No. 23:14-cr-2324

IN THE
Supreme Court of the
United States

SHELBY, ARTHUR
Petitioner,

v.

CAMPBELL, CHESTER
Respondent.

On Petitioner for a Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

TEAM NUMBER 20
Counsel for Respondent

QUESTIONS PRESENTED

1. Did the District Court wrongfully deny Arthur Shelby's motion to proceed in forma pauperis by counting his three prior Heck dismissals against him as 'strikes' under the Prison Litigation Reform Act's three-strike provision, without independently analyzing whether any of the prior suits he filed were frivolous, malicious, or failed to state a claim?
2. Did the District Court wrongfully dismiss Arthur Shelby's complaint under the Fourteenth Amendment by requiring subjective proof of Officer Campbell's culpable mindset, which is an Eighth Amendment standard?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported but reproduced on pages 12 – 20 of the record. (R. at 12 – 20). The opinion of the United States District Court for the District of Wythe is unreported but reproduced on pages 2 – 11 of the record. (R. at 2 – 11).

CONTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV, in part, provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 1915(a), in part, provides:

> Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

28 U.S.C. § 1915(b), in part, provides:

> Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee.

28 U.S.C. § 1915(g) provides:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

42 U.S.C. § 1983 provides:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1997e(a) provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Fed. R. Civ. P. 8(a), in part, provides:

> A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.

Fed. R. Civ. P. 8(c), in part, provides:

> In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense.

Fed. R. Civ. P. 12, in part, provides:

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> (1) Lack of subject-matter jurisdiction
>
> . . .
>
> (6) failure to state a claim upon which relief can be granted

STATEMENT OF THE CASE

Arthur Shelby was being held at the Marshall jail when Officer Chester Campbell placed him with three other detainees who beat Shelby within an inch of his life. (R. at 6–7). Shelby suffered life-threatening injuries as a result of the attack, including penetrative head wounds, multiple rib fractures, lung lacerations, acute abdominal edema, organ laceration, and internal bleeding. (R. at 7). After spending several weeks in the hospital, Shelby filed a § 1983 claim against Officer Campbell. Shelby moved to proceed in forma pauperis, but the District Court denied the motion and subsequently assessed a $402 filing fee. Shelby paid the fee and alleged that Officer Campbell should have known of the substantial risk of harm he faced at the Marshall jail, thereby violating his Fourteenth Amendment rights by failing to protect him from other detainees. (R. at 8).

The danger Shelby faced stems from the infamous rivalry between Marshall's two gangs: the Geeky Binders (of which Shelby is second-in command) and the Bonucci Clan. (R. at 2–3). Their history is "local legend. (R. at 2). The Geeky Binders used to control the town by "running various businesses, owning much of the real estate, and even holding public office." (R. at 3). Recently, the Bonucci Clan took over, extending their influence to public offices and law enforcement. (R. at 3). Even after a public purge of corrupt officials with Bonucci ties—including several Marshall jail officers—the Bonucci's continue to exercise considerable control. (R. at 3). Gang activity in the town is so high that the Marshall jail employs several gang intelligence officers who review all new admits to the jail for safety threats (R. at 3).

Recently Shelby's brother Tom, who leads the Geeky Binders, murdered his rival Luca Bonucci's wife. (R. at 5). The Bonucci Clan issued a hit on Arthur Shelby in retaliation (R. at 5). Gang intelligence officers at the jail were aware of the hit. (R. at 5).

Thus, when Arthur Shelby arrived at the Marshall jail on December 31, 2020, the jail took substantial precautions to ensure his safety. They first placed him in an administrative area of the jail (R. at 5), and only placed him in Block A with the other Geeky Binders once they received confirmation that all Bonucci's were dispersed between cell Blocks B and C. (R. at 5). They then held a required all-staff meeting on the morning of January 1, 2021 to brief guards about Shelby and the hit. (R. at. 5). They made notes to keep Shelby separate from all Bonuccis in multiple locations and media, including in his file, on the rosters, on floorcards in the jail, in the central database, and on paper notices left in administrative areas. (R. at 5).

On January 8, 2021, Officer Campbell took Shelby from Block A to the common recreation area. (R. at 6). While walking with Shelby, another inmate called out to Shelby, "I'm glad your brother Tom finally took care of the horrible woman," referencing the murder of Luca Bonucci's wife. (R. at 6). Officer Campbell reacted to the statement; he shushed Shelby when Shelby replied. (R. at 6). Officer Campbell then left Shelby and another Block A resident at a guard station, and collected three additional inmates—all members of the Bonucci clan—from Blocks B and C. (R. at 6–7). The Bonucci detainees attacked Shelby on sight. (R. at 6–7).

Jail officers are required to attend mandatory meetings such as the one that occurred on January 1. (R. at 5). At the very least, they are obligated to review the minutes. (R. at 6). They are also supposed to check rosters, floorcards, etc. for notices about inmates before moving anyone into common areas. (R. at 5). At the January 1 meeting, staff were reminded of these obligations (R. at 5). Officer Campbell is not a gang intelligence officer; he is only an entry-level guard. (R. at 5). However, Officer Campbell had been employed at the jail for several months and was meeting expectations. (R. at 5). The record is ambiguous as to whether Officer Campbell abided by any of these requirements. Roll call shows he was at the meeting, but

timesheets indicate he called in sick during the morning and only arrived after the conclusion of the meeting. (R. at 5–6). A glitch in the system erased whether he viewed the minutes. (R. at 6). Plaintiff saw that Officer Campbell was holding the paper roster when collecting him, but did not see whether Officer Campbell checked it. (R. at 6).

Officer Campbell moved to dismiss Shelby's complaint for failure to state a claim. (R. at 8). He did not assert qualified immunity. (R. at 8). Rather, he claimed that Shelby must demonstrate that Officer Campbell had actual knowledge of the risk to Shelby's life, rather than just should have known of it. (R. at 8). The District Court for the Western District of Wythe granted Officer Campbell's motion, holding that a failure to protect claim required a showing of subjective deliberate indifference in order to be a constitutionally cognizable injury. (R. at 8).

