No._____

In The
Supreme Court Of The United States

RONALD COX,
Petitioner,

vs.

DEPUTY WARDEN BENJIE NOBLES,
OFFICER CRUMP,
WARDEN PERRY,
SERGEANT DAVIS,
WARDEN TED PHILBIN,
UNIT MANAGER HARRIS,
Respondents,

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should the requirements of the Prison Rape Elimination Act, 34 U.S.C. §§ 30301 et seq. and PREA regulations be followed to protect the vulnerability of the transgender Petitioner in determining whether to dismiss Petitioner's cause of action for being sexually and physically assaulted at three Georgia prisons because of the Respondents' deliberate indifference in violation of the Petitioner's Eighth Amendment rights?

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The Decision of the United States Court of Appeals for the Eleventh Circuit, October 18, 2021, affirming the District Court's dismissal of the Petitioner's Amended Complaint in *Cox v. Nobles, et al,* Appeal No. 20-11425 is set forth in Appendix A-1. The Order of the United Stated District Court for the Southern District of Georgia, March 31, 2020, dismissing the Amended Complaint in *Cox v. Nobles, et al.,* Civil Action No. 1:19-cv-031 is set forth in Appendix A-2.

JURISDICTION

The final judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on October 18, 2021. The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a writ of certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY AND REGIULATIONS

AMENDMENT XIV. SECTION I. …nor shall any State deprive any person, of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws; nor deny to any person within its jurisdiction equal protection of the laws.

42 U.S.C. § 1983. *Civil action for deprivation of rights*.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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.

Prison Rape Elimination Act, 34 U.S.C. §§ 30301, et seq.

34 U.S.C. § 30301 (13) FINDINGS:

(13) The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In *Farmer v. Brennan*, 511 U.S. 825 (1994) the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Eighth Amendment rights of State and local prisoners are protected through the Due Process Clause of the Fourteenth Amendment. Pursuant to the power of Congress under Section Five of the Fourteenth Amendment, Congress may take action to enforce those rights in States where officials have demonstrated such indifference. States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference. Therefore, such States are not entitled to the same level of Federal benefits as other States.

34.U.S.C. § 30302 PURPOSES

The purposes of this Act [34U.S.C. §§ 30301, et seq] are to—
(1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States;
(2) make the prevention of prison rape a top priority in each prison system;

(3) develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape;
(4) increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities;
(5) standardize the definitions used for collecting data on the incidence of prison rape;
(6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;
(7) protect the Eighth Amendment rights of Federal, State, and local prisoners;
(8) increase the efficiency and effectiveness of Federal expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness; and
(9) reduce the costs that prison rape imposes on interstate commerce.

Regulations under the *Prison Rape Elimination Act*, 34 U.S.C. § § 30301, et seq:

28 C.F.R. § 115.42

(a) The agency shall use information from the risk screening required by § 115.41 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.

(b) The agency shall make individualized determinations about how to ensure the safety of each inmate.

(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.

(d) Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.

(e) A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.

(f) Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.

(g) The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.

28 C.F.R. § 115.62

When an agency learns that an inmate is subject to a substantial risk of imminent sexual abuse, it shall take immediate action to protect the inmate.

28 C.F.R. § 115.86

(a) The facility shall conduct a sexual abuse incident review at the conclusion of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.

(b) Such review shall ordinarily occur within 30 days of the conclusion of the investigation.

(c) The review team shall include upper-level management officials, with input from line supervisors, investigators, and medical or mental health practitioners.

(d) The review team shall:

(1) Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;

(2) Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility;

(3) Examine the area in the facility where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;

(4) Assess the adequacy of staffing levels in that area during different shifts;

(5) Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff; and

(6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1) through (d)(5) of this section, and any recommendations for improvement and submit such report to the facility head and PREA compliance manager.

(e) The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so.

