No. 14-939

In The Supreme Court of the United States

STANLEY TAYLOR and RAPHAEL WILLIAMS,

Petitioners,

v.

KAREN BARKES, ALEXANDRA BARKES, and BRITTANY BARKES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Under *Estelle v. Gamble*, deliberate indifference to the serious medical needs of prisoners, "[r]egardless of how evidenced," violates the Eighth Amendment. *Ashcroft v. Iqbal* held that a supervisor may be held liable "for his or her own misconduct." The question presented is:

If a prison official exercises his supervisory authority in a manner that constitutes deliberate indifference to the serious medical needs of prisoners, is that misconduct actionable under section 1983?

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In addition to the opinions set out in the Appendix to the petition, the February 18, 2011 Memorandum Opinion of the District Court is set out at pp. 10a-18a of the Appendix to this brief. The July 27, 2010 Report and Recommendation of the Magistrate Judge, is set out at pp. 1a-9a of the Appendix to this brief.

STATEMENT

There is less to this case than meets the eye.

The first question set out in the petition is whether in a section 1983 action supervisory officials are strictly liable for the constitutional violations of anyone whom they oversee, even if those officials themselves engaged in no misconduct of their own. The Court of Appeals below, however, expressly rejected *respondeat superior* vicarious liability. Petitioners maintain that the district court erred in holding that in this case there was sufficient evidence of personal misconduct on the part of the defendant supervisory officials. But this is an interlocutory appeal, and appellate courts in such cases have no jurisdiction to review district court decisions regarding the sufficiency of the evidence. *Johnson v. Jones,* 515 U.S. 304 (1995).

The second question presented in the petition concerns the standard governing claims that the medical care provided to an inmate was unconstitutionally

inadequate under *Estelle v. Gamble,* 429 U.S. 97 (1976). The petitioners ask this Court to decide whether jails and prisons have a general obligation to screen all incoming inmates to detect those who might be at risk of suicide. But that question is not presented by this case. Here the prison medical officials did administer such a screen, and had actual knowledge that the decedent presented such a risk. The lower courts agree that where the risk of suicide is thus known, the Eighth Amendment requires the institution to provide constitutionally adequate care. The District Court concluded that there was sufficient evidence to permit a finding of deliberate indifference in the denial of adequate care to the decedent, and its decision is not subject to review in this interlocutory appeal.

Legal Background

The Eighth Amendment requires prisons and jails to provide medical care for those in their custody. "[T]he government[ ] [is] obligat[ed] to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those ends will not be met." *Estelle v. Gamble,* 429 U.S. 97, 103 (1976). "[D]eliberate indifference to serious medical needs of prisoners [is] ... proscribed by the Eighth Amendment.... Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." *Id.*

104 (quoting *Gregg v. Georgia,* 428 U.S. 153, 173 (1976)).

Every circuit to address the issue has concluded that this constitutional requirement applies to protecting inmates from the danger of suicide, a risk which may arise from mental illness or various physical conditions. As the court below explained, "[a] serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills. A psychological or psychiatric condition can be as serious as any physical pathology or injury, especially when it results in suicidal tendencies." Pet.App. 40a n.13.

Petitioners do not question the applicability of *Estelle* to the medical needs of inmates who are at risk of suicide. This case presents a fact-bound application of that well-established constitutional rule.

Factual Background

(1) Christopher Barkes was an inmate whose history of mental illness and attempted suicide was well documented in the records of the Delaware Department of Corrections ("DOC"). On November 13, 2004, he was arrested for violation of probation, and taken to the Howard R. Young Correctional Institution ("HRYCI") in Wilmington. The next morning Barkes committed suicide by hanging himself in his cell. This was his fourth suicide attempt, and his second attempt at HRYCI itself.

It is undisputed that Barkes's mental illness was known at the time. The intake worker at the prison noted on forms filled on November 13 that Barkes had a history of bipolar disorder, sometimes referred to as manic depression, and that he had a "psychiatric history."[1] Intake forms prepared that day also detailed the psychoactive medication that Barkes was taking, Seroquel and Depakote, both commonly prescribed for bipolar disorder, and Effexor, an antidepressant.[2]

Counsel for the defendant acknowledged in the court below that the worker "who did the intake screening knew that [Barkes] was already a suicide risk."[3] Barkes clearly informed the intake worker that he had attempted suicide in the past, and that history is noted on two different intake forms.[4] Barkes specifically told the intake official, at the least, that in 2003 – a year before – he had attempted to kill himself. There is a dispute as to whether the intake worker asked Barkes for information about all suicide attempts.[5]

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[1] Third Circuit Joint Appendix ("J.A.") 348, 352, 354, 398, 399.

[2] J.A. 346, 355, 396.

[3] Third Circuit Tr., p. 27.

[4] J.A. 299, 346.

[5] The relevant portion of the "Standard Intake Screening Form," which Barkes apparently filled out, asked only that he check either "yes" or "no" to a question, "Have you ever attempted suicide?" J.A. 346. The relevant portion of the "Adult Intake

(Continued on following page)

It is undisputed that Barkes had attempted to commit suicide on three occasions other than in 2003, once in 1997, and twice on September 10, 2004, only 65 days before he killed himself at HRYCI. In 1997, while incarcerated at HRYCI itself, Barkes attempted suicide by hanging; that suicide attempt was documented in the prison's medical records.[6] In September 2004, Barkes repeatedly attempted to kill himself, first by taking a drug overdose and then "by wrapping [an] IV cord around [his] neck." Those two attempted suicides were described in Barkes' probation records. Subsequently, according to those probation records, Barkes was for a period "committed to [the] Delaware Psychiatric Center."[7] But when Barkes was arrested and returned to custody at HRYCI on November 13, 2003, the intake worker, adhering to the governing medical intake procedures, did not review either Barkes' prison medical records or Barkes'

Mental Health Screening [Form]," which was filled out by the intake worker, instructed the worker to check either "yes" or "no" with regard to the question "Has previous suicide been attempted?" Apparently in response to the instruction, "note method," the intake worker wrote in a small comment box "Overdose 2003." J.A. 299. The petition speculates that the worker specifically asked Barkes for information about *all* previous suicide attempts, and that Barkes lied and indicated that the 2003 overdose was his only attempt. Pet. 6. The more plausible interpretation of the document, however, is that the worker never asked that question – because the form does not call for such information.

[6] J.A. 253.

[7] J.A. 261.

probation records, even after learning of Barkes' history of mental illness and attempted suicide.

In addition, less than a year before Barkes' suicide at HRYCI, his wife had telephoned Barkes' probation officer and expressly warned him that Barkes was suicidal. The probation officer reported that warning in Barkes' written probation records, recounting that Mrs. Barkes "thinks [Mr. Barkes] is going to kill himself."[8] In February 2004, Barkes' probation officer himself wrote a memorandum warning that Barkes was "a threat to himself."[9] When Barkes subsequently called his wife from HRYCI and again indicated he was suicidal, Mrs. Barkes believed that the prison was a place where he would be safe, because state officials knew about his prior suicide attempts and because his probation officer knew that Barkes was suicidal.[10]

But "[d]espite Barkes's extensive history of mental health problems and multiple suicide attempts (including one at the very prison where he was being held, and two a mere 65 days before his death), the [intake worker] who performed his intake did not place him on even the lowest level of suicide watch." Pet.App. 47a. Barkes was placed in a cell by himself, without any suicide precautions, and committed suicide the next morning. Barkes killed himself by

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[8] J.A. 279.

[9] J.A. 293, 296.

[10] J.A. 620.

hanging, the same method that he had used in his suicide attempts at HRYCI and at a hospital in September 2004.

When Barkes' lifeless body was taken to a nearby hospital, a medical official at HRYCI sent to the hospital a "Consultation Request" form, describing the "Reason for Referral" as "Ø Pulse, Ø Res[piration]." On the portion of the form to print the "[Medical] Provider's Name," a prison medical official wrote "Nurse Jackie."[11] Nurse Jackie is the title character in a television series on the Showtime network.

(2) The fatal handling of Barkes' incarceration was not the result of a discretionary misjudgment on the part of the intake worker involved; to the contrary, the worker was doing precisely as he had been directed under the established intake procedures. It was those controlling procedures, not any choices made by the intake worker, that were fatally flawed.