The Court of Appeals for the Fourteenth Circuit reversed, holding that pretrial detainee failure to protect claims are guided by an objective standard; in other words, constructive knowledge suffices. (R. at 18). It also reversed the District Court's decision to deny Shelby in forma pauperis status, holding that the District Court had improperly applied the three-strike provision of the Prison Litigation Reform Act ("PLRA") to deny the motion. Officer Campbell applied for certiorari, which this Court granted to hear whether pretrial detainee failure to protect claims involve a subjective or objective standard and to determine whether the District Court improperly applied the PLRA's three-strike rule against Shelby to deny him in forma pauperis status. (R. at 21).

SUMMARY OF ARGUMENT

The District Court erroneously applied the PLRA's three-strike rule to deny Shelby in forma pauperis status. The rule states that any prisoner who has had three prior suits dismissed for being "frivolous, malicious, or fail[ing] to state a claim" may not proceed in forma pauperis.

28 U.S.C. § 1915(g). Shelby has had three prior suits dismissed pursuant to Heck v. Humphrey, 512 U.S. 477 (1994), which held that civil actions for damages under 42 U.S.C. § 1983 may be dismissed when (1) the plaintiff's claims imply the invalidity of their conviction, and (2) they have not gotten their conviction reversed. The District Court counted those dismissals against Shelby for purposes of counting strikes under the PLRA. But that holding contravenes the plain text of the PLRA's three-strike rule.

The Fourteenth Circuit was correct to hold that Heck-barred suits do not always fail to state a claim, nor are they automatically frivolous or malicious. Heck did not create a new pleading requirement for § 1983 plaintiffs, but rather a new affirmative defense assertible by defendants. Failing to plead facts responsive to an affirmative defense does not make a complaint automatically dismissible for failing to state a claim. Moreover, the district court in every § 1983 case must make a threshold legal determination as to whether a plaintiff's claims actually imply the invalidity of their underlying conviction before invoking Heck to dismiss it. However, that threshold determination is not always clear cut and many Heck-barred claims are cognnizable as close legal calls that were neither frivolous nor malicious. Therefore, not all Heck dismissals automatically count as strikes under the PLRA.

The Fourteenth Circuit correctly held Shelby alleged sufficient facts to support his claim for failure to protect under the Fourteenth Amendment. To allege failure to protect, a plaintiff must show (1) a substantial risk of deprivation of their rights (2) stemming from unreasonable conduct of the defendant. The Fourteenth Circuit correctly held that unreasonableness of the officer's conduct is measured from an objective, not subjective standpoint. Accordingly, Shelby need not allege Officer Campbell actually knew of the risk to his safety, only that Officer Campbell should have known. Not only has this Court never held that a subjective "actual

knowledge" standard applies to Fourteenth Amendment claims by pretrial detainees, but it has repeatedly confirmed that deliberate indifference—which is the standard the district court used—is an Eighth Amendment doctrine that is inapposite to the Fourteenth Amendment. Circuit courts have grafted Eighth Amendment standards onto Fourteenth Amendment claims based largely on factual similarities between the claims of pretrial detainees and prisoners. However, this Court's holding in Kingsley v. Hendrickson, 576 U.S. 389 (2015), reaffirmed that this Court has always distinguished between Eighth Amendment and Fourteenth Amendment claims. The Court's unbroken precedent, the text of the Amendments, and their distinct purposes demands and objective standard for failure to protect claims under the Fourteenth Amendment. However, even if this Court finds that a subjective standard is appropriate, Shelby has alleged sufficient facts to demonstrate that the risk of assault was so obvious that it was subjectively knowable.

ARGUMENT

I. SHELBY'S MOTION TO PROCEED IN FORMA PAUPERIS WAS WRONGFULLY DENIED BECAUSE HECK DISMISSALS DO NOT AUTOMATICALLY COUNT AS STRIKES UNDER THE PLRA.

The cost of filing a lawsuit can prevent prisoners with even the strongest claims from vindicating their rights. That is why Congress gave district judges a choice: they can assess fees against any prisoner, 28 U.S.C. § 1915(b), or, in their discretion, they *may* grant in forma pauperis status to relieve the financial burden for a particular litigant. 28 U.S.C. § 1915(a) (emphasis added). Petitioner asks this Court to take that discretion away from district judges based on an erroneous interpretation of a provision of the PLRA. Such a result would contravene the plain text of the PLRA and prevent countless prisoners from bringing meritorious claims to court.

The District Court, in assessing a $402 filing fee against Shelby, erroneously applied the PLRA's "three-strike rule." That rule requires judges to deny in forma pauperis status to any

prisoner who, while incarcerated or detained, has brought three or more actions or appeals that have been dismissed on the grounds of being "frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). It applied the rule against Shelby, denying him in forma pauperis status, because he had three prior cases dismissed pursuant to Heck v. Humphrey, 512 U.S. 477 (1994). It determined that Shelby's previous Heck dismissals automatically count as strikes under the PLRA. That determination was erroneous because not all Heck-barred claims are frivolous or malicious, nor do they always fail to state a claim upon which relief may be granted.

Heck itself sets out a clear rule: prisoners bringing § 1983 suits for damages cannot proceed with any claims that imply the invalidity of their conviction without first getting their conviction overturned (the "favorable termination" requirement). 512 U.S. at 486-87. Heck's purpose is to prevent an outcome where a federal court hearing a § 1983 claim determines that a prisoner's conviction is invalid, generating a damages award, but then has no power to reverse the conviction itself, or worse, that another federal court later affirms the validity of the conviction in a separate habeas suit. Cf. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (holding that a writ of habeas corpus, and not § 1983, is the sole federal remedy available to a prisoner challenging the fact or duration of their physical imprisonment). Such a result would undermine a "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." Heck, 512 U.S. at 484 (1994).

