SUPREME COURT OF THE UNITED STATES

No. 92–7247

DEE FARMER, PETITIONER *v.* EDWARD BRENNAN, WARDEN, ET AL.

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

[June 6, 1994]

JUSTICE BLACKMUN, concurring.

I agree with Justice Stevens that inhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind. This Court's holding in *Wilson* v. *Seiter*, 501 U. S. 294 (1991), to the effect that barbaric prison conditions may be beyond the reach of the Eighth Amendment if no prison official can be deemed individually culpable, in my view is insupportable in principle and is inconsistent with our precedents interpreting the Cruel and Unusual Punishments Clause. Whether the Constitution has been violated "should turn on the character of the punishment rather than the motivation of the individual who inflicted it." *Estelle* v. *Gamble*, 429 U. S. 97, 116 (1976) (STEVENS, J., dissenting). *Wilson* v. *Seiter* should be overruled.

Although I do not go along with the Court's reliance on *Wilson* in defining the "deliberate indifference" standard, I join the Court's opinion, because it creates no new obstacles for prison inmates to overcome, and it sends a clear message to prison officials that their affirmative duty under the Constitution to provide for the safety of inmates is not to be taken lightly. Under the Court's decision today, prison officials may be held liable for failure to remedy a risk so obvious and

substantial that the officials must have known about it, see *ante*, at 16, and prisoners need not "`await a tragic event [such as an] actua[l] assaul[t] before obtaining relief,'" *ante*, at 19.

Petitioner is a transsexual who is currently serving a 20–year sentence in an all-male federal prison for credit-card fraud. Although a biological male, petitioner has undergone treatment for silicone breast implants and unsuccessful surgery to have his testicles removed. Despite his overtly feminine characteristics, and his previous segregation at a different federal prison because of safety concerns, see *Farmer* v. *Carlson*, 685 F. Supp. 1335, 1342 (MD Pa. 1988), prison officials at the United States Penitentiary in Terre Haute, Indiana, housed him in the general population of that maximum-security prison. Less than two weeks later, petitioner was brutally beaten and raped by another inmate in petitioner's cell.

Homosexual rape or other violence among prison inmates serves absolutely no penological purpose. See *Rhodes* v. *Chapman*, 452 U. S. 337, 345–346 (1981), citing *Gregg* v. *Georgia*, 428 U. S. 155, 183 (1976) (joint opinion) (the Eighth Amendment prohibits all punishment, physical and mental, which is "totally without penological justification"). "Such brutality is the equivalent of torture, and is offensive to any modern standard of human dignity." *United States* v. *Bailey*, 444 U. S. 394, 423 (1980) (BLACKMUN, J., dissenting). The horrors experienced by many young inmates, particularly those who, like petitioner, are convicted of nonviolent offenses, border on the unimaginable. Prison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem, accompany the perpetual terror the victim thereafter

must endure. See Note, Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of *Wilson* v. *Seiter*, 44 Stan. L. Rev. 1541, 1545 (1992). Unable to fend for himself without the protection of prison officials, the victim finds himself at the mercy of larger, stronger, and ruthless inmates. Although formally sentenced to a term of incarceration, many inmates discover that their punishment, even for nonviolent offenses like credit-card fraud or tax evasion, degenerates into a reign of terror unmitigated by the protection supposedly afforded by prison officials.[1]

The fact that our prisons are badly overcrowded and understaffed may well explain many of the shortcomings of our penal systems. But our Constitution sets minimal standards governing the administration of punishment in this country, see *Rhodes*, 452 U. S., at 347, and thus it is no answer to the complaints of the brutalized inmate that the resources are unavailable to protect him from what,