Medical care in the Delaware correctional system in the period in question was contracted out to a private firm, First Correctional Medicine ("FCM"). Pet.App. 6a. The medical aspect of the intake process was governed by two forms (which included certain instructions) that had been developed by FCM. The first, a "Standard Intake Screening Form," was apparently used for all new inmates. The portion of

[11] J.A. 350.

that form filled out by the new inmate included a question as to whether "you [have] ever attempted suicide?"[12] For those who checked the "yes" box, a second form and instruction sheet was used, headed: "Adult Intake Mental Health Screening." This second form and set of instructions was filled out and applied, in this case and routinely,[13] by a Licensed Practical Nurse ("LPN").

The Adult Intake Mental Health Screening sheet governed in a rigidly mechanical way the processing of a new inmate. The form contained 17 questions to which the LPN was to answer either "yes" or "no." The LPN was directed to "notify Provider on call" only if there was a total of 8 or more "yes" answers, or if there was an affirmative answer to certain questions or combination of questions. The "Provider" evidently referred to an on-call physician, who would then assess the inmate and decide what level of suicide prevention was needed. See Pet. 6; Pet.App. 5a; J.A. 299. But if there were fewer than 8 "yes" answers (and none of the special questions or combinations was answered affirmatively), then no suicide prevention measures were taken. This form mandated a "categorization of inmates solely on the total number of 'positive' responses given." B. Opp. App. 8a. As counsel for the defendants explained, "there is nothing else that the Correctional staff or that FCM

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[12] J.A. 346.

[13] J.A. 554.

can do when ... the person does not score higher on a form, to be taken to psychiatric close observation." D. Ct. Oral Arg. Tr., Doc. 274, p. 49 (emphasis added); see Pet. 6.

In the instant case, the LPN checked "yes" for only two questions on Barkes' form, whether he had a "psychiatric history" and whether "previous suicide [had] been attempted."[14] "Because Barkes' [form contained] check[s] [of] only two of the 17 risk factors ... the nurse ... did not place him on suicide watch." Pet. 6.[15] The LPN simply did as instructed by the terms of the Intake Mental Health Screening sheet when he sent Barkes to a cell without any suicide preventive measures.

Several aspects of this mandated process highlight its mechanical nature. First, the LPN was required to "ignore[ ] the qualitative implications of responses to individual questions (including 'Have you ever attempted suicide?')...." Br. Opp. App. 8a. All that mattered was the inmate's "score[ ]." Second, with regard to each question, the only thing that mattered was whether the answer was "yes" or "no"; the details were irrelevant. Thus the defendants themselves repeatedly stressed that in the administration

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[14] J.A. 299.

[15] In the court below counsel for the defendants correctly described this as a form filled out by the LPN. Third Cir. Tr., p. 6. The form contains phrases such as "is individual incoherent," which call for a description by someone other than the inmate himself.

of the process it simply did not matter how *many* times Barkes had attempted suicide;[16] under the controlling standard, four suicide attempts were no more significant than one, and it was of no importance that two of the attempts had occurred within the previous 65 days. Similarly, it did not matter why or how recently an inmate had been treated by a psychiatrist; all "psychiatric history" was of the same significance. Third, information about other indications of suicidality, such as Mrs. Barkes' statement to the probation officer that her husband was suicidal, were not among the questions on the sheet, and thus also were irrelevant; even if the LPN had read the probation report with that warning, the number of risk factors checked on the form would have remained the same. Similarly, even though the sheet asked what "psychotropic medic[ine]" the inmate was using, the fact that he was using such medication, and any implications about his mental state that could have been drawn from the type of medication involved, did not affect an inmate's "score[ ]."

(3) The litigation in the courts below focused in part on whether the intake methodology used at the Delaware penal institutions satisfied the standards established by the National Commission on Correctional Health Care ("NCCHC"). The contract between

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[16] Defendants Taylor and Williams' Reply Brief in Support of Their Motion for Summary Judgment, Doc. 264, p. 3; Third Circuit Tr., pp. 10, 12.

the state Department of Corrections and FCM required FCM at a minimum to meet the standards set by NCCHC.[17] The defendants argued that the NCCHC standards were sufficiently demanding to satisfy the constitutional standards, and that by requiring FCM to meet the NCCHC standards the state had met its constitutional obligations.[18] The plaintiffs assumed that the NCCHC standards were as demanding as the constitutional standards, but objected that FCM had not even satisfied the NCCHC standards, and that the defendant officials could be held liable for deliberate indifference in failing to ensure that FCM actually did so.

Plaintiffs contended that the FCM practice clearly violated the standards established by NCCHC in 1997. Pet.App. 8a, 44a-45a, 96a. Plaintiffs relied on provisions in the NCCHC standards stating that once there is any indication that an inmate is potentially suicidal, he or she must be given an "assessment" by a "mental health professional."

SUICIDE ASSESSMENT AND PREVENTION GUIDELINES

> The intake screening form ... should contain some items regarding potential suicide risk. When it is suspected that an inmate is

[17] J.A. 60.

[18] Defendants Taylor and Williams' Opening Brief in Support of Their Motion for Summary Judgment, Doc. 245, pp. 9 10, 13, 19.

> suicidal, s/he should be referred to a mental health professional to determine the degree of suicide risk and the supervision level required. Degree of risk can be assessed using forms such as the samples that follow. Also included are two sample protocols for supervising inmates placed on various precaution levels.[19]

Under the 1997 NCCHC standards, the assessment "should be conducted by a qualified mental health professional, who designates the inmate's level of risk."[20] The NCCHC standards include a model form, to be used as part of a general medical intake, which includes questions as to whether an inmate has ever attempted suicide, seen a psychiatrist, or taken psychoactive medication. The accompanying directions require prison staff to "[r]efer an inmate to mental health staff for assessment if the inmate gives a 'Yes' response to ANY question. There are no exceptions to this procedure."[21]

The practice at the Delaware penal institutions, reflected in the Mental Health Screening form described above, was in several particulars inconsistent with the 1997 NCCHC standards. First, an incoming inmate who indicated (on the Standard Intake Screening form) a past history of attempted suicide was not seen next by a psychiatrist or anyone else who might

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[19] Doc. 239, p. 10; J.A. 322.

[20] J.A. 306.

[21] J.A. 314 (capitalization in original).

be considered a "qualified mental health professional," but only by an LPN, who filled out the Mental Health Screening form. Pet.App. 45a, 96a. An LPN has modest medical training, and typically engages in such limited tasks as changing bandages or taking down medical histories; an LPN would be unqualified to diagnose mental illness or assess suicidality, just as he or she would be unqualified to diagnose leukemia or a defective heart valve.[22] During the relevant time period, Delaware law forbade an LPN from making a medical assessment.[23] Second, the NCCHC standards require that an inmate with a history of attempted suicide will be given an "assessment." An "assessment" refers to an in depth evaluation (and, perhaps, diagnosis) of a patient, typically by a physician, whereas a "screening" is some simple method (based on questions, or some brief examination) to determine whether an individual should be seen by a doctor. The step of the FCM intake process governed by the "Mental Health Screening," however, was (and was expressly labeled) a screening, not an assessment. Third, although the NCCHC standards called for particularly stringent preventative measures for an inmate who had recently attempted suicide,[24]

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[22] The behavioral descriptions required by the Mental Health Screening sheet involved a number of issues that a mental health professional could assess far more competently than an LPN. It inquired, for example, whether the inmate "[s]hows signs of ... emotional flatness." J.A. 299.

[23] Del. Code Ann., tit. 24, § 1902(m).

[24] J.A. 326-28.

under the FCM process, the recentness of a suicide attempt had no effect on an inmate's "score."

The defendants argued that it was not all that important whether, once Barkes' revealed a history of attempted suicide, he was seen by an LPN rather than by a psychiatrist. They contended that the FCM Mental Health Screening sheet was at least "modeled on" a form that was part of the 1997 NCCHC materials.[25] Pet. 5. Plaintiffs responded that assessment by a mental health professional was essential, and that the form in the 1997 NCCHC materials to which the defendants referred did not override the express requirements of the NCCHC Guidelines. Plaintiffs pointed out that the form in question had in any event been deleted by NCCHC in 2003, at least a year before FCM's screening sheet was applied to deny Barkes any suicide prevention measures. Pet.App. 45a, 96a. The defendants noted that the medical care system at the Delaware prisons had been accredited by NCCHC in 2003; that contention led to further disputes about what the accreditation meant, and what information NCCHC had at the time about FCM's practices.

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[25] The NCCHC form, for example, was intended for use by a corrections officer, and established a standard for deciding when to "notify [the] shift commander," rather than (under the FCM form) to "notify Provider on call." Under the NCCHC form, an officer could notify the shift commander whenever he or she "feel[s] notification is appropriate." The FCM form had no comparable provision.