The District Court's decision to count Shelby's three prior Heck dismissals as strikes against him under the PLRA misreads Heck's favorable termination requirement. The Fourteenth Circuit, in reversing the District Court and holding that Heck dismissals do not automatically count as strikes under the PLRA, joins the Seventh and Ninth Circuits. See Washington v. Los

Angeles Cnty. Sheriff's Dep't, 833 F.3d 1048 (9th Cir. 2016); Polzin v. Gage, 636 F.3d 834 (7th Cir. 2011). This court should follow the rule adopted by these three circuits because not all Heck-barred claims always fail to state a claim upon which relief may be granted, nor are they always frivolous or malicious.

A. Not all Suits Dismissed under the Heck Doctrine are Dismissed for Failing to State a Claim.

'Failing to state a claim upon which relief may be granted' is a term of art as it is used in the PLRA's three-strikes provision, 28 U.S.C. § 1915(g), which is "essentially synonymous" with the language of grounds for dismissal under Federal Rule of Civil Procedure 12(b)(6). Knapp v. Hogan, 738 F.3d 1106, 1109 (9th Cir. 2013). A plaintiff's obligation in their complaint, in order to survive an attack by a 12(b)(6) motion, is merely to provide the "grounds" of their "entitle[ment] to relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations and citations omitted). To meet that obligation, a § 1983 plaintiff must allege two things: (1) that the defendant acted under the color of law, and (2) that the defendant's conduct violated the plaintiff's constitutional rights. See, e.g., Miller v. Town of Wenham Massachusetts, 833 F.3d 46, 51 (1st Cir. 2016); Kuha v. City of Minnetonka, 365 F.3d 590, 596 (8th Cir. 2003). But neither of those elements include, and § 1983's text does not refer to, the favorable termination requirement created by Heck. So, it is not clear that favorable termination of an underlying conviction is a pleading requirement which must be alleged in the initial complaint in order to survive a 12(b)(6) motion.

Of course, not all pleading requirements sit directly in the text of the sections of the U.S. Code that create the underlying causes of action. Courts can create them too, and if this Court in Heck intended to add a favorable termination pleading requirement to § 1983 claims, it could have done so explicitly. But it did not do that. Heck's gloss on § 1983 says nothing about

whether the bar to relief it creates for § 1983 plaintiffs is jurisdictional in nature (implicating a defense for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)), whether the favorable termination requirement is in fact a pleading requirement, or whether it is something entirely different, such as an affirmative defense which the defendant must raise in order to produce a Heck dismissal.

i. *This Court should extend its reasoning from Jones to hold that Heck's favorable termination requirement is an affirmative defense*

But even though Heck is silent as to the nature of the bar to relief it created, this Court's more recent precedent interpreting similar provisions of the PLRA supports reading the Heck doctrine as an affirmative defense rather than a pleading requirement necessary to state a claim upon which relief can be granted. Specifically, in Jones v. Bock, this Court held that the provision of the PLRA that creates the administrative exhaustion requirement for actions challenging prison conditions, 42 U.S.C. § 1997e(a), creates an affirmative defense and not a pleading requirement. 549 U.S. 199, 212 (2007). There are two reasons to extend Jones's reasoning to the question presented here and hold that Heck creates an affirmative defense rather than a pleading requirement.

First, the legal issues are substantially similar. In Jones, the provision of the PLRA at issue required plaintiffs to exhaust their administrative remedies before bringing a lawsuit, and the court had to contend with an ambiguity as to "whether exhaustion must be pleaded by the plaintiff or is an affirmative defense." Jones, 549 U.S. at 212. This court held that, in the face of silence from the statute, the PLRA's administrative exhaustion requirement is better construed as an affirmative defense than a pleading requirement because the PLRA does not provide the source of the claim and only imposes a bar to relief. *Id*. Jones emphasized that the pleading scheme created by Federal Rule of Civil Procedure 8 separates pleading requirements from

affirmative defenses. Whereas Rule 8(c) provides a nonexhaustive list of affirmative defenses raisable by the *defendant*, Rule 8(a) merely requires the *plaintiff* to make a "short and plain statement" of their claim. Plaintiffs are not required to preemptively address every possible affirmative defense that could be raised against them. Thus, when the government seeks to dismiss a prisoner's suit for lack of administrative exhaustion, they must do so via responsive pleading under Rule 8 and not a motion to dismiss for failure to state a claim under Rule 12(b)(6). The upshot is that claims barred for lack of administrative exhaustion are not dismissed for failing to state a claim – the affirmative defense just wins against the properly pled complaint in those cases.

The court should now extend its reasoning from Jones to hold that Heck's favorable termination requirement also creates an affirmative defense. The favorable termination requirement is a bar to relief for prisoners bringing § 1983 suits, just like the PLRA's administrative exhaustion requirement is. And just like the PLRA's silence as to whether administrative exhaustion is a pleading requirement or an affirmative defense, Heck is silent as to whether favorable termination is a pleading requirement or an affirmative defense. Because the two bars to relief are so similar, it would create a discordant result for this court to hold that favorable termination is a pleading requirement plaintiffs must raise in their initial complaints alongside the elements of a § 1983 claim, while administrative exhaustion is not.

Second, the Congressional intent underlying the provisions at issue in this case and Jones—the three-strike rule and the administrative exhaustion requirement, respectively— are similar because the PLRA created them both for the same reasons. The policy goal behind the PLRA was to "reduce the quantity and improve the quality of prisoner suits." Porter v. Nussle, 534 U.S. 516, 524 (2002). The three-strike rule and the administrative exhaustion requirement

both serve that goal. If making administrative exhaustion an affirmative defense is in line with the PLRA's scheme to reduce the quantity and improve the quality of prisoner suits, then so should making Heck's favorable termination requirement an affirmative defense for PLRA strike counting purposes. The Court ought not depart from Jones's reasoning when the issue presented here is so similar. And the only way to faithfully extend Jones's reasoning to this case is to hold that Heck's bar to relief is effectuated properly as an affirmative defense.

