Docket No. 23-05

In The

Supreme Court of the United States

October Term, 2023

ARTHUR SHELBY,

Petitioner,

v.

CHESTER CAMPBELL,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT

Team 43

[redacted]

Attorneys for Respondent

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QUESTIONS PRESENTED

I. Does a dismissal of a prisoner's civil action under *Heck v. Humphrey* equate to a failure to state a claim and constitute a "strike" within the meaning of the Prison Litigation Reform Act (PLRA) 28 U.S.C. § 1915 and is the imminent danger exception accepted when the danger has been subsequently removed?

II. Whether pretrial detainees and convicted prisoners are afforded the same constitutional protections even though pretrial detainees are presumed innocent until proven guilty?

III. Does *Kingsley v. Hendrickson* eliminate the requirement for a pretrial detainee to prove a defendant's subjective intent in a failure-to-protect claim for a violation of the pretrial detainee's Fourteenth Amendment Due Process rights in a 42 U.S.C. § 1983 claim?

OPINIONS BELOW

The decision and order of the United States District Court for the Western District of Wythe is unreported and set out in the record. R. at 1-11. The opinion of the United States Court of Appeals for the Fourteenth Circuit Court of Appeals is also unreported and set out in the record. R. at 12-20.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS

Constitutional Provisions

The Eighth and Fourteenth Amendments to the United States Constitution are relevant to this case and reprinted in Appendix A.

Statutory Provisions

The following statutes are relevant to this case: 28 U.S.C. § 1915(a); 28 U.S.C. § 1915(g); 28 U.S.C. § 1915(h); 42 U.S.C. § 1983. These statutes are reprinted in Appendix B.

REGULATORY PROVISIONS

Fed. R. Civ. Proc. 12(b)(6) is relevant to this case and reprinted in Appendix C.

STATEMENT OF THE CASE

Factual Background

Geeky Binders run the town of Marshall. Arthur Shelby is a prominent member of a well-known gang in Marshall. R. at 2. The infamous gang—the Geeky Binders—was formed after their founding member, Brendan Alex Davidson, escaped from custody after proceeding pro se on his trial for murder. R. at 2. During closing arguments, Davidson beat the courtroom guards in the courtroom to death by striking them with binders full of case law. R. at 2. Since Davidson's courtroom escape, the Geeky Binders have developed a reputation for sophisticated torture techniques using sharp awls they have hidden in engraved ballpoint pens. R. at 2. Historically, the Geeky Binders have dominated the town of Marshall by running many of the town's businesses, owning much of the real estate, and even holding public offices guiding important policy decisions for the town. R. at 3.

Rival gang creates competition for the Geeky Binders. The Geeky Binders lost control of Marshall after the recent takeover by Luca Bonucci and the Bonucci clan (herein after referred to as "Bonucci"). R. at 3. Since rising to power, the Bonucci's have exerted pressure on local politicians in their war for control over the town of Marshall. R. at 3. Some of the officials include Marshall police officers and jail officials who were charged with accepting bribes from members of the Bonucci clan. R. at 3. In an effort to erase the gang's influence, the Marshall jail has replaced the corrupt officials with new employees unaffected by the Bonucci's influence. R. at 3. Bonucci's control dwindled when he was brought into custody on charges of assault and armed robbery with several other members of the Bonucci clan. R. at 3. However, even from behind bars, the Bonucci clan still competes with the Geeky Binders to dominate and control the town of Marshall. R. at 3.

Police arrest Arthur Shelby. Recently, Marshall police attempted to arrest three leading members of the Geeky Binders—Thomas Shelby, Arthur Shelby, and John Shelby at a boxing match on charges of battery, assault, and a number of firearm offenses. R. at 3. Arthur's brothers managed to flee the scene, while Arthur (herein after referred to as "Shelby") under the influence of alcohol and several drugs, failed to escape. R. at 3. Police subsequently charged Shelby with battery, assault, and possession of a firearm by a convicted felon and held him at the Marshall jail. R. at 3-4. Officer Dan Mann, a seasoned jail official, booked Shelby and took note of his affiliation with the Geeky Binders. R. at 4. Specifically, he noted Shelby's three-piece suit, long overcoat, and custom-made ballpoint pen—concealing an awl and engraved with the words "Geeky Binders." R. at 4. The jail's database contains a file for each inmate that lists their charges, inventoried items, medications, gang affiliation, other pertinent statistics, and data that jail officials would need to be aware of. R. at 4. While Officer Mann entered Shelby's paperwork, he noted that Shelby already had a page in the database due to his prior arrests. R. at 4. Officer Mann had to open a new file to find the information on Shelby's prior arrests, but the gang affiliation was displayed on the jail's online database. R. at 5. After booking, Shelby was placed in a holding cell apart from the main area of the Marshall jail. R. at 5.

Gang intelligence officers. Due to Marshall's high gang activity, the gang affiliation subset of the page is particularly valuable to the gang intelligence unit who review all incoming inmate's entry in the online database. R. at 4. The database allows officers to indicate any known gang affiliation, possible hits placed on the inmate, and ongoing gang rivalries. R. at 4. The Marshall gang intelligence unit reviewed and edited Shelby's file, noting that Shelby had been a prime target of the Bonucci clan since Shelby's brother murdered Bonucci's wife. R. at 5. After marking a special note in Shelby's file, the unit printed out notices at every administrative area in

the jail, even placing roster and floor cards indicating Shelby's status. R. at 5. Then, the officers held a meeting with all jail officials to notify the staff that Shelby would be isolated to the population of cell block A, while members of the Bonucci clan would need to be held between cell blocks B and C. R. at 5. The intelligence unit encouraged officers to check the roster and floor cards regularly to ensure rival gangs were not in contact with each other in any common space in the jail. R. at 5.

Officer Chester Campbell. Officer Chester Campbell (herein after referred to as "Officer Campbell") is a new guard at the Marshall jail and has been meeting job expectations since he was employed after basic training. R. at 5. Officer Campbell was out sick the morning that the gang intelligence unit held their briefing on Shelby's arrival. R. at 5. The jail's time sheets indicate that Campbell did not arrive until after the meeting was finished despite roll call records indicating his presence. R. at 4-5. The policy of the Marshall jail was to require anyone absent to review a recording of the meeting on their database, which ordinarily indicates whether a person reviews the meeting minutes. R. at 6. Unfortunately, a glitch in the system caused a total erasure of who viewed the recording of the debrief held by the gang intelligence unit. R. at 6.

Inmate transfer. Approximately a week after Shelby was booked, Officer Campbell was entrusted to transfer inmates to and from the jail's recreation room as an entry-level guard. R. at 6. Officer Campbell approached Shelby and Shelby indicated he wanted to go to recreation. R. at 6. Unfortunately, at this time Officer Campbell did not know or recognize Shelby, and failed to reference the hard copy list of inmates and the jail's database. R. at 6. Despite this, Officer Campbell continued with regular transportation duties and retrieved Shelby from his cell and led him to the guard stand to wait for other inmates to be gathered for recreation. R. at 6. While

making the walk to the guard stand, another inmate expressed his gratitude towards Shelby's brother for "t[aking] care of that horrible woman," referencing an attack on Bonucci's wife. R. at 6. When Shelby responded, Officer Campbell told him to be quiet, collected another inmate from cell block A and then two more from cell blocks B and C. R. at 6-7. As soon as the inmates were in contact, the inmates from cell block B and C, who were members of the Bonucci clan, jumped Shelby and began beating him. R. at 7. Officer Campbell tried unsuccessfully to break up the fight but could not take down Shelby's aggressors until other officers arrived to assist. R. at 7. Shelby was transported to the hospital after suffering life-threating injuries, including a traumatic brain injury and severe fractures. R. at 7. After a bench trial, Shelby was acquitted of the assault charge and found guilty of battery and possession of a firearm by a convicted felon. R. at 7.