The District Court concluded that there was sufficient evidence to support a finding that the medical care provided to Barkes was constitutionally deficient. Pet.App. 97a-98a. That district court holding is not subject to review in this interlocutory appeal.

(4) There was ample evidence that defendants were well aware of the inadequacies of FCM's medical services, and that their failure to address that problem amounted to deliberate indifference. Defendant Taylor was the Commissioner of the Department of Corrections, and defendant Williams was the warden of HRYCI.

> [Defendants] stated in deposition testimony that they knew that the quality of FCM's provision of medical services was degrading, with both [defendants] acknowledging awareness of intentional short-staffing.... A reasonable juror could draw from that evidence the conclusion that [defendants] were aware of an unreasonable risk that FCM's declining performance would result in a failure to treat or a mistreatment of an inmate's serious medical condition. A reasonable juror could also conclude that, by failing to enforce FCM's compliance with NCCHC standards as required by their contract, [defendants] were deliberately indifferent to the risk that FCM's flagging quality would result in a violation of an inmate's constitutional rights.

Pet.App. 46a; see *id.* 96a-97a. "Taylor ... acknowledged that in the period of 2003-2007 audits conducted

by the NCCHC had identified deficiencies in the healthcare provision in the Delaware prison system. He also suspected that FCM was intentionally leaving positions vacant in order to save money." *Id*. 11a. "Williams admitted that FCM's performance had degraded significantly and that he was aware FCM may not have been fulfilling its contractual obligations.... He was aware of significant backlogs, that FCM may have been intentionally short-staffing to save money, and that inmate complaints had increased." *Id*. 10a.[26]

Petitioners argue that Taylor's failure to correct the known systemic problems did not constitute deliberate indifference, because he had delegated to one of his subordinates, Joyce Talley, *all* responsibility for dealing with FCM. Pet. 7, 16. But Talley emphatically denied that Taylor had given her responsibility for ensuring that FCM was providing adequate medical care. "Talley ... testified that she did not believe it to be her responsibility to ensure FCM's compliance with NCCHC standards.... ('Q. Did you believe that it was your responsibility when you

[26] "FCM was not doing some things ... they were saving money and they weren't filling those positions.... but the medical services at that point in time was going down. It was not what it used to be when I actually started. They had a serious concern about the delivery of services at that point, if they were actually doing all the stuff that they were contractually obligated to do.... It was over a period of time. It was, like, slowly going downhill over a period of time." Williams Dep. 96, J.A. 792.

served in that role as bureau chief that you reviewed the compliance with the standards set forth by NCCHC? A: No.')." Pet.App. 7a; see *id.* 45a-46a, 98a. Indeed, Talley insisted that no one in the DOC had that responsibility or capability. *Id.* 45a-46a n.17. Talley generally appointed a subordinate "key manager" to oversee particular functions; but she did not appoint a key manager to oversee medical care. Pet.App. 7. Talley testified that the person on whom she actually relied to ensure that FCM was complying with the NCCHC standards was the CEO of FCM itself.[27]

Petitioners argue that Warden Williams' failure do anything about the known medical care problems did not constitute deliberate indifference, because the FCM medical staff at HRYCI prison did not report to Williams. Pet. 7, 16. But as the Warden of HRYCI, Williams had other methods available to him to attempt to correct the inadequacy of the medical care being provided in his prison. Talley testified that when a concern arose about the quality of medical care, she "encouraged it be resolved at the local level,"[28] and Williams served on a committee with FCM officials where he could have raised such issues.[29] When Williams concluded that "the medical services ... w[ere] going down," he could have contacted

[27] J.A. 368.

[28] J.A. 916-17.

[29] J.A. 530, 538.

Talley and pressed her to correct the situation. Williams did not claim he ever did so, but insisted that he had no responsibility to report those problems to other officials in the Department.[30] Although Williams knew that FCM was understaffing HRYCI in order to increase profits,[31] Talley insisted that no one ever told her.[32]

The district court concluded that there was sufficient evidence to support a finding that Taylor and Williams were deliberately indifferent to the inadequacies of the medical care provided by FCM to Barkes and other inmates. Pet.App. 98a-101a and n.9. That district court holding is not subject to review in this interlocutory appeal.

Proceedings Below

In 2006 the widow and children of Barkes commenced this action against Taylor, Williams, and FCM. FCM has gone bankrupt.

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[30] J.A. 304:

> Q. Is it fair to say then that you believe in your role as warden that you had no personal responsibility to ensure compliance with the standards of NCCHC?
>
> A. The responsibility lied with management services. If there was an issue with that, *they would notify me*.

(Emphasis added).

[31] Pet.App. 10a.

[32] J.A. 794-95.

Counts I and III of the original complaint asserted claims based on the medical policies of the DOC itself (rather than the policies of FCM) and on the asserted failure of Taylor and Williams to train employees of the department. In 2008 the District Court granted summary judgment on Counts I and III, holding that there was insufficient evidence that Taylor and Williams had acted with deliberate indifference in setting department medical policies or in training department employees. Pet.App. 114a-120a. Because there is still no final judgment in this case, that decision is not yet subject to appeal.

In 2010 the District Court permitted the plaintiffs to amend their complaint to allege in Count V that Taylor and Williams were deliberately indifferent in failing to supervise the actions of FCM. The defendants moved to dismiss Count V. The district court rejected a motion to dismiss Count V, reasoning that even though the defendants had no specific role in the treatment of Barkes, their alleged failure to supervise FCM could constitute the requisite personal misconduct. Br. Opp. App. 10a-18a.

The defendants then moved for summary judgment on Count V, and asserted that they were entitled to qualified immunity. The District Court denied that motion, concluding "that there are numerous genuine disputes of material fact that preclude a grant of summary judgment ... on Count V." Pet.App. 97a. Those disputed material issues concerned both whether the medical care accorded Barkes was so inadequate as to violate the Eighth Amendment, and

whether Williams and Taylor had been deliberately indifferent in failing to supervise FCM. *Id.* 97a-101a and n.9. The court emphasized that the plaintiffs did "not seek to impose vicarious liability on Defendants for the misdeeds of FCM" (*id.* at 100a n.9), but "seek to hold Defendants ... liable for their individual actions ... in failing to supervise [FCM]...." *Id.* 101a.

Defendants filed an interlocutory appeal of the District Court decision denying qualified immunity. Defendants' appeal presented a specific legal question, whether an Eighth Amendment claim against supervisory officials could be grounded on their failure to supervise a *third party* providing medical care to inmates. Defendants insisted that if Delaware officials took no remedial action despite knowing that inmates were not actually receiving needed medical care, they could be liable for deliberate indifference only if the medical staff involved were state employees, but not if the staff worked instead for a third-party vendor hired by the state.[33] The Court of Appeals rejected that distinction.

> Appellants['] ... argument hinges entirely on the outsourcing of prison medical care to a private, third-party provider. Appellants do not argue that they have no responsibility to supervise ... medical staff were it composed of state employees rather than private contractors. Rather, their argument depends

[33] Appellants Taylor and Williams' Opening Brief, 19; Appellants Taylor and Williams' Reply Brief, 6.

> entirely on the Court finding that there is a difference of constitutional import between the two. No reasonable prison administrator could believe that hiring a private contractor to provide a constitutionally required service would allow them to abdicate their constitutional supervisory duties.

Pet.App. 36a.

A dissenting opinion argued that in the wake of this Court's decision in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), a supervisor could never be liable for deliberate indifference in failing to supervise (or train) anyone, either state government employees or employees of third-party vendors. Pet.App. 48a-76a. The majority rejected this contention on three grounds.

First, the majority held that, while *Iqbal* held that a supervisor may be held liable only "for his or her own misconduct" (556 U.S. at 677), the standard governing what constitutes "misconduct" – specifically, the necessary mental state – will vary, depending on what constitutional right is asserted. Pet.App. 20a-21a.

Second, the majority noted that deliberate indifference, not some invidious motive, is the state of mind required to establish an Eighth Amendment violation. Pet.App. 22a. "[W]hen a plaintiff seeks to hold a defendant liable under the Eighth Amendment in his or her role as a supervisor, ... 'the deliberate indifference test [is] applied to the specific situation of a policymaker.'" *Id*. 16a-17a (quoting *Beers-Capitol v. Whetzel,* 256 F.3d 120, 135 (3d Cir. 2001)). The

Court rejected the suggestion that an Eighth Amendment medical care claim against a supervisor, unlike, for example, an Eighth Amendment claim against a guard, requires proof of a specific intent to harm the inmate. *Id.* 24a-25a, 33a-34a.

