

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DEE FARMER, Petitioner v. EDWARD BRENNAN,
WARDEN, ET AL.

CASE NO: No. 92-7247

PLACE: Washington, D.C.

DATE: Wednesday, January 12, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DEE FARMER, :

4 Petitioner :

5 v. : No. 92-7247

6 EDWARD BRENNAN, WARDEN, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, January 12, 1994

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:03 a.m.

13 APPEARANCES:

14 ELIZABETH ALEXANDER, ESQ., Washington, D.C.; on behalf
15 of the Petitioner.

16 PAUL BENDER, ESQ., Deputy Solicitor General, Department of
17 Justice, Washington. D.C; on behalf of the
18 Respondents.

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1 PROCEEDINGS

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 92-7247. The spectators are admonished not to
5 talk until you get outside the courtroom. The Court
6 remains in session. We're going to hear argument next in
7 92-7247, Dee Farmer v. Edward Brennan.

8 Ms. Alexander.

9 ORAL ARGUMENT OF ELIZABETH ALEXANDER

10 ON BEHALF OF THE PETITIONER

11 MS. ALEXANDER: Mr. Chief Justice, and may it
12 please the Court:

13 The petitioner in this case is a transsexual.
14 She is a young, nonviolent prisoner of feminine appearance
15 and demeanor. Prior to her incarceration, she had
16 undergone silicone breast injections and unsuccessful
17 surgery to remove her testicles. She alleges that she was
18 raped approximately 10 days after her placement in general
19 population at the Terre Haute Penitentiary.

20 Rape is one of the most painful and humiliating
21 things that --

22 QUESTION: Would you -- would you preface your
23 remarks by telling us where the petitioner is now located
24 and under what circumstances, and also telling us
25 precisely what relief it is that you are presently

1 seeking?

2 MS. ALEXANDER: Yes, Your Honor. The petitioner
3 is currently confined at FCI Florence in Florence,
4 Colorado. This is a medium security facility. She is in
5 general population at that medium security facility.

6 QUESTION: And what relief is it precisely that
7 is being sought here?

8 MS. ALEXANDER: She is seeking two things. She
9 is seeking damages from the respondents. She is also
10 seeking --

11 QUESTION: From the individual respondents?

12 MS. ALEXANDER: Yes, Your Honor. She --

13 QUESTION: None of whom were involved in her
14 placement at Terre Haute?

15 MS. ALEXANDER: Your Honor, we would argue that
16 they -- that their actions did cause that placement, and I
17 will -- I will get to that.

18 QUESTION: All right.

19 MS. ALEXANDER: She is also seeking an
20 injunction to prevent her return to a penitentiary. That
21 is the injunctive relief that is sought in this case.

22 QUESTION: An injunction to prevent her from
23 being moved to a different facility?

24 MS. ALEXANDER: Not to a different facility,
25 to -- to another penitentiary such as Terre Haute.

1 QUESTION: Does the Government --

2 QUESTION: The petitioner is in the general
3 population at the current facility?

4 MS. ALEXANDER: Yes, Your Honor.

5 QUESTION: Well, where -- where would the
6 Government be free to move her if she gets her injunction?

7 MS. ALEXANDER: She -- where she is is not
8 inconsistent with -- with the injunctive relief she seeks,
9 because it's -- this would, again, become relevant on
10 remand should the Government seek to -- again, to transfer
11 her to a penitentiary.

12 QUESTION: Well, she was sentenced to a term
13 that would ordinarily end her up in a penitentiary, was
14 she not?

15 MS. ALEXANDER: Your Honor, after sentencing she
16 was -- she was eligible for confinement either in a
17 penitentiary or in a Federal correctional institution,
18 within that -- the whole range of Bureau of Prisons
19 facilities.

20 QUESTION: And so her -- would -- her injunction
21 would request that she be confined only in an FCI and not
22 in a penitentiary?

23 MS. ALEXANDER: Yes, Your Honor.

24 QUESTION: What's the difference between those
25 two?

1 MS. ALEXANDER: There are -- they have a
2 different security level system in general in that
3 penitentiaries are the -- the -- traditionally the higher
4 security facilities. Marion is a highest security
5 facility within the Federal system. Leavenworth, Atlanta,
6 the former Atlanta facility, those are other
7 penitentiaries, as is Terre Haute.

8 QUESTION: To the extent that we're dealing with
9 the injunction, the prisoner doesn't suffer from the
10 Government's view of the standard, I suppose, because the
11 hearing is going to be sufficient to prove knowledge even
12 at the Government's higher -- slightly higher requirement.
13 So it's only with respect to the -- the damage action for
14 the past harm that the standard might make a difference,
15 isn't that so?

16 MS. ALEXANDER: I'm not certain that's true.
17 What I can -- what I can imagine is a situation in which
18 the petitioner would be able to prove that the -- the risk
19 was obvious that placement, again in Terre Haute or in
20 Leavenworth or in another penitentiary, would place her at
21 reasonable risk, and yet the Government's position was --
22 was we don't have actual knowledge of that.

23 QUESTION: Is the incidence of rape higher at
24 maximum -- you mentioned Marion. The more secure the
25 prison, the higher the incidence of rape, or in medium

1 security facilities?

2 MS. ALEXANDER: Justice Ginsburg, I don't
3 believe that there can be any generalization. What is a
4 level of violence is not -- not so -- doesn't so much turn
5 on the security designation of the facility as a
6 particular atmosphere and practices at that facility.

7 QUESTION: In terms of the injunctive relief
8 that you're seeking, though, I don't comprehend why Farmer
9 is more at risk in a maximum security facility than at a
10 medium security facility.

11 MS. ALEXANDER: The allegation in this case is
12 that the primary risk came from the fact that violent
13 individuals were allowed to have access to her in the
14 general population at Terre Haute. It is -- it is -- the
15 confinement of violent other prisoners that she pointed to
16 as a risk to her, and that within 10 days of her placement
17 in general population at Terre Haute materialized in her
18 rape.

19 QUESTION: And yet she did -- did want to be in
20 the general population, because when she was at Lewisburg
21 didn't she object to being in administrative detention?

22 MS. ALEXANDER: I would submit that she wanted a
23 safe placement. She wanted -- she would have preferred
24 that safe placement to have been in general population.
25 But what -- what -- certainly, she did not want to be

1 raped. She wanted a safe placement. She has a
2 disagreement with prison officials at Lewisburg as to what
3 that safe placement would be. The Federal court agreed,
4 in that case, with the prison officials that the only safe
5 placement was in segregation, not in general population at
6 the penitentiary.