Procedural Background

District of Wythe. After the attack, Shelby filed a 42 U.S.C. § 1983 action pro se against Officer Campbell in his individual capacity within the statute of limitations. R. at 7. Coupled with his complaint, Shelby filed a motion to proceed in forma pauperis, which the district court denied pursuant to 28 U.S.C. § 1915(g) based on Shelby's accrued three "strikes" under the Prison Litigation Reform Act (hereinafter referred to as "PLRA"). R. at 7. In response to the court's order, Shelby paid the $403.00 filing fee in full. R. at 7. Thereafter, Shelby alleged Officer Campbell violated his rights when he failed to protect Shelby as a pretrial detainee from the rival gang attack and requested damages for his resulting injury. R. at 8. Officer Campbell responded by filing a motion to dismiss arguing that Shelby failed to state a claim. R. at 8.

The District Court of Wythe granted Officer Campbell's motion to dismiss. R. at 2. The court correctly held that for an officer to be held liable under a failure-to-protect claim, an official must have a subjective, actual knowledge of the risk to the inmate, and recklessly

disregard such risk. R. at 8. Additionally, the court held that the subjective standard used to evaluate a deliberate indifference claim, like a failure-to-protect claim, applies to pretrial detainees and prisoners in the same regard. R. at 8. In sum, the court found that the facts alleged by Shelby did not demonstrate a culpable state of mind for Officer Campbell at the time of the attack. R. at 8.

Fourteenth Circuit. On appeal, the Fourteenth Circuit Court of Appeals reversed the district court's decision and remanded the case. R. at 19. The Circuit Court of Appeals incorrectly held that the district court erred in counting Shelby's prior *Heck* dismissals as "strikes" under the PLRA and that failure-to-protect claims must be analyzed under an objective standard established in *Kingsley v. Hendrickson*. R. at 15-16. The Circuit Court concluded that Officer Campbell acted in an objectively unreasonable manner with all of the information made available to him regarding Shelby's status in the Geeky Binders gang and consequently placed Shelby at risk of suffering serious harm. R. at 19.

SUMMARY OF THE ARGUMENT

We respectfully ask this Court to reverse the Fourteenth Circuit's decision based on two points of error. First, the reversal of the district court's holding that dismissal under *Heck v. Humphrey* do not constitute a strike under 28 U.S.C. 1915(g). Second, the district court's holding that Officer Campbell was liable for failing to protect Shelby.

The Prison Litigation Reform Act. The PLRA forbids inmates to proceed in forma pauperis when they have accrued three strikes. Strikes under this Act include dismissals of suits brought by inmates based on frivolous, meritless, or failure to state a claim; regardless of whether they were dismissed with or without prejudice. Shelby's claims were dismissed pursuant to *Heck v. Humphrey* which falls under the category of failure to state a claim. Since Shelby

brought three separate actions, all of which were dismissed for failure to state a claim, the district court was correct in denying him permission to proceed in forma pauperis. One can be excused from the three strikes rule if an inmate faces imminent danger of serious physical injury at the time the complaint was filed. Although courts initially faced difficulty with whether the imminent danger must be present when the complaint was filed or when the incident took place, several circuit courts took the approach that the proper inquiry is when the complaint was filed. In this case, Shelby was transported to a hospital immediately after the attack and then was moved to an entirely different prison after he was treated. He is now housed in the Wythe prison surrounded by armed guards away from his attackers and is not subject to imminent danger of serious physical injury at the time the complaint was filed.

Constitutional protections for a pretrial detainee. In a deliberate indifference claim, both pretrial detainees and convicted prisoners are awarded the same constitutional protections. Whether a claim arises under the Fourteenth or Eighth Amendment, a pretrial detainee cannot be punished prior to an adjudication of guilt. The same subjective standard requirement under *Farmer* applies to determine whether an official was attempting to punish a pretrial detainee in their conduct. Thus, Officer Campbell's conduct did not amount to punishment as he was not aware of Shelby's high-risk status and inadvertently placed him in a group with other violent inmates. He did not take Shelby to recreation against his will; Shelby indicated he wanted to go and did not express any safety concerns to Officer Campbell at the time. As soon as Officer Campbell saw the attack take place, he immediately tried to break it up and called for backup. Therefore, Officer Campbell was not subjectively aware of the risk Shelby faced and did not punish him in any form by transporting him to recreation under his normal job duties.

***Kingsley* is not a one size fits all**. *Kingsley* analyzed excessive force claims and the court determined they fall under an objective standard. That objective standard cannot be extended to all pretrial detainee claims because failure-to-protect claims, conditions of confinement, and inadequate medical care require different state of minds for an officer to be held liable. Applying the subjective standard adopted in *Farmer*, Officer Campbell did not knowingly disregard Shelby's safety because he was not aware of Shelby's high-risk status or gang affiliation. While Officer Campbell could have known this information by checking the jail's online database and hardcopy roster lists, he failed to do so before the attack. At most, Officer Campbell's actions were negligent and do not rise to the high standard of deliberate indifference. The standard is not what a reasonable officer would have done under the circumstances—it is what the officer knew at the time and what actions he took as a result of his personal knowledge. Because Officer Campbell was not subjectively aware of the risk Shelby faced, he cannot be held liable for the unprovoked inmate attack that came about when he was transporting inmates to recreation.

STANDARD OF REVIEW

The appropriate standard of review for determining if the appellate court erred in reversing the district court is de novo. De novo review grants the court broad freedom to "not defer to the lower court's ruling but freely consider[] the matter a new, as if no decision had been rendered below." *United States v. Silverman,* 861 F.2d 571, 576 (9th Cir. 1988). Constitutional questions as well as statutory interpretation of a law are reviewed de novo. *United States v. Perez-Macias*, 335 F.3d 421, 425 (5th Cir. 2003). Therefore, the de novo standard applies when reviewing whether the dismissal of a claim pursuant to 28 U.S.C. § 1915(g) constitutes a strike for purpose for 28 U.S.C. § 1983 as well as when reviewing whether an officer's conduct infringes on a pretrial detainee's constitutional rights. *See id*. When issues of law are raised, a

court applies de novo review to reach a different outcome than the lower courts based on the record. *See State v. Madison*, 163 Vt. 390, 393 (Vt. 1995).

ARGUMENT

I. This Court should reverse the Fourteenth Circuit's decision because dismissals based on the failure to state a claim constitute strikes under the Prison Litigation Reform Act.

The Prison Litigation Reform Act (PLRA) prohibits a prisoner from bringing more than three lawsuits in forma pauperis if the actions were dismissed on the grounds that it was frivolous, malicious, or failed to state a claim. 28 U.S.C. § 1915(g). This three-strike maximum has been deemed the "three strikes rule." Sandra J. Senn, *Stemming of the Time: Reduction in Federal Pro Se Prisoner Lawsuits*, 9-OCT S.C. Law. 24 (1997). *Id*. at 26. Failure to state a claim is the basis for a Rule 12(b)(6) dismissal and a Rule 12(b)(6) dismissal constitutes a strike under the PLRA. *Washington v. Los Angeles Cnty. Sheriff's Dept.*, 833 F.3d 1048, 1055 (9th Cir. 2016). If an inmate has accumulated three strikes, it prevents him from proceeding in forma pauperis unless there is a showing that he is in "imminent danger of physical harm." *Id*. at 1051.