Third, the court concluded that deliberate indifference could take the form of a supervisor's policy or practice, and is not limited to instances in which a supervisor is personally involved in decisions about a particular inmate. Pet.App. 15a, 24a, 27a-33a.

> A high-ranking prison official can expose an inmate to danger by failing to correct serious known deficiencies in the provision of medical care to the inmate population. That the official had no specific knowledge of any particular inmate or the failure of subordinate officials to treat that inmate's serious medical condition is irrelevant.

Id. 31a. A failure to supervise is a type of policy that could cause such harm. *Id.* 15a-16a.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE LIABILITY STANDARD FOR EIGHTH AMENDMENT CLAIMS AGAINST SUPERVISORS

A. The Third Circuit Did Not Hold That Supervisors Can Be Held Liable Under A *Respondeat Superior* Theory

The first question set out in the petition is whether in a section 1983 action a supervisor is strictly liable "for a subordinate's ... constitutional violations." Pet. i. Petitioners repeatedly assert that the Third Circuit adopted such a rule, imposing automatic vicarious liability on supervisors whenever a subordinate commits a constitutional violation.[34] If the Third Circuit had adopted such a rule, it would indeed conflict with the law in other circuits, and with the decision in *Iqbal*. But the Court of Appeals did no such thing.

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[34] This area of the law is complicated by the two possible meanings of the phrase "supervisory liability." "Supervisory liability" could refer to the *automatic* imposition of liability on a supervisor for the acts of a subordinate; *Iqbal* holds that "supervisor liability" in this sense does not exist in a section 1983 case. 556 U.S. at 677. On the other hand, "supervisory liability" could refer to the imposition of liability on a supervisor because of misconduct in the manner in which he or she used (or refused to use) his or her supervisory authority. It is in that sense of the phrase that the court of appeals commented that *Iqbal* did not "abolish[ ] supervisory liability in its entirety." Pet.App. 22a.

The Third Circuit expressly held that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." Pet.App. 15a (quoting *Iqbal,* 556 U.S. at 676). The Court below emphasized that even a supervisor's negligence would not give rise to liability. "Nothing in our definition of the right at issue – or in our opinion more broadly – remotely suggests that a mere negligent failure to properly implement suicide prevention protocols would be sufficient to trigger liability." Pet.App. 42a n.15.

Petitioners argue that the Third Circuit must have been imposing some form of *respondeat superior* liability because "the district court ... [had] held ... the defendants *were not deliberately indifferent* to the inmate's medical needs...." Pet. 16 (emphasis in petition); see *id.* 7-8. But the District Court holding on which petitioners rely concerns Counts I and III of the complaint (deliberate indifference in adopting the Department's own medical standards and in training Department employees), not to Count V, the claim at issue in this appeal (deliberate indifference in failing to supervise FCM). See Pet.App. 114a-120a; *compare* Pet.App. 87a (insufficient evidence of deliberate indifference as to Count I) *with* Pet.App. 96a-101a (sufficient evidence of deliberate indifference as to Count V). The Third Circuit and the District Court specifically rejected this very argument, the appellate court dismissing it as a "red herring." Pet.App. 29a; Br. Opp. App. 14a-16a. The Third Circuit held that a reasonable jury could conclude, with regard to Count V, "that,

by failing to enforce FCM's compliance with NCCHC standards as required by their contract, Appellants were deliberately indifferent to the risk that FCM's flagging quality would result in a violation of an inmate's constitutional rights." Pet.App. 46a.

Petitioners insist that "[b]ecause the officials were not involved with the inmate's treatment (or even with supervising the medical provider) and the plaintiffs did not challenge the State's policies, these officials could only be liable under a theory of *respondeat superior*...." Pet. 3. But the gravamen of Count V *is* a challenge to the policies of Taylor and Williams, policies of deliberate and indifferent inaction regarding the known deficiencies in the medical care provided by FCM. "'Failure to' claims – failure to train, ... or, as i[n] the case here, failure to supervise – are generally considered a subcategory of policy or practice liability." Pet.App. 15a-16a. A deliberate decision to generally ignore something is commonly characterized as a policy; the military's former "don't ask, don't tell policy" was described in just such terms.

Petitioners assert that "the Third Circuit's ... supervisory liability test ... required plaintiffs '*only* [to] establish a supervisory practice or procedure that the supervisor failed to employ.'" Pet. 11 (quoting Pet.App. 68a (dissenting opinion)) (emphasis added). To the contrary, the Court of Appeals expressly required plaintiffs to demonstrate four *additional* elements in order to establish that a defendant was

deliberately indifferent to a known, unreasonable risk of an Eighth Amendment violation. Pet.App. 43a.

Petitioners assert that "the Warden and Commissioner were sued not based on their own actions...." Pet. 17 (quoting Pet.App. 66a) (dissenting opinion). To the contrary, both courts below correctly understood that the claim in Count V was based specifically on Taylor's and Williams' own actions. "Plaintiffs seek to hold Defendants Taylor and Williams liable for their individual actions (in failing to supervise) rather than for the actions of their subordinates." Pet.App. 101a.

> The essence of the type of claim [in this case] is that a state official, by virtue of his or her *own* deliberate indifference to known deficiencies in a government policy or procedure, has allowed to develop an environment in which there is an unreasonable risk that a constitutional injury will occur, and that such injury does occur.

Pet.App. 22a (emphasis added); see *id.* 101a.

Petitioners assert that "the complaint 'targeted' these officials because they '"presided over a system."' Pet.App. 66a, 72a (quoting Complaint)." But the four words "presided over a system" are taken out of the context of a 190-word sentence (in a brief, not the complaint) which asserts the defendants were culpable because they "presided over a system in which: they knew [that inmates were receiving inadequate care and which] Defendants nevertheless

failed [to correct]."[35] The paragraph-long sentence spells out a litany of deficiencies in the medical care in the prisons that were known to the defendants, as well as a list of corrective measures the defendants had failed to take.

The petition sets out a one-sided and incomplete summary of the evidence and claims, framed to show that Barkes received constitutionally sufficient medical care, and that even if he did not the defendants were not the least at fault, and then argues that "[h]olding that officials may be held liable *under these circumstances* reduces 'deliberate indifference' to nothing more than '*respondeat superior*.'" (Pet. 17-18) (emphasis added). But the District Court, looking at the entire record, assessed the evidence differently, and its evaluation is not subject to review in this interlocutory appeal. Petitioners cannot avoid the limitations on the scope of appellate jurisdiction by assuming that the Court of Appeals must have agreed with the defendants' view of the evidence, and hypothesizing that the appellate court must therefore have been applying some (unstated) improper legal standard under which the asserted lack of evidence did not matter.

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[35] Doc. 256, Plaintiff's Answering Brief in Opposition to State Defendants' Motion for Summary Judgment, J.A. 745-46.

B. The Lower Courts Agree That In Eighth Amendment Medical Care Cases Supervisors Can Be Liable for Policies Constituting Deliberate Indifference

The courts of appeals are in agreement that the state of mind necessary to impose liability on a supervisor varies, and depends on the underlying constitutional claim. Under *Iqbal*, "[t]he factors necessary to establish a ... violation [by a supervisor] will vary with the constitutional provision at issue." 556 U.S. at 676. The Third Circuit correctly noted that "[m]ost courts have ... recognize[d] that because the state of mind necessary to establish a § 1983 ... claim varies with the constitutional provision at issue, so too does the state of mind necessary to trigger liability in a supervisory capacity." *Id*. 20a. Five other circuits have so held. *Id.* 20a-21a. Petitioners do not contend that there is a circuit conflict on this issue, and do not suggest that proof of the state of mind required in a discrimination case such as *Iqbal* – invidious intent – would be necessary in all other types of constitutional claims.