The Ninth Circuit reached this same conclusion, reasoning that "compliance with Heck most closely resembles the mandatory administrative exhaustion of PLRA claims, which constitutes an affirmative defense and not a pleading requirement." Washington, 833 F.3d at 1056. The Washington court reached that conclusion by beginning with the premise that courts applying the Heck doctrine need to make the threshold legal determination as to whether the facts alleged in a particular § 1983 suit imply the invalidity of the conviction or not. Because a plaintiff's need to establish favorable termination is entirely contingent on a ruling on a purely legal matter, plaintiffs cannot always be expected to know whether their claims are Heck-barred before they file their civil action for damages under § 1983. So favorable termination cannot be understood as a necessary element at the pleading stage of every § 1983 suit and is more naturally understood as an affirmative defense which a defendant may raise whenever the court determines, as a matter of law, that a plaintiff's claims in a § 1983 suit actually attack the validity of the conviction.

ii. *The only Circuit to rebut the argument that Heck created an affirmative defense advances an unpersuasive counterargument*

The Third Circuit is the only federal circuit court to rebut Washington's conclusion that Heck creates an affirmative defense, see Garrett v. Murphy, 17 F.4th 419 (3d Cir. 2021), but their counterargument is not persuasive. Garrett rejects extending this Court's reasoning from

Jones to questions involving Heck because "[t]he Court in Heck took pains to make clear that it was not adding an exhaustion requirement to § 1983." 17 F.4th at 429. That statement is a non sequitur in this context. Extending Jones's reasoning here does not mistakenly construe Heck as creating an exhaustion requirement. Rather, the Ninth Circuit's approach emphasizes the similarity between the two bars to relief and reasons by analogy. That mode of reasoning is standard for a court applying precedent from one set of facts to a new one: the Supreme Court in Jones held that exhaustion requirements are affirmative defenses and not pleading requirements, so Washington held that Heck's favorable termination requirement also creates an affirmative defense. This result is correct not because Heck added an exhaustion requirement onto § 1983, but because administrative exhaustion requirements and favorable termination requirements are similar enough to extend this Court's reasoning from one to the other.

Garrett's only other grounds for rejecting the affirmative defense approach are purely conclusory. It states that "Heck is clear that the favorable-termination requirement is a necessary element of the claim for relief under § 1983, not an exhaustion defense that must be anticipated by the defendant's answer." Id. But Heck is not so clear. In fact, a portion of the Heck opinion that Garrett cites for that conclusory proposition states that "when a prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." Heck, 512 U.S. at 487. This does not read like a pleading requirement as much as an instruction to district judges to sua sponte take up their own Heck analysis. Then, if the judge determines the plaintiff's suit attacks the validity of their conviction, the court still does not need to dismiss it immediately for failing to state a claim. Instead, the plaintiff may proceed with their claims if "[they] can demonstrate that [their] conviction or sentence has already been invalidated." Id. While this language does not

explicitly make the favorable termination requirement an affirmative defense, it also does not explicitly make it a pleading requirement either. And it certainly does not foreclose this court from extending its own reasoning from Jones to this similar area of law that Heck left ambiguous. The Heck doctrine is thus most naturally understood as creating an affirmative defense.

iii. *The District Court on remand must adjudge Shelby's prior dismissals by Rule 8(a)'s straightforward standards*

The consequence of construing Heck as an affirmative defense is that not every § 1983 suit dismissed under Heck can be automatically characterized as being dismissed for failing to state a claim upon which relief can be granted. The three prior suits dismissed against Shelby may have properly alleged both elements of a § 1983 claim, fulfilling his obligations under Rule 8(a) to state a claim, but ended up getting dismissed because the government successfully raised a Heck defense. If that is the case, then those dismissals cannot count against him as strikes under the PLRA to deny in forma pauperis status. Determining whether Shelby's three prior dismissals were for failure to state a claim could have been done on remand, as the Fourteenth Circuit below ordered. But instead, Petitioner comes to this court seeking a sweeping new rule that would count every Heck dismissal as a PLRA strike based on the erroneous conclusion that Heck created a new pleading requirement for § 1983 plaintiffs. This court should reject that interpretation, affirm the Fourteenth Circuit, and require the District Court to analyze whether Shelby's three prior dismissals failed to state a claim according to Rule 8(a)'s straightforward standards. The PLRA does not permit any other result.

B. Not all Suits Dismissed under the Heck Doctrine are Dismissed for Frivolousness or Maliciousness.

If Heck-barred claims are not automatically dismissible for failing to state a claim, then the only question that remains for determining whether Heck dismissals automatically count as

strikes is whether every Heck-barred claim is automatically frivolous or malicious per se. They are not. At the outset, no federal circuit has held that all Heck-barred claims are automatically malicious. A claim is "malicious when it is filed with the intention or desire to harm another." Knapp, 738 F.3d at 1109 (quotations omitted). Not every § 1983 suit where the judge makes the threshold determination that the plaintiff's claims challenge the validity of their conviction, but the plaintiff has not yet met the favorable termination requirement, can be universally categorized that way.

But the Fifth Circuit has reached the extreme conclusion that all Heck-barred § 1983 suits are legally frivolous. See Hamilton v. Lyons, 74 F.3d 99, 102 (5th Cir. 1996). That holding is inconsistent with the bar for frivolousness set by this Court. An action or appeal is frivolous as a matter of law when "[none] of the legal points are arguable on their merits." Neitzke v. Williams, 490 U.S. 319, 325 (1989) (internal quotations and citations omitted). When a § 1983 plaintiff brings a claim to federal court, Heck instructs district judges to "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." Heck, 512 U.S. at 487. That is a legal conclusion which can be arguable depending on the facts alleged.

Maybe a particular plaintiff is alleging in the most explicit terms possible that their conviction is invalid, in which case the complaint could meet Neitzke's definition of frivolousness if the plaintiff has not also met Heck's favorable termination requirement. However, not all Heck-barred § 1983 suits involve such a straightforward legal determination. A plaintiff can make factual allegations where the extent to which the allegations actually imply the invalidity of their conviction are arguable, thus meeting Nietzke's standards for a nonfrivolous claim. Thus, it is erroneous to hold as a matter of law that every complaint dismissed under Heck must have been frivolous.

