No: 18-9175

In The
Supreme Court of the United States

COREY MILLEDGE

Petitioner,

v.

GARY ENGLISH, ET. AL

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Eleventh Circuit affirmed summary judgment against an inmate on an Eighth Amendment failure to protect claim holding that, based on the particular facts of the case, a single/vague threat by another inmate, without any other evidence or indicators of risk, was insufficient to impute Respondents' subjective knowledge of a substantial risk of serious of harm.

The question presented is:

Whether *Farmer v. Brennan*, 511 U.S. 825 (1994), demands that a every threat of violence communicated to a prison official, regardless of its nature or surrounding circumstances, must automatically be deemed sufficient to infer that the official had subjective knowledge of a substantial risk of serious of harm.

PARTIES

Petitioner, Corey Milledge, is a *pro se* inmate of the Florida Department of Corrections and was the Plaintiff below.

Respondent, Gary English, is a former Assistant Warden of Operations at the Blackwater River Correctional Facility, Milton, Florida, and was a Defendant below.

Additional (non-appearing) Respondents, Warden Scott Middlebrooks, Chief of Security Jared Johnson, and Dormitory Control Officer Kerline Joseph, were unserved Defendants below and did not appear in the case.

TABLE OF CONTENTS

QUESTION PRESENTED I

PARTIES II

TABLE OF CONTENTS III

TABLE OF AUTHORITIES V

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

A. *INTRODUCTION.* 2

B. FACTUAL BACKGROUND. 3

C. *THE DISTRICT COURT.* 5

D. *THE COURT OF APPEALS.* 6

REASONS FOR DENYING THE PETITION 6

A. THE DECISION BELOW WAS CONSISTENT WITH THIS COURT'S PRECEDENT IN *FARMER V. BRENNAN* AND LIMITED TO THE SPECIFIC FACTS OF THE CASE. 6

B. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE EIGHTH CIRCUIT. 9

CONCLUSION 10

CERTIFICATE OF COMPLIANCE 10

CERTIFICATE OF SERVICE 10

INDEX TO SUPPLEMENTAL APPENDIX

H.	Judgment of the Court of Appeals, dated January 10, 2019	98
I.	Judgment of the District Court, dated March 26, 2018	99
J.	Order Dismissing Defendant Julie Jones dated November 18, 2016	100-107
K.	Petition for Rehearing to Court of Appeals (First)	108-132
L.	Petition for Rehearing to Court of Appeals (Second)	131-135
M.	Motion for Summary Judgment by Defendant/Respondent Gary English, with exhibits	36-223
N.	Response in Opposition to Summary Judgment by Plaintiff/Petitioner Corey Milledge, with exhibits	224-326
O.	Respondent's Objections to Magistrate Judge's Second Report and Recommendation by Respondent	327-41

TABLE OF AUTHORITIES

Cases

Brown v. Hughes,
894 F.2d 1533, 1537 (11th Cir. 1990), *cert. denied*, 496 U.S. 928 (1990) 7

Farmer v. Brennan,
511 U.S. 825 (1994) ..... i, 6, 7, 8

Jackson v. Everett,
140 F.3d 1149 (8th Cir. 1998) 10

Jones v. Wallace,
641 Fed. Appx. 665 (8th Cir. 2016) 10

McElligott v. Foley,
182 F.3d 1248 (11th Cir. 1999) 8

Prater v. Dahm,
89 F.3d 538 (8th Cir. 1996) 9, 10

Statutes

42 U.S.C. § 1983 2

Other Authorities

Eighth Amendment to the United States Constitution ..... i, 2, 4

OPINCases

Farmer v. Brennan,
511 U.S. 825 (1994) ..... i, 6, 7, 8

Jackson v. Everett,
140 F.3d 1149 (8th Cir. 1998) 9

Jones v. Wallace,
641 Fed. Appx. 665 (8th Cir. 2016) 9

Prater v. Dahm,
89 F.3d 538 (8th Cir. 1996) 8, 9

Statutes

42 U.S.C. § 1983 2

Other Authorities

Eighth Amendment to the United States Constitution ..... i, 2, 4, 6, 8

OPINIONS BELOW

The unpublished decision of the Court of Appeals is reported at 760 Fed. Appx. 741, and is also reproduced at pp.1-10 of the Appendix.