STATEMENT OF THE CASE

On March 4, 2019, Petitioner Ronald Cox's Counsel filed a Complaint against all Defendant's (Docket #1) in *Cox v. Nobles et al*, 1:19-CV-00031. Petitioner then filed an Amendment to the Complaint on August 8, 2019 (Docket #16). On August 12, 2019, Respondents filed a Motion to Dismiss the Petitioner's Amended Complaint (Docket #17), alleging that the Amended Complaint fails to state a plausible claim and as such the Respondents were entitled to qualified immunity. On March 31, 2020, the United States District Court for the Southern District of Georgia Augusta Division entered a judgment dismissing the Petitioner's Amended Complaint and granting Respondent's Motion to Dismiss (Docket #26, Appendix 2). The Eleventh Circuit declined to rule on the issue of whether the Respondents were entitled to qualified immunity, but held that because the Petitioner could not state the contents of the PREA complaints that the Petitioner did not demonstrate the subjective awareness of the prison officials. Petitioner could not demonstrate the content of the PREA complaints and grievances because the District Court granted Respondents' motion to stay discovery. (Docket #24). Petitioner's Counsel filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on April 13, 2020 (Docket #28). The Eleventh Circuit affirmed the District Court's dismissal on October 18, 2021. (Appendix 1).

STATEMENT OF FACTS

In deciding a Motion to Dismiss the facts are taken as true as stated in Petitioner's Amended Complaint as follows: (Docket # 16).

While an inmate at Autry State Prison, Central State Prison, and Augusta State Medical Prison, Petitioner was receiving transgender injections of estrogen which caused her[1] to exhibit female breasts and hips, as well as other female features. (Docket #16, para. 10). Even though Petitioner requested protection in accordance with the Prison Rape Elimination Act ("PREA"), 34 U.S.C. §30301, from the Warden of every prison in which she was incarcerated, she was continually subject to physical and sexual attacks by other inmates to which the Respondents were deliberately indifferent in failing to protect her from attacks by other inmates and to transfer her to PREA segregated dormitory. (Docket # 16, par. 10).

On April 27, 2017, at Autry State Prison, Petitioner filed a PREA complaint which was reviewed Deputy Warden Benjie Nobles who had Petitioner moved into a cell with Rashad Stanford who sexually assaulted and threatened her with a weapon. (Docket #16, para. 11). Petitioner reported the sexual assault to Officer Crump who took no action to remove Petitioner from the cell. Petitioner also reported to Officer Crump after the assault that Rashad Stanford had a shank. Officer Crump did nothing to

[1] Petitioner was at all times housed in general population, all male facilities and was born as a male, but this Petition will refer to Petitioner with she/her pronouns.

remove the shank or to remove Petitioner from his cell with inmate Stanford. (Docket #16, para. 12).

After the assault and threat by Stanford, Petitioner immediately filed a PREA with Unit Manager Hodge. An investigation by PREA was done by Warden Benjie Nobles who made no action to remove Petitioner into a PREA dorm. When Petitioner asked to be put in a PREA dorm, Warden Benjie Nobles replied that there were no PREA dorms there and no need for them because the prison was safe as is. No action was made to remove Petitioner or Rashad from the cell or dorm with one another. (Docket #16, para. 13).

Petitioner was sent to the hospital for medical attention following the assault. Upon returning to the prison, Petitioner was transferred out of the cell with Rashad and placed on lockdown for thirty days until she was transferred to Central State Prison. (Docket #16, para. 14).

When Petitioner was transferred to Central State Prison, she was not placed in a safe environment provided by PREA which she requested from Warden Perry and filed grievances about not being protected in accordance with PREA. On August 9, 2017, Petitioner was attacked from behind by Benjamin Israel while watching television at Central State Prison. Petitioner was hit so hard that she fell to the ground. Her attacker proceeded to kick her in the abdomen and punch her continuously. No officer broke up the fight. The prison was short staffed and there was only one officer watching four pods. (Docket #16, para. 15).

When Petitioner was transferred to Augusta State Medical Prison, she was not placed in a safe environment provided by PREA which he requested from Warden Philbin and filed grievances about not being protected in accordance with PREA. Petitioner remained at Augusta State Medical Prison from December 2017 through July 2018. (Docket # 16, para. 16).