Another reason Heck-barred claims are not frivolous per se is that there is a split in authority over whether district courts may bypass the Heck doctrine altogether to reach the merits of a § 1983 claim. The Seventh Circuit has held that because Heck is a defense and does not create a jurisdictional bar, it is "subject to waiver." Polzin, 636 F.3d at 837-38. Therefore, "district courts may bypass the impediment of the Heck doctrine and address the merits of [a] case" at their discretion. Id. While this court need not adopt the Seventh Circuit's view that Heck defenses are waivable in order to hold that Heck dismissals are not strikes under the PLRA, the fact that a prisoner could file a Heck-barred claim in at least one federal circuit and still be eligible for relief on the merits shows how *not* frivolous it would be for a prisoner to file a § 1983 suit challenging the validity of their conviction before they meet the favorable termination requirement. While some district judges might still dismiss those suits, Polzin reflects an understanding of Heck which allows a judge to decide the merits of a Heck-barred claim at their discretion. So not every Heck-barred claim is automatically frivolous. The District Court below did not independently analyze whether any of the suits previously dismissed against Shelby were frivolous, and so it failed to apply the PLRA's three trike rule properly. This court should affirm the Fourteenth Circuit.

II. SHELBY'S COMPLAINT WAS WRONGFULLY DISMISSED BECAUSE THE FOURTEENTH AMENDMENT DOES NOT REQUIRE PRETRIAL DETAINEES TO ALLEGE AN OFFICER HAD SUBJECTIVE OR SPECIFIC KNOWLEDGE OF A SUBSTANTIAL RISK OF HARM.

Respondent has alleged sufficient facts to support his 42 U.S.C. § 1983 claim that defendant Officer Campbell violated his Fourteenth Amendment rights by failing to protect Shelby from violence by other inmates. To survive a motion to dismiss, a plaintiff must only plead facts sufficient to support his claim. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Factual ambiguities are resolved in the plaintiff's favor. See id. at 555. Claims for

damages under § 1983 must demonstrate a constitutional violation by a state actor. 42 U.S.C. § 1983. Here, Officer Campbell violated plaintiff's Fourteenth Amendment rights when he failed to protect Shelby from violence by other inmates. Failure to protect claims have two requirements: (1) a substantially serious risk of deprivation that implicates due process; and (2) a sufficiently culpable state of mind. Farmer v. Brennan, 511 U.S. 825, 828 (1994). Section 1983 does not mandate a specific mens rea. Daniels v. Williams, 474 U.S. 327, 330 (1986).

Shelby easily demonstrates risk of a serious deprivation. He sustained "life-threatening injuries" as a result of a hit by a rival gang. (R. at 5, 7); cf. Rochin v. California, 342 U.S. 165, 172 (1952) (holding that bodily integrity is a protected due process interest). The only remaining question is whether Officer Campbell's mindset was culpable enough for him to be liable for violating Shelby's Fourteenth Amendment rights. That question raises an issue of constitutional interpretation this court must now answer: whether the appropriate standard for evaluating a defendant's culpability in a failure to protect suit brought by pretrial detainees is objective or subjective. The constitution and this court's own precedent requires an objective standard.

A. Deliberate Indifference Is Not the Proper Test for Claims Made by Pretrial Detainees Under the Fourteenth Amendment.

This Court has never held that pretrial detainees suing for any prison condition under Fourteenth Amendment[1] must prove deliberate indifference by jail officials in order to establish a constitutional violation. Under the Eighth Amendment, it is well established that a prisoner suing under a failure to protect theory must demonstrate that an official acted with "deliberate indifference to a substantial risk of serious harm." Farmer, 511 U.S. at 828. Proving deliberate

[1] For ease of readability, language referring to Due Process claims under the Fourteenth Amendment should be considered to encompass identical claims under the Fifth Amendment against federal entities. Cf. Malinski v. New York, 324 U.S. 401, 415 (1945) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.") (Frankfurter, J., concurring)

indifference requires a subjective element; a prison official "must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. The Eighth Amendment applies to convicted prisoners; the Fourteenth applies to pretrial detainees who have not been convicted. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983). Shelby is a pretrial detainee, not a prisoner. (R. at 6, n.1).

The standards this Court has articulated for pretrial detainees under the Fourteenth Amendment establish that a subjective element is not necessary for liability. Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015) ("[A] pretrial detainee can prevail by providing *only objective evidence* that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.") (citing Bell v. Wolfish, 441 U.S. 520 (1979)) (emphasis added); see Youngberg v. Romeo, 457 U.S. 307 (1982) ("[L]iability may be imposed only when the decision by the professional is a substantial departure from accepted professional judgment, practice, or standards.").

This Court has never held that the Eighth Amendment deliberate indifference standard should apply to Fourteenth Amendment claims, let alone imported the subjective requirement articulated in Farmer. There is no principled reason to begin doing so now. Both this Court's jurisprudence and the Constitution itself demand that persons presumed innocent must only prove the defendant's mindset by an objective standard.

i. *"Deliberate Indifference" to Conditions of Confinement is a Feature of the Eighth Amendment's Grant of Punishment for Convicted Persons.*

Deliberate indifference is an Eighth Amendment doctrine inapplicable to Shelby's Fourteenth Amendment claim. The term first appeared in the Eighth Amendment case Estelle v. Gamble, 429 U.S. 97 (1976), where the Court held that deliberate indifference to a prisoner's serious medical need constituted cruel and unusual punishment. 429 U.S. at 291. Notably, Estelle

made no mention of pretrial detainees or what duty states or the federal government might owe them. Farmer v. Brennan, another Eighth Amendment case, established that deliberate indifference has a subjective component. 511 U.S. at 837. To prove deliberate indifference, a prisoner must show that an official knew, not just should have known, of the substantial harm the prisoner faced. Id. at 837.