7 QUESTION: Well, isn't it a part of your case,
8 just to follow this line of questioning, that the maximum
9 security prisons are the most dangerous because they have
10 the most dangerous people, or is that not your case?

11 MS. ALEXANDER: Is it not the argument. The
12 argument is what is a dangerous facility has to do with a
13 number of factors, the characteristics of the
14 prisoner -- in this case this was a prisoner who was at
15 extraordinarily unusual risk -- and the characteristics of
16 the facility, the particular facility.

17 If in a facility with very violent offenders,
18 inappropriate and inadequate steps are taken to protect
19 the prisoners, that is a facility in which there is
20 extraordinarily high risk of what happened to this
21 petitioner. That is within 10 days of her placement, her
22 rape.

23 QUESTION: So then the Government doesn't make
24 an error if it selects a -- a maximum security prison,
25 necessarily.

1 MS. ALEXANDER: Not necessarily. Petitioner --

2 QUESTION: And it doesn't make an error if it
3 puts the person in the general population, necessarily.

4 MS. ALEXANDER: Whether -- not necessarily. It
5 would depend on the characteristics of the prisoner and
6 the characteristics of general population in that
7 facility. Petitioner asks for an opportunity to prove
8 that this placement in the general population at Terre
9 Haute violated the Eighth Amendment because it was obvious
10 to respondents that petitioner was at an unreasonable
11 risk.

12 What does obvious risk mean in the context of
13 this case? Suppose we were making a list of people who
14 would be at obvious risk of sexual assault if placed in a
15 high security male prison. Women would be at the top of
16 the list, surely, and the risk is so obvious that we
17 cannot imagine a prison deciding to confine women in
18 general population at a male high security facility. But
19 also near the top of the list would be someone who had the
20 appearance and demeanor of a woman, a transsexual like
21 petitioner.

22 In the trial court most of the respondents filed
23 declarations denying acknowledge --

24 QUESTION: How about a young man with a slight
25 build, youthful 18, 19-year-old, slender male.

1 MS. ALEXANDER: There -- one could easily
2 imagine a number of facilities in which a person as
3 described by Your Honor would be at obvious and
4 unreasonable risk in general population.

5 On the basis of the statements of the
6 respondents in the trial court denying actual knowledge,
7 the trial court threw out this complaint on summary
8 judgment without allowing petitioner an opportunity to
9 conduct discovery. This --

10 QUESTION: But at least as far as the
11 transferring officials are concerned, they didn't know,
12 did they, what the placement would be inside Terre Haute,
13 whether it was going to be to administrative segregation
14 or general population?

15 MS. ALEXANDER: Well, they knew this much.
16 First of all, two of them filed declarations in which they
17 said they had knowledge about conditions at Terre Haute,
18 in the trial court. But they also knew -- and I think
19 that the transfer documents were in the process of
20 classification in the Bureau of Prisons, things that
21 ordinarily are -- their function is to determine
22 placement, their function is have -- to have to do with
23 where the person goes. And there -- and therefore that
24 what was in those was important to where -- to the actual
25 placement of the petitioner.

1 Now, in the -- in the trial court the -- the
2 complaint was thrown out on summary judgment without
3 giving the petitioner an opportunity to conduct discovery
4 that would be relevant to Your Honor's point.

5 QUESTION: But we didn't -- we didn't take the
6 case, though, on that point. We took on the subjective
7 standard involved for an Eighth Amendment violation. We
8 didn't take the case to decide whether there was time
9 enough allowed for discovery in the trial court.

10 MS. ALEXANDER: It wasn't an issue of time, but
11 perhaps it illustrates the Seventh Circuit's standard. If
12 I could go back to the example of the woman who was placed
13 in general population at Terre Haute. Under the Seventh
14 Circuit standard, it would -- if the officials filed the
15 same declarations that they filed in this case, we didn't
16 know that she would be an unreasonable risk, that would
17 end the case and that's wrong.

18 QUESTION: Well, do you -- do you agree that
19 you -- that you have to show that the prison officials
20 were deliberately indifferent?

21 MS. ALEXANDER: Yes, Your Honor. That is -- the
22 standard that applies to this case is the deliberate
23 indifferent standard from Wilson v. Seiter. That and --

24 QUESTION: Would you help me a little bit, Ms.
25 Alexander? Would you tell me what you think the precise

1 legal issue is we have to decide? I think there's been
2 perhaps a change in the Government's position, I'm not
3 sure. But would you tell me what you think the issue is?

4 MS. ALEXANDER: Well, I think the change is from
5 the Seventh Circuit standard and how much of the Seventh
6 Circuit standard the Government would prefer to defend in
7 this Court. But the Government's standard is that we -- a
8 plaintiff must show actual knowledge. Our stand --
9 however, the Government differs from the Seventh Circuit
10 standard by saying if the plaintiff shows that the risk
11 was obvious, that can be circumstantial evidence of actual
12 knowledge, and that's a reasonable concession on the
13 Government's part. But the --

14 QUESTION: In other words, the Government has --
15 on the Government's theory, the official has got to draw
16 the conclusion which you say should be inferred by any
17 reasonable person from the obviousness of the risk,
18 whereas under your standard you don't have to prove that
19 the conclusion was actually drawn, you simply have to
20 prove knowledge of the facts that made it obvious.

21 MS. ALEXANDER: That's right. And -- and
22 because of the Government's concession in this case,
23 really the issue now is reframed as to what should the
24 lower courts in the Seventh Circuit do on remand in this
25 case.

1 Petitioner argues that deliberate indifference
2 exists when a risk of serious and likely harm was either
3 known or obvious to the defendants, defendants had the
4 ability to forestall the harm but defendants nonetheless
5 failed to act. And like respondent's standard -- again to
6 clarify -- this standard requires a demonstration that the
7 defendants knew the underlying facts that rendered the
8 risk obvious. Unlike respondent's standard, it does not
9 require proof that the defendants recognized an obvious
10 risk when they saw it.

11 This is a rights standard because inherent in
12 the affirmative duty that prison officials owe to protect
13 the safety of those in their care is at least, at least a
14 duty to know what is obvious to anyone in their position.

15 QUESTION: Well, doesn't your standard come
16 pretty close to being just negligence?

17 MS. ALEXANDER: No, Your Honor. This is a
18 deliberate indifference standard, word for word, that
19 comes from the City of Canton v. Harris case.

20 QUESTION: Yes, but you really water it down, it
21 seems to me, in your application. You say that simply
22 awareness of an obvious risk is enough, that one -- the
23 fact finder need not further infer that their -- that the
24 person was deliberately indifferent to the risk. Well,
25 why is that any different from negligence?