On April 13, 2018, officials at Augusta State Medical Prison became aware of a fight that occurred between Petitioner and Terry Frasier. The altercation began when Frasier saw Cox come in the shower where Frasier was masturbating which Frasier thought Petitioner was watching. Frasier then threatened to "wet" Petitioner. That same day, Frasier pulled out a shank on Petitioner and Petitioner fought back with a lock in a sock. (Docket #16, para. 17).

No action was taken by Sargent Young after being made aware of the fight. Petitioner was told nothing could be done until a PREA coordinator arrived which never happened. No further action was taken to remove Petitioner or Terry Frasier. (Docket # 16, para. 18).

Petitioner filed a PREA regarding the fight with Terry Frasier. The PREA was filed with Counselor Taylor who reported it to Sargent Harris. It was thirty days (May 17, 2018) before as investigation took place. (Docket #16, para. 19).

The morning of the following Monday, May 21, 2018, at Augusta State Medical Prison, Petitioner returned to Sargent Harris to ask why Frasier had

not been moved from the cell to which Sargent Harris replied that Petitioner should be moved. Although Petitioner was removed from the cell, Frasier remained in the dorm with Petitioner. (Docket # 16, para. 20).

On May 21, 2018, Petitioner was critically stabbed by Terry Frasier and hospitalized for six days for his injuries. Upon being released from the hospital Plaintiff was placed on lockdown in a PREA dorm. (Docket #16, para. 21).

REASONS FOR GRANTING THE PETITION

The lower court should have considered Petitioner's transgender status, as required under the Prison Rape Elimination Act, 34 U.S.C. §§ 30301 et seq., and PREA Regulations in determining whether to dismiss Petitioner's cause of action for being sexually and physically assaulted at three different Georgia prisons because of Respondents' deliberate indifference in violation of Petitioner's Eighth Amendment rights.

The Decision of the Eleventh Circuit is in conflict with long established precedent of the Supreme Court of the United States in the virtually identical case of *Farmer v. Brenan*, 511 U.S. 825 (1994) in that in both cases the plaintiffs were transgender inmates who were repeated sexually and physical assaulted to which prison officials were deliberately indifferent.

The decision of the United States Court of Appeals for the Eleventh Circuit in the instant case is arguably in conflict with the decision of the United States Court of Appeals for the Second Circuit, *Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999), which

vacated a district court's grant of qualified immunity as to the plaintiff's Eighth Amendment claim because disclosure of the inmate's status as HIV positive and transgender "could constitute deliberate indifference to a substantial risk that such inmate would suffer serious harm at the hands of other inmates." *See id.* at 115 ("[I]t was as obvious in 1991 as it is now that under certain circumstances the disclosure of an inmate's HIV-positive status—and perhaps more so—her transsexualism could place that inmate in harm's way.").

THE RESPONDENTS KNEW OF AND WERE DELIBERATELY INDIFFERENT TO PETITIONER'S TRANSGENDER VULNERABILITY, THUS VIOLATING PETITIONER'S EIGHTH AMENDMENT RIGHTS

The Eleventh Circuit Decision acknowledges that the Respondents would have had knowledge of grievances and PREA complaints filed by the Petitioner, but then contends that the Wardens did not have knowledge of the Petitioner's continuing attacks by their inmates. The Eleventh Circuit Decision then contends that the PREA does not provide for an independent cause of action, which entirely misses the point that the PREA complaints and grievances did put the Wardens on notice that the Petitioner had transgender female characteristics and was continually being attacked by other inmates in each prison. In other words, the PREA complaints, even though they did not form the basis of an independent cause of action, did put the Wardens on notice of the transgender vulnerability of the Petitioner to physical attacks by other inmates and were deliberately indifferent to his security, including taking no action to protect him and transfer him to a

PREA dorm. The cause of action is pursuant to 42 U.S.C. § 1983 because Respondents' deliberate indifference violated the Eighth Amendment of the United States Constitution by subjecting the Petitioner to cruel and unusual punishment.