The subjective requirement of deliberate indifference is rooted in the Eighth Amendment. Id. ("The . . . [subjective culpability] requirement follows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment."); Wilson v. Seiter, 501 U.S. 294, 300 (1991) ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself . . . ."). A prison official that accidentally exposes a prisoner to harm could not be said to be acting cruelly and unusually. Farmer, 511 U.S. at 838. Thus, a prison official's failure to protect an inmate is only cruel and unusual where they knew of the risk. Id. However, pretrial detainees like Shelby cannot be punished, let alone cruelly and usually. Bell, 441 U.S. at 535. The deliberate indifference doctrine, born out of the Eighth Amendment, is not appropriate for measuring whether Shelby's Fourteenth Amendment rights were violated.

ii. *This Court Has Never Held That Persons Without Convictions Must Prove Deliberate Indifference to Their Rights Under the Fourteenth Amendment.*

Refusing to apply deliberate indifference to Shelby's claim aligns with this Court's precedent. This Court has repeatedly declined to require deliberate indifference for Fourteenth Amendment detainee claims. Bell v. Wolfish, decided just three years after Estelle, overwrote a previous Fourteenth Amendment detainee standard, but with a test distinct from deliberate indifference. 441 U.S. at 535. Per Bell, conditions violate due process when they (1) amount to punishment; (2) are not "rationally related to a legitimate nonpunitive governmental purpose"; or

(3) "appear excessive in relation to that purpose." Id. at 561. Deliberate indifference features nowhere in Bell's analysis.

Youngberg v. Romeo, 457 U.S. 307 (1982) reaffirmed that Fourteenth Amendment standards for conditions claims are distinct from Eight Amendment ones. There, the Court determined the "appropriate standard was whether the defendants' conduct was such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment." Id. at 314 (internal citations and quotations omitted). Youngberg expressly rejected the use of deliberate indifference under the Fourteenth Amendment. Id. at 312, n.11. ("[The district court] erroneously used the deliberate-indifference standard articulated in [Estelle].").

Most recently, in Kingsley v. Hendrickson, the Court reaffirmed Bell's holding that pretrial detainees can prevail by showing something other than deliberate punishment, namely that an officer's intentional action was "objectively unreasonable." Kingsley, 576 U.S. at 391-92. Kingsley made no reference to Estelle, Farmer, or deliberate indifference. Id. Thus, for over forty years this Court has consistently held that pretrial detainees' claims are not governed by deliberate indifference.

This is not to say deliberate indifference never appears in connection with the Fourteenth Amendment—deliberate indifference is a standard with multiple meanings in different contexts. See e.g., County of Sacramento v. Lewis, 523 U.S. 833, 836 (1988) (a police officer does not violate due process when acting with deliberate indifference during a high-speed chase because their actions did not "shock the conscience"); Bd. of Cnty. Comm'rs of Bryan Cnty v. Brown, 520 U.S. 397, 398 (1997) (a government entity can violate due process by being deliberately indifferent to inadequate training). In the specific context of detainee claims, this Court has never required deliberate indifference. Where the court has applied the deliberate indifference standard,

it used deliberate indifference only because "[t]he parties appear to agree on this standard, and, *for purposes of this case*, the Court assumes it to be correct." Ziglar v. Abbasi, 582 U.S. 120, 146 (2017) (concerning detainees held under the Patriot Act) (emphasis added). Ziglar passed no judgment on the applicability of the standard beyond that case. Id.

The closest this Court has come to equating the Eighth and Fourteenth Amendment standards was in City of Revere v. Massachusetts General Hospital. See id., 63 U.S. at 244 (1983) ("[T]he due process rights of a [person in custody] *are at least as great as* the Eighth Amendment protections available to a convicted prisoner.") (emphasis added). After explicitly engaging with deliberate indifference under the Eight Amendment, the Court separately held that "*whatever the standard may be*, Revere fulfilled its constitutional obligation by seeing that [a person injured in custody] was taken promptly to a hospital that provided the treatment." Id. at 245 (emphasis added). Importantly, Revere only stated that the rights of people in custody are "at least as great as"—but not automatically equal to—prisoners. Id. at 244. Indeed, Revere emphasized that "because there had been no formal adjudication of guilt . . . the Eighth Amendment has no application." Id.

iii. *The Text and Guarantees of the Fourteenth Amendment Requires a Different Standard for Pretrial Detainees than Prisoners.*

That distinction between prisoners' rights and the rights of pretrial detainees like Shelby rests on the text and substantive guarantees of the Eighth and Fourteenth Amendments. The Eighth Amendment prohibits "cruel and unusual punishment" but permits punishments that do not rise to the level of "tortures and other barbarous methods." U.S. Const. Amend. VIII; see Estelle, 429 U.S. at 102 (internal citations and quotations omitted). The Eighth Amendment permits punishment "deliberately administered for a penal . . . purpose." Wilson, 501 U.S. at

300. Detention under the Eighth Amendment is *intended* as punishment for committing a crime. See id. at 297.

The Fourteenth Amendment allows detention for the limited purpose of ensuring a criminal adjudication occurs, but does not permit detention as punishment. Fourteenth Amendment guarantees hinge on "due process of law." See U.S. Const. Amend. XIV. Substantively, this means that the government may not infringe upon certain rights without proper process or justification. See Cnty. of Sacramento v. Lewis, 523 U.S. at 845 ("touchstone of due process is protection of the individual against arbitrary action of government."). Detainment before trial is justified by governmental interests in ensuring adjudication. Bell, 441 U.S. at 534. However, where adjudicated has not yet occurred, the person is presumed innocent. Id. at 533. The government cannot justifiably punish innocent persons, nor arbitrarily deprive them of other rights. Id. at 536–37. Evaluating Shelby's claim under a standard used to differentiate permissible punishment from cruel and unusual punishment runs counter to the Fourteenth Amendment's guarantee against punishment.

Circuit court holdings grafting the Farmer test onto claims by pretrial detainees ignore this distinction between the Eighth and Fourteenth Amendment. This Court's recent emphasis on the difference between the Eighth and Fourteenth Amendment in Kingsley demonstrates this application was flawed and overbroad.