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[1]Numerous court opinions document the pervasive violence among inmates in our state and federal prisons. See, *e.g.*, *United States* v. *Bailey*, 444 U. S. 394, 421 (1980) (BLACKMUN, J., dissenting); *McGill* v. *Duckworth*, 944 F. 2d 344, 348 (CA7 1991), cert. denied, ___ U. S. ___ (1992); *Redman* v. *County of San Diego*, 942 F. 2d 1435 (CA9 1991) (en banc), cert. denied, ___ U. S. ___ (1992); *Hassine* v. *Jeffes*, 846 F. 2d 169, 172 (CA3 1988); *Alberti* v. *Klevenhagen*, 790 F. 2d 1220, 1222 (CA5), clarified, 799 F. 2d 992 (CA5 1986); *Jones* v. *Diamond*, 636 F. 2d 1364, 1372 (CA5 1981), overruled on other grounds, 790 F. 2d 1174 (CA5 1986); *Withers* v. *Levine*, 615 F. 2d 158, 161 (CA4), cert. denied, 449 U. S. 849 (1980); *Little* v. *Walker*, 552 F. 2d 193, 194 (CA7 1977), cert. denied, 435 U. S. 932 (1978); *Holt* v. *Sarver*, 442 F. 2d 304, 308 (CA8 1971), later proceeding *sub. nom*., *Hutto* v. *Finney*, 437 U. S. 678 (1978).

in reality, is nothing less than torture. I stated in dissent in *United States* v. *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' (emphasis in original). Address by THE CHIEF JUSTICE, 25 Record of the Assn. of the Bar of the City of New York 14, 17 (Mar. 1970 Supp.)." 444 U. S., at 423.

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. The Court justified this remarkable conclusion by asserting that only pain that is intended by a state actor to be punishment is punishment. See *Wilson*, 501 U. S., at 300 ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify") (emphasis in original).

The Court's analysis is fundamentally misguided; indeed it defies common sense. "Punishment" does not necessarily imply a culpable state of mind on the part of an identifiable punisher. 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. See also Webster's New International Dictionary of the English Language 1736 (1923) (defining punishment as "[a]ny pain, suffering, or loss inflicted on *or suffered by* a person because of a crime or evil-doing") (emphasis supplied); cf. *Wilson*, 501 U. S., at 300, quoting *Duckworth* v. *Franzen*, 780 F. 2d 645, 652 (CA7 1985), cert. denied, 479 U. S. 816 (1986) ("`The infliction of punishment is a deliberate act intended to chastise or deter'").

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 is sentenced to a period of confinement at a relatively safe, well-managed prison, complete with tennis courts and cable television, while another is sentenced to a prison characterized by rampant violence and terror. Under such circumstances, it is natural to say that the latter individual was subjected to a more extreme punishment. It matters little that the sentencing judge did not specify to which prison the individuals would be sent; nor is it relevant that the prison officials did not intend either individual to suffer any attack. The conditions of confinement, whatever the reason for them, resulted in differing punishment for the two convicts.

Wilson's myopic focus on the intentions of *prison officials* is also mistaken. Where a legislature refuses to fund a prison adequately, the resulting barbaric conditions should not be immune from constitutional scrutiny simply because no prison official acted culpably. *Wilson* failed to recognize that "state-sanctioned punishment consists not so much of specific acts attributable to individual state officials, but more of a cumulative agglomeration of action (and inaction) on an institutional level." The Supreme Court—Leading Cases, 105 Harv. L. Rev. 177, 243 (1991). The responsibility for subminimal conditions

in any prison inevitably is diffuse, and often borne, at least in part, by the legislature. Yet, regardless of what state actor or institution caused the harm and with what intent, the experience of the inmate is the same. A punishment is simply no less cruel or unusual because its harm is unintended. 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. As Judge Noonan has observed:

> "The Framers were familiar from their wartime experience of British prisons with the kind of cruel punishment administered by a warden with the mentality of a Captain Bligh. *But they were also familiar with the cruelty that came from bureaucratic indifference to the conditions of confinement*. The Framers understood that cruel and unusual punishment can be administered by the failure of those in charge to give heed to the impact of their actions on those within their care." *Jordan* v. *Gardner*, 986 F. 2d 1521, 1544 (CA9 1993) (concurring opinion) (citations omitted) (emphasis supplied).