The unpublished decision of the District Court is reproduced at pp.15-22 of the Appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 2019, [Supp. Appx. H]. Petitioner filed untimely petitions for rehearing on February 7, 2019, and February 14, 2019,[1] which were summarily denied on March 27, 2019. [Appx. p. 13].[2]

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[1] [Supp. Appx. pp.108 and 131]. *See* 11th Cir. R. 40-3 ("A petition for rehearing must be filed within 21 days of entry of judgment"). The first petition for rehearing was placed in the mail on or after February 4, 2019. [Supp. Appx., pp.119, 130].

[2] The Order did not state the grounds for denial.

Petitioner's Petition for Writ of Certiorari to this Court was thereafter filed on May 2, 2019. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part that "cruel and unusual punishments [shall not be] inflicted."

42 U.S.C. § 1983 provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

A. *INTRODUCTION.*

Petitioner, a *pro se* inmate of the Florida Department of Corrections, sued Respondents for deliberate indifference to a serious risk of harm under 42 U.S.C. § 1983 and the Eighth Amendment. Petitioner alleged that he was attacked by his cellmate and cut across the cheek with a razorblade after complaining to Respondents that his cellmate had verbally threatened him.

Petitioner frames this case as one where the Court of Appeals departed from Supreme Court precedent by holding that the communication of a threat to official is never sufficient to impute the official's subjective knowledge of a serious risk of harm under the Eighth Amendment. In truth, because Petitioner sought to prove Respondents' subjective knowledge through circumstantial evidence, the Eleventh Circuit merely applied well settled law in looking to the totality of the circumstances

known to Respondents—including the vague nature of the threat and lack of any other evidence of a substantial risk. The court held that while a threat could *in some cases* constitute evidence that an official was subjectively aware of a serious risk of harm, the particular factual circumstances of Petitioner's case did not meet that threshold. [*See* Opinion, Appx. pp.8 ("We've held, in certain circumstances, that an inmate warning a prison official of another inmate's threat can constitute evidence that the official was subjectively aware of the substantial risk of serious harm . . . . [But we] cannot say that a single threat, on the circumstances of this case, is sufficient by itself to constitute a substantial risk of serious harm")].

B. FACTUAL BACKGROUND.

Petitioner alleged that he complained to Respondents that his cellmate had told him: "*You nasty ass roommate, I'm going to fuck you up soon 'cause I don't like that*." [Petition, p.4].[3] No other information was provided.

At the time, Petitioner and the cellmate had been housed together for nearly a month without incident of any kind. There had been no prior violence or evidence of a propensity for violence. There was no allegation or evidence that the two inmates were involved with rival gangs or had any issues related to race, debt, romance, or anything else that might render one an excessive/substantial danger to the other. There had been no prior threats of violence. Petitioner did not complain that his cellmate may have had a weapon (of any kind) or convey any other information which

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[3] Respondents deny that Petitioner communicated any such threat; nonetheless, Respondents accepted the allegation as true for the purposes of summary judgment.

may have served to elevate the risk to Petitioner to an unreasonable level beyond that which is everpresent in prison facilities. [Opinion, Appx. p.9; Supp. Appx. pp.163-165].

Several weeks later, a fight broke out between the inmates. The cellmate attacked Petitioner with a razorblade, cutting him across the cheek, and Petitioner attacked his cellmate, beating him with a "lock-in-a-sock." The inmates chased each other around the dorm and also struck each other with clenched fists and food trays. The dormitory control room officer observed the fight and immediately radioed for the facility's "Alpha Response Team" to be activated. The team arrived at the scene approximately three minutes later and restrained the inmates without incident. Each inmate blamed the other for starting the fight. [Supp. Appx., pp.140-144]. Petitioner filed suit alleging that the failure to protect him from his cellmate constituted deliberate indifference under the Eighth Amendment.