Petitioner's situation corresponds directly with the transgender inmate in the precedent case of *Farmer v. Brenan*, 511 U.S. 825 (1994) in which the Supreme Court ruled that:

> Deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Eight Amendment rights of State and Local Prisoners are protected through the Due Process Clause of the Fourteenth Amendment. Pursuant to the power of Congress under §5 of the Fourteenth Amendment, Congress may take action to enforce those rights in the States where officials have demonstrated such indifference. (PREA § 2(13)).

Farmer instructed that, "it does not matter whether a prisoner faces an excessive risk attack personal to him or because all prisoners face such risk." *Farmer* further states:

> If for example, prison officials were aware that inmate rape was so common and uncontrolled that some potential victims dared not sleep but instead . . . Would leave their beds and spend the night clinging to the bars nearest the guards' station, it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom. *Farmer,* 511 U.S. at 843.

Following *Farmer v Brenan* the United States Court of Appeals for the Eleventh Circuit stated in *Bugge v. Roberts*, 430 Fed. Appx. 753, 761 (11th Cir. 2011),

> [a] prison official cannot avoid liability under the Eighth Amendment "by showing that . . . he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." [*Farmer*, 511 U.S.] at 843, 114 S.Ct. 1970. This is because "[t]he question under the Eight Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial risk of serious damage to his future health." *Id.* (quoting *Helling v. McKinney*, 509 U.S. 25, 35, (1993)); *Rodriguez v. Sec'y for Dep't of Corr.*, 1508 F.3d 6112 (11th Cir. 2007).

PREA cites *Farmer v. Brenan* as an example of deliberate indifference to the substantial risk of sexual attack by other prisoners as violative of the Eighth Amendment and that the State's failure to follow the requirements of PREA demonstrates deliberate indifference as PREA provides in § 2(13) in 34 U.S.C. §§ 30103, et seq. The regulations under PREA require screening of risk of victimization specifically for transgender inmates in 28 CFR § 115.41 and require assignment of transgender inmates and placement as well as taking steps to protect inmates at high risk of being sexually abused including transgender inmates. 28 CFR § 115.42(a) provides, "that the agency shall use information from the risk screening required by §115.41 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive." 28 CFR § 115.42(b) states, "the agency shall make individual determinations about how to ensure the safety of each inmate." 28 CFR § 115.42(c) states, "in deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and

in making other housing and programming assignment, the agency shall consider on a case-by-case basis whether a placement would ensure the inmates health and safety, and whether the placement would present management or security problems."

The United States Department of Justice Final Rule regarding prison and jail standards under PREA requires that the prisons shall protect inmates against sexual abuse through a variety of forms, including adequate levels of staffing and video monitoring. 28 C.F.R. § 115.13. Further, "[w]hen an agency learns that an inmate is subject to a substantial risk of imminent sexual abuse, it shall take immediate action to protect the inmate." 28 C.F.R. §115.62. In protecting transgender inmates, "the inmate's own views with respect to his or her own safety shall be given serious consideration." *Id.* at §115.42(e). The Georgia Department of Corrections Standard Operating Procedure for PREA, Policy number 208.06, adopts a zero tolerance for sexual abuse of inmates at risk to sexual attack and specifically adopts the standards of PREA found at 28 CFR § 115 et seq.

The Amended Complaint was filed to make it clear that all wardens were notified of the transgender status of Petitioner, and the PREA also requires that the wardens take affirmative steps to classify such transgender individuals who are at risk of sexual attack such as Petitioner and takes steps to protect them from attacks by other inmates and to transfer them to PREA segregated facilities or dormitories. (Amended Complaint, Docket # 16,

para. 22). Petitioner filed multiple grievances and PREA complaints detailing her fears and Respondents made no move to protect her even though they were notified of the danger posed to him, and his own safety fears, in violation of the United States Department of Justices Final Rule Prisons and Jail Standards, § 115.62 and § 115.42.