Before *Wilson*, it was assumed, if not established, that the conditions of confinement are themselves part of the punishment, even if not specifically "meted out" by a statute or judge. See *Wilson*, 501 U. S., 306–309 (White, J., concurring), citing *Hutto* v. *Finney*, 437 U. S. 678 (1978); *Rhodes* v. *Chapman*, 452 U. S. 337 (1981). We examined only the objective severity of the conditions of confinement in the pre-*Wilson* cases, not the subjective intent of government officials, as we found that "[a]n express intent to inflict unnecessary pain is not required. . . . *[H]arsh `conditions of confinement' may constitute cruel and unusual punishment* unless such conditions `are part of the penalty that criminal offenders pay for their offenses against society.'" *Whitley* v. *Albers*,

475 U. S. 312, 319 (1986), quoting *Rhodes*, 452 U. S., at 347 (emphasis added). This initial approach, which employed an objective standard to chart the boundaries of the Eighth Amendment, reflected the practical reality that "intent simply is not very meaningful when considering a challenge to an institution, such as a prison system," *Wilson*, 501 U. S., at 310 (White, J., concurring). It also, however, demonstrated a commitment to the principles underlying the Eighth Amendment. The Cruel and Unusual Punishments Clause was not adopted to protect prison officials with arguably benign intentions from lawsuits. The Eighth Amendment guarantees each prisoner that reasonable measures will be taken to ensure his safety. Where a prisoner can prove that no such reasonable steps were taken and, as a result, he experienced severe pain or suffering without any penological justification, the Eighth Amendment is violated regardless of whether there is an easily identifiable wrongdoer with poor intentions.

Though I believe *Wilson* v. *Seiter* should be overruled, and disagree with the Court's reliance upon that case in defining the "deliberate indifference" standard, I nonetheless join the Court's opinion. Petitioner never challenged this Court's holding in *Wilson* or sought reconsideration of the theory upon which that decision is based. More importantly, the Court's opinion does not extend *Wilson* beyond its ill-conceived boundaries or erect any new obstacles for prison inmates to overcome in seeking to remedy cruel and unusual conditions of confinement. The Court specifically recognizes that "[h]aving incarcerated people with demonstrated proclivities for criminally antisocial and, in many cases, violent conduct, [and] having stripped them of virtually every means of self-protection and

foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Ante*, at 6. The Court further acknowledges that prison rape is not constitutionally tolerable, see *ibid.* ("[b]eing violently assaulted in prison is simply not `part of the penalty that criminal offenders pay for their offenses against society'"), and it clearly states that prisoners can obtain relief before being victimized, see *ante*, at 19 ("a subjective approach to deliberate indifference does not require a prisoner seeking `a remedy for unsafe conditions [to] await a tragic event [such as an] actua[l] assaul[t] before obtaining relief'"). Finally, under the Court's holding, prison officials may be held liable for failure to remedy a risk of harm so obvious and substantial that the prison officials must have known about it, see *ante*, at 16. The opinion's clear message is that prison officials must fulfill their affirmative duty under the Constitution to prevent inmate assault, including prison rape, or otherwise face a serious risk of being held liable for damages, see *ante*, at 15–18, or being required by a court to rectify the hazardous conditions, see *ante*, at 19–21. As much as is possible within the constraints of *Wilson* v. *Seiter*, the Court seeks to ensure that the conditions in our Nation's prisons in fact comport with the "contemporary standard of decency" required by the Eighth Amendment. See *DeShaney* v. *Winnebago Cty. Dept. of Social Services*, 489 U. S. 189, 198–200 (1989). Short of overruling *Wilson* v. *Seiter*, the Court could do no better.