, 489 U. S., at 396-97. Contrary to respondents' suggestion, prison officials will not, under Canton, be held liable for mere negligence; nor will they be held to a "should have known" standard. In order to make out a claim of deliberate indifference to a prisoner's safety, the 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." Young v. Quinlan, 960 F.2d 351, 361 (CA3 1992).

² Reversal of the Third Circuit in this case would also be consistent with your dissent in Wilson v. Seiter, 111 S.Ct. 2321 (1991), in which you indicated your belief that the "deliberate indifference" standard is too high and too unmanageable to provide meaningful protection of inmates' safety and health.

As respondent concedes, there is little difference between its formulation of the deliberate indifference standard and petitioner's. The important distinction is that under respondent's standard, a plaintiff must find a way to prove actual knowledge, a burden that will be insurmountable in the vast majority of cases. Indeed, this case demonstrates the extraordinary burden an "actual knowledge" standard places on plaintiffs in this context. Despite the statement of one respondent that petitioner was in extreme danger in another maximum security prison, the district court, applying an "actual knowledge" standard, did not even think there was a material issue of fact warranting discovery. This is incredible to me given that both parties acknowledge petitioner's youth and feminine appearance. It is hard to imagine that prison officials were not aware of the risk that petitioner would be raped in a maximum security, all-male prison. As petitioner's state, it is hard to imagine a case where the risk of sexual assault would be more obvious.

IV. CONCLUSION

This Court should hold, consistent with Canton, that where the risk of harm to an inmate is obvious, disregarding that risk will be construed as a deliberate choice on the part of the prison officials and, therefore, a violation of the Eighth Amendment. "Deliberate indifference" certainly encompasses the refusal to consider or act upon obvious threats of harm to individual prisoners or the prison population as a whole — whether the harm comes from other inmates, contaminated water or cigarette smoke. The Eighth Amendment does not authorize prison officials to ignore obvious risks of violence. The case should be remanded so that petitioner may proceed with discovery and attempt to prove that the risk that she would be raped was so obvious to the prison officials that their failure to place her

in administrative detention or transfer her to a minimum security prison constituted "deliberate indifference" to her safety.