A number of the cases cited by petitioner did not involve Eighth Amendment medical care claims, the constitutional violation at issue in the instant case. *T.E. v. Grindle,* 593 F.3d 583 (7th Cir. 2010), is a Due Process claim based on the failure of an elementary school principal to prevent a teacher from molesting several students. The court below correctly noted that the Seventh Circuit decision in *Vance v. Rumsfeld,* 701 F.3d 193 (7th Cir. 2012) (en banc) "involved violation of

a federal statutory right rather than the Eighth Amendment, and so the mental state need not have matched that which we apply today." Pet.App. 34a n.10.[36] The plaintiffs in *Vance* alleged that they had been mistreated in Iraq by American military officials; the Seventh Circuit in that case noted that "the conduct alleged in the complaint appears to violate the Detainee Treatment Act ... and may violate one or more treaties." 701 F.3d at 199. The petition describes *Vance* as if the central claims were constitutional in nature. "But even if subordinates subjected the plaintiffs to unconstitutional conditions, the Seventh Circuit held, the Secretary could not be held liable because '[h]e did not [abuse] plaintiffs....'" Pet. 21. However, in the actual *Vance* opinion the clause that begins "even if" actually refers to the statutory claim. "Even if we were to create a common-law damages remedy [under the Detainee Treatment Act], against military personnel and their civilian superiors, former Secretary Rumsfeld could not be held liable. He did not [abuse] plaintiffs...." 701 F.3d at 203.

The courts of appeals are also in agreement that the state of mind that must be shown to establish liability on the part of a supervisor for a violation of a

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[36] In opposing certiorari in *Vance*, the Solicitor General assured this Court that "the court of appeals did not purport to exempt government supervisors from liability predicated on deliberate indifference." Brief for the Respondent in Opposition, *Vance v. Rumsfeld,* No. 12-976, available at 2013 WL 1945159, at *24.

particular constitutional right is the same state of mind required to establish liability on the part of any other government official. The petition itself quotes a decision which says just that. "'Simply put, there's no special rule of liability for supervisors'; the test for supervisors 'is the same as the test for everyone else.'" Pet. 21 (quoting *Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010)). The Tenth Circuit decision in *Dodds v. Richardson,* 614 F.3d 1185, 1204 (10th Cir. 2010), on which petitioners rely (Pet. 19, 22), held that "after *Iqbal* when a plaintiff claims the defendant-supervisor violated her constitutional rights, she must allege the defendant-supervisor acted with whatever state of mind is required to state the underlying constitutional violation." 614 F.3d at 1204. Petitioners do not contend that there is a circuit conflict on that issue.

Petitioners acknowledge that the state of mind required to establish liability for an Eighth Amendment *Estelle* violation is deliberate indifference. Pet. 4, 13. The lower courts have consistently concluded that in such an Eighth Amendment case a supervisor, like any other government defendant, can be held liable if his or her actions constituted deliberate indifference. *Dodds*, for example, held that

> [a plaintiff] can ... succeed on a § 1983 claim ... by showing that as a supervisor [the defendant] behaved knowingly or with deliberate indifference that a constitutional violation would occur at the hands of his subordinates, [if] that is the same state of

> mind required for the constitutional deprivation he alleges.

614 F.3d at 1204. In *Starr v. Baca,* 652 F.3d 1202 (9th Cir. 2011), the dissenting opinions agreed with the panel majority that the supervisory officials could be held liable if they were deliberately indifferent to circumstances that threatened the safety of the plaintiff prisoners. See 652 F.3d at 1208 (majority opinion), 1217 (Trott, J., dissenting); *Starr v. County of Los Angeles,* 659 F.3d 850, 854-55 (9th Cir. 2011) (O'Scannlain, J., dissenting); *Franklin v. Curry,* 738 F.3d 1246, 1252 n.7 (11th Cir. 2013); *Whitson v. Stone County Jail,* 602 F.3d 920, 928 (8th Cir. 2010).

Petitioners suggest that *Nelson v. Corr. Med. Servs.,* 583 F.3d 522 (8th Cir. 2009), held that under *Iqbal* liability may not be based on deliberate indifference.

> Because "[i]n a § 1983 case an official 'is only liable for his ... own misconduct' and is not 'accountable for the misdeed of [his] agents,'" the Director could not be liable for "deliberate indifference" to the prisoner's medical needs. [583 F.3d] at 534-35 (quoting *Iqbal*, 556 U.S. at 677) (omission and second alteration in original).

Pet. 20. But *Nelson* actually says the opposite, holding that in an Eighth Amendment case a supervisor can be liable for deliberate indifference.

> In a § 1983 case an official "is only liable for his ... own misconduct" and is not "accountable

> for the misdeed of [his] agents" under a theory such as *respondeat superior* or supervisory liability. ... [Director] Norris is thus liable only *if* he personally displayed deliberate indifference to the hazards and pain resulting from shackling an inmate such as Nelson during the final stages of labor. *Farmer* [*v. Brennan*]*,* 511 U.S. [825,] 842 [(1994)].

583 F.3d at 534-35 (emphasis added); see 583 F.3d at 535 (Director could have been held liable "if he personally displayed deliberate indifference to the hazards and pain [at issue]"), 536 (plaintiff might have prevailed if there had been "further allegation or evidence of deliberate indifference").

Petitioners assert that *Iqbal* held that a supervisor can never be held liable for acquiescing in known constitutional violations by his subordinates, thus precluding (even in Eighth Amendment cases) liability based on that type of deliberate indifference.

> The Court began with the principle that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*," and explained that "[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." [556 U.S.] at 676.... *Based on this principle*, the Court rejected the argument "that, under a theory of 'supervisory liability,' petitioners can be liable for

> knowledge and acquiescence in their subordinates'" constitutional violations. *Iqbal,* 556 U.S. at 677.

Pet. 15 (emphasis added). But between the Court's conclusion (556 U.S. at 677) and what petitioners contend was the reason for that holding (the passage quoted from 556 U.S. at 676), there is an entire paragraph which petitioners overlook. That paragraph, which begins "[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue" (556 U.S. at 676), explains that because the constitutional claim in *Iqbal* itself was one of intentional discrimination, a supervisor could only be liable in *that* case based on a showing of such invidious intent. It was based on that principal, not the general rule against *respondeat superior* liability, that the Court concluded liability in *Iqbal* itself could not be based on knowledge and acquiescence. As the Court reiterated, "purpose rather than knowledge is required to impose ... liability ... for unconstitutional *discrimination* ... [on] an official charged with violations arising from his or her superintendent responsibilities." 556 U.S. at 677 (emphasis added).

Petitioners appear to contend that even when a deliberate indifference standard applies, it does not encompass deliberate indifference in the supervision or training of lower officials. But the Third Circuit's holding that those forms of deliberate indifference are actionable is consistent with the rule in other circuits. The Fifth Circuit decision in *Gates v. Texas Dept. of Protective and Regulatory Svcs.,* 537 F.3d 404, 435

(5th Cir. 2008), on which petitioners rely (Pet. 19), expressly recognizes failure to supervise claims. In the years since *Iqbal* the Fifth Circuit has repeatedly held that a supervisor can be held liable for a deliberately indifferent failure to supervise or train subordinates.[37] Subsequent to its decision in *Nelson*, the Eighth Circuit held that liability could be based on deliberate indifference in the training or supervision of lower level officials. *Laganiere v. County of Olmsted,* 772 F.3d 1114, 1117 (8th Cir. 2014); see *Sanchez v. Pereira-Castillo,* 590 F.3d 31, 49 (1st Cir. 2009) ("Liability may attach 'if a responsible official supervises, trains, or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation.'") (quoting *Camilo-Robles v. Zapata,* 175 F.3d 41, 44 (1st Cir. 1999)). Petitioners acknowledge that "the extent of [an official's] liability as a supervisor is similar to that of a municipality that implements an unconstitutional policy." Pet. 19-20 (quoting *Carnaby v. City of Houston,* 636 F.3d 183, 189 (5th Cir. 2011)). *City of Canton v. Harris,* 489 U.S. 378, 390 (1989), the municipal liability case cited

[37] *Hobart v. Estrada,* 582 Fed.Appx. 348, 356 (5th Cir. 2014); *Estate of Pollard v. Hood County, Texas,* 579 Fed.Appx. 260, 266 (5th Cir. 2014); *Winston v. City of Shreveport,* 390 Fed.Appx. 379, 385 (5th Cir. 2010); *Blank v. Eavenson,* 530 Fed.Appx. 364, 369 (5th Cir. 2013); *Porter v. Epps,* 659 F.3d 440, 446 (5th Cir. 2011); *Brown v. Callahan,* 623 F.3d 249, 255 (5th Cir. 2010).

in *Carnaby*, holds that cities can be liable for "failure to train" in some cases. *Id.*[38]

Petitioners argue that in the wake of *Iqbal* the standard governing liability of supervisors for constitutional violations is "muddied" or "murky." Pet. 19. But in the absence of a clear and entrenched circuit conflict about a specific issue, merely generalized uncertainty weighs heavily in favor of permitting the lower courts to continue to air these issues, until and unless such a conflict actually arises.

II. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR DECIDING ANY EIGHTH AMENDMENT ISSUE

This case is not an appropriate vehicle for deciding any issue regarding the constitutional standard under *Estelle* for Eighth Amendment medical care claims. Although the District Court concluded that there is sufficient evidence to find a constitutional violation, under *Johnson v. Jones* that evidentiary question is not subject to review in this interlocutory appeal. The interlocutory appeal that petitioners did file was limited to the legal standard governing when

[38] Municipal liability, unlike individual liability, requires a showing that the city acted with reckless disregard of the danger to individuals such as the plaintiff.

a supervisor is personally liable for such an Eighth Amendment violation.[39]

In the course of discussing that liability standard, the Court of Appeals made clear that the Eighth Amendment is not satisfied by the mere adoption of a constitutionally sufficient standard for prison medical care, if that standard is not actually implemented. Pet.App. 42a n.15, 45a; see Pet.App. 100a n.9. It was in that context (and the context of the medical need at issue in this case) that the Third Circuit explained that the Eighth Amendment requires "proper *implementation* of adequate suicide prevention protocols." Pet.App. 38a (emphasis added).

Petitioners do not appear to disagree with the implementation requirement. They object to the adjective "adequate," apparently preferring the adjective "basic" in the dissenting opinion. Pet. 12;

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[39] Appellants Taylor and Williams' Opening Brief, available at 2013 WL 1623555 at *2 ("Statement of Issues"):

> Are the Warden and Commissioner of Correction responsible for supervising the contracted medical vendor regardless of the specific division of labor between medical staff and prison administrators?
>
> Was the law regarding the Eighth Amendment so clearly established that no reasonable employee in defendants' position could believe that delegating all medical decision-making to the medical vendor was unlawful?

Petitioners' appellate briefs contained only a single conclusory sentence regarding the merits, merely asserting that if there was a constitutional violation it did not violate clearly established legal requirements. *Id.* at *22.

but see Pet. 26 (Eighth Amendment requires "adequate[ ]" level of care). But "adequate" is the very term this Court has used repeatedly to delineate the level of medical care required by the Eighth Amendment.[40] Petitioners assert erroneously that "the Third Circuit ... h[e]ld[ ] that state prison officials must maintain best practices with respect to the suicide prevention protocol...." Pet. 29. But the Court of Appeals decision cannot fairly be interpreted as imposing any such requirement; the phrase "best practices" appears only in the dissenting opinion. Pet.App. 61a n.12, 65a. Petitioners contend that "[t]he Third Circuit's holding ... conflicts with this Court's holdings that the Eighth Amendment does not constitutionalize medical malpractice in prisons...." Pet. 4. But there is no such Third Circuit holding.

Petitioners object that the Third Circuit failed to recognize that an inadvertent failure to provide adequate care in a particular case would not violate the Eighth Amendment. Pet. 23-24. But the Third Circuit in fact said precisely the opposite. Pet.App. 42a n.15.

Petitioners claim that "[t]he Third Circuit's holding that the Eighth Amendment requires 'proper implementation of adequate suicide prevention protocols' creates a split with [five] Circuits, which

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[40] *Estelle,* 429 U.S. at 105; *Brown v. Plata,* 131 S.Ct. 1910, 1924, 1928, 1938, 1944 (2011); *DeShaney v. Winnebago County Dept. of Social Svcs.,* 489 U.S. 189, 198 (1989); *West v. Atkins,* 487 U.S. 42, 54 (1988).

have held that there is no constitutional right to be screened for suicidal tendencies." Pet. 14. But the Third Circuit does not hold that screening of all inmates (or any other specific medical practice) is constitutionally required; the purpose of the passage to which petitioners object was only to make clear that a state cannot meet constitutional requirements by merely adopting, but not implementing, a policy of providing a constitutionally sufficient level of medical care. In this case, moreover, there was screening for suicidal tendencies; the dispute is about whether the state (through FCM) provided adequate care once the screening official actually knew that Barkes had attempted suicide, had been seen by a psychiatrist, and was on powerful psychoactive medications. All of the circuits on which petitioners rely hold that a prison has a duty to provide adequate medical care when – as here – it has actual notice of an inmate's suicidal tendencies.[41]

Petitioners acknowledge that "the Eighth Amendment require[s] ... that prison personnel respond adequately when an ... inmate's need for care is ... brought to their attention." Pet. 26; see Pet. 28-29 (defendants may be liable where there was "knowledge," "notice" or "signs of" suicidal tendencies).

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[41] E.g., *Gordon v. Kidd,* 971 F.2d 1087, 1094 (4th Cir. 1992) ("knew or should have known"); *Whitt v. Stephens County,* 529 F.3d 278, 284 (5th Cir. 2008) ("known," "demonstrable," or "manifest"); *Comstock v. McCrary,* 273 F.3d 693, 702 (6th Cir. 2001) ("alerted to"); *Tittle v. Jefferson County Commission,* 10 F.3d 1535, 1539 (11th Cir. 1994) ("ha[d] notice").

Plaintiffs assert that this is precisely what did not occur when Barkes' mental illness and history of attempted suicide and psychiatric care were brought to the attention of officials in the prison. The District Court's holding that there is sufficient evidence to prove a denial of adequate care is not subject to review in this interlocutory appeal. *Johnson v. Jones.*

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KAREN BARKES, et al.,	:	
Plaintiffs,	:	
v.	:	C. A. No. 06-104-JJF-MPT
FIRST CORRECTIONAL MEDICAL, et al.,	:	
Defendants.	:	

REPORT AND RECOMMENDATION

I. INTRODUCTION

The court now considers defendants' Motion to Dismiss plaintiffs' Third Amended Complaint. For the reasons that follow, the court recommends defendants' motion be denied.

II. BACKGROUND

On February 16, 2006, plaintiffs filed a complaint under 42 U.S.C. § 1983 and Delaware state law regarding decedent Christopher Barkes.[1] Barkes committed suicide at the Howard R. Young Correctional Institution ("HRYCI") on November 14, 2004. Plaintiffs are the surviving members of decedent's family in varying capacities.

[1] D.I. 1.

Plaintiffs named the State of Delaware Department of Corrections ("DOC"), Stanley Taylor, DOC Commissioner, and Raphael Williams, Warden of HRYCI (collectively, "State Defendants"), as well as then-DOC medical provider First Correctional Medical, Inc. ("FCM") as defendants. Plaintiffs asserted an Eighth Amendment claim for deliberate indifference to Barkes' serious medical needs, an Eighth Amendment claim for failure to train and/or wrongful customs, practices and policies, and a state law wrongful death claim. All State Defendants prevailed on summary judgment.[2]

On May 21, 2008, following a show cause hearing, the court granted entry of default judgment against FCM.[3] The court also granted plaintiffs leave to amend the pleadings to add new claims "that may pertain either to third parties or the parties that were initially in the case that you want to rejoin in the case."[4] Plaintiffs responded by filing an Amended Complaint against Taylor and Williams including two new counts and several new allegations.[5] Taylor and Williams then moved to strike the Amended Complaint.[6] The court granted this motion because the Amended Complaint retained and reasserted claims

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[2] D.I. 60.

[3] D.I. 74.

[4] D.I. 73 at 3-4.

[5] D.I. 75.

[6] D.I. 76.

from the original Complaint upon which State Defendants had already prevailed on summary judgment, but granted plaintiffs leave to file a second amended complaint that did not include such claims.[7] Plaintiffs then filed their Second Amended Complaint on April 9, 2009.[8] Defendants' Motion to Strike the Second Amended Complaint was denied.[9] After substantial discovery, Taylor and Williams moved to dismiss the Second Amended Complaint under Fed. R. Civ. P. 8(a) and 12(b)(6).[10] The court granted this motion while giving plaintiffs leave to amend Count V only.[11] The Third Amended Complaint is the subject of another Motion to Dismiss.[12]

III. DISCUSSION

A. Standard of Review

Rule 12(b)(6) permits a party to move to dismiss a complaint for failure to state a claim upon which relief can be granted. The purpose of a motion under Rule 12(b)(6) is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case.[13] "The issue is not whether a plaintiff will

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[7] D.I. 81.

[8] D.I. 82.

[9] D.I. 92.

[10] D.I. 144.

[11] *See* D.I. 150, D.I. 158.

[12] D.I. 153.