1 MS. ALEXANDER: Your Honor, it's not simply
2 obvious risk. It is when an obvious risk exists that the
3 prison official had the ability to fix and then in that
4 situation did not fix. This is not a negligence standard.
5 Indeed, Canton says we don't -- we don't apply negligence,
6 we don't apply gross negligence, it's only deliberate
7 indifference.

8 QUESTION: But we're -- we're talking about a
9 very aspect of liability, or state of mind basically. And
10 the Government says you may infer deliberate indifference
11 from the obviousness of a risk. You say you don't even
12 have to do that; simply knowledge of the obviousness of
13 risk, without any inference by the fact finder, is enough.
14 And I honestly don't see why that's much different than
15 negligent -- than the state of mind required for negligent
16 injury.

17 MS. ALEXANDER: Well, when you have a prison
18 official who the essence of that job is to maintain
19 security and order, and that -- that includes -- the
20 essence of the job includes paying attention to risk
21 factors. Without basic minimal attention to the job, that
22 essence is gone. If in these circumstances prison
23 officials do not know what is obvious to anyone in their
24 position, then they are oblivious, callous, or uncaring.
25 They're deliberately indifferent.

1 QUESTION: Not necessarily. They're just
2 grossly negligent.

3 MS. ALEXANDER: I don't think that's grossly --

4 QUESTION: It seems to me that we do -- we have
5 used the phrase "deliberate indifference" rather
6 consistently, and it seems to me what you're describing is
7 not deliberate indifference. It is negligent
8 indifference, perhaps, grossly negligent indifference, but
9 not deliberate indifference.

10 MS. ALEXANDER: I agree --

11 QUESTION: Isn't there a subjective element to
12 deliberate indifference?

13 MS. ALEXANDER: Yes. And the subjective element
14 has to -- has to do with the fact that always the facts
15 are viewed from the perspective of the defendant. But I
16 do agree with the first part of Justice Scalia's question.
17 I agree that the Court has always treated deliberate
18 indifference as one standard, the same standard. And that
19 standard in Wilson says "deliberate indifference as
20 articulated in Estelle."

21 When one looks at deliberate indifference as
22 articulated in Estelle, one then sees, in turn, that
23 Estelle said that -- essentially, here's a list of lower
24 court cases consistent with the standard that we announce
25 today. When one reads through the case -- what those

1 cases, in turn, use as their standard, those cases are
2 consistent with -- with the obvious standard, they're not
3 consistent with the Seventh Circuit standard.

4 And also -- that's also true of Canton. Canton
5 is a case in this Court that gives the most substantial
6 guidance as to what deliberate indifference means. Canton
7 is a case that speaks of obvious risk. It is a case that
8 never speaks of actual knowledge.

9 QUESTION: Canton was not an Eighth Amendment
10 case, though, was it?

11 MS. ALEXANDER: That is correct. There is no
12 question that -- that the Court was addressing a statutory
13 question, not the question of deliberate indifference.
14 However, it would seem odd if the Court were, without
15 telling anyone, to 2 years after it had announced --
16 defined deliberate indifference in Canton, to without
17 saying it announce a different -- adopt a different
18 deliberate indifference standard in the Wilson case.

19 And moreover, there's another reason why the
20 deliberate indifference standards appear to be the same
21 standards, and that is if one looks side by side at the
22 Wilson case and the Canton case, there are passages that
23 are essentially parallel in the two cases. And those
24 passages have to do with why the Court decides that the
25 deliberate indifference standard is the applicable

1 standard.

2 The -- in Canton, the Court adopted deliberate
3 indifference because it said we -- what we need here is a
4 standard that means that -- that the policymakers were
5 culpable enough, were -- were making a choice enough that
6 it is fair to give them liability under Monell. There's a
7 parallel passage in Wilson which says given the state of
8 mind requirement of the Eighth Amendment, we need a
9 standard that is -- that is deliberate enough that this
10 standard --

11 QUESTION: Can I come back to this case? Are
12 there any individual defendants here who were officers or
13 officials at Terre Haute?

14 MS. ALEXANDER: The warden at Terre Haute, Your
15 Honor. And this is -- this is also the respondent who, in
16 the Lewisburg case that was referred to earlier in
17 questioning, had filed a declaration that led to the
18 Federal court finding that it was -- that of course it's
19 unsafe to put a transsexual in general population at this
20 penitentiary.

21 QUESTION: Now, in the prior litigation when
22 this prisoner wanted to be taken out of solitary and put
23 in the general population, the Bureau of Prisons took the
24 position that the prisoner was too high risk to do that?

25 MS. ALEXANDER: Yes, Your Honor. And they

1 said -- and the Bureau of Prisons was successful in
2 Federal Court because the Federal Court found that -- that
3 the decision of the officials that this transsexual should
4 not be in general population was an appropriate decision
5 for the officials to make.

6 QUESTION: And does that position and knowledge,
7 is that attributable now to the warden at Terre Haute, in
8 your view?

9 MS. ALEXANDER: I would say that that means that
10 there was actual knowledge on the part of this
11 respondents. Of course, it was not before -- given the
12 dismissal on these -- the face of these declarations, this
13 additional information about actual knowledge wasn't
14 available to the trial court. And it suggests, of course,
15 why it's so important --

16 QUESTION: Why wasn't it available?

17 MS. ALEXANDER: Because the petitioner
18 approached, who was proceeding without counsel, didn't put
19 that information in.

20 QUESTION: I see.

21 MS. ALEXANDER: Why the respondent didn't point
22 that out to the court is, of course, another issue.
23 But --

24 QUESTION: Ms. Alexander, just a trivial
25 question. This case came up through the Western District

1 of Wisconsin.

2 MS. ALEXANDER: Yes, Your Honor.

3 QUESTION: Why?

4 MS. ALEXANDER: Because several of the
5 respondents are from Oxford, the transferring institution,
6 which is in the Western District of Wisconsin. So that's
7 where the petitioner filed the case. Now --

8 QUESTION: Ms. Alexander, we took the case for
9 this subjective/objective issue and not for whether,
10 assuming that the subjective approach is correct, the
11 granting of the motion for summary judgment was proper.
12 But if we were to reach that -- that latter issue, there
13 really may be a lot less to this case than meets the eye,
14 don't you think?

15 I mean, let's assume that we were to rule
16 against you and say that, in fact, there has to be
17 knowledge of the dangerous situation and that the
18 situation is dangerous. If you have a situation where it
19 is as obvious as you say it was here, I assume you would
20 not be able to grant a motion for summary judgment because
21 the fact finder could certainly conclude from the fact
22 that it was so obvious that this warden knew about it, if
23 it was so obvious, right?