Respondents took no steps to protect the transgender Petitioner and were deliberately indifferent to the Petitioner's sexual status, and failed to undergo any efforts to house her in a protected and segregated environment. The case of *Diamond v. Owens*, 131 F. Supp. 3rd 1346 (M.D. GA 2015), presented a similar situation in which the plaintiff was transgender and was denied medical treatment as well as alleged multiple failure to protect claims. Judge Treadwell's opinion is specifically instructive on the frequency of sexual assaults against a transgender to show subjective awareness and who was not separated but put in a general population close security prison and where no action was taken to reduce the substantial risk of sexual assaults Judge Treadwell's opinion, citing *Farmer* and *Bugge* states that:

> Diamond's allegations paint a picture dramatically different than the typical failure-to-protect claim asserted by inmates. The usual failure to protect claim involves a single assault. Thus, the inmate must allege facts tending to establish the requisite subjective awareness before that single assault occurred. As the cases cited by the Defendants illustrate, this can be a difficult task. But here Diamond alleges a series of assaults. While she does not concede that Lewis and McCracken did not have subjective awareness of the risk of harm before the first assault that occurred on their respective watches, she alleges that after they received notice of that assault, and then

> the next, and the next, and so on, they clearly had subjective awareness of the risk of harm she faced as a transgender inmate housed with violent offenders. Repeatedly, she alleges, they continued to receive notice of her sexual assaults. Clearly, at this stage of the litigation, these facts are sufficient to establish that Lewis and McCracken were subjectively aware of the risk of harm Diamond faced. See *Farmer*, 511 U.S. at 842-43, 14 S. Ct. 1970; *Bugge v. Roberts*, 430 Fed. Appx. 753, 761 (11th Cir. 2011) ("[T]he pervasive and widespread nature of the conditions… suggest [the defendant] 'had been exposed to information concerning the risk and thus must have known about it.' "quoting *Farmer*, 511 U.S. at 842-43, 114 S.Ct. 1970)). In sum, these allegations are not threadbare recitations of the subjective awareness element. Rather, Diamond alleges the Full gamut of facts *Farmer* contemplated to show subjective awareness. Yet, despite being aware of risk of sexual assault and despite having the authority and obligation to take reasonable safety measures after ach incident, Lewis and McCracken, according to Diamond, failed to take any action. As a result, the substantial risk of harm remained unabated, and Diamond suffered further sexual assaults. Clearly Diamond has sufficiently alleged a plausible failure-to-protect claim against Lewis and McCracken. *Id*.

a. Plaintiff experienced a sufficiently substantial risk of serious harm

An alleged deprivation of rights under the Eighth Amendment must be "sufficiently serious" under an objective standard. *Id*. The deprivation is sufficiently serious when the inmate is subject to "conditions posing a substantial risk of serious harm." *Id.*

Here, Petitioner was incarcerated under conditions which placed her under a substantial risk of serious harm. Her transgender status alone placed her at substantial risk of attack from other inmates. PREA and GDOC policies and guidelines make it clear that transgender inmates are highly vulnerable to sexual assault. She recognized this danger and raised

her concerns via PREA complaints and grievances. She was placed in a cell with another inmate at Autry State Prison, Rashad Stanford, although she had requested a segregated dorm for protection based on the risk of harm which she foresaw. Subsequently, she did in fact experience this harm, as her cellmate sexual assaulted her and threatened her with a weapon. (Docket # 16, para. 12 & 13).

A few months later at Central State Prison, and again after requesting protection, she was attacked from behind by another prisoner who knocked her to the ground, kicking and punching her in the abdomen continuously. Her injuries were serious enough that she had to be sent to the hospital for treatment. (Docket # 16, para. 14 & 15).

After being transferred to Augusta State Medical Prison, she was attacked a third time by her new cellmate, Terry Frasier. Petitioner filed another PREA complaint regarding this fight, which only resulted in her being moved from the cell but she remained in the same dorm with her assailant. Later the same day that she was moved, Petitioner was critically stabbed by Frasier and hospitalized for six days. (Docket # 16 para 17 & 18).