Prisoners who are granted in forma pauperis status are not relieved from filing fees but can postpone the payment if they have not filed too many meritless complaints in the past. *See Neitzke v. Williams*, 490 U.S. 319, 324 (1989). The PLRA was enacted in "order to address the large number of prisoner complaints filed in federal court, mandate early judicial screening of prisoner complaints and require prisoners to exhaust prison grievance procedures before filing suit." *Jones v. Bock*, 549 U.S. 199, 199 (2007). The majority of prisoner complaints lack merit, with many being frivolous. *See Neitzke,* 490 U.S. at 324. The task for the judicial system is prevent the inundation of baseless claims from overshadowing the claims that do have merit. *See id*. The major goal behind the PLRA is to "promote administrative redress, filter out groundless

claims, and foster better prepared litigation of claims aired in court." *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

The failure to state a claim threshold includes all dismissals. *See Lomax v. Ortiz-Marquez*, 590 U.S. 1721, 1722 (2020). In *Lomax*, the inmate filed for in forma pauperis status, but had three legal actions dismissed already while he was incarcerated. *Id*. The Supreme Court therefore had to look at if the dispositions of those cases amounted to three strikes to determine if the inmate could proceed in forma pauperis. *Id*. The Court stated, "this case begins and pretty much ends, with the text of Section 1915(g)." *Id.* In accordance with Section 1915(g), a prisoner accrues a strike for any case dismissed due to failure to present a claim for which relief can be granted—encompassing all such dismissals, whether they are dismissed with or without prejudice. *Id*. Dismissals that do not fall under the PLRA are generally both habeas corpus and mandamus petitions. *See Washington v. Los Angeles Cnty. Sheriff's Dept.*, 833 D.3d 1048, 1059 (9th Cir. 2016); *see also Defining the Reach of Heck v. Humphrey: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus*?, 121 Harv. L. Rev. 868, 869 (2008) (stating convicted criminals usually challenge constitutional violations while confined through two avenues— the habeas corpus statute and through a 42 U.S.C. § 1983 claim). In *Lomax*, the inmate argued that two of the three dismissals were made without prejudice and should not have counted as strikes. *Lomax*, 140 S.Ct. at 1724. However, the Supreme Court joined the Tenth Circuit Court of Appeals and rejected this argument, holding that the nature of the prior dismissals was immaterial because he had already brought three lawsuits during his time in prison that were dismissed pursuant to a failure to state a claim. *Id*. at 1724. The Court declined to reach the opposite conclusion that "dismissed" means "dismissed with prejudice" and counter the intent of Congress in passing the PLRA in the first place. *Id*. at

1724-25. Therefore, the Court held that the statute does not apply only to dismissals with prejudice. *Id*. at 1725.

Therefore, Shelby was prohibited from bringing another cause of action without paying the full filing fees after three prior cases were dismissed pursuant to *Heck*. R. at 1. Similar to the court's holding in *Lomax*, the language of the PLRA covers *all* dismissals—with or without prejudice. Therefore, Shelby's three separate civil actions brought under 42 U.S.C. § 1983 that were dismissed without prejudice squashed his ability in proceeding in forma pauperis. R. at 3. Thus, the district court was proper to deny Shelby to proceed in forma pauperis. R. at 7.

A. Shelby's three prior dismissed cases pursuant to *Heck* are considered "strikes" under the Prison Litigation Reform Act.

Cases that are dismissed pursuant to *Heck* that lack a valid cause of action are thus categorized as a failure to state a claim. *See Garrett v. Murphy*, 17 F.4th 419, 428 (3d Cir. 2021). A "strike" is defined as follows: "an action or appeal in a court of the United States that was dismissed on the grounds that it was frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger." 28 U.S.C. § 1915(g)); *see also Coleman v. Tollefson*, 575 U.S. 532, 537 (holding a prior dismissal counts as a strike "even if the dismissal is the subject of an appeal."). A strike determination under U.S.C § 1915(g) is solely dependent on the grounds for dismissal, irrespective of the prejudicial impact on the decision. *Lomax v. Ortiz-Marquez*, 140 S.Ct. 1721, 1724 (2020).

In *Heck v. Humphrey*, Heck was convicted in state court and sentenced to fifteen years in state prison. 512 U.S. 477, 479 (1994). While in prison, Heck filed a 42 U.S.C. § 1983 claim against prosecutors and an investigator for knowingly destroying evidence, among other allegations. *Id*. In Heck's complaint, he did not ask for injunctive relief or release from custody—only compensatory and punitive damages. *Id*. The Court answered the question of

whether to dismiss Section 1983 claims that call into question the lawfulness of the conviction. *Id*. at 483. The answer was that when requesting an award of damages, that if awarded would inherently imply the unconstitutionality of the conviction or sentence, a plaintiff must prove that he received a favorable termination during the previous case to proceed with the present suit. *Id.* at 486-87. If the plaintiff cannot prove a favorable termination, his case will be dismissed pursuant to *Heck v. Humphrey*. *Id*. Therefore, if a district court determines that a judgment in favor of the plaintiff would imply the invalidity of his conviction or sentence, then it is proper to dismiss the complaint. *Id*. For example in *Cabot v. Lewis*, the court provided an example of the type of case where *Heck* would apply; in a scenario where a man was convicted of resisting arrest and sought to bring a Section 1983 claim for a violation of his Fourth Amendment rights. *Cabot v. Lewis*, 241 F.Supp.3d 239, 254 (D.Mass. 2017). *Heck* applied in this case because "in order to prevail on his 1983 claim, he would negate an element of the offense for which he was convicted—namely, that his arrest was lawful." *Id*.

This rule mirrors malicious prosecution claims that required favorable termination which *Heck* relied on. *See Garrett*, 17 F.4th at 428; *see also* Steven H. Steinglass, *§ 18:17 Heck v. Humphrey and the Scope of § 1983*, 2 Section 1983 Litigation in State and Federal Courts § 18:17 (2023). Favorable termination was originally a necessary element of a malicious prosecution claim and without it, the complaint must be dismissed as failure to state a claim. *Garrett*, 17 F.4th at 428. In other words, if favorable termination does not occur, the complaint must be dismissed as, "premature for failure to state a claim." *Id*. Therefore, both a malicious prosecution claim and Section 1983 claims that necessarily challenge the validity of the conviction or sentence require a plaintiff to prove favorable termination in the previous case as necessary to "bring a complete and present cause of action." *Id*.

Heck dismissals come in various forms—only a complete dismissal of an action under *Heck* constitutes a strike under the PLRA. *Washington v. Los Angeles Cnty. Sheriff's Dept.*, 833 D.3d 1048, 1055 (9th Cir. 2016). There are two circumstances in which *Heck* is implicated: "(1) when a prisoner has filed a civil suit seeking monetary damages only relating to an allegedly unlawful conviction; and (2) when a prisoner seeks injunctive relief challenging his sentence or convictions and seeks monetary relief for damages attributable to the same sentence or conviction." *Id*. at 1056. While a *Heck* dismissal is not categorically frivolous or malicious, it is a dismissal for failure to state a claim. *Id*. at 1055. On the face of the complaint, *Heck* dismissals constitute Rule 12(b)(6) dismissals for failure to state a claim because a necessary element to prove the cause of action was not plead. *Id*. at 1054. Additionally, the Third Circuit Court of Appeals held that a *Heck* dismissal constitutes a failure to state a claim stating that, "We now join the Fifth, Tenth, and D.C. Circuits in holding that the dismissal of an action for failure to meet Heck's favorable-termination requirement counts as a PLRA strike for failure to state a claim. We do so for a simple reason: Any other rule is incompatible with *Heck*." *Garrett*, 17 F.4th at 427. Therefore, under any circumstance a *Heck* dismissal is synonymous with a 12(b)(6) dismissal for failing to state a claim. *See id*.

In the case of *In re Jones,* the plaintiff tried to compel the district court to grant him in forma pauperis status after he already had three cases dismissed for failure to state a claim under *Heck v. Humphrey*. *In Re Jones*, 652 F.3d 36, 38 (D.C. Cir. 2011). In that case, the court joined the Fifth and Tenth Circuits upholding the *Heck* rule and concluding that the "plaintiff has failed to state a claim for purposes of section 1915(g)." *Id*. In the end, the court held that when Jones initiated his four earlier Section 1983 damage lawsuits, three cases were dismissed in accordance with *Heck* and his conviction had not been overturned. *Id*. at 38. Therefore, his Section 1983

claims were considered premature under *Heck*. *Id*. In *Garrett v. Murphy*, the court reasoned that, "[s]uits dismissed for failure to meet *Heck's* favorable-termination requirement are dismissed because the plaintiff lacks a valid 'cause of action' under § 1983, and a cause of action in this context is synonymous with a 'claim' under the PLRA." *Garrett*, 17 F.4th at 427.

Shelby had three prior cases dismissed pursuant to *Heck v. Humphrey* similar to the plaintiff's procedural history in *In re Jones.* R. at 1. The actions Shelby commenced would have caused the court to question either his conviction or sentence. R. at 3. Consequently, under *Garrett,* the favorable termination rule would have applied and allowed the district court to proceed with dismissal. R. at 3. *Heck* dismissals have been proven to count as strikes under the PLRA as failure to state a claim. Shelby's procedural history is exactly the kind of conduct Congress was aiming to prevent by passing the PLRA in the first place; disallowing a prisoner from continuing to use the benefits of proceeding in forma pauperis after bringing three baseless claims during the time an inmate was incarcerated. R. at 7. Therefore, the district court was correct in denying Shelby the right to proceed in forma pauperis under 28 U.S.C. § 1915(g).

B. Shelby was not in imminent danger and thus cannot be excused under the exception.

There is disagreement among the courts as to the determination of whether an inmate is in "imminent" danger so as to qualify for the exception to the "three strikes" provision is to be determined as of the time of the alleged incident, or at the time the complaint is filed. *See Abdul-Akbar v. McKelvie*, 239 F.3d 307, 312 (3d Cir. 2001); *but see Gibbs v. Roman*, 116 F.3d 83, 86 (3d Cir. 1997) (holding that the imminent danger exception must be evaluated by what the inmate faced at the time of the alleged incident). The Third Circuit Court of Appeals was originally under the impression that the evaluation occurs at the time of the alleged incident. *Gibbs*, 116 F.3d at 93. However, only four years later in *Abdul-Akbar v. McKelvie*, the Third

Circuit Court of Appeals overruled that decision and joined alongside the Fifth, Eighth, and Eleventh Circuit Court of Appeals in holding that imminent danger is evaluated at the time the complaint was filed. *McKelvie*, 239 F.3d at 312. Additionally, courts have held that inmates who faced imminent danger in the past, but not currently, was insufficient to trigger the exception. *Daker v. Ward*, 999 F.3d 1300, 1311 (11th Cir. 2021). Furthermore, the three strikes rule does not block an inmate's ability to recover at all, it just requires them to pay the full filing fee at the time of filing. *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997). So even if an inmate was not in imminent danger of physical injury at the time the complaint was filed, they can still proceed with their complaint simply by making the payment at the time of filing. *Id.*

In *Daker v. Ward*, the inmate alleged that prison officials were forcibly shaving inmates who did not voluntarily want to shave, placing him in imminent danger by allegedly cutting him and burning him in the process. *Daker,* 999 F.3d at 1306. The Eleventh Circuit Court of Appeals rejected the petitioners view that the use of unsanitized and damaged clippers increased the risk of transmitting infectious diseases and thus presented an imminent danger. *Id.* at 1311. The court reasoned that an inmate "being forcibly shaved with damaged and unsanitary clippers could expose him to an infectious diseases like HIV or hepatitis [was] too speculative to establish he was under imminent danger." *Id*. at 1312. To rise to the level of imminent, an inmate must face danger of serious physical injury. *Jacoby v. Lanier*, 850 F.App'x 685, 688 (11th Cir. 2021). For example, in *Jacoby v. Lanier*, the plaintiff alleged that prison officials used excessive force by pepper-spraying, punching, kicking, physically and verbally assaulting him. *Jacoby*, 850 F.App'x at 686. The inmate alleged that he asked for protective custody, and it was never provided, thereby leading him to be on suicide watch due to repeated threats and fear of violence

from the officials. *Id*. at 687. In this severe example, the court determined the inmate met the imminent danger exception. *Id*.

Applying the standard set forth by the Third, Fifth, Eighth, and Eleventh Circuit Court of Appeals, Shelby was not in imminent danger at the time the complaint was filed. Even though Shelby suffered injuries during the attack, the fight was broken up and he was transported to the hospital to get treated. R. at 7. Following an extended hospital visit, Shelby was found guilty of battery and possession of a firearm by a convicted felon and was placed at the Wythe prison. R. at 7. There is no evidence that the rival gang members are also incarcerated at the Wythe prison or are presently putting Shelby in imminent danger. R. at 7. Shelby's allegations do not rise to the high level of danger presented in *Jacoby.* To speculate whether Shelby will face danger at the Wythe prison is exactly that—speculation within the court's view illustrated in *Daker*. Generally, prisons have armed guards and keep violent inmates in separate cells. After this attack and the information that the gang intelligence unit gathered on Shelby in the Marshall jail, the officials at the Wythe prison will have background context into Shelby's risk status. R. at 5. Therefore, Shelby cannot claim the imminent danger exception.

II. Pretrial detainees and prisoners are awarded the same constitutional protections in a deliberate indifference claim.

The Constitution protects incarcerated people from reasonably foreseeable assaults by other inmates. *See Villar v. Cnty. of Erie*, 5 N.Y.S.3d 747, 748 (4th Dept. 3015); *see also Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1099 (11th Cir. 2014) (pointing out preventing every inmate-on-inmate attack is not the responsibility of a prison official). The State must adhere to due process guarantees for both pretrial detainees and convicted state prisoners "because of the State's recognized interests in detaining defendants for trial and in punishing those who have been adjudged guilty of a crime." *Hare v. City of Corinth,* 74 F.3d 633, 638 (5th Cir. 1996).

Since pretrial detainees and convicted state prisoners alike are restricted in their personal freedoms, the State's duty to both groups is to provide basic human needs such as, "food, clothing, shelter, medical care, and reasonable safety" while within their care. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs*., 489 U.S. 189, 200 (1989). Pretrial detainees are differentiated among convicted criminals because they have been charged with a crime but have not yet been adjudicated guilty or innocent; in other words, they have yet to have their day in court. *Bell v. Wolfish,* 441 U.S. 520, 523 (1979). Pretrial detention is utilized to ensure an individual's presence at trial. *Id*. at 536. Thus, the presumption of innocence remains with pretrial detainees. *Id*. at 531.

Due to the distinction between pretrial detainees and convicted prisoners, an assumption rises that detainees would be entitled to greater rights than those who have been convicted. *See id.* at 536-57. However, pretrial detainees are seldom treated differently than convicted prisoners. *See id*. The Supreme Court has held that "pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." *Id*. at 545. Whether a pretrial detainee brings a claim under the Fourteenth Amendment or the Eighth Amendment, it does not "mandate different constitutional analyses." Kendall Huennekens, *Long Over-Due Process: Proposing a New Standard for Pretrial Detainees' Length of Confinement Claims*, 71 Duke L.J. 1647, 1668 (2022); *see also Whitney v. City of St. Louis,* 887 F.3d 857, 860 (11th Cir. 2018) (explaining the Eighth Amendment prohibits officials from acting with deliberate indifference toward inmate suicidal risks and now pretrial detainees are afforded the same protection under the Fourteenth Amendment).

Courts evaluate constitutional violations the same among both groups regardless of the status of a prisoner. *Dang v. Sheriff, Seminole Cnty.,* 871 F.3d 1272, 1279 (5th Cir. 2017). In *Dang,* a

pretrial detainee brought an inadequate medical care claim, and the court evaluated the claim based on the same constitutional standards as a convicted prisoner's claim. *Id.* at 1279. Additionally, in *Goebert,* a pretrial detainee brought a Section 1983 claim against jail officials, physicians, and the jail's medical services after officials did not respond to her emergency medical needs when she was pregnant and leaking amniotic fluid for over a week. *Gobert v. Lee Cnty.*, 510 F.3d 1312, 1326 (11th Cir. 2007). Again, the court evaluated the pretrial detainee's claim through the lens of a convicted prisoner's rights. *Id.*

Similar to *Dang* and *Goebert*, whether this Court evaluates Shelby's claims under the standard of a convicted prisoner or under a pretrial detainee, the constitutional protections are the same. The State's duty to Shelby was to provide reasonable safety among the circumstances while he was detained and waiting for trial. Shelby's allegations were not similar to the allegations in *Gobert*, where the officer refused to respond to a safety concern. R. at 6. Officer Campbell simply did not know of the risk posed to Shelby at the time of the unprovoked attack. R. at 6-7. In fact, when Officer Campbell asked Shelby if he wanted to go to recreation, he responded yes—not indicating any concern that he needed to be protected while interacting with the general population. R. at 6. To evaluate whether the State provided reasonable safety, the proper inquiry is whether the restrictions or treatment amounted to punishment.

A. Officer Campbell did not punish Shelby prior to an adjudication of guilt pursuant to the protections of the Fourteenth Amendment.

Even if this Court does not evaluate a pretrial detainee's claims from a convicted prisoner standpoint, an evaluation under the Fourteenth Amendment still produces the same result. Due to the presumption of innocence, pretrial detainees bring Section 1983 claims under the broader Fourteenth Amendment, rather than the Eighth Amendment, because they have not been convicted. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). The intention of detaining an

individual before trial is not punitive; it is to ensure their presence at trial. *Id*. Pretrial detainees cannot be "punished" and have the right to be free from unreasonable deprivations of "life, liberty, or property, without due process of law." Jennifer A. Bandlow, *Constitutional Standards for the Care of Pretrial Detainees*, 34-MAR L.A. Law. 13, 13 (2011). Since Shelby was a pretrial detainee at the time of the attack, his claims arise under the Fourteenth Amendment rather than the Eighth amendment. *Dang,* 871 F.3d at 1279 (holding a plaintiff who alleged inadequate medical care as a pretrial detainee falls within the Fourteenth Amendment protection); *see also* U.S. Const. amend. XIV.

Courts evaluate the constitutionality of treatment conditions or treatment of pretrial detainees under the analysis of whether such conditions or treatment amount to punishment. *Bell v. Wolfish*, 441 U.S. at 535. Before a determination of guilt, pretrial detainees cannot be subject to *any form* of punishment in accordance with due process of law. *Id.* at 535; *see also* Noah Speitel, *Holding the Big House Accountable: The Sixth Circuit Concludes a Pretrial Detainee's Fourteenth Amendment Deliberate Indifference Claim is a Wholly Objective Determination*, 68 Vill. L. Rev. 699, 706 (2023). Hence, the government is permitted to detain the individual, to ensure his presence at trial, but the measures taken to ensure presence cannot contravene their constitutional rights. *Bell,* 441 U.S. at 536. An official is deemed to punish a detainee when he has "an expressed intent to punish." *Id*. at 538.

The Supreme Court has cautioned that not every restriction or condition imposed during pretrial detention amounts to punishment. *Id.* at 537. Drawing upon the government's authorized power to detain a person who is awaiting trial, prisons are allowed to use measures to accomplish the purposes of detention. *Id*. Evidently, when one is detained, certain freedoms are lost such as the freedom of choice and privacy due to confinement. *Id*. Even though the detainee's natural

inclination to live in comfort as they do in their everyday lives is lost, this does not transform any condition or restriction imposed in a detention facility to punishment. *Id*. Therefore, if the government imposes a particular condition or restriction during pretrial detention, it does not alone amount to punishment if it is "reasonably related to a legitimate governmental objective." *Id*. at 539; *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (listing seven factors to evaluate when considering whether a sanction is penal or regulatory in nature). The Court has also recognized that the government possesses valid safety interests arising from facility management where an individual is held. *Bell,* 441 U.S. at 540. Operational considerations involving the facility might limit certain rights of pretrial detainees to ensure their presence at trial and to maintain institutional security. *Id*. at 540, 546.

In *Bell v. Wolfish*, several pretrial detainees brought violation of due process claims for "double-bunking" in a cell meant only to house one inmate. *Id*. at 541. The Court held this did not amount to any constitutional violation. *Id*. at 543. Specifically, the Court acknowledged, "[a] detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Id.* at 546. Establishing internal order in a correctional facility is a complex task and the daily managerial decisions do not lend themselves to simple solutions. *Id.* at 548. These complex decisions are to be made by the professional expertise of correction officials and "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgement in such matters." *Pell v. Procunier*, 417 U.S. 817, 827 (1974); *see also Leal v. Wiles*, 734 F.App'x 905, 912 (5th Cir. 2018) (holding "an official's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment.").

Officer Campbell did not try to punish Shelby in any way before an adjudication of guilt because he was unaware of Shelby's high-risk status similar to the officer in *Leal*. R. at 6. Officer Campbell's job duties, including transferring inmates to recreation, were essential to operating the correctional facility in a way that maintains internal order and discipline, which are legitimate interests of the government as illustrated in *Bell*. Officer Campbell proceeded to transport Shelby to recreation without any intention to cause harm or to punish him. R. at 6. After all, Shelby indicated he wanted to be transported to recreation and if Officer Campbell wanted to punish him, he would not have given him the option to choose to go to a less confined, less restrictive area of the facility. R. at 6. After a member of the Bonnuci clan abruptly jumped Shelby, Officer Campbell responded immediately and tried to break up the attack. R. at 7. Once again, if he were trying to punish Shelby, he would not have intervened and put himself at risk. R. at 7. Nothing in the record suggests that Officer Campbell tried to provoke any attack or knowingly placed Shelby in a situation where he was at risk, when he inadvertently placed Shelby with members of the Bonucci clan. R. at 9.

B. Even under an Eighth Amendment analysis, Shelby's treatment did not amount to punishment.

Usually, courts analyze pretrial detainees claims under the Fourteenth Amendment, while those who have been convicted are afforded similar protections under the Eighth Amendment. Keonna L. Boone, *Kingsley v. Hendrickson: An Analysis of Pretrial Detainee Excessive Force Claims and the Constitutional Gap*, 53 No. 3 Crim. L. Bull. ART 3 (2017). Nevertheless, courts have historically employed an Eighth Amendment analysis to assess claims of deliberate indifference involving pretrial detainees. Kendall Huennekens, *Long Over-Due Process: Proposing a New Standard for Pretrial Detainees' Lengths of Confinement Claims*, 71 Duke L.J. 1647, 1653 (2022). The Eighth Amendment provides that convicted criminals *can* be punished

because they have been adjudicated guilty, but the Constitution still prevents *cruel and unusual* punishment. Kate Lambroza, *Pretrial Detainees and the Objective Standard After Kingsley v. Hendrickson*, 58 Am. Crim. L. Rev. 429, 452 (2021); *see also* U.S. Const. amend. VIII. Cruelty regarding punishment is only presumed when it is carried out with malicious and sadistic intent or with deliberate indifference. Lambroza*, Pretrial Detainees and the Objective Standard After Kingsley v. Hendrickson, supra,* at 452. Under the Fourteenth Amendment, pretrial detainees possess the right to be free from *any* punishment—extending beyond just the cruel and unusual. *Id*. Therefore, whether a pretrial detainee asserts their rights under the Eighth Amendment or the Fourteenth Amendment, a detainee cannot be punished in any form while awaiting their trial. *Id*.

When prison officials act with deliberate indifference to a prisoner's health or safety, inmates can pursue causes of action under the Eighth Amendment or the Fourteenth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 102-06 (1976). For example, in *Estelle v. Gamble*, an inmate brought a 42 U.S.C. § 1983 claim against a medical director and correctional officers for inadequate treatment of a back injury while he was in prison. *Estelle*, 429 U.S. at 287. The Court evaluated the deliberate indifference claim for serious medical needs under the Eighth Amendment. *Id.* at 291; *see also Leal v. Wiles,* 734 F.App'x 905, n.1 (2018) (noting the plaintiff originally brought an Eighth Amendment claim as a pretrial detainee for failure to protect him in an attack).

Even though Shelby's claim likely falls under the Fourteenth Amendment because he was a pretrial detainee at the time of the attack, similar to the plaintiff in *Leal*, an Eighth Amendment analysis would be appropriate and produce the same outcome. R. at 5. Shelby's status indicates he could not be punished at all prior to an adjudication of guilt and Officer Campbell could not have intended to punish him without actual knowledge of Shelby's at-risk status. R. at 9.

C. The same subjective standard applies to pretrial detainees and prisoners whether the claim falls under the Eighth Amendment or the Fourteenth Amendment.

The initial acknowledgment of a Section 1983 claim for deliberate indifference under the Eighth Amendment was expanded to include pretrial detainees under the Fourteenth Amendment. *See Strain v. Regalado*, 977 F.3d 984, 989 (10th Cir. 2020). The Tenth Circuit Court of Appeals held that no matter if a claim is grounded under the Eighth Amendment or the Fourteenth Amendment, the subjective standard for deliberate indifference remains consistent. *See id*. Ultimately, the subjective standard of the Eighth Amendment applies to pretrial detainees and convicted persons alike and yields similar outcomes pursuant to the "punishment" standard established in *Bell v. Wolfish*. *Bell*, 441 U.S. at 535-36. In *Whitney v. Albers,* the Court opined that the Fourteenth Amendment affords no greater protection to pretrial detainees than the Eighth Amendment does to convicted criminals, thus the same standard ought to apply to both groups. *See Whitley v. Albers*, 476 U.S. 312, 327 (1986) (noting in a prisoner suicide case arising under the Eighth or Fourteenth amendment, the official must have shown "deliberate indifference to the prisoner taking his own life.").

Under *Farmer*, the subjective standard for failure to protect claims would apply to pretrial detainees and prisoners alike, regardless of whether the claim arises under the Eighth Amendment or the Fourteenth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994). In *Hare*, the court interpreted *Farmer* as dealing "specifically with a prison official's duty under the Eighth Amendment to provide a convicted inmate with humane conditions of confinement, we conclude that its subjective definition of deliberate indifference provides the appropriate standard for measuring the duty owed to pretrial detainees under the Due Process Clause." *Hare v. City of Corinth*, 74 F.3d 633, 648 (5th Cir. 1996); *see also Richko v. Wayne Cnty.,* 819 F.3d 910-20 (6th

Cir. 2016) (holding that the pretrial detainee's failure to protect claim brought under the Eighth Amendment was harmless error and inconsequential because pretrial detainees are entitled to the same rights as inmates).

Thus, under the Eighth Amendment or the Fourteenth Amendment, Officer Campbell would have had to have a subjective, actual knowledge of the risk to Shelby in order to be held liable in a deliberate indifference claim—such as a failure to protect. This was not the case. Officer Campbell was not aware of any indicators that Shelby could be at risk of violence from another inmate prior to the attack. R. at 6-7. Without such knowledge, Officer Campbell cannot be held liable for failing to protect Shelby in an attack he did not see coming, and could not prepare for due to his lack of personal knowledge about the risk. R. at 6-7.

III. Failure-To-Protect claims do not fall in the "one size fits all category" alongside excessive force claims under *Kingsley* and must be analyzed under *Farmer* because these claims require a different state of mind.

Prison officials have a duty to "protect prisoners from violence at the hands of other prisoners." *Farmer*, 511 U.S. at 833. For a failure-to-protect claim to succeed, the official must have treated the inmate with deliberate indifference and subjected the inmate to harm. *Id.* at 837. Claiming deliberate indifference requires the inmate to meet a very high standard; the inmate must show the official's act amounted to something more than mere negligence, and even higher than gross negligence. *Leal*, 734 F. App'x at 909-10. For example, claims that officials have been "inept, erroneous, ineffective, or negligent" do not equate to an official acting with deliberate indifference. *Id.* at 910. For an official to act with deliberate indifference, they must have acted with a culpable state of mind. *Id.* at 909. To show that state of mind, a plaintiff must prove the following elements: (1) subjective knowledge of a risk of serious harm; (2) disregard

of that risk; (3) by conduct that is more than mere negligence. *Dang*, 871 F.3d 1272, 1279 (11th Cir. 2017); *see also Burnette v. Taylor*, 533 F.3d 1325, 1330 (11th Cir. 2008).

The deliberate indifference standard operates under a subjective inquiry, necessitating that an official possesses actual knowledge of the risk to the detainee at the time of an alleged constitutional violation. *See Dang*, 871 F.3d at 1280. Nevertheless, several circuit courts have held that the objective standard used in the landmark excessive force case, *Kingsley*, somehow applies to all pretrial detainees claims—including a failure-to-protect claim. *Kingsley v. Hendrickson*, 576 U.S. 389, 389-90 (2015); *see also* Charles Starnes, *Kingsley and Objective Reasonableness*, 62 No. 6 DRI For Def 31 (2020) (pointing out the Ninth, Seventh, and Second circuits uphold the *Kingsley* standard); *see also Castro v. City of Los Angeles*, 833 F.3d 1060, 1076 (9th Cir. 2016) (noting the Ninth Circuit has adopted an objective standard); *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018). Other circuit courts have properly declined to extend the objective standard to all pretrial detainee claims. *Miranda,* 900 F.3d at 352 (stating that the First, Third, Fifth, Sixth, Eighth, and Eleventh have not extended the *Kingsley* standard).

Extending *Kingsley* beyond the excessive force context is improper because for some claims from pretrial detainees to amount to a due process violation, a more culpable state of mind is required. *See Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020); *see also Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting) (warning that the "Due Process Clause is not a font of tort law to be superimposed upon" all jails and prisons). In *Strain*, the Tenth Circuit Court of Appeals grappled with an argument similar to Shelby's—that after the decision in *Kingsley*, the standard for pretrial detainees' Fourteenth Amendment claims is based exclusively on objective evidence. *Strain,* 977 F.3d. at 991. There, the court rightly refused to adopt an objective standard because *Kingsley* involved excessive force—not a failure to protect. *Id*. at 992-93. To be sure, the Tenth

Circuit Court reasoned that the nature of a deliberate indifference claim infers a subjective component, while an excessive force claim turns on objective circumstances. *Id*. Additionally, the court noted that the Supreme Court previously rejected an objective standard for deliberate indifference claims, and principles of stare decisis forbid overruling Supreme Court precedent to extend a holding to a new category of claims. *Id.* at 991.

The Supreme Court held in *Kingsley*, "an objective standard is appropriate in the context of *excessive force claims* brought by pretrial detainees pursuant to the Fourteenth Amendment"—it does not say an objective standard is appropriate in *all* pretrial detainees claims. *Kingsley*, 576 U.S. at 402. There are plenty of other claims a pretrial detainee might bring, such as: (1) failure to protect; (2) conditions of confinement; and 3) inadequate medical care. Lambroza, *Pretrial Detainees and the Objective Standard After Kingsley v. Hendrickson*, *supra* at 441. The broad range of claims serve to protect different rights for various reasons such that a one size fits all state of mind does not satisfy proving the state of mind for different claims. *Strain*, 977 F.3d at 991. The Supreme Court has recognized the need for different states of mind for deliberate indifference and excessive force cases. *Id.* at 992. It is evident that under a deliberate indifference case, an official's subjective state of mind matters in contrast to an excessive force claim where it does not require an official's subjective interpretation of the use of force. *Id.* at 992. The court has even pointed out the difference between utilizing the objective standard when evaluating internal prison polices, but rightfully scrutinizing the independent acts of individual officers using a subjective standard. Lambroza, *Pretrial Detainees and the Objective Standard After Kingsley v. Hendrickson*, *supra*, at 450. Therefore, it is not conclusive that the objective standard utilized in *Kingsley* applies to all claims by pretrial detainees.

A. Applying the subjective standard adopted in *Farmer*, Officer Campbell cannot be held liable for a failure-to-protect claim because he did not have subjective knowledge of the risk to Shelby's safety.

To determine whether an officer was deliberately indifferent to an inmate's safety turns on the officers "own knowledge and actions." *Beck v. Hamblen Cnty.*, 969 F.3d 592, 600 (6th Cir. 2020). If a prison official is aware that an inmate is at risk of being assaulted and deliberately fails to protect him, the official could be liable for a deliberate indifference claim. *See Bishop*, 636 F.3d 757, 767 (6th Cir. 2011). However, it does not matter if a reasonable official would have noticed the risk, or even if it should have been obvious to the prison official whose conduct is being scrutinized. *See id*. Even an inmate's history of violence does not rise to the level of an officer's subjective knowledge of the risk posed to a separate inmate housed with them. John Bourdeau & Karl Oakes, *§ 114. Rights of Pretrial Detainees, Generally*, 72 C.J.S. Prisons § 114 (2023). An official is considered aware of a risk if "(1) he is aware of facts from which he could infer that a substantial risk of serious harm exists, and (2) he in fact draws that inference." *Leffew v. Patterson*, No. 1:19-cv-793-TBM-RPM, 2021 WL 3679236, at * 4 (S.D. Miss. June 23, 2021). Therefore, subjective knowledge is based on the defendant's personal experience with the inmate and whether or not the official knows of a substantial risk to the inmate's safety. *See Bishop*, 636 F.3d at 769; *see also Beck*, 533 F.3d at 1331 (differentiating between imputed or collective knowledge which are not sufficient for a deliberate indifference claim).

In *Leal v. Wiles*, the Fifth Circuit found that an official was not deliberately indifferent because Leal, a pretrial detainee, could not show that the official had actual knowledge that Leal was the target of a gang attack. *Leal*, 734 F.App'x at 910. The Fifth Circuit admitted that the official "should have checked the recreation roster" to look for current gang-sanctioned hits, but

the record did not indicate he did so. *Id*. at 910. As the Court stated in *Farmer,* "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Farmer*, 511 U.S. at 838. Therefore, there was no showing that he knew Leal was at-risk, and ultimately did not meet the high standard necessary to constitute deliberate indifference. *Leal*, 734 F.App'x at 910; *see also Crandell v. Hall*, 75 F.4th 537, 544 (5th Cir. 2023) (binding the Fifth Circuit with a "rule of orderliness" by upholding the panel's decision adopting the subjective standard absent a change in the law). Additionally in *Beck*, the Sixth Circuit Court of Appeals evaluated the official who was in question based on his personal knowledge of the specific situation he was in. *Beck v. Hamblen Cnty.,* 969 F.3d 592, __ (6th Cir. 2020). The evidence used to establish the official did not have actual knowledge of the assault risk the inmate faced was whether or not the officer helped choose the cell for the inmate, heard any warnings personally about placing Beck in a cell with another inmate, or any characteristics that the officer could have identified at the time. *Id.* at 601. The court held the official was not aware of Beck's risk of assault, and therefore could not have acted with deliberate indifference. *Id*.

There is no dispute Officer Campbell should have checked the applicable databases, hard copy lists, and reviewed the meeting minutes prior to transporting Shelby; but because he did not Officer Campbell was not actually aware of Shelby's high-risk status. R. at 5-6. Similar to the officer in *Leal* who did not check the recreation roster, the court acknowledged it is not whether or not an officer should have known—it is what the officer knew. *See Leal*, 734 F.App'x at 910. In this case, the internal policies of the Marshall jail indicated that an officer should reference either the hard copy of list of inmates with special statuses or reference the jails database prior to transporting them. R. at 6. While those policies were in place, Officer Campbell did not perform

those duties and therefore did not recognize Shelby or take the precautions that he should have given Shelby's high-risk status. R. at 5-6. While Officer Campbell should have complied with the internal polices, his lack of knowledge at the time of the attack did not amount to a deliberate indifference claim, just blatant negligence.

B. Officer Campbell did not disregard Shelby's safety because he did not know of Shelby's gang affiliation or high-risk status and he took prompt steps to protect Shelby as soon as the attack began.

The subjective inquiry under *Farmer* requires that "an official knows of and disregards an excessive risk to inmate health and safety." *Farmer*, 511 U.S. at 837. To reach the heights of a deliberate indifference claim, an official must have been "reckless" or "wanton" in failing to protect an inmate. *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985). Wanton has been interpreted by the Supreme Court to mean "a licentious act of a man towards the person of another, without regard to his rights . . . as the conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after discovery of the peril . . ." *Smith v. Wade*, 461 U.S. 30, 39 n.8 (1983) (explaining in a deliberate indifference claim regarding serious medical injury that wanton disregard would include conduct such as refusing to treat an inmate, ignoring concerns from an inmate, or intentionally treating an inmate incorrectly). *Johnson*, 759 F.2d at 1238. For an official to consciously disregard the risk, the official would have to know and fail to take reasonable steps to alleviate the risk of harm to an inmate. *Solis v. Barber,* 2021 WL 3434991, at *4 (N.D. Tex. June 30, 2021). In sum, to act with deliberate indifference means an officer had to make a knowing or conscious choice to subject the inmate to harm. *See generally City of Canton v. Harris*, 489 U.S. 378, 379 (1989) (illustrating the standard for a deliberate indifference claim for an inmate's medical needs).