24 MS. ALEXANDER: I would agree that on a variety
25 of levels the trial court committed error.

1 QUESTION: Fine.

2 MS. ALEXANDER: But that error was invited by
3 the Seventh Circuit standard --

4 QUESTION: But, I mean, we may not be arguing
5 about a whole lot here, that it really may not make a
6 whole lot of difference whether you say it's a subjective
7 standard or an objective standard. If it's as obvious as
8 you say it is, any fact finder with a brain in his head is
9 going to say that the warden must have known about it.

10 MS. ALEXANDER: I would agree that it is very
11 possible that in this case this standard wouldn't make a
12 difference, because any fact finder would infer from the
13 circumstantial evidence evidence of actual knowledge.
14 However, the general standard makes a great deal of
15 difference.

16 And, by the way, I would respectfully disagree
17 with the characterization of our case as a subject
18 standard -- an objective standard. Ours is a subjective
19 standard also because it necessarily requires --

20 QUESTION: Call it a subjective standard once
21 removed, how about that, all right?

22 (Laughter.)

23 MS. ALEXANDER: Yes, Your Honor. And I'd like
24 to make another --

25 QUESTION: Well, Ms. Alexander, if knowledge of

1 the defendants is an element, do you accept the model
2 penal code definition of knowledge? That is, knowledge is
3 established if a person is aware of a high probability of
4 its existence unless he actually believes it does not
5 exist.

6 MS. ALEXANDER: Your Honor, again, under our
7 standard the actual knowledge simply isn't what the -- the
8 trier of facts should focus on. It's the obviousness of
9 the risk.

10 QUESTION: Well, I know that's your argument,
11 but there certainly is a risk here that that isn't what
12 the court's going to adopt, and so I wanted to explore
13 with you whether you accept the model penal code
14 definition?

15 MS. ALEXANDER: Your Honor, with -- without
16 having given it a great deal of thought, for which I
17 apologize, as I hear it it seems to me that that -- were
18 the Court to adopt what I think would be the wrong
19 standard, that indeed may well be what it would adopt.

20 And I want to turn to another point because I
21 think it's important here: respondents' attempt to defend
22 their standard by arguing that this case is about the wide
23 latitude that prison officials must have in running
24 prisons, and in particular in making housing decisions.

25 The concerns respondents raise about the

1 complexities of decisions of prison staff are not wrong,
2 but they're not central to this case. The respondents'
3 claim here is that they lacked actual knowledge of an
4 unreasonable risk to the petitioner. According to the
5 transfer documents in the record, respondents didn't even
6 consider petitioner's transsexuality when they placed her
7 in general population in a penitentiary, even though the
8 most distinctive fact about this petitioner is her
9 transsexual status.

10 You can't claim to have considered a risk you
11 also say you didn't know about, thus respondents' denial
12 of actual knowledge of the unreasonable risk logically
13 precludes them from claiming that the placement was based
14 on a reasoned judgment. Thus this isn't a case about
15 deference, it's a case about the proper standard under the
16 Eighth Amendment.

17 Respondents attempt to force their standard into
18 conformity with this Court's precedent. This effort has
19 required that they jettison whole sections of the Seventh
20 Circuit standard. Even with the remodeling, the standard
21 they --

22 QUESTION: Suppose -- suppose this -- Farmer had
23 said at Terre Haute, as Farmer did at Lewisburg, I want to
24 be in the general population, and then this horrible event
25 occurred, would she still have a 1983 case?

1 MS. ALEXANDER: Yes, Your Honor. There might be
2 some circumstances in which the fact that the plaintiff
3 essentially represented that there wasn't an unreasonable
4 risk would render an otherwise obvious risk not obvious,
5 but if the risk was obvious, then we ought to think about
6 who has the better information on that. It's -- certainly
7 the prison officials know -- knew far more about what
8 general population was like at Terre Haute than did the
9 petitioner.

10 And so it's -- it's the wrong concept to think
11 of taking from the prison officials, who have the
12 information, the duty and giving it to prisoners who don't
13 have the duty and also who don't have the information.
14 Because that -- the notice -- the requirement that you
15 warn prison officials that is so frequent in the Seventh
16 Circuit, either the warning's superfluous in that they
17 already have the information or you're required to warn
18 them about something that you don't know as a prison,
19 something they're in the better position to -- to address.

20 QUESTION: But this was -- this was -- it's a
21 Bivens case, isn't it?

22 MS. ALEXANDER: Yes, Your Honor.

23 QUESTION: And this was about the sixth or
24 seventh institution.

25 MS. ALEXANDER: Yes, Your Honor.

1 I would like to reserve the balance of my time.

2 QUESTION: Very well, Ms. Alexander.

3 Mr. Bender, we'll hear from you.

4 ORAL ARGUMENT OF PAUL BENDER

5 ON BEHALF OF THE RESPONDENTS

6 MR. BENDER: Mr. Chief Justice, and may it
7 please the Court:

8 I'd like to start by clarifying a couple of
9 factual matters that the Court expressed interest in in
10 Ms. Alexander's argument. First of all, although it was
11 true until 7 days ago that the petitioner was in the
12 general population at Florence, 7 days ago he went into
13 administrative detention for reasons that have nothing to
14 do with this case, and so he is presently in
15 administrative detention at Florence. But prior to that
16 time he had been in the general population for 5 -- for 5
17 months.

18 A related clarification that I would like to
19 make --

20 QUESTION: You'll have to help me, Mr. -- Mr.
21 Bender. How does that have -- bear on the -- on the
22 question of whether the complaint states a cause of
23 action?

24 MR. BENDER: I don't think that does at all, but
25 the Court had asked that and there's no way that Ms.

1 Alexander would know that. I just found that out
2 yesterday, and I didn't want to leave the Court with a
3 misunderstanding. I don't think that's relevant at all.

4 Something that is possibly relevant to relief
5 that I also need to clarify is something that I think
6 reflects a misunderstanding on our part in our brief. At
7 the end of our brief in talking about the possibility of
8 injunctive relief, we said that we thought that injunctive
9 relief was no longer -- would no longer be appropriate in
10 this case because the petitioner was in administrative
11 detention status because of his HIV-positive status and
12 the fact that he had been involved in consensual sexual
13 activity at Oxford.

14 Bureau of Prisons has a policy with regard to
15 HIV-positive inmates that if they are either predators or
16 if they are sexually promiscuous, it will very often put
17 them in administrative detention status. And it was our
18 understanding at the time we wrote the brief that the
19 petitioner would remain in that kind of -- either in that
20 kind of segregated or status or at a place like
21 Springfield, which is where he went after Terre Haute,
22 which is a medical facility.