[13] *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993).

ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."[14] A motion to dismiss may be granted only if, after "accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to the plaintiff, plaintiff is not entitled to relief."[15] While the court draws all reasonable factual inferences in the light most favorable to plaintiff, it rejects unsupported allegations, "bald assertions," and "legal conclusions."[16]

To survive a motion to dismiss, plaintiffs' factual allegations must be sufficient to "raise a right to relief above the speculative level. . . ."[17] Plaintiffs are

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[14] *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (internal quotations and citations omitted), *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007) ("[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.").

[15] *Maio v. Aetna, Inc.,* 221 F.3d 472, 481-82 (3d Cir. 2000) (internal quotations and citations omitted).

[16] *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted), *see also Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997) (rejecting "unsupported conclusions and unwarranted inferences"); *see generally Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519, 526 (1983) ("It is not . . . proper to assume [plaintiff] can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged.").

[17] *Twombly*, 550 U.S. at 555; *see also Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007).

therefore required to provide the grounds of their entitlement to relief beyond mere labels and conclusions.[18] Although heightened fact pleading is not required, "enough facts to state a claim to relief that is plausible on its face" must be alleged.[19] A claim has facial plausibility when a plaintiff pleads factual content sufficient for the court to draw the reasonable inference that defendant is liable for the misconduct alleged.[20] Once stated adequately, a claim may be supported by showing any set of facts consistent with the allegations in the complaint.[21]

B. Sufficiency of the Complaint

Count V of the Third Amended Complaint (the only count at issue here) alleges that Commissioner Taylor and Warden Williams violated the Eighth Amendment and thereby 42 U.S.C. § 1983 by exhibiting deliberate indifference to decedent Barkes' particular vulnerability to suicide as well as the general risk of prison suicides created by First Correctional

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[18] *Twombly*, 550 U.S. at 555.

[19] *Id.* at 570; *see also Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) ("In its general discussion, the Supreme Court explained that the concept of a 'showing' requires only notice of a claim and its grounds, and distinguished such a showing from 'a pleader's bare averment that he wants relief and is entitled to it.' ") (quoting *Twombly*, 550 U.S. at 555 n.3).

[20] *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556).

[21] *See Twombly*, 550 U.S. at 563 (citations omitted).

Medical's improper staffing, training, and procedures.[22] To succeed on a claim against supervisors in their individual capacities based on prison policy or practices, plaintiffs must identify a specific policy or practice that the supervisors failed to employ and show that: (1) the existing policy or practice created an unreasonable risk of Eighth Amendment injury; (2) the supervisor was aware that the unreasonable risk was created; (3) the supervisor was indifferent to that risk; and (4) the injury resulted from the policy or practice.[23] In the context of prison suicides, the Third Circuit has explained that a plaintiff must: (1) identify specific training not provided that could reasonably be expected to prevent the suicide that occurred; and (2) demonstrate that the risk reduction associated with the proposed training is so great and so obvious that the failure of those responsible for the content of the training program to provide it can reasonably be attributed to a deliberate indifference to whether the detainees succeed in taking their lives.[24]

The court dismissed Count V as it appeared in the Second Amended Complaint because it found plaintiffs' allegations that Taylor and Williams were aware of *general* defects in FCM's medical services insufficient to support an inference that they were also aware of *particular* defects in FCM's suicide

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[22] *See* D.I. 152 at ¶¶ 53-58.

[23] *See Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989).

[24] *Colburn v. Upper Darby Tp.*, 946 F.2d 1017, 1030 (3d Cir. 1991).

screening and prevention policies.[25] At least with regard to plaintiffs' claim based on the failure to properly train, supervise, and monitor FCM, this defect has been cured. While the Second Amended Complaint stated only that "the DOC and its administration . . . were aware that FCM was supplying defective medical services," the Third Amended Complaint alleges more precise knowledge by Taylor and Williams of the risk of suicide in Delaware prisons. Specifically, the Third Amended Complaint alleges defendants were aware that: (1) the suicide rate in Delaware prisons was above the national average; (2) jailed detainees are more at risk for suicide than incarcerated individuals; (3) the first 24 hours of a jailed detainee's detention present a heightened risk of suicide; (4) Delaware prisons house both detainees and inmates; and (5) there was only one suicide prevention policy applicable to both populations, with no enhanced protections applicable to detainees like Barkes. Viewing these well-pleaded facts in the light most favorable to plaintiffs suggests that Taylor and Williams were aware of a generally elevated risk of suicide in Delaware prisons and a particularly heightened risk of suicide for jailed detainees, especially in their first 24 hours of detention. Knowing this, and also knowing that FCM was supplying generally defective medical services, Taylor and Williams failed to alter or amend the applicable suicide prevention policy – a policy

[25] *See* D.I. 150 at 10-11.

they purportedly knew provided no additional safeguards for newly jailed detainees.

Plaintiffs have also identified particular suicide screening deficiencies at HRYCI, the alteration of which might have saved Barkes' life. These include: (1) reliance on an out-of-date intake form from the National Commission on Correctional Health Care that the organization disavowed in its 2003 "Standards for Health Services in Prisons"; (2) an initial mental health evaluation that ignored the qualitative implications of responses to individual questions (including "Have you ever attempted suicide?") and instead based sensitive categorization of inmates solely on the total number of "positive" responses given; (3) failure to administer indicated medications; and (4) failure to check DOC medical files and records for evidence of suicidal behavior at the time of detention.

With their Third Amended Complaint, then, plaintiffs have alleged sufficient actual matter for this court to reasonably infer that Taylor and Williams were aware of and indifferent to a heightened risk of suicide for individuals in Barkes' situation created by defective suicide prevention and screening policies, and that Barkes' injury is attributable to these defective policies. Because plaintiffs have "nudged their claims across the line from conceivable to plausible,"[26] this court recommends defendants' Motion to Dismiss the Third Amended Complaint be denied.

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[26] *Twombly*, 550 U.S. at 570.

IV. ORDER AND RECOMMENDED DISPOSITION

For the reasons contained herein, it is recommended that:

(1) Defendants' Motion to Dismiss the Third Amended Complaint (D.I. 153) be DENIED.

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D.Del.LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation.[27] The objections and response to those objections are limited to ten (10) pages each.

The parties are directed to the court's standing Order in Non-Pro Se Matters for Objections Filed under Fed. R. Civ. P. 72, dated November 16, 2009, a copy of which is available on the court's website, www.ded.uscourts.gov.

Dated: July 27, 2010

/s/ Mary Pat Thynge
UNITED STATES
MAGISTRATE JUDGE

[27] FED. R. CIV. P. 72(b).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KAREN BARKES, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 06-104-LPS
FIRST CORRECTIONAL MEDICAL, et al.,	:	
Defendants.	:	

MEMORANDUM ORDER

Pending before the Court are Objections To Report And Recommendation Regarding Motion To Dismiss Plaintiff's [sic] Third Amended Complaint filed by Defendants Stanley Taylor and Raphael Williams. (D.I. 166.) For the reasons discussed, the Court will overrule the Objections, adopt the Report And Recommendation (D.I. 165) issued by Magistrate Judge Thynge, and deny Defendants' Motion To Dismiss (D.I. 153).

I. BACKGROUND

The background relevant to this action is set forth fully in Magistrate Judge Thynge's July 27, 2010 Report and Recommendation (D.I. 165 at 1-3), as well as the February 27, 2008 Memorandum Opinion (D.I. 60 at 2-9) issued by Judge Farnan. By way of brief summary, Plaintiffs, the surviving family members of decedent Christopher Barkes, filed this action pursuant to 42 U.S.C. § 1983, in connection

with Barkes' suicide at the Howard Young Correctional Institute ("HYCI"). Plaintiffs' initial Complaint alleged Eighth Amendment violations against the State Department of Corrections (the "DOC"); Stanley Taylor, the Commissioner of the DOC; Raphael Williams, Warden of the Howard Young Correctional Institute ("HYCI") (collectively, "the State Defendants"); and First Correctional Medical, Inc. ("FCM"), the DOC medical provider at the relevant time.

In February 2008, Judge Farnan granted summary judgment in favor of the State Defendants (D.I. 60-62) and entered default judgment against FCM. (D.I. 74.) Judge Farnan also granted Plaintiffs leave to amend the pleadings to add new claims "that may pertain either to third parties or the parties that were initially in the case that you want to rejoin in the case." (D.I. 73 at 3-4.)