Kingsley freshly re-affirmed that claims under the Eighth and Fourteenth Amendments are doctrinally distinct. 576 U.S. at 400. Kingsley emphasized that "the language of the two Clauses differs, and the nature of the claims often differs" Id. Circuit courts explicitly recognized this call to re-examine their use of deliberate indifference in pretrial detainee cases. Miranda v. Cnty. of Lake, 900 F.3d 335, 352 (7th Cir. 2018); see also Darnell v. Pineiro, 849 F.3d 17, 35 (2d

Cir. 2017); Castro v. Cnty. of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016); Banks v. Booth, 468 F. Supp. 3d 101, 100 (D.D.C. 2020). As Chief Judge Wood of the Seventh Circuit explained:

> [W]e have typically assessed pretrial detainees' medical care (and other) claims under the Eighth Amendment's standards, reasoning that pretrial detainees are entitled to at least that much protection. In conducting this borrowing exercise, we have grafted the Eighth Amendment's deliberate indifference requirement onto the pretrial detainee situation. Missing from this picture has been any attention to the difference that exists between the Eighth and the Fourteenth Amendment standards.

Id. at 350–51. The Fourteenth Circuit correctly followed this example and evaluated Officer Campbell's mindset from an objective standpoint.

No circuit has advanced a persuasive argument for this Court to depart from its precedent in this case. Most circuits simply declined to reconsider because they felt barred by rules of orderliness. Crandell v. Hall, 75 F.4th 537, 544 (5th Cir. 2023); Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018); Nam Dang ex rel Vina Dang v. Sheriff, Seminole Cnty. Fla., 871 F.3d 1272, 1279 n.2 (11th Cir. 2017). Only the Tenth Circuit advanced an affirmative argument for keeping Farmer deliberate indifference in Fourteenth Amendment claims. See Strain v. Regalado, 977 F.3d 984, 987 (10th Cir. 2020). The Tenth Circuit reasoned that because Kingsley is an excessive use of force claim, it is inapplicable to omission claims like failure to provide adequate medical care Strain, 977 F.3d at 988.

Kingsley's facts do not quarantine its utility here. While Kingsley involved excessive force and Shelby alleges a failure to protect, this is a distinction without a difference. This Court has previously recognized that the same standard can apply to use of force and failure to protect. See Youngberg, 457 U.S. at 321 (holding that substantial departure from professional benchmarks of care was the correct standard for evaluating a civil commitment facility's use of physical restraints and its failure to protect its charge from injury from other occupants). The

distinction between an affirmative act and a failure to act is not material in the pretrial detainment context. "Excessive force applied directly by an individual jailer and force applied by a fellow inmate can cause the same injuries, both physical and constitutional." Castro, 833 F.3d at 1070. The continued unprincipled extension of Eighth Amendment standards to the Fourteenth Amendment was never sanctioned, and now is expressly disavowed.

Applying the objective standard articulated in Kingsley to Shelby's case still guards against allowing the Fourteenth Amendment to become a "font of tort law." Id., 576 U.S. at 408 (Scalia, J., dissenting). "[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." Id. at 396 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. at 849). The "objectively unreasonable" standard, while sounding in negligence, goes beyond mere failure to take reasonable precautions; objective unreasonableness distinguishes between an intentional act and an accidental one. See Kingsley, 576 U.S. at 396 ("Thus, if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim."). The Ninth Circuit, when applying Kingsley to a failure to protect claim, clarified that "intentional act" means the act must be intentional "with respect to conditions under which plaintiff was confined." Castro, 833 F.3d at 1071; accord Daniels, 474 U.S. at 331 (holding that leaving a pillow on a jail staircase to be tripped over does not give rise to a constitutional injury). These requirements ensure that accidental acts—in other words, mere negligence—are not improperly transformed into constitutional harms. The objective standard is the correct inquiry for Fourteenth Amendment prison condition claims.

B. Under An Objective Standard, Shelby's Claim Easily Withstands a Motion to Dismiss.

Shelby has plead "enough facts to state a claim for relief that is plausible on its face." Twombly, 550 U.S. at 570. He has adequately alleged that Officer Campbell acted intentionally with respect to where he was placed in an objectively unreasonable manner.

First, Officer Campbell acted intentionally when he made a deliberate decision to place Shelby in a common area. Officer Campbell was aware of his actions when taking Shelby to recreation. (R. at 6). Unlike in Daniels, where a jail officer accidentally left a tripping hazard on a staircase, 474 U.S. at 328, Officer Campbell did not accidentally move Shelby from Block A to recreation. He specifically asked Shelby if Shelby wanted to go to recreation. (R. at 6). Officer Campbell made a deliberate decision with respect to plaintiff that put Shelby at risk.

Second, Officer Campbell's deliberate decision was objectively unreasonable. Actions are assessed from the perspective of a reasonable officer. Kingsley, 576 U.S. at 397. A reasonable officer would have abided by facility policy. See Plunket v. City of New York, No. 10-CV-6778 CM, 2011 WL 4000985, at *5 (S.D.N.Y. Sept. 2, 2011) (officer acted unreasonably where he left his post in violation of DOC policy). The is no evidence in the record to justify this failure, such as if Officer Campbell were in a hurry. See Leal v. Wiles, 734 F. App'x 905, 911 (5th Cir. 2018) (holding under facts very similar to this case that the officer justifiably may not have known of the risk there because he was in a hurry). Officer Campbell could have checked the roster (R. at 5), checked the database (R. at 5), attended the meeting (R. at 5–6), or reviewed the meeting notes (R. at 6) prior to placing Shelby in recreation. At the very least, he could have glanced at the floorcards or the paper notices in administrative areas. (R. at 5). Shelby need not allege that Officer Campbell took one of these actions, only that he should have done so.

Regardless, the complaint contains sufficient allegations that Officer Campbell did check one of these sources. At least one jail record indicates he was present at the meeting. (R. at 6). At this preliminary stage, factual ambiguities are resolved in favor of the plaintiff. Twombly, 550 U.S. at 555. This Court "must take as true" the allegations of a plaintiff. Estelle, 429 U.S. at 99. Either way, Officer Campbell either knew or should have known about the substantial risk to Shelby. Shelby has alleged more than sufficient facts to meet the "objectively unreasonable" standard.

C. Even if this Court Holds that Subjective Deliberate Indifference Applies to Pretrial Detainees, Shelby can Still Demonstrate that Officer Campbell Knew of and Disregarded the General Risk of Comingling Geeky Binders and Bonucci Clan Members.

Even if this Court decides that condition claims under the Fourteenth Amendment should be governed by the Farmer subjective deliberate indifference standard, Shelby can still withstand a motion to dismiss. Farmer requires a plaintiff to prove that an officer was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. One way to demonstrate awareness of facts and actual inference is by demonstrating the information was so obvious it was subjectively knowable. Id. Shelby can demonstrate that Officer Campbell, despite not recognizing Shelby *specifically*, knew that *generally* Geeky Binders face a substantial risk of harm from Bonuccis. Officer Campbell's training coupled with the town's substantial gang activity made it obvious that comingling detainees from Block A and Blocks B and C presented a substantial risk of harm.

i. *No Knowledge of the Particularized Risk is Required, Officer Campbell Only Needed to Generally Know of a Substantial Risk.*

Farmer did not require a plaintiff to prove knowledge of an exact threat to an inmate. See Farmer, 511 U.S. at 84 ("[I]t 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."). A plaintiff can still prove deliberate indifference to a substantial risk of harm by demonstrating that they are in substantial danger of a general risk. Id. Gang rivalry can serve as a basis for establishing a known, general risk. Plunkett, 2011 WL 4000985, at *4 (jail employees assumed to have knowledge of risk where plaintiff alleged sufficient facts to demonstrate Riker's had a custom of separating rival gangs). Thus, Shelby can still prevail by demonstrating Officer Campbell had actual knowledge of the general risk of intermingling members of the Geeky Binders and member of the Bonucci clan, and that each gang was housed in cell Blocks A or Blocks B and C, respectively.

ii. *Shelby's Complaint Adequately Pleads that Officer Campbell Had Subjective Knowledge of the Risk Because the Risk Was so Obvious it Must Have Been Known.*

Establishing actual knowledge of a substantial risk is a fact-based inquiry. Farmer, 511 U.S. at 842. Actual knowledge can be proven using circumstantial evidence. Id. "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id. Obvious facts include those that are "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past." Id. Thus, if there is evidence that the official was "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." Id. at 842–43.

Shelby has alleged sufficient facts to demonstrate that the Farmer test is met here. For one, Marshall is a town ruled by two large gangs. (R. at 3). In a small municipality like a town, especially one with such "substantial" and "high" gang activity, it is both obvious and longstanding knowledge that these two gangs exist. (R. at 4). It is such common knowledge that the District Court referred to the story about how Geeky Binders came to be as "local lore." (R.

at 2). That the Geeky Binders fight with the Bonucci clan over control of the town of Marshall is a fact likely obvious to all who live there. The existence of the gangs should be even more obvious to Officer Campbell because of his role in law enforcement. Moreover, the recent firing of corrupt jail officers was 'public' and certainly noted by a current employee. (R. at 3). There are sufficient facts to demonstrate the gang rivalry is an obviously known fact.

Shelby also alleged sufficient facts to show Officer Campbell knew the jail's policy of keeping the gangs separate. Office Campbell had been working at the Marshall jail for several months at the time of the attack. (R. at 5). He had proven he was a competent employee during that time. (R. at 5). Adequate performance would include gaining knowledge of the jail's practice of keeping the gangs separate, with the Geeky Binders in Block A and the Bonuccis in Blocks B and C. (R. at 5).

While it is stipulated that Officer Campbell did not recognize Shelby when taking him to recreation, Shelby's statements and actions immediately before the attack demonstrate that Officer Campbell at least knew he was a Geeky Binder. Right before Officer Campbell left Shelby at the guard station, another detainee called out to Shelby about Tom—the leader of the Geeky Binders—and labelled Shelby as Tom's brother. (R. at 6). Coupled again with the town's immense gang activity and the common knowledge among not just officers, but townsfolk of the leaders of the Geeky Binders, the mention of the leader of the Geeky Binders by name as Shelby's brother is enough to infer that is was obvious Officer Campbell was transporting a Geeky Binder.

Moreover, the jail requires that officers check the floorcards or rosters before moving detainees about the jail, which it appear Officer Campbell did not do. (See R. at 7–8). The District Court found that at the January 1 meeting, gang intelligence officers "*reminded* everyone

to check the rosters and floor cards regularly to ensure that the rival gangs were not coming in contact in common spaces in the jail." (R. at 5) (emphasis added). The fact that this practice was something to be reminded of, not taught, indicates it was already in place. Therefore, Officer Campbell would have known of it regardless of his January 1 meeting attendance. Additionally, paper notices were printed and placed in all administrative areas of the jail. (R. at 5). Officer Campbell was undoubtedly exposed to at least one of these notices in the six days between when they were posted and before he took Shelby to recreation.

This is precisely the kind of situation where "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious". Farmer, 511 U.S. at 842. Shelby has alleged sufficient facts to demonstrate that knowledge of risk was so obvious that Officer Campbell had been exposed to it, and therefore knew about it. Regardless of the standard of mental intent, the complaint has alleged enough, on its face, to withstand a motion to dismiss.

CONCLUSION

The Court should affirm the Fourteenth Circuit and grant Shelby's motion to proceed in forma pauperis and deny Defendant's motion to dismiss. The District Court erroneously applied the PLRA's three-strike rule. Shelby's prior Heck dismissals do not automatically count as strikes against him because Heck-barred claims are not automatically frivolous or malicious, nor do they automatically state a claim upon which relief can be granted. The District Court also wrongly dismissed Shelby's § 1983 complaint because it evaluated the culpability of Officer Campbell using the incorrect standard. It also failed to resolve factual ambiguities in Shelby's favor when deciding that Officer Campbell did not possess actual knowledge of the risk. For the

foregoing reasons, Plaintiff respectfully requests this court affirm the order of the Fourteenth Circuit and remand the case to the District Court for further proceedings.