23 And although petitioner did remain in those two
24 statuses for a long time -- he was at Springfield for
25 2-1/2 years after Terre Haute, after he was put in

1 administrative detention at Terre Haute -- he was then put
2 in general population at Florence, where he has existed
3 for 5 months without any problem.

4 What's going on there is that putting
5 HIV-positive people into a segregated status is something
6 that the Bureau of Prisons does but they don't do that
7 permanently. They continue to reevaluate whether that's
8 the appropriate thing to do, because the general
9 presumption is that they would like to put everybody in
10 general population. And therefore the time came -- after
11 he had been without serious problems for a long time, the
12 time came when they thought that they should put him in a
13 general population.

14 We still think that injunctive relief is not
15 appropriate here because the injunction here that's
16 requested has to do with placing him in a penitentiary
17 status. Penitentiaries are those next-to-the-highest-
18 level institutions, like Lewisburg, of which there are
19 four or five, I think. Since there is no present threat
20 of his being placed in a penitentiary status, injunctive
21 relief we think is inappropriate in this case, because
22 there isn't the kind of threat of that kind of action
23 which would justify injunctive relief. So the conclusion
24 is the same.

25 QUESTION: Mr. Bender, do you -- do you think

1 that this -- this issue that we've been focusing on today,
2 whether it's a subjective test or a subjective test once
3 removed, pertains only to monetary relief, and that -- and
4 that as far as injunctive relief is concerned, the -- as
5 far as that goes, the prison is certainly put on notice
6 when a complaint is filed, right?

7 MR. BENDER: Yes, that's what I was going to
8 say. I don't think the Court has ever clarified whether
9 it's exactly the same test in injunctive relief cases.

10 QUESTION: Yeah.

11 MR. BENDER: But it doesn't really come up,
12 because if you're suing for injunctive relief you will put
13 the -- you will put the prison officials on notice by the
14 allegations in your complaint.

15 QUESTION: Yeah, but you -- you could say that
16 the complaint should be judged on the basis of the state
17 of facts at the time it was filed, and you could always
18 come in and say at the time it was filed we had no
19 knowledge.

20 MR. BENDER: Well, even if you said that --

21 QUESTION: They'd file an amended complaint,
22 right?

23 MR. BENDER: -- You could -- you can put them on
24 notice by sending them a letter saying that the
25 following --

1 QUESTION: Before you file.

2 MR. BENDER: Before you file. So I don't think
3 that will -- I don't think knowledge of facts will
4 ordinarily be a problem in injunctive actions. I think it
5 will -- the issue will be much more important in damage
6 actions, which is the -- the only -- the action brought
7 against four of the people here.

8 It's important in that regard to realize -- and
9 I want to emphasize that those four people against whom
10 damages are sought here, their only connection with this
11 case was that they were the officials who transferred the
12 petitioner to Terre Haute. None of those people were the
13 officials at Terre Haute who decided to put him in the
14 general population.

15 QUESTION: I thought one of them was the warden
16 of Terre Haute, no?

17 MR. BENDER: One of them was the warden of Terre
18 Haute at one time, but at the time the action was brought
19 he was not -- he was no longer the warden at Terre Haute.
20 But he is not sued for money damages, interestingly
21 enough. He was the warden at Terre Haute at the time of
22 the incident, but he's not being sued for monetary
23 damages, he's only being sued in his official capacity,
24 which is only a suit for injunctive relief. That's an
25 interesting facet of this case. The only people who are

1 being sued for money damages are the officials at Oxford
2 and the officials at the North Central office who
3 authorized the transfer to Terre Haute.

4 QUESTION: Do -- are any of the officials who
5 are -- who are named in the complaint and against who
6 injunctive relief is sought, do any of them currently have
7 the power to provide the injunctive relief?

8 MR. BENDER: I think the Director --

9 QUESTION: He's in a different institution now,
10 right?

11 MR. BENDER: I think the Director of the Bureau
12 of Prisons does.

13 QUESTION: The director.

14 MR. BENDER: I think that would be the only
15 person among those people who would currently have the
16 power --

17 QUESTION: And you say -- and your one argument
18 against injunctive relief at this point is that there's no
19 threat of what -- what is sought to be enjoined?

20 MR. BENDER: That's the main argument, yes.

21 QUESTION: Well, what's --

22 MR. BENDER: There is another argument.

23 QUESTION: What's the other one?

24 MR. BENDER: Which is that there is not -- there
25 is no showing on this record that there -- even in a

1 penitentiary, that there would be the very serious threat
2 of injury which would justify an injunction against the
3 transfer to any penitentiary, but I don't think the Court,
4 or the lower court if you remand the case on that, would
5 have to reach that issue, because there is no plan
6 whatever and no consideration of putting him in one of the
7 very few penitentiary institutions.

8 The one he was in in general population, which
9 is Lewisburg -- Terre Haute is no longer what you would
10 call a penitentiary institution. It is a lower level.
11 The one penitentiary institution that he was in, the
12 warden there made the judgment, as is apparent in his
13 district court litigation with -- with Carlson, wouldn't
14 made the judgment that it wasn't safe to put him in a --
15 in the general population, and we know no reason to think
16 that that judgment would be any different today.

17 The Court -- one other factual matter. Justice
18 Ginsburg, you talked about the horrible event that
19 occurred here. The Court should be clear that that is an
20 allegation only. There is --

21 QUESTION: The alleged horrible event.

22 MR. BENDER: The alleged horrible event. I
23 think that important to bear in mind.

24 The Court said that it took the case to deal
25 with this subjective/objective issue, and that's what I

1 would like to address -- to address myself to. I assume
2 the Court noticed an apparent conflict between the Seventh
3 Circuit on that, which seemed to -- to say that there was
4 a subjective test, which did say there was a subjective
5 test of actual knowledge, and the Third Circuit. One
6 opinion of the Third Circuit indicates that "should have
7 known" is enough. There doesn't have to be actual
8 knowledge.

9 I think it's important in thinking about this,
10 to think first about what deliberate indifference means.
11 Everybody agrees that that's the standard, deliberate
12 indifference. I think there are at least two factors in
13 deliberate indifference, and it's important not to get
14 them confused with each other.

15 In a situation like this where you're talking
16 about protecting an inmate from attacks by other inmates,
17 deliberate indifference has one element of the prison
18 official's knowledge of the risk. There's did the prison
19 official know, or if you take the objective approach,
20 should the prison official have known that there was, in
21 fact, a risk? That's the first element. Then there's a
22 second element; knowing about a certain risk -- and there
23 are lots of risks in prison -- was the prison official
24 deliberately indifferent to that risk.