Plaintiffs then filed an Amended Complaint, which was stricken by the Court to the extent it contained claims upon which the State Defendants had already prevailed. (D.I. 81.) However, leave was granted to file a second amended complaint that did not include such claims. (*Id.*) The Second Amended Complaint was filed (D.I. 82), and Defendants moved for dismissal. (D.I. 144.) The Court granted the Motion To Dismiss, but allowed Plaintiffs leave to amend Count V. (D.I. 150, 158.) As a result, Count V is the only count of the Third Amended Complaint currently at issue.

Count V of the Third Amended Complaint alleges that Defendants Taylor and Williams violated decedent's Eighth Amendment Rights to be free from cruel and unusual punishment by failing to supervise and monitor FCM. By her Report and Recommendation, Magistrate Judge Thynge recommended that the Court deny Defendants' Motion To Dismiss.

II. PARTIES' CONTENTIONS

Defendants, Stanley Taylor and Raphael Williams, object to the Report and Recommendation, contending that Judge Thynge erred in dismissing Count V on two grounds. First, Defendants contend that the facts underlying this claim were already litigated and decided in their favor when Judge Farnan adjudicated their summary judgment motion in February 2008. Thus, Defendants contend that the relitigation of this claim is barred by collateral estoppel.

Second, Defendants contend that Judge Thynge erred in finding that Plaintiffs sufficiently alleged that Defendants were personally involved in decedent Barkes' suicide. Because they are government officials, Defendants contend that Plaintiffs must establish that each Defendant violated the Constitution through his individual actions. According to Defendants, Judge Thynge erroneously relied on a theory of *respondeat superior* to sustain Claim V.

In response, Plaintiffs contend that Count V was introduced into this litigation well after Judge Farnan adjudicated the 2008 summary judgment motion and

raises a new claim not previously addressed by Judge Farnan. Specifically, Plaintiffs contend that the previous claims concerned Defendants Taylor and Williams' alleged failure to supervise their own personnel, but the current Count V alleges that Defendants Taylor and Williams failed to supervise FCM. Plaintiffs maintain that the allegations forming the basis of this claim differ in significant detail from any previous allegations considered by the Court and, therefore, Judge Farnan's summary judgment decision should not bar the current claim. In addition, Plaintiffs contend that Count V sufficiently alleges Defendants' "'personal involvement' by virtue of their failure to *supervise* FCM, which failure was a proximate cause of Mr. Barkes' suicide for which they are culpable." (D.I. 168 at 4, emphasis in original.)

III. LEGAL STANDARDS

When reviewing the decision of a magistrate judge on a dispositive matter, the Court conducts a *de novo* review. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(3). A motion to dismiss and a motion for summary judgment are considered dispositive matters and, therefore, the findings and conclusions of the magistrate judge in connection with such motions are reviewed *de novo*. *Id.* The Court may accept, reject, or modify the recommendations of the magistrate judge. Id. The Court may also receive further evidence or return the matter to the magistrate judge with instructions for proceeding. *Id.*

IV. DISCUSSION

Reviewing the Report And Recommendation *de novo,* the Court concludes that Magistrate Judge Thynge did not err in recommending the denial of Defendants' Motion To Dismiss. Collateral estoppel, or issue preclusion, is the general rule requiring courts to give preclusive effect to prior decisions involving "an issue of fact or law [that has been] actually litigated and determined by a valid and final judgment." *Restatement (Second) of Judgments* § 27 (1980). Issue preclusion applies to a particular issue when "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." *Jean Alexander Cosmetics, Inc. V. L'Oreal USA, Inc.,* 458 F.3d 244, 249 (3d Cir. 2006); *see also Nat'l R.R. Passenger Corp. v. Pennsylvania Public Utility Comm'n,* 288 F.3d 519, 525 (3d Cir. 2002). The Third Circuit has also "considered whether the party being precluded 'had a full and fair opportunity to litigate the issue in question in the prior action,' and whether the issue was determined by a final and valid judgment." *Id.* (internal citations omitted).

In arguing for dismissal of Count V, Defendants highlight three factual allegations noted by Judge Thynge in her Report and Recommendation: (1) the suicide screening form used at HYCI in 2004, (2) the DOC's suicide policy, and (3) the suicide rate in Delaware prisons compared to the national average.

Defendants contend that collateral estoppel applies because Judge Farnan already considered this evidence in his summary judgment decision and, therefore, this evidence cannot be used to shield Plaintiffs' current claim from dismissal. However, Judge Farnan's consideration of the aforementioned evidence was in a different procedural posture and different context than the current claim. As Plaintiffs point out, Count V alleges a claim against Defendants for their failure to supervise and/or monitor the activities of FCM. This claim is quite different from the claim considered by Judge Farnan in 2008, which concerned Defendants' failure to train and supervise DOC personnel so as to properly recognize suicidal inmates and care for them. Thus, when Judge Farnan considered this evidence, he did so in the context of whether it alerted Defendants to deficiencies in their own policies or protocols, rather than the potential impact of the evidence vis-á-vis known deficiencies in medical care provided by FCM. In the Court's view, these differences in the nature of the claim are significant and weigh against the application of collateral estoppel.

Moreover, Judge Farnan considered this evidence in the context of summary judgment, concluding, at that juncture, that there was a lack of evidence in the record demonstrating that Defendants had knowledge of the evidence. As Plaintiffs point out, however, the inquiry for dismissal focuses on the sufficiency of the allegations and not the weight of the evidence supporting them. New depositions of Defendants Williams

and Taylor are in progress; and whether these depositions reveal further evidence in the context of the particular claim asserted here is an issue more appropriately reserved for summary judgment.

In addition, the Court notes that Judge Thynge discussed numerous allegations set forth by Plaintiffs in the Third Amended Complaint supporting the claim, and not just the three pieces of evidence highlighted by Defendants. These additional allegations have not been pled previously and, in the Court's view, they are sufficient, taken as a whole and in the light most favorable to Plaintiff, to state a claim against Defendants regarding their failure to supervise FCM, such that Count V should not be dismissed at this juncture.

As for Defendants' argument concerning Plaintiffs' alleged failure to plead Defendants' "personal involvement," the Court likewise finds no error in Judge Thynge's Report and Recommendation. An individual government "defendant in a civil rights action must have personal involvement in the alleged wrongdoing; liability cannot be predicated solely on the operation of respondeat superior." *Evancho v. Fisher,* 423 F.3d 347, 353 (3d Cir. 2005) (internal quotation marks omitted). Allegations of personal direction of the alleged wrongdoing, or of actual knowledge and acquiescence in the alleged wrongdoing, can establish a defendant's personal involvement. *Id.* "While vicarious liability is not available, supervisory liability may attach if the supervisor implemented deficient policies and was deliberately indifferent to

the resulting risk or if the supervisor's actions and inactions were 'the moving force' behind the harm suffered by the plaintiff." *Jackson v. Taylor,* 2006 WL 2347429, at *2 (D. Del. May 12, 2006) (citing *Sample v. Diecks,* 885 F.2d 1099, 1117-18 (3d Cir. 1989)).

Defendants contend that Judge Thynge "erred in finding that an inference could be drawn showing that Defendants Taylor and Williams were personally involved in the decedent Barkes' suicide, when Plaintiffs failed to plead that each defendant, through their [sic] individual actions, had violated the Constitution." (D.I. 166 at 10.) However, the wrongdoing alleged as the constitutional violation in the Third Amended Complaint is not decedent Barkes' suicide. Rather, the thrust of Count V is that Defendants committed the constitutional wrong of failing to supervise and/or monitor FCM, such that this failure subsequently gave rise to decedent Barkes' suicide. Thus, whether Defendants were personally involved in decedent Barkes' suicide is not the appropriate inquiry. The proper inquiry is whether Plaintiffs have adequately pled Defendants' personal involvement in the constitutional wrong of failing to supervise FCM.

In this case, Plaintiffs have sufficiently alleged personal knowledge by Defendants of deficiencies in FCM's care of inmates and facts related to the suicide rates of inmates and jailed detainees, as well as a suicide proclivity on the part of decedent Barkes, in particular. Plaintiffs have also alleged a series of inactions by Defendants concerning their failure to adequately monitor FCM in these circumstances. Taking

these allegations in the light most favorable to Plaintiffs, the Court concludes that they are sufficient to allege Defendants' personal involvement in the constitutional wrong of failure to supervise and/or monitor FCM.

Accordingly, the Court concludes that Judge Thynge correctly concluded that the allegations of Count V are sufficient, at this juncture, to withstand dismissal.

NOