QUESTIONS PRESENTED FOR REVIEW

MRSA[*] bacteria was present in the Dallas County when Plaintiff Mark Duvall was confined in that Jail as a pretrial detainee between December 11-26, 2003, as it is present everywhere. As a result of a break in his skin that occurred during an altercation, the bacteria entered Duvall's body, resulting in serious illness to him and the loss of an eye shortly after he left the Jail. Despite evidence of only one other prior incident in which MRSA bacteria entered an inmate's body, Dallas County was found to have violated the Due Process Clause, as a matter of law. Strictly following *Bell v. Wolfish*, 441 U.S. 520 (1979), the district court asked the jury only to find if the presence of such bacteria caused Plaintiff's injuries, to which it answered yes. That jury verdict was upheld by a panel of the Fifth Circuit.

1.

Whether a claim by a pretrial detainee is established under the Due Process Clause as a ***matter of law*** solely on the basis of the presence of MRSA bacteria in a county jail, where both pretrial detainees and convicted inmates are incarcerated, and by the admission that no legitimate, governmental purpose is served by the presence of MRSA bacteria in that jail?

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[*] MRSA is an acronym for Methicillin-Resistant Staphylococcus Aureus, a bacterial staph infection that is highly resistant to some antibiotics.

2.

Whether a strict application of *Bell v. Wolfish*, 441 U.S. 520 (1979) is still appropriate given this Court's later decisions in *Daniels* v. *Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986)(both rejecting negligence as actionable under the Due Process Clause)?

3.

Whether the "deliberate indifference" standard announced in *Wilson v. Seiter*, 501 U.S. 294 (1991) and *Farmer v. Brennan,* 511 U.S. 825 (1994) as to claims brought by convicted inmates should also be the standard applicable where a pretrial detainee challenges conditions of confinement that potentially put the health of both categories of inmates at risk?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dallas County respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Duvall v. Dallas County* (App. 1a) is reported at 631 F.3d 203 (5th Cir. 2011). The district court's order denying summary judgment, which sets forth the legal standard used in the submission of the case to the jury (App. 25a), is not reported. The jury instructions are in the Appendix. (App. 47a).

JURISDICTION

The court of appeals entered its judgment on January 13, 2011. (App. 14a). Rehearing *en banc* was denied on March 3, 2011. (App. 45a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of Fourteenth Amendment:

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

STATEMENT OF THE CASE

A. Factual Background

There has never been any significant dispute about the facts underlying Respondent's claim that his rights under the Fourteenth Amendment Due Process Clause were violated.

Respondent Mark Duvall ("the plaintiff") was booked into the Dallas County Jail on December 11, 2003, charged with failure to register as a sex offender and on misdemeanor charges out of the City of Dallas. At the time plaintiff was booked into the jail, he was seen by a nurse because he indicated on his booking information sheet that he was diabetic and hypoglycemic. (App. 26a).

The next day, December 12, 2003, plaintiff was involved in an altercation with three other inmates. As a result of that altercation, plaintiff was seen by a nurse for scratches to his neck, back and face and for a swollen lip. The clinic notes made by the nurse on December 12, 2003 indicate plaintiff complained of pain in the left rib cage and left arm below the elbow, as well as bruising on various parts of his body and some skin tear on his neck. (*Id*.)

On December 23, 2003, plaintiff was seen by a nurse with complaints of sore throat and wanting more medication for rib pain and migraine headaches. He was given a medicated spray for his complaint of a sore throat. No pus pocket or inflammation was noted by the nurse and he had no elevated temperature. On December 24, 2003, plaintiff was again seen by a nurse, with complaints of coughing and sore throat, as

well as pain in inhaling. Based on these visits with nurses on December 23 and 24, 2003, physicians entered orders for medication on December 24, 2003. (*Id*., at 26a-27a).

Plaintiff was released from the custody of the jail on December 26, 2003. He received medical treatment after leaving the jail. He spent thirty days in a "clean room" in the ICU, needed surgery to drain fluid from his legs, and was left permanently blind in his left eye because of his exposure to MRSA bacteria while confined in the jail. (*Id*. at 27a).

Plaintiff's experts testified to the following facts: Staph Aureus has probably been around as long as man has; it was "one of the plagues that Job had, the boils all over his body." (Tr. 169, ll. 18-25). In the early 1990's, there were more and more cases of staph infections that did not respond to the usual antibiotics; the bacteria had become resistant to the usual penicillin-type antibiotics used to treat staph infections. Methicillin was that antibiotic. (Tr. 170, ll. 10-14). "Staph bacteria" is basically all over our world, "even on counsel's hands." It is not going to infect you, unless you have a cut or something. It more or less lives on the skin without causing infections. (Tr. 193, l. 15-194, l. 8). Some people are persistently "colonized" with the MRSA bacteria and it is difficult to decolonize them; "[m]aybe 20 to 30 percent of the population is sporadically infected, but not persistently." (Tr. 198, l. 22-199, l. 3). Although there is not anything simple about this bacteria (Tr. 194, l. 22), simple hand washing is at the center of MRSA prevention, "at the forefront." "[T]he best way you can take [care of] it is to do what your mama told you and that's wash your hands and take a bath every day and wear clean

clothes. That is the best way. Its funny how some things never change." (Tr. 195, ll. 6, 13-15).

The following facts were not disputed: At the time of plaintiff's confinement, a video played at the jail that told inmates to "wash your hands." The paper version of that video stated that the content of the video was provided by the Center for Disease Control. (Tr. 268, l. 9-p. 269, l. 1). Clorox bleach is one of the good ways to prevent the spread of MRSA and the jail was cleaned three times a day and on GI days twice a week and bleach days once a week. (Tr. 261, ll. 1-23). The medical director of the Jail knew of only one case, other than plaintiff's, where MRSA bacteria had penetrated an inmate's skin to cause an infection inside the body. (Tr. 451, ll. 10-19).

B. Federal Proceedings

This civil rights action, brought under 42 U.S.C. § 1983, was originally filed by plaintiff's counsel on May 24, 2007. (R. 13). The claims asserted in this action had previously been filed in the Northern District of Texas, Dallas Division in Cause No. 3:05-CV-2431-B, which was dismissed because plaintiff had not exhausted his administrative remedies by filing the grievance required by the Prison Litigation Reform Act. Following the dismissal of that cause, plaintiff timely filed a grievance, which tolled the statute of limitations. Once a decision was given with regard to that grievance, plaintiff timely filed this suit.

In district court, plaintiff originally asserted claims under the Fourth, Eighth and Fourteenth

Amendments to the Constitution.[1] He alleged the County violated his rights by "failing to provide proper medical treatment, by failing to protect him and through indifference to his medical needs." (R. 18).

On May 19, 2008, the County filed its motion for summary judgment as to all of plaintiff's claims. (R. 117). That motion was denied by memorandum opinion and order filed October 10, 2008. (App. 25a). In denying that motion, the district court acknowledged that plaintiff was asserting only a "conditions of confinement" claim, not an "episodic act or omission" claim. (App. 29a). There were two conditions of confinement" challenged: (1) the presence of MRSA bacteria in the jail and (2) denial of medical care and treatment for a staph infection resulting from that bacteria entering plaintiff's body through a crack in his skin. The County argued that *Bell* was not the correct legal standard for these facts and instead plaintiff had to prove the County acted with deliberate indifference as to his "conditions of confinement." The County also urged the district court not to follow the decision of a sister district court in *Shepherd v. Dallas County*[2]. *Shepherd* erred in concluding that a plaintiff *need only prove* there is no "legitimate, governmental" purpose to prevail on a claim brought by a pretrial detainee.

The district court rejected the County's arguments and relied instead on the Fifth Circuit's *en banc* decision in *Hare v. City of Corinth, Miss.*, 74 F.3d 633

[1] Later, plaintiff abandoned claims under the Fourth and Eighth Amendment and pursued only his rights as a pretrial detainee under the Fourteenth Amendment.

[2] Later decided against the County in a published opinion by the Fifth Circuit, 591 F.3d 445 (2009).

(1999). (App. 32a). The district court held that even though *Hare* includes language that the *Bell* standard in conditions of confinement cases is "functionally equivalent" to the deliberate indifference standard, "this holding [*Hare*] does not require the court to apply the deliberate indifference standard in a conditions of confinement case." (App. 33a). The district court then rejected the County's motion for summary judgment (App. 43a), which motion was premised on lack of evidence of a constitutional violation under the "deliberate indifference" standard and of any liability for such constitutional violation under 42 U.S.C. § 1983.

The case then proceeded to trial before a jury on two claims, both complaining about "conditions of confinement." The first claim was that plaintiff had been subjected to the ***condition of "inadequate medical care"*** that was not reasonably related to legitimate governmental objective," ***a claim which the jury rejected***. (App. 56a-57a). The second claim concerned this "condition of "confinement:" exposure to MRSA bacteria which was present in the jail. As to this latter "condition," the County admitted the obvious: no "legitimate governmental purpose was served by the allowance of the MRSA infection to be present in the Dallas County Jail between December 11-26, 2003." (App. 55a).

The district court refused to submit an issue to the jury inquiring if MRSA bacteria was present in the jail because of any deliberate act of indifference, done with the intent to punish. Instead, as to this "condition of confinement," the district court ***only*** asked the jury to decide causation, that is, whether plaintiff proved "that the presence of MRSA in the Dallas County Jail

between December 11-26, 2003, *caused* the MRSA infection that Plaintiff suffered," to which the jury answered yes. (App. 57a). (Emphasis added).

The next question put to the jury concerned the County's liability under 42 U.S.C. § 1983 for the underlying violation of the Due Process Clause: do you find "the presence of MRSA in the Dallas County Jail between December 11 and December 26, 2003, was caused by a policy or custom of Dallas County," to which the jury answered yes and then awarded plaintiff damages in the amount of $355,000. (App. 60a-61a, 64a).

The district court entered judgment in plaintiff's favor on April 21, 2009. (App. 14a-16a). On April 30, 2009, the County filed its motion for judgment as a matter of law or, alternatively, for new trial (R. 773), which the district court denied. (App. 17a). On June 25, 2009, the County filed its notice of appeal from the judgment of April 21, 2009 and the order of June 24, 2009. (R. 796).

As it did in the district court, the County argued, *inter alia*, before the Fifth Circuit that *Bell v. Wolfish*, 441 U.S. 520 (1979), was not the correct legal standard for evaluating a plaintiff's claim based on the presence of MRSA bacteria in the jail as a "condition of his confinement;" the jury instruction was necessarily flawed because it was based on the wrong legal standard; and therefore the judgment upon which the jury's verdict was based is likewise flawed because there is an ***absence of any jury finding with regard to the whether the County violated the plaintiff's rights under the Fourteenth Amendment of the Due Process Clause***.

The Fifth Circuit acknowledged the County's contention was that "the district court's jury instructions and denial of its motion for judgment as a matter of law were erroneous because the district court relied on the wrong standard." (App. 2a). The appellate court held, however, that in case like plaintiff's, "grounded in unconstitutional conditions of confinement, the plaintiff need *only show* that such a condition, which is alleged to be the cause of a constitutional violation, has no reasonable relationship to a legitimate governmental interest." (App. 4a). (Emphasis added).

The circuit court rejected the County's argument that the jury verdict was based on "strict liability" under the Due Process Clause. *Id*. In rejecting the County's argument that it was being held "strictly liable," the court quoted from its *en banc* decision in *Hare v. City of Corinth, MS*., 74 F.3d 633, 644 (5th Cir. 1996):

> [E]ven where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, *its intent to do so is nevertheless presumed* when it incarcerates the detainee in face of such known conditions and practices.

(App. 5a). (Emphasis added).

REASON FOR GRANTING THE WRIT

In *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983), the Court acknowledged that due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available

to a convicted person." The Court however, reserved decision on the question whether something less than the Eighth Amendment's "deliberate indifference" test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody. *Id*.

The Court should clarify whether there is a state of mind requirement for a claim under the Due Process Clause brought by a pretrial detainee challenging a "condition of confinement," such as the presence of MRSA bacteria, and whether that standard is "deliberate indifference" or some less strenuous standard.

A. This Court has moved beyond the *Bell* test, where the dispositive issue is whether a "condition of confinement' constitutes punishment, to *Daniels* and *Davidson*, where the dispositive issue is whether the conduct alleged to violate due process amounts to something more than mere negligence or lack of ordinary care.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court considered for the first time the scope of constitutional protections that must be afford pretrial detainees. The respondents in *Bell* challenged numerous conditions of their confinement at the pretrial detention facility in New York City and various policies and practices of that institution. This Court held that, where it is alleged that a pretrial detainee has been deprived of liberty without due process, the dispositive inquiry is whether the challenged condition, practice or policy

constitutes punishment, "[for] under the Due Process Clause, a detainee must not be punished prior to an adjudication of guilt in accordance with due process law. *Id*., at 535 (footnote omitted).

In addressing the particular challenges to "conditions" in *Bell*, this Court carefully outlined the principles to be applied in evaluating the constitutionality of conditions of pretrial detention. *Block v. Rutherford*, 468 U.S. 576, 584 (1984). Specifically, this Court observed that "[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other governmental purpose." *Bell*, 441 U.S. at 538. Absent proof of intent to punish, this Court noted, this determination "generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Id.*, quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963).

This Court went on to note 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." *Bell*, 441 U.S. at 545. (Emphasis added). That pretrial detainees retain certain rights, however, "does not mean that these rights are not subject to restrictions and limitations." *Id*.

The *Bell* test was later addressed by this Court with regard to the preventive detention of an accused juvenile delinquent based on a finding of a serious risk that the child might by the return date commit an act

which, if committed by an adult, would constitute a crime. *Schall v. Martin*, 467 U.S. 253 (1984). The facts in *Schall* were deemed not to constitute punishment violative of the Due Process Clause. Specifically, this Court held that "the controlled environment briefly imposed by the State on juveniles in secure pretrial detention" was not "'imposed for the purpose of punishment' rather than as 'an incident of some other legitimate governmental purpose.'" *Id*., at 271, citing *Bell*, 441 U.S. at 538.

In *Block*, this Court had before it this question: "whether the prohibition of contact visits is reasonably related to legitimate governmental objectives." 468 U.S. at 586. *Bell* articulated the principles governing resolution of this question, this Court held, in rejecting the charge that a policy of denying pretrial detainees contact visitation had punishment as its purpose. *Id*., at 585. The blanket prohibition against contact visits was held to be a "reasonable, nonpunitive response to the legitimate security concerns identified, [and] consistent with the Fourteenth Amendment." *Id*., at 588.[3] In his concurring opinion, Justice Blackmun stated that *Block* reaffirms what the Court made clear in *Bell*: "a pretrial detainee who challenges conditions of confinement on the ground that they amount to a punishment in violation of the Due Process Clause must show that the *conditions are the product of punitive intent*." *Id*., at 592. (Emphasis added).

Then shortly after *Block*, this Court revisited the protections afforded by the Due Process Clause of the

[3] In *Block*, the Court also upheld a challenge to a room search procedures almost identical to the practice sustained in *Bell*. *Id*., at 591.

Fourteenth Amendment. In the companion cases of *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986), this Court held the Due Process Clause is simply not implicated by a *negligent* act of an official causing *unintended* loss of or injury to life, liberty, or property. *Daniels*, 474 U.S. at 328; *Davidson*, 474 U.S. at 347. In so holding, this Court reconsidered its statement in *Parratt v. Taylor*, 451 U.S. 527 (1981) to the effect that negligent loss could amount to a deprivation within the meaning of the Due Process Clause. This Court reversed itself by concluding that allowing the Due Process Clause to be violated by a negligent act would open the federal courts to lawsuits where there has been *no affirmative abuse of power*. *Daniels*, 474 U.S. at 330, quoting Justice Powell's concurrence in *Parratt*, 451 U.S. at 548-549. This Court went on to agree as well with Justice Stewart's concurrence in *Parratt*, that "[t]o hold this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution." *Daniels*, 474 U.S. at 330, quoting *Parratt*, 451 U.S. at 545.

In distancing itself from *Parratt*, this Court reiterated two salient points: (1) "[t]he touchstone of due process is protection of the individual against *arbitrary action of government*," *Daniels*, 474 U.S. at 331, quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (emphasis added) and (2) "'we must never forget, that it is a *constitution* we are expounding.'" *Daniels*, 474 U.S. at 332, quoting *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819) (emphasis in original).

B. Parallel to its decisions regarding the rights of pretrial detainees, this Court has issued decisions addressing the rights of those who have been convicted and held that "deliberate indifference" is a prerequisite to a claim of an Eighth Amendment violation.

As this Court knows well, unlike pretrial detainees whose rights arise from the Due Process Clause, the rights of those who have been convicted have their origin in the Eighth Amendment as applied to the States through the Due Process Clause of the Fourteenth Amendment.

In *Estelle v. Gamble*, this Court held that a convicted prisoner complaining about inadequate attention to his medical needs must allege "deliberate indifference" to his "serious" medical needs. 429 U.S. 97, 106 (1976). Allegations of "inadvertent failure to provide adequate medical care," *id*., at 105, or of a "negligent…diagnosis," *id*., at 106, simply fail to establish the requisite culpable state of mind.

After *Estelle*, this Court next confronted an Eighth Amendment challenge to a prison deprivation in *Rhodes v. Chapman*, 452 U.S. 337 (1981). In that case, this Court rejected the notion that confining two inmates in a single cell constitutes "unnecessary and wanton infliction of pain" violates the Eighth Amendment. *Id*., at 347-348. While *Rhodes* was only concerned with the objective component of an Eighth Amendment prison claim (Was the deprivation sufficiently serious?), this Court later reinforced, in *Whitley v. Albers*, 475 U.S. 312, 319 (1986), that a subjective component (Did the officials act with a

sufficiently culpable state of mind?) is also a requisite for any Eighth Amendment claim. Although the issue concerned the Eighth Amendment, the Court stated that "conduct that *does not purport to be punishment at all* must involve more than ordinary lack of due care for the prisoner's interests or safety…." *Id*.

A few terms later, the question before this Court was whether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials, and, if so, what state of mind is required. In *Wilson v. Seiter*, 501 U.S. 294 (1991), the Court acknowledged an intent requirement is implicit in the Eighth Amendment itself, which bans only cruel and unusual *punishment*. "If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributable to the inflicting officer before it can qualify." *Id*., at 300. (Emphasis in original). This Court defined the infliction of punishment as a "deliberate act intended to chastise or deter." *Id*. Rejecting the concurrence's argument that "*all* conditions that exist in prison, even though prison officials neither know nor have reason to know about them, constitute 'punishment,'" *id.*, at 301 n.2 (emphasis in original), the Court concluded there is no basis for such a position in principle and no logical reason why the requirement of intent should evaporate, even if the condition is of long duration. *Id*., at 300-301.

After concluding that an Eighth Amendment claim requires an inquiry into the state of mind of the officials involved, the Court went on to hold that the deliberate indifference standard articulated in *Estelle* is the applicable standard for evaluating the officials'

state of mind. *Id*., at 303. In reaching this conclusion, this Court recognized "that, as a general matter, the actions of prison officials with respect to these non-medical conditions [food an inmate is fed, clothes he is issued, temperature he is subjected to in his cell and protection he is afforded from other inmates] are [not] taken under materially different constraints than their actions with respect to medical conditions." *Id*. This Court's then noted retired Justice Powell's conclusion that "'[w]hether one characterizes the treatment received [by the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*.'" *Id*.

In 1994, this Court gave definition to the term "deliberate indifference" as used in *Estelle* and its predecessors. In *Farmer v. Brennan*, 511 U.S. 825 (1994), this Court recognized that deliberate indifference is more than mere negligence but something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. *Id*., at 835. Rejecting an objective test as the measure for "deliberate" conduct, this Court held instead that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate *humane conditions of confinement* unless the official knows of and disregards an excessive risk to inmate health or safety…." *Id*., at 837. (Emphasis added). In so holding, the Court repeated that in W*ilson* it rejected any reading of the Eighth Amendment that would allow liability to be imposed "*solely because of the presence of objectively inhumane prison conditions*." *Id*., at 837, citing *Wilson*, 501 U.S. at 299-302. (Emphasis added).

C. There is a conflict between the circuit courts as to the standard applicable where a pretrial detainee asserts a violation of his rights under the Due Process Clause.

1. Despite this Court's 1979 decision in *Bell*, circuit courts have predominantly turned to the "deliberate indifference" standard when evaluating the rights of pretrial detainees, merging the standard for evaluating Due Process claims with the standard applied to claims asserting cruel and unusual punishment violative of the Eighth Amendment.

In the intervening years between this Court's 1979 decision in *Bell* and the present, many appellate courts have ignored this Court's admonition that *Bell*'s less rigorous Due Process standard applies to pretrial detainees. Despite the distinction between pretrial detainees and convicted felons drawn by this Court in *Bell*, many appellate courts have required detainees alleging unconstitutional conditions of confinement to meet the same standard that convicted felons must meet under the Eighth Amendment.

Prior to the Fifth Circuit's 2011 opinion in *Duvall v. Dallas County*, which is the subject of this petition, the claims brought by pretrial detainees were, by and large, analyzed under the same test as those brought claims under the Eighth Amendment. In its 2009 opinion in *Caiozzo v. Koreman*, 581 F.3d 63, the **Second Circuit** concluded that it was a logical

extension of the principles in *Farmer* that an injured state pretrial detainee, to establish a violation of his Fourteenth Amendment due process rights, must prove, *inter alia*, that the government-employed defendant disregarded a risk of harm to the plaintiff of which the defendant was aware. *Id*., at 71. That court noted that "[o]ur sister circuits that have examined this question after *Farmer* have all reached a similar conclusion." *Id*., at 71-72. The Second Circuit identified some decisions by its sister circuits (denoted below by **). Other decisions not identified by the Second Circuit are included in the list below:

First Circuit- ***Surprenant v. Rivas*, 424 F.3d 5, 18 (2005); *Burrell v. Hampshire Cnty.*, 307 F.3d 1, 13-14 (2002).

Fourth Circuit- *Young v. City of Mount Ranier*, 238 F.3d 567, 575 (2001); ***Brown v. Harris*, 240 F.3d 383, 388 (2001).

Fifth Circuit- ****Hare v. City of Corinth, MS*, 74 F.3d 633 (1996)(*en banc*)(*dictum*)(discussed later in this petition).

Sixth Circuit- ****Phillips v. Roane Cnty., Tenn.*, 534 F.3d 531, 539-540 (2008); *Miller v. Calhoun Cnty.*, 408 F.3d 803, 812 n.3 (2005)(citing cases); *Garretson v. City of Madison Heights*, 407 F.3d 789, 796-797 (2005).

Seventh Circuit-*Lewis v. Downey*, 581 F.3d 467, 475 (7th Cir. 2009), *cert. den'd*, 2010 U.S. LEXIS 2585 (U.S. Mar. 22, 2010) (anything that violates the Eighth Amendment would also violate the Fourteenth Amendment plaintiff; argued only for the limited protections of the Eighth Amendment); *Klebanowski v.*

Sheahan, 540 F.3d 633, 639-640 (2008) (upholding summary judgment against a pretrial detainee based on a test akin to *Farmer*); *Grieveson v. Anderson*, 538 F.3d 763, 778-779 (2008) (upholding summary judgment against pretrial detainee on six or seven claims, based on *Farmer,* finding fact issue under *Farmer* as to remaining claim); *Hart v. Sheahan*, 396 F.3d 887, 892 (Cir. 2004) (Posner, J.) (standards applicable to complaints by convicts and by pretrial detainees about unsafe conditions merge); ***Whiting v. Marathon Cnty. Sheriff's Dep't*., 382 F.3d 700, 703 (2004).

Eighth Circuit- ***Krout v. Goemmer*, 583 F.3d 557, 567 (2009) (applying deliberate indifference standard to pretrial detainee's claim of denial of medical care); ***Butler v. Fletcher*, 465 F.3d 340, 344-345 (2006), *cert. den'd*, 550 U.S. 917 (2007).

Tenth Circuit- *Martinez v. Beggs*, 563 F.3d 1082, *cert. den'd*, 130 S. Ct. 259 (2009) (upholding summary judgment against pretrial detainee based on test akin to *Farmer*); ***Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002); *Craig v. Eberly*, 164 F.3d 490, 495 (1998) (although Due Process Clause governs a pretrial detainee's claim of unconstitutional conditions of confinement-citing *Bell*, the Eighth Amendment standard provides the benchmark for such claims).

Eleventh Circuit- *Marsh v. Butler Cnty.*, 268 F.3d 1014, 1024 n.5 (2001) (*en banc*) (accepting precedents treating the Eighth and Fourteenth Amendments as the same in the context of incarceration); *Harper v. Lawrence Cnty., Ala.*, 592 F.3d 1227, 1234 (2010); *Burnette v. Taylor*, 533 F.3d 1325, 1330 n.4 (2008)

(distinction between Eighth Amendment and Fourteenth Amendment is unimportant because minimum standard for providing medical care is same for pretrial detainee as convicted prisoner)(upholding summary judgment against detainee based on a test akin to *Farmer*); *Gish v. Thomas*, 516 F.3d 952, 954 (2008) (Due Process Clause guarantees pretrial detainees right to basic necessities that Eighth Amendment guarantees convicted persons) (upholding summary judgment against pretrial detainee on a test akin to *Farmer*); *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1326 (2007) (standards under Fourteenth Amendment are identical to those under the Eighth); *Andujar v. Rodriquez*, 486 F.3d 1199, 1203 (2007); *Bozeman v. Orum*, 422 F.3d 1265, 1271 (2005) ("[I]t makes no difference whether [the plaintiff] was a pretrial detainee or a convicted prisoner because 'the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving . . . pretrial detainees.'"). (Omission in original); ***Lancaster v. Monroe Cnty., Ala.*, 116 F.3d 1419, 1425 & n.6 (1997); *Hamm v. DeKalb Cnty.*, 774 F.2d 1567, 1574 (1985) ("with respect to basic necessities of life, the fourteenth amendment rights of detainees can be defined by reference to the eighth amendment rights of convicted inmates").

2. Some circuit courts have adhered to the *Bell* standard in evaluating claims brought by pretrial detainees under the Fourteenth Amendment.

There is a divergence, in whole or in part, between the circuits identified above and the remaining circuits with regard to the correct legal standard to be applied

to Due Process claims. And, there is even disagreement within some of the circuits.

For example, despite it 2009 decision in *Caiozzo*, *supra*, relying on a "deliberate indifference" standard, a prior panel of the **Second Circuit** relied upon an "expanded" version of the *Bell* test. In *Benjamin v. Fraser*, 343 F.3d 35, 50 n.16 (2d Cir. 2003), that court turned to these guideposts identified in *Bell* in determining whether a challenged condition or restriction is punitive in nature:

(1) does the sanction involve an *affirmative* disability or restraint;
(2) has it has been historically regarded as a punishment;
(3) does it come into play only on a finding of *scienter*;
(4) does its operation promote the traditional aims of punishment-retribution and deterrence;
(5) is the behavior to which it applies already a crime;
(6) is an alternative purpose to which it may rationally be connected assignable for it; and
(7) does it appear excessive in relation to the alternative purpose assigned.

Quoting Bell, 441 U.S. at 537-538 *(quoting Mendoza-Martinez*, 372 U.S. at 168-169). As the court noted in *Benjamin*, the punitiveness inquiry focuses principally on the *purpose of an imposed disability*. *Id*., at 50. It went on to conclude that the *Bell* inquiry is of limited utility when evaluating the environmental challenges to *prison conditions which, for the most part,* were *not affirmatively imposed*. *Id*.

The **Third Circuit** applied the *Bell* test to pretrial detainees' complaint that they were "tripled-celled for the illegitimate purpose of coercing them to enter into plea bargains." *Hubbard v. Taylor*, 538 F.3d 229, 232 (2008).

While the **Fourth Circuit** applied the "deliberate indifference" standard in *Young v. City of Mount Rainer*, *supra*, and *Brown v. Harris*, *supra*, it more recently rejected that standard in favor of the *Bell* test. *Slade v. Hampton Rds. Reg. Jail*, 407 F.3d 243, 251 (2005) (concluding the one dollar per day charge for prisoners' keep did not amount to unconstitutional punishment of pretrial detainees).

In similar inconsistent fashion, the **Fifth Circuit** declared in its 1986 decision in *Ortega v. Rowe*, 796 F.2d 765, 767 that the then-recent Supreme Court decisions in *Daniels* and *Davidson* had dramatically changed the law of due process since *Bell*, noting "*Daniels* and *Davidson* render much of *Bell's* language surplusage." *Id*. at 768.

Then, in its *en banc* decision in *Hare*, *supra*, the **Fifth Circuit** announced its views on claims brought by pretrial detainees under the Due Process Clause, even though the *en banc* court ultimately analyzed the facts raised as an "episodic acts or omission" claim, *rather than a "conditions of confinement"* claim. *Id*., at 647-648. Thus, all of the statements in *Hare* regarding the standards applicable to "conditions of confinement" were unnecessary to that court's holding and are, therefore, *dictum*; and they are dictum even if they were pronounced by an *en banc* court. Even in that *dictum*, however, this circuit did not appear to fully embrace a strict application of the *Bell* test. Instead

the court recognized the "apparent simplicity of the *Bell* formula belies the mischief that has emerged in our case law…." *Id*., at 641. As to claims framed as a denial of medical care or a failure to protect, this circuit concluded they "should be treated the same for purposes of measuring constitutional liability," rejecting an application of *Bell* to such claims. *Id*., at 643. For purposes of claims regarding medical care and failure to protect, the court "[t]his dichotomy, however, does not offer a principled basis for invoking a different legal standard." *Id*. Thus, a distinction was drawn by the court between claims based on "jail conditions" and those that do not challenge a "condition, practice, rule, or restriction," but "episodic acts or omissions." *Id*., at 645. *Bell*, this circuit stated, "retains viability only when a pretrial detainee attacks general conditions, practices, rules or restrictions of pretrial confinement." *Id*., at 643. The court so held even thought it rejected *Bell* for "episodic acts or omissions," ***calling it an "ill-fitting test***." *Id*., at 645.

Subsequent to *Hare*, the **Fifth Circuit** held in *Shepherd v. Dallas County*, 591 F.3d 445, 453 (2009), that the pretrial detainee's claim was an attack on a "condition of confinement" (inadequate medical care) and was not based on an "episodic act or omission." Thus, the court applied *Bell*, holding it to be the "functional equivalent to a deliberate indifference inquiry." *Id*., at 455, citing *Hare*, 74 F.3d at 643. The jury instruction[4] in *Shepherd* required the jury to find either an "established rule or restriction" or "acts or omissions sufficiently extended or pervasive to prove

[4] The challenge in *Shepherd* was to the sufficiency of the evidence, *inter alia*, not the instructions and questions submitted to the jury or the legal standard applied to the facts.

an intended condition or practice." And, the jury was also given the option to find that the level of medical care was reasonably related to a legitimate governmental objective, and therefore not violative of Due Process under *Bell*. *Shepherd*, 591 F.3d at 455.

Less than two years later, in *Duvall*, the **Fifth Circuit** upheld the judgment challenged by this petition. That circuit court upheld a verdict that did not require the jury to find an "established rule or restriction" or "acts or omissions sufficiently extended or pervasive to prove an intended condition or practice," as the jury had been required to find in *Shepherd*. The panel upheld a judgment in plaintiff's favor ***even though the district court refused to submit the question of whether there had been a constitutional violation to the jury at all.*** Instead, the district court decided ***there had been a Due Process violation as a matter of law*** and the Fifth Circuit allowed that decision to stand.

The **Sixth Circuit** has most recently applied the deliberate indifference test in *Phillips v. Roane County, Tenn.*, *supra*, *Miller v. Calhoun County*, *supra*, and *Garretson v. City of Madison Heights*, *supra*. In *Daniels v. Woodside*, 396 F.3d 730, 735 (2005), however, this circuit strictly applied the *Bell* test, upholding the holding of pretrial detainee juvenile in a jail rather than in alternative housing.

The **Ninth Circuit** has applied *Bell* to claims brought by a "civil detainee" held in jail for a year, under California's Sexually Violent Predator Act, Cal. Welf. & Inst. Code § 6600 *et seq*., with the general criminal population. *Jones v. Blanas*, 393 F.3d 918, 934 (2004), *cert. den'd*, 546 U.S. 820 (2005). That court

held that a "civil detainee awaiting adjudication is entitled to conditions of confinement that are not punitive." *Id*., at 933. Given the length of the detainee's incarceration in the criminal population, the court concluded the detention appears "excessive in relation" to the purpose of the state statute at issue. *Id*., at 934. *Bell* was met, the court held, and the case was remanded in part for additional discovery. In so holding, this circuit *expressly rejected the "deliberate indifference" standard*. *Id*., at 934. This circuit also applied Bell to pretrial detainees' claims arising out of the installation of "webcams" by Arizona's infamous Sheriff Joe Arpaio of Maricopa County. *Demery v. Arpaio*, 378 F.3d 1020, 1030-1031 (2004), *cert den'd*, 2005 LEXIS 5040 (U.S. June 27, 2005) (affirming preliminary injunction against "webcams" in the jail).

It appears as though the **District of Columbia Circuit** has not recently or often addressed the applicable standard for evaluating the claims of pretrial detainees. In *Brogsdale v. Barry*, 926 F.2d 1184, 1187 n.4 (1991), however, that circuit applied *Bell's* standard, holding that while "conditions constituting the constitutional violation may be essentially the same…*the threshold for establishing a constitutional violation is clearly lower for the pretrial detainees*." *Id*. (Emphasis added).

D. Review of this case is a proper vehicle for this Court to consider the viability of *Bell* in light of the Court's subsequent decisions in *Daniels* and *Davidson*, and to resolve the conflict between the circuit courts as to whether the legal standard applicable to a claim challenging a "condition of confinement" is the same for pretrial detainees and convicted inmates, under the Due Process Clause and the Eighth Amendment, respectively, where both category of inmates are exposed to the same "condition" of confinement.

The present case represents, to the best of counsel's knowledge, a case of "first impression," at least with regard to the "condition" of confinement at issue. *But see*, *Brown v. Plata*, 563 U.S. ___ (2011), No, 09-1233 (May 23, 2011) (referencing staph infections among inmate population). The "condition" of MSRA bacteria is, according to plaintiff's own experts, a "condition" which is literally present everywhere and "colonized" periodically on the skin of about 20% to 30% of the population at large. (Tr. 195, ll. 13-15). No authority has been found by the undersigned counsel from any circuit court that has held MRSA to be a "condition" of confinement to which the *Bell* test is applicable.

The present case represents, again to the best of counsel's knowledge, the strictest application of *Bell v. Wolfish* by any circuit court, both in terms of its result (a constitutional violation based on strict liability) and the decision of the circuit court to uphold a simplistic, literal application of *Bell*. That court upheld a judgment based on the district court's conclusion that

the Due Process Clause had been violated *as a matter of law* and, therefore, the question whether the Fourteenth Amendment had been violated need not be submitted to the jury. Almost all of the circuit courts that have applied *Bell* to some "condition" of confinement have found that the challenged condition was *not violative of the due process rights* of pretrial detainees. In this case, however, not only did the Fifth Circuit uphold the application of *Bell* to a condition of confinement, but it upheld the conclusion that the challenged condition was *necessarily violative of due process rights*. The Fifth Circuit's decision and judgment in *Duvall* stands alone in upholding such an expansive view of the rights of pretrial detainees.

By strict application of *Bell* to these facts, the result is "mischief." The "mischief" is apparent in the absence of any determination by the factfinder that the presence of MRSA bacteria in the jail in December 2003 was the "product of punitive intent." *See Block*, 468 U.S. at 592 (Blackmun, J.) (concurring). The "mischief" is apparent in the district court's conclusion that the County's rather obvious admission that MRSA bacteria served no legitimate, governmental purpose in the jail was *alone* sufficient to establish a constitutional violation under *Bell*. The "mischief" is apparent in the district court's decision that the absence of a legitimate, governmental purpose is *tantamount to the intent to punish*. While this Court has said the intent to punish *may* be drawn from the absence of a legitimate, governmental purpose, nothing in *Bell* sanctions the district court's decision that such intent *must be drawn* from the lack of any legitimate, governmental purpose.

Bell's "reasonably related" test is akin to a negligence standard, which falls below the protections of due process, as this Court has forcefully stated in *Daniels* and *Davidson*. Yet, perpetuation of *Bell*, particularly in the circumstances of this case, imposes liability for conduct which, at most, is mere negligence. *Bell's* viability after *Daniels* and *Davidson* is highly suspect: "[w]hether a condition is *reasonably* related to a legitimate governmental purpose is a negligence standard. Since *Bell*, the Supreme Court has emphatically (and repeatedly) declared that liability for "negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998). (Emphasis in original). Ironically, it was the Fifth Circuit that stated (*in dictum*): "[t]hat pretrial detainees may have more protections or rights in general . . . does not mean that they are entitled to greater protection of rights shared in common with convicted inmates….The fact of conviction ought not make one more amenable under the Constitution to unnecessary random violence or suffering, or to a greater denial of <u>*basic*</u> human needs." *Hare*, 74 F.3d at 649. (Citations omitted; emphasis added).

The decision in the present case is appropriate for review because there is no principled basis for drawing a distinction between those conditions that pose a risk to the health of inmates based on solely on the inmate's status, that is, whether the inmate is a pretrial detainee or a convicted inmate. This Court should review whether the principles of *Farmer* extend to due process claims brought by pretrial detainees.

This case presents an opportunity for this Court to clarify that there is not only a *scienter* requirement for

due process claims, but that the "deliberate indifference" standard applicable to the Eighth Amendment governs claims brought under the Due Process Clause. With respect to providing basic necessities to individuals in the state's custody, the Eighth Amendment and the Due Process Clause necessarily yield the same result. Life and health are just as precious to convicted persons as to pretrial detainees. *Hamm*, 774 F.2d at 1574. As the Eighth Circuit cautioned:

> "[d]istinguishing the eighth amendment and due process standards in this area would require courts to evaluate the details of slight differences in conditions. Many city and county jails have convicted prisoners and pretrial detainees. That approach would result in the courts' becoming 'enmeshed in the minutiae of prison operations,' a situation against which the Supreme Court has warned."

Id. The governmental duty to protect at issue in this case is not based on the pretrial detainee's right to be free from punishment, but is grounded in principles of safety and general well-being. As this Court stated in *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189, 200 (1989):

> when the State by affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state

> action set by the Eighth Amendment and the Due Process Clause.

See also Butler, 465 F.3d at 345 ("[p]retrial detainees and convicted inmates, like all persons in custody, have the same right to these basic human needs. Thus, the same standard of care is appropriate.)."

CONCLUSION

The petition for writ of certiorari should be granted.

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