25 We take the position, as did the Seventh

1 Circuit, that on the first of those elements the Court has
2 already decided -- and if it hadn't it should decide
3 now -- that it is a subjective standard. You cannot be
4 deliberately indifferent to a risk unless you know about
5 the risk. And that is the position that we urge you
6 to adopt.

7 QUESTION: Now, Mr. Bender, on that point do you
8 accept the model penal code definition of knowledge?

9 MR. BENDER: The one you had mentioned to Ms.
10 Alexander?

11 QUESTION: Yes.

12 MR. BENDER: Would you read it again?

13 QUESTION: Yes, if I can put my hands on it,
14 because I thought it was of some interest. It says: "When
15 knowledge of the existence of a particular fact is an
16 element of the offense, such knowledge is established if a
17 person is aware of a high probability of its existence,
18 unless he actually believes it does not exist."

19 MR. BENDER: Yes, we accept that. In fact, our
20 brief -- our brief makes reference to that.

21 QUESTION: But do you think that's what the
22 Seventh Circuit's view of the word "knowledge" is?

23 MR. BENDER: I'm not sure.

24 QUESTION: It's rather clear it's not when they
25 say "actual knowledge," isn't it?

1 MR. BENDER: Well, I think what the model penal
2 code definition is referring to is what's often called the
3 ostrich situation, the head-in-the-sand situation, that if
4 there's a -- if there is a high probability and you stop
5 yourself from making a conclusion, you turn away from it,
6 that that can also be dealt with as actual knowledge. But
7 otherwise, I think you need to have actual knowledge.
8 Just the fact --

9 QUESTION: Well, then I'm not sure you do then
10 agree with the -- with the model penal code. It seems to
11 me the model penal -- it's one thing to say you can infer
12 from knowledge of the risk that you knew about it, or that
13 you had the necessary subjective standard. But to say
14 there's simply a high prob -- that you knew there was a
15 high probability, it seems to me it would fall a good deal
16 short of ultimately inferring actual intent.

17 MR. BENDER: Well --

18 QUESTION: Actual --

19 MR. BENDER: Well, that's what -- that's where I
20 think we can get confused between the first issue and the
21 second. If you're aware of a high probability of risk, it
22 seems to me you are aware of a risk. And then the
23 question is were you deliberately indifferent to the risk
24 that you were aware of, and those are two different
25 questions.

1 It's not enough to show, in a deliberate
2 indifference case, that the prison officials were aware
3 that there was a dangerous situation. You've also got to
4 show that they were deliberately indifferent to that
5 dangerous situation.

6 QUESTION: But is it your position that the
7 finder of fact must infer that they actually knew of the
8 risk?

9 MR. BENDER: Yes, that they knew of the danger,
10 right.

11 QUESTION: That you could infer it from
12 knowledge of other -- other facts.

13 MR. BENDER: Right. We believe that you can
14 make such a finding based on circumstantial evidence, but
15 the finding must be -- if you have a jury, you should tell
16 the jury that they -- in order to find there's a violation
17 of the Eighth Amendment, you have to find that the
18 defendant knew of the risk --

19 QUESTION: Then I suggest you don't really agree
20 with the model penal code.

21 MR. BENDER: I was reading that -- that part of
22 the high probability to refer to a situation where if you
23 know of a high -- if you know -- I think the problem is
24 that risks are probabilities and we're talking here about
25 risks, and therefore if you know of the high probability

1 of a risk, you know enough about the risk.

2 QUESTION: But you can analyze, I think, the
3 thing best in terms of what instruction do you give the
4 jury. And it seems to me, your -- under your view you
5 would give the jury that you -- you must have known and
6 then go on to say you can infer knowledge from a number of
7 things.

8 MR. BENDER: Right. I agree completely, yes --

9 QUESTION: But suppose there is a risk that's
10 known, that inmates of a certain kind are assaulted at
11 Terre Haute, and the prison official knows there's a high
12 probability that this person is in Terre Haute, what
13 result?

14 MR. BENDER: They don't know he is in Terre
15 Haute?

16 QUESTION: No.

17 MR. BENDER: They just know there's a
18 probability that he is in Terre Haute. That would be
19 different. There I think they would have to know that he
20 is in Terre Haute.

21 QUESTION: No liability, in your view.

22 MR. BENDER: If -- if liability would turn on
23 their knowledge that he's in Terre Haute, yes.

24 QUESTION: Then you really don't agree with
25 the -- with the --

1 MR. BENDER: On that part of it, I --

2 QUESTION: Because that's not a probability. It
3 seems to me you ought to agree with that. If there's a
4 high probability that he's in the general population,
5 that's -- that seems to me enough to create deliberate
6 indifference. He really doesn't, you know. Yeah, he may
7 well be there, he probably is there, but I don't care. I
8 consider that, you know --

9 (Laughter.)

10 QUESTION: I consider that deliberate
11 indifference.

12 MR. BENDER: I think if -- it's sort of a risk
13 on a risk. If you are aware that there's a high
14 probability he's in the general population and the general
15 population is a very dangerous place, then I think the
16 prison official should try to find out whether or not he
17 is in the general population, and not to do so would be
18 deliberate indifference.

19 QUESTION: He's aware of the risk.

20 MR. BENDER: He's aware of the risk.

21 QUESTION: If there is a probability that he's
22 in that population, he's aware of the risk.

23 MR. BENDER: I think that's right. And I think
24 the confusing thing is we're dealing here with risks to
25 begin with, and so we're dealing with probabilities, and

1 you've got to be aware of the probability.

2 QUESTION: In other words, the probability is
3 a -- is, in effect, an inference. I mean there are facts
4 and there are inferences from them. The risk is an
5 inference which you draw from the facts, and you're saying
6 you've got to prove that they drew the inference. I.e.,
7 in the model penal code's terms, you've got to prove that
8 they understood the high probability that these facts
9 implied. That -- isn't that what you're saying?

10 MR. BENDER: Yes.

11 QUESTION: Yeah.

12 MR. BENDER: Yes, I think so. Otherwise it's
13 hard to say that you're deliberate indifferent to it, if
14 you don't know about it. I think that flows from the
15 Court's decision in --

16 QUESTION: If you're a bad logician, you may
17 have a defense.

18 MR. BENDER: You may have a defense to a -- to
19 an Eighth Amendment claim. You may not have a defense to
20 a negligence claim. And it's really important to
21 understand here that there's also a possibility of
22 bringing a Tort Claims Act suit for negligence.