The evidence showed that Respondents' reliance upon existing procedures and personnel to protect against possible general hostility was reasonable. Disagreements between inmates are common and are the reason secure facilities like Blackwater are designed and operated as they are. [Opinion, Appx. pp.7-8].

More specifically, the evidence showed that the Blackwater facility employed various procedures and personnel designed and trained to address common threats to inmate safety, which had proven reasonably adequate. For example, although razors had been permitted within the facility since it began operations in October 2010, facility security procedures had proven reasonably effective at preventing their

use as weapons in inmate disputes. As of the date of the incident involving Petitioner, there had only been *two* prior instances of inmate-on-inmate violence at the facility involving razors. [Supp. Appx., pp.144-46]. Further, as demonstrated by the immediate observation of the fight and rapid deployment of the "Alpha Response Team" in this case, the evidence showed that the facility employed reasonably effective monitoring and response procedures. [Supp. Appx., p.164].

Petitioner produced no evidence of widespread or rampant violence at the Blackwater facility or any evidence that the facility's policies and/or personnel were known to be ineffective in addressing abuse or threats of abuse by inmates. [Opinion, Appx., p.19].

C. *THE DISTRICT COURT*.

Following the conclusion of discovery, the District Court granted summary judgment for Respondents. Finding no evidence of "widespread abuse at Blackwater facility" or that "Blackwater's policies and personnel were ineffective in handling abuse or threats of abuse by inmates," the court held that, as a supervisor not charged with the day-to-day supervision of inmates, Assistant Warden English "was entitled to rely on the policies and personnel in place at Blackwater to protect [Petitioner] from the undefined threat of harm posed by [his cellmate]." [Appx. pp.18-19].

The court dismissed the unserved supervisory defendants, Warden Middlebrooks, and Chief Johnson, because they would have been entitled to summary judgment for the same reason. The court similarly dismissed the claim against the unserved control room officer, Officer Joseph, because the evidence showed that she "acted promptly to summon and dispatch the response team." [Appx. pp.20-21].

D. *THE COURT OF APPEALS*.

The Eleventh Circuit affirmed the decision of the District Court, but narrowed its decision to a single issue. The court held that "[although] an inmate warning a prison official of another inmate's threat can constitute evidence that the official was subjectively aware of the substantial risk of serious harm," "[Petitioner] did not present any evidence beyond informing officials of only a single threat" which, given the totality of the circumstances known to Respondents, was "[not] sufficient by itself to constitute [knowledge of] a substantial risk of serious harm." [Appx. p.9].

REASONS FOR DENYING THE PETITION

A. THE DECISION BELOW WAS CONSISTENT WITH THIS COURT'S PRECEDENT IN *FARMER V. BRENNAN* AND LIMITED TO THE SPECIFIC FACTS OF THE CASE.

The answer to the question presented is "No." No bright-line rule exists requiring that every communicated threat, regardless of its nature or surrounding circumstances, must automatically be deemed sufficient to infer an official's knowledge of a substantial risk of serious harm. The Court of Appeals correctly looked to the totality of the circumstances—including the vague and generalized nature of the "threat" in combination with other surrounding circumstances—to hold that, on these particular facts, there was insufficient evidence to impute the required knowledge to Respondents.

Under this Court's precedent, a prison official violates the Eighth Amendment's prohibition against cruel and unusual punishment only if he or she

demonstrates deliberate indifference to "a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

To be deliberately indifferent, the official must have been subjectively aware of the substantial risk in order to have had a "sufficiently culpable state of mind." *Farmer* at 834. "[T]he 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." *Farmer* at 837 (noting that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.")).[4]

"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." *Farmer* at 842. "For example, [courts] can infer that prison officials knew that the inmate faced a substantial risk based on "the very fact that the risk was obvious." *Id*. The official's subjective awareness can be proven "by reliance on any relevant evidence." *Farmer* at 848.