In *Leal v. Wiles*, the official who allegedly failed to protect a gang member admitted to rushing through his duties and failing to check the recreation roster as he was required to do. *Leal*, 734 F.App'x at 911. The court held the official's actions did not establish that he knew of and disregarded a substantial risk of harm to the inmate. *Id*. Even more, in *Solis* an officer left a transgender inmate was alone with a "high-security" male inmate who assaulted them as soon as the official left them unsupervised. *Solis,* 2021 WL 3434991, at *4. In that case, the court held the official's conduct did not demonstrate subjective knowledge of the risk the transgender inmate faced in being left alone with the high-security male. *Id.* at *4. Similarly, in *Thompson*, prison officials left two inmates waiting to appear for a hearing in mechanical restraints, but allegedly a double lock feature for one of the inmates was not present, and the inmates attacked each other. *Thompson v. AVC Correctional Ctr. Staff*, 2013 WL 3778911, at *1 (W.D.La. July 17, 2013). The court held that even if the officials negligently left the cuffed inmates alone or misused the cuffs—the officials did not disregard the risk to the inmate's safety or intend for them to get hurt, because they immediately responded to the fight. *Thompson,* 2013 WL 3778911 at *1.

At the time of the transportation to the recreation room, Officer Campbell was not aware of the high-level risk Shelby faced if approached by another gang member from a different cell block. R. at 5-6. Officer Shelby was not at the meeting hosted by the gang intelligence officers. R. at 5-6. Similar to the officer in *Leal*, Officer Campbell did not reference any database or hard copy list before taking Shelby from his cell. R. at 6. Even though another inmate yelled at Shelby on the walk from his cell that he was glad his brother "took care of that horrible woman," Officer Campbell had no context for what that reference could have meant. R. at 6. Additionally like the officers in *Thompson*, Officer Campbell immediately responded to the attack. R. at 7. Therefore,

Officer Campbell did not have a chance to disregard the risk because he never knew of the risk in the first place and took reasonable steps to protect Shelby once the fight broke out. R. at 5-6.

C. At most, Officer Campbell was negligent in his actions by not complying with internal policies of the prison before transporting Shelby to an area with rival gang member inmates.

The law does not demand that officials prevent all inmate-on-inmate violence arising in a prison. *Solis,* 2021 WL 3434991 at *4. In a failure to protect claim, courts look not only at the official's conduct, but also the intent behind their conduct. *See Strain v. Regalado*, 977 F.3d 984, 992 (10th Cir. 2020). Deliberate indifference claims encompass an official making a conscious choice to disregard a pretrial detainee's rights. *See City of Canton v. Harris*, 489 U.S. 378, 389 (1989). It is not enough that an official was negligent in his conduct to rise to the level of a violation of due process for the pretrial detainee. *Strain*, 977 F.3d at 994; *see also Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 852 (1998) (noting "negligently inflicted harm is categorically beneath the threshold of constitutional due process."). It has been established that negligence is not the appropriate standard in these types of cases because officials have to make decisions that are subjective, complex, and highly circumstantial. *Daniels v. Williams*, 474 U.S. 327, 332 (1986). Therefore, where an official fails to alleviate a significant risk that they should have been aware of, that failure cannot be the basis for liability under a deliberate indifference claim. *Farmer,* 511 U.S. at 838.

Mere negligence, while not preferred, is not enough to meet deliberate indifference. *Strain*, 977 F.3d at 994. For instance, in *Leal* the internal prison policies consisted of checking for an inmate's protected status in an online database roster. *Leal*, 734 F.App'x at 910. The official in *Leal* admitted that he was "too busy and under pressure" to follow through on those policies. *Id*. Even in that case of obvious negligence, the court held that because the official did

not know of the protected status of the inmate prior to the assault, he could not have acted with deliberate indifference. *Id*. Thus, if an official does not comply with internal prison polices that are put in place to ensure the safety of inmates through negligent actions, it will not amount to a deliberate indifference claim. *See Sandoval v. Fox*, 135 F.App'x 691, 691-92 (5th Cir. 2005).

Officer Campbell was merely negligent in transporting Shelby to a room with another violent inmate. R. at 6-7. Shelby argues that Officer Campbell should have known that he was at risk considering all of the information that was available to him. R. at 8. However, as the court stated in *Leal*, it does not matter what Officer Campbell should have known, only what he did know at the time. Shelby has not demonstrated, nor does it show in the record, that Officer Campbell had any knowledge of Shelby's gang affiliation or high-risk status. R. at 6. He was negligent to not comply with the internal safety precautions created by the gang intelligence unit to learn of the high-risk status of Shelby, but mere negligence does not meet the high standard of a deliberate indifference claim. R. at 6-7.

CONCLUSION

The purpose of the PLRA was to prevent the waste of judicial resources by allowing endless meritless claims through the system. Congress was lenient to allow three strikes before an inmate must pay the required fees to proceed in litigation. An inmate that fails to state a claim in a complaint accrues a strike under the PLRA. A dismissal pursuant to *Heck v. Humphrey* has been deemed to count as a strike for failure to state a claim. Accordingly, since Shelby accrued three strikes under the PLRA, he was unable to proceed in forma pauperis to continue another litigation claim.

Under the Eighth Amendment or the Fourteenth Amendment, a pretrial detainee cannot be punished in any form prior to trial because they are presumed innocent until proven guilty.

Conduct can amount to punishment if it is carried out with a malicious, sadistic, or deliberate indifference state of mind. As long as the treatment or confinement is tied to a legitimate government interest and is not intended to punish an inmate, the conduct will not be classified as a violation of constitutional rights. Officer Campbell's conduct did not amount to punishment as he was performing his regular duties of transporting inmates to recreation, and he was not aware of the risk Shelby faced at the time he transported him.

Finally, failure-to-protect claims fall under the subjective standard established in *Farmer* because they require a different state of mind from excessive force claims that were evaluated under an objective standard in *Kingsley*. Using the subjective standard, Officer Campbell was not subjectively aware of the high-risk status of Shelby and did not disregard his safety by merely transporting him to another area of the jail without knowing the safety dangers present. Officer Campbell's conduct could be considered negligent, but negligence is not the standard of a failure to protect deliberate indifference claim. Therefore, Officer Campbell cannot be held liable under these circumstances.

It is for these reasons this Court should reverse the United States Court of Appeals for the Fourteenth Circuit and affirm the district court's judgment.

/s/_____

Attorneys for Respondent

APPENDIX A

Constitutional Provisions

U.S. Const. amend VIII

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

U.S. Const. amend XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Statutory Provisions

28 U.S.C. § 1915(a)

(a)(1) 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. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

28 U.S.C. § 1915(e)

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—
(A) the allegation of poverty is untrue; or
(B) the action or appeal—
(i) is frivolous or malicious;
(ii) fails to state a claim on which relief may be granted; or
(iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(g)

(g) 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.

28 U.S.C. § 1915(h)

(h) As used in this section, the term “prisoner” means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

42 U.S.C. § 1983

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.

APPENDIX C

Rule Provisions

Fed. R. Civ. P. 12(b)(6)

(b) How to Present Defenses. 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;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.