23 On the other hand, I do want to say that we
24 don't take the position that this ought to be approached
25 as if it were a criminal cases. There are some things in

1 the Seventh Circuit opinions which say use a criminal
2 approach to what recklessness is. I don't think that
3 helps. These are not criminal cases. If a warden of a
4 prison --

5 QUESTION: You do -- you do suggest twice in
6 your brief that a remand might be appropriate, remand
7 might be appropriate. You say it on page 10 and again on
8 page 29. But you're not precise about, well, what should
9 the instruction be to the Seventh Circuit. Seventh
10 Circuit, you didn't get it right so we have to remand.
11 What does the Government say, in a nutshell, is right?

12 MR. BENDER: First of all, one problem is the
13 Seventh Circuit never wrote an opinion in this case, so
14 we're talking about other Seventh Circuit opinions.

15 QUESTION: Yes.

16 MR. BENDER: I think you should tell the Seventh
17 Circuit that they got it right, that there has -- it's
18 actual knowledge of the risk rather than somebody -- a
19 reasonable person should have known of the risk, that they
20 got right.

21 I think you should tell them that it doesn't
22 help to look at this as if it were a criminal case, and it
23 doesn't help to tell a jury that they should look at it as
24 if it were a criminal case. I don't think we will -- we
25 take the position that we don't take the position that a

1 warden who was found to be liable because of a violation
2 of the Eighth Amendment, if that should occur, is
3 equivalent to a criminal. It's not a criminal case, it's
4 a civil case, and I don't think it ought to be thought
5 about in those -- in those terms.

6 QUESTION: Mr. Bender, can --

7 QUESTION: But the reason that that is helpful,
8 it seems to me, is that it does invoke such constructions
9 as the model penal code where we're talking about an
10 actual state of mind.

11 MR. BENDER: It's -- I think it's fine to do
12 that and I think you should do that, but it's the aura of
13 criminality that I don't -- that I don't think is
14 acceptable.

15 QUESTION: Well, except that the state of mind I
16 have described is not usually a test in the civil law at
17 all.

18 MR. BENDER: And I think you should make clear
19 what the state of mind is that you're talking about. But
20 I don't think it --

21 QUESTION: So it's not civil, but it's not
22 criminal either.

23 MR. BENDER: It's civil. It's -- to be, to make
24 sure that juries are not told that they should only find
25 an Eighth Amendment violation if they find that the

1 defendants were criminals, were the kind of people who
2 should be -- who should be treated as criminals or go to
3 jail or have criminal sanctions invoked against them. I
4 think that puts an aura on the case which is not -- which
5 is not entirely appropriate.

6 QUESTION: Well, I'm not sure anyone has
7 suggested that.

8 MR. BENDER: I should say, in that connection,
9 that the Government's position in this case is a position
10 that is -- is forged from a variety of interests that we
11 have. The Government interests are certainly in defending
12 officials of the Bureau of Prisons against unjustifiable
13 and incorrect suits of violations of the Eighth Amendment.
14 But the Government also plays a role in suing prisons for
15 unconstitutional prison conditions, and I think it's
16 important that we bear both of those things in mind.

17 And, for example, in trying to remedy
18 unconstitutional prison conditions, I don't think that we
19 should be required to show that the people who are running
20 those institutions should be treated as criminals. That's
21 not -- that just may -- it seems to me is too heavy a
22 burden. I think --

23 QUESTION: What is the second part of your
24 charge? The first part is actual knowledge of the risk.

25 MR. BENDER: Of the risk.

1 QUESTION: But once you have actual knowledge of
2 the risk, then what?

3 MR. BENDER: Then you have to be deliberately
4 indifferent to the risk, which means that there has to be
5 something that you could do readily to avoid the risk, and
6 you have to have made a decision not to do that even
7 though it was something that could easily have been done.
8 That's the indifferent part of it, and the -- and the
9 deliberate indifferent part of it is that you are aware
10 that there's something you could do and that you don't do
11 anything to deal with it.

12 Now that's very hard to quantify, and I think
13 that's where the obviousness comes into it, and I think
14 that's one of the confusions. There if you -- there you
15 could say if it is obvious that something should be done
16 and this person didn't do it, that might amount to
17 deliberate indifference. Obvious in the sense that
18 there's something that can be done to alleviate the risk
19 and that action isn't taken.

20 QUESTION: Mr. Bender, we've talked in -- trying
21 to phrase in general terms without being concrete about
22 the particular allegations. On page 7 of your adversary's
23 brief the petitioner points to a Bureau of Prisons report
24 in 1986 which, quote, stated that petitioner would be
25 subject to a great deal of sexual pressure because of her

1 youth and feminine appearance. Now, is that a sufficient
2 knowledge of the risk that's at stake in this case?

3 MR. BENDER: That is a knowledge of a risk, but
4 another --

5 QUESTION: Does that take care of the first --
6 the first half of your two --

7 MR. BENDER: No, because the risk has to be a
8 very serious risk, a very severe risk of very serious
9 harm. Otherwise every prison official in the country
10 would be violating the Eighth Amendment at every moment.
11 There's always a risk in every prison of something
12 happening.

13 QUESTION: You don't think that's a special risk
14 that's described there?

15 MR. BENDER: Just the fact that somebody is
16 effeminate or young.

17 QUESTION: And is specifically identified as
18 being particularly subject to a great deal of sexual
19 pressure?

20 MR. BENDER: I guess it depends on what you mean
21 by a great deal of sexual pressure.

22 QUESTION: Well, in which way do you construe
23 those allegations, favorable to the plaintiff or the
24 defendant?

25 MR. BENDER: Right. I think there has to be a

1 very great likelihood that the person is in danger.
2 Sexual pressure seems to me an awfully vague term to refer
3 to that. It would be better -- it would be an allegation
4 that's closer to liability in this case if it was subject
5 to a considerable risk of being attacked. And it has to
6 be a considerable risk of being attacked, not just a small
7 risk. And that is, again, a very hard part of the
8 standard to quantify, but it's important to realize that
9 it's got to be more than the normal risks in prison.

10 And, also, people who are young and effeminate
11 have to be housed somewhere in an institution. You -- I
12 don't think it's fair to them to say that they always have
13 to be kept in a solitary confinement situation. The
14 Bureau of Prisons likes to have people in the general
15 population, and the fact that there is a small danger that
16 a person will be attacked in the general population does
17 not seem to me to --

18 QUESTION: Well isn't it fairly generally known
19 that the danger is not really small, just throughout the
20 prison system? Don't you start from a predicate of very
21 substantial danger throughout the system?

22 MR. BENDER: No, I don't think that's -- I don't
23 think that's true, at least with the Federal prison
24 system. The -- the statistics that I've seen, which are
25 published statistics from 1989, indicates that the number

1 of assaults of any kind, including sexual assaults but
2 other assaults as well, in the Federal prison system in
3 1989 in general was about 1 percent of the population, a
4 little bit less than 1 percent of the population.