The Eleventh Circuit thus looks to the "totality of circumstances" when determining whether "there is sufficient evidence to support a jury finding that [an

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[4] The Eleventh Circuit has long held that "[t]he known risk of injury must be a strong likelihood, rather than a mere possibility before a guard's failure to act can constitute deliberate indifference." *Brown v. Hughes*, 894 F.2d 1533, 1537 (11th Cir. 1990), *cert. denied*, 496 U.S. 928 (1990).

official] had the requisite subjective knowledge." *McElligott v. Foley*, 182 F.3d 1248, 1256 (11th Cir. 1999).

Petitioner argues that because he communicated some kind of "threat," this alone required the court to infer Respondents' knowledge of a "substantial risk of serious harm," regardless of the nature of the threat or the surrounding circumstances. But nothing within *Farmer* or any other precedent of this Court requires such an outcome. Indeed, if accepted, Petitioner's argument would eliminate the subjective standard for knowledge set by this Court in *Farmer*.

The Court of Appeals applied the correct analysis by looking to the totality of the circumstances when Petitioner sought to prove Respondents' subjective knowledge through circumstantial evidence. The court expressly acknowledged that while threats could *in some cases* serve to impute the required knowledge to the official, the circumstances in this particular case did not meet that threshold. [*See* Opinion, Appx. pp.8 ("We've held, in certain circumstances, that an inmate warning a prison official of another inmate's threat can constitute evidence that the official was subjectively aware of the substantial risk of serious harm . . . . [But we] cannot say that a single threat, on the circumstances of this case, is sufficient by itself to constitute a substantial risk of serious harm")].

The totality of the evidence in this case included: (1) that prison was not known to be prone to excessive amounts of inmate violence; (2) Petitioner and his cellmate had been housed together for nearly a month without incident of any kind; (3) Petitioner communicated only a single, vague, and generalized threat of harm; (4)

Petitioner did not communicate that his cellmate might have a weapon; and (5) there were no other circumstances which served to elevate the risk to Petitioner to an unreasonable level beyond that which is everpresent in prison facilities, such as evidence of any prior violence between the inmates, or evidence that the inmates were involved with rival gangs or had any issues related to race, debt, romance, or anything else that might render one a substantial danger to the other.

On the totality of these facts, the Court of Appeals correctly concluded that Petitioner had simply proffered insufficient evidence to support a jury finding that Respondents had the requisite subjective knowledge. The court did not create a bright-line rule holding threats can *never* be sufficient; only that the particular threat in this case, on these facts, was not. The court's application of well settled law to the facts of Petitioner's case requires no intervention by this Court.

B. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE EIGHTH CIRCUIT.

Petitioner alleges that "if [he] had brought his case in the Eighth Circuit, the Court of Appeals would have allowed [his] failure to protect claims [to] proceed to trial." [Petition, pp. 9-10, 17].

Petitioner is simply incorrect. Like the Opinion below, the Eighth Circuit has specifically held that mere knowledge of a threat between inmates is not, in every case, sufficient to impute knowledge of a substantial risk of harm:

> Prater has alleged no facts from which an inference could be made that the prison officials actually knew of the risk to Prater. Although Prater's pleadings allege that he was threatened by Penn, threats between inmates are common and do not, under all circumstances, serve to impute actual knowledge of a substantial

> risk of harm. In all other respects, the pleadings reflect the absence of a reason for alarm on the part of the officials.

Prater v. Dahm, 89 F.3d 538, 541 (8th Cir. 1996). *See also Jones v. Wallace*, 641 Fed. Appx. 665, 666 (8th Cir. 2016) (same); *Jackson v. Everett*, 140 F.3d 1149, 1152 (8th Cir. 1998) (same).

This is precisely the analysis applied by the Eleventh Circuit here.

CONCLUSION

The petition for writ of certiorari should be denied.

CERTIFICATE OF COMPLIANCE

This Brief in Opposition is prepared under Rule 33.2 as Petitioner is proceeding in forma pauperis. *See* Rule 15.3. This Brief is less than 40 pages.

CERTIFICATE OF SERVICE

I hereby certify that this document is being filed electronically and service shall be through the Court's transmission facilities on all persons appearing before this Court; original and ten hard copies have been furnished via Federal Express to the Court; and a copy has been furnished via U.S. mail this 4th day of June 2019 to:

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