Given all of these attacks, Petitioner was not only at risk of substantial harm as a transgender inmate, but she actually experienced serious harm of multiple sexual and physical attacks.

b. Defendants were deliberately indifferent to Plaintiff's safety

Deliberate indifference is established when prison officials have subjective awareness of the substantial risk of harm and do not respond reasonably to the risk, causing the injury. *Diamond v. Owens*, 131 F. Supp. 3d 1346, 1376 (M.D. Ga. 2015). This standard is the equivalent of reckless disregard of the risk of harm that the official is aware of. *Brennan*, 511 U.S. at 836. This Court was clear that an obvious risk can create a presumption of awareness. *Id.* at 842 (stating "[w]hether 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"). This Court further provided examples of how a prison official might become aware of a risk:

> If an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.…Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health," and it does not matter whether the risk comes from a single source or

> multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.*Id.* at 843–44 (internal citation omitted).

To analyze a prison official's subjective awareness, courts have considered the obviousness of the risk to inmate safety, the defendant's knowledge about the vulnerability of certain types of inmates to risk of harm, prison policies pertaining to such inmates, and their housing placements. *Diamond*, 131 F. Supp. 3d at 1377. Plaintiffs often point to guidelines and regulations to support the inference that risks to transgender inmates are obvious and well-documented and therefore known to defendants. *Id.* Additionally, in the Diamond case, the plaintiff alleged a series of assaults, and the court pointed out even if it were true that the prison officials were not subjectively aware of the risk of harm to her before the first assault, they did receive notice of the assaults on her and clearly had to become aware of the danger. *Id.* at 1378.

Petitioner's transgender status, of which Respondents were aware, heightened her vulnerability to attacks by other inmates. PREA and GDOC policies are clear that transgender inmates are highly susceptible to sexual assault. This alone could have raised safety concerns which the Respondents should have addressed, but they additionally were notified by Petitioner through the PREA complaints and grievances that she filed stating that she was in need of protection. If that were not enough, once Petitioner was in fact assaulted at Autry State Prison, the danger was clear and she should have been protected from later attacks by those

in charge of her safety, as the court pointed out in the *Diamond* case. Instead, the Respondents were deliberately indifferent to the safety concerns of the vulnerable Petitioner and failed to take sufficient actions to protect her. This lack of protection allowed her subsequent attacks at Central State Prison and at Augusta State Medical Prison, despite numerous warnings, PREA complaints and grievances. At Augusta State Medical Prison she had to continue to share a cell with her attacker, Terry Frasier, while waiting for an investigation of her PREA complaint regarding the attack. Once she was finally moved out of the cell with Frasier, she was still placed in the same dorm as him. This proximity allowed Frasier to later stab Petitioner, resulting in a six days of hospitalization for her injuries. Only then was she placed on lockdown in a PREA dorm. The Respondents at all times had knowledge of Petitioner's vulnerability as a transgender inmate, and the risk was obvious based on both GDOC and PREA guidelines as well as by the complaints raised by Petitioner and the attacks that she suffered.

The Eleventh Circuit rooted their decision by declining to find that "a violation of the PREA violates the Eighth Amendment *per se*." (Eleventh Circuit Decision p. 20). However, Petitioner is not advocating for a finding that a PREA complaint automatically satisfies an Eighth Amendment violation. Instead, Petitioner is arguing that knowledge of transgender status establishes the subjective knowledge prong of a substantial risk of harm.