5 That does not suggest to me that throughout the
6 system there is a considerable risk. Interestingly enough
7 as well, the statistics for the institution to which the
8 petitioner was transferred, Terre Haute, the statistics of
9 assault -- assaultive occasions there during that year are
10 exactly the same, almost exactly the same percentage,
11 slightly less 1 -- less than 1 percent. There may be some
12 institutions at some times where there is a much greater
13 risk, and I don't mean to denigrate a 1 percent risk.

14 QUESTION: What do you mean by 1 percent? 1
15 percent of all of the prisoners were involved in an
16 assault?

17 MR. BENDER: Were assaulted.

18 QUESTION: Were assaulted.

19 MR. BENDER: Yeah.

20 QUESTION: 1 percent --

21 MR. BENDER: Any kind.

22 QUESTION: In that year.

23 MR. BENDER: An assault of any kind within the
24 Federal system during --

25 QUESTION: It's not just sexual assaults.

1 MR. BENDER: No, no, not at all.

2 QUESTION: Any kind of assault.

3 MR. BENDER: Assaults of any kind. We don't
4 have -- I did not see figures about sexual -- a breakdown
5 with regard to sexual assaults. So I don't think --

6 QUESTION: Let me -- that's a -- that's really
7 quite a surprising statistic. How do they define assault?
8 Is it some -- ones that have been subject to disciplinary
9 action?

10 MR. BENDER: I think the ones that have been
11 reported.

12 QUESTION: Yeah, because --

13 MR. BENDER: And I think --

14 QUESTION: -- Presumably there are occasionally
15 these incidents that don't surface.

16 MR. BENDER: Right. And we don't know how -- we
17 don't know how great they are. But there is nothing in
18 the record in this case that indicates that either there
19 was a great risk of that kind of assault at Terre Haute
20 generally, in the general population, and there's
21 certainly nothing that indicates there was any such risk
22 in segregation at Terre Haute.

23 And the position of the respondents here is that
24 the four respondents who were responsible for sending the
25 petitioner to Terre Haute only sent the petitioner to

1 Terre Haute as a -- as an institution. They knew that
2 when he got to Terre Haute he would be put in a segregated
3 situation, administrative detention, for purposes of
4 evaluation, and that the officials there would know what
5 the situation was in Terre Haute at the time, and would
6 know about his transsexualism and his history in prison
7 previously, and that they would then make a decision,
8 based on their -- their based judgment, about whether it
9 was safe to put him in the general population.

10 And it's not at all certain that they would make
11 a judgment to put him in the general population. When he
12 was at Lewisburg, which was the first institution he
13 landed at, he was never put in the general population.
14 And therefore you cannot say on this record that there
15 could be enough evidence to survive a summary judgment
16 motion that these -- that these defendants had the
17 knowledge of the risk.

18 Because even if you were to assume that there
19 was a substantial risk in the general population at Terre
20 Haute -- and there's not any basis for that either given
21 the statistics I've just mentioned. Even if you were to
22 assume that, there's no inevitability that the petitioner
23 is going to go into the general population at Terre Haute.
24 He could stay in segregation for a substantial time and
25 then be moved to another institution.

1 Transfers from one institution to another are
2 often does as a disciplinary matter. If somebody, as this
3 petitioner has, manipulates the institution, has access to
4 telephones, commits credit-card fraud while in the
5 institution, it's often thought that it's useful to move
6 him to another institution where he won't have that --
7 that same ability to manipulate. That could involve
8 moving him to another institution where he would stay in a
9 segregation status for 6 months and then be moved to yet a
10 different institution if the thought was he should then
11 come out of administrative segregation.

12 And so it's for those reasons that we take the
13 position that there is no basis for -- for remand on that
14 issue, that the Court can affirm the summary judgment on
15 that issue.

16 If there are no other questions.

17 QUESTION: Thank you, Mr. Bender.

18 Ms. Alexander, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF ELIZABETH ALEXANDER

20 ON BEHALF OF PETITIONER

21 MS. ALEXANDER: Thank you, Your Honor.

22 When the Government refers to the record, of
23 course they're referring to a record that we had no
24 opportunity to develop with regard to the risk at Terre
25 Haute. But I would submit, even bearing that in mind,

1 that whatever the general risk, if it's 1 percent, of
2 assault per year in Terre Haute, that wasn't this
3 petitioner's risk of assault. This petitioner was at a --
4 at an extraordinarily high and unusual risk in comparison
5 to the background risk.

6 And I'd like to -- to then turn to Justice
7 Stevens' comments about the -- what was in the record,
8 because what is in the record is about -- what -- where
9 the record has some development is about what put this
10 petitioner at risk, and that points out something that's
11 important to bear in mind.

12 Both sides here have a subjective standard. It
13 is -- because to both sides actual knowledge of something
14 is critical. To our case, actual knowledge is critical
15 because in order for there to be a risk that is obvious,
16 that -- because it has to be obvious to the defendants,
17 those defendants must know the facts, must have actual
18 knowledge of the facts that make it an obvious risk. So
19 actual knowledge plays -- is central to both cases'
20 description of the subjective component.

21 And this also points out to something that is, I
22 think, one of the real practical problems, and one of the
23 things that's wrong with the Government's proposed
24 standard. In this case what is it that the -- that the
25 respondents didn't know about this petitioner? Presumably

1 they would -- they would -- the record seems to indicate,
2 and at least it is alleged that they knew she was a
3 transsexual.

4 The answer says -- this answer admits this is a
5 person who projects feminine characteristics. They knew
6 she was in general population at Terre Haute, a
7 penitentiary. That they -- according to the allegations
8 of the complaint that she was not allowed to develop, they
9 knew this was a violent place where a person with the
10 characteristics of petitioner would be assaulted. They
11 also, according to petitioner, knew transsexuals were at
12 high risk.

13 But yet the problem with the Government's
14 standard is even assuming that petitioner had all these
15 allegations and therefore assuming that she would be able
16 to establish them, they would still say I knew these facts
17 but I didn't know that she was at high risk. And that
18 is -- that is why it makes more sense when one looks at
19 what is the actual knowledge that prison officials need to
20 have. It ought to be actual knowledge that makes the risk
21 obvious, because otherwise it's always a retreating
22 standard.

23 If there are no questions, I am concluded.

24 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
25 Alexander.

1 The case is submitted.

2 (Whereupon, at 11:56 a.m., the case in the
3 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

DEE FARMER V. EDWARD BRENNAN, WARDEN, ET AL.

NO. 92-7247

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Am Mani Federico

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