Furthermore, the Eleventh Circuit decision takes the position that the PREA does not provide an independent cause of action, but this holding misses the point. PREA requires that prison officials evaluate and protect

transgender inmates who are exceptionally vulnerable to physical and sexual attack. *See, e.g.*, 28 C.F.R. § 115.42 (stating that housing placements for transgender individuals must made on a case-by-case basis with "serious consideration" for the "[i]nmates' views of their own safety" and should be "reassessed at least twice a year to review of any threats to safety experienced by the inmate"); 28 C.F.R. § 115.86 (stating that sexual abuse incident reviews shall consider "whether the incident or allegation was motivated by" transgender status). Further, the PREA complaints and grievances filed by the Petitioner would have placed the Respondents on notice of the need to protect the Petitioner from repeated rapes and physical oattacks in violation of his civil rights, actionable under § 1983.

The Eleventh Circuit decision stated that a basis of the Court's decision was that the Petitioner did not state the contents of the PREA complaints which ignores the Order of the District Court staying discovery immediately with the filing of the Respondents' Motion to Dismiss that prevented the Petitioner's counsel for obtaining access to the PREA complaints. (Docket #24). This put the Petitioner is a Hobson's Choice that is an illusory choice that is no choice at all. Hobson was a livery stable owner whose choice of customers wanting to pick out a horse whose reply was, "you can choose any horse s long as it is the next in line."

The Eleventh Circuit decision did not follow its own precedent. "The law in this circuit is clear: the party opposing a motion for summary

judgment should be permitted an adequate opportunity to complete discovery prior to consideration of the motion." *Jones v. City of Columbus*, 120 F.3d 248, 253 (11th Cir. 1997) "Plaintiff has offered what may well be the most recognized reason *why* a party should be given the shelter of Rule 56 (d) from a pre-discovery motion for summary judgment: '[T]he key evidence lies in the control of the moving party. *Estate of Todashev v. United States,* 815 Fed. Appx. 446, 453 (11th Cir. 2020) (quoting McCray v. Md. Department of Transportation, 741 F. 3d 480, 484 (4th Cir, 2014), The reasoning is even more applicable to a motion to dismiss as ion the instant case.

THE RESPONDENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

The District Court's dismissal Order found that Respondents are entitled to qualified immunity because the law is not established. (Appendix 2). This ignores that the existing law requiring heightened protection of the Petitioner as a transgender inmate was established *Farmer v. Brennen*, supra.

The Decision of the Eleventh Circuit erroneously followed the District Court determination that Respondents are entitled to qualified immunity because they were "engaged in a job-related function when generally working as officers and wardens at the prison" (Docket #26, pg. 11) and the Petitioner did not show that Respondents violated her constitutional rights. This is erroreous because Respondents did know of the transgender condition of the

vulnerable Petitioner and did not take any action to protect her. Respondents are not entitled to qualified immunity because the Respondents knew of the general substantial risk to the Petitioner, even having been explicitly told of Petitioner's own fears, and failed to keep Petitioner safe in the prison. *Rodriguez*, 1508 F.3d at 6112 (11th Cir. 2007).

This Court's case of *Hope v. Pelzer*, 536 U.S. 730 (2002), establishes that the individual Respondents can be liable for damages under 42 U.S.C. §1983 when under color of law they "violate clearly established statutory or constitutional rights of which a reasonable person would have known," and that "for a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Id.* at 739.

The Order of the District Court applies the law in the Eleventh Circuit before *Hope*, in which this Court reversed the Eleventh Circuit's prior precedent requiring a "materially similar" case. *Id.* at 746. The opinion of Mr. Justice Stevens disposed of this argument as "rigid gloss on the qualified immunity standard… is not consistent with our cases." *Id.* at 739. The opinion pointed out that the standard only required that prior law give officials a general "'fair warning' that his conduct deprived his victim of a

constitutional right, and that the standard for determining the adequacy of that warning was the same as the standard for determining whether a constitutional right was 'clearly established' in civil litigation under §1983." *Id.* at 740. Certainly, Respondents were on notice of the prior existing law requiring heightened protection of the Petitioner as a transgender inmate as established in *Farmer v. Brenan*, *supra.*

CONCLUSION

For the above reasons, the Petitioner prays that this Petition for Writ of Certiorari be granted. It is also suggested that summary reversal may be appropriate based on *Farmer v. Brennan*, supra.

Respectfully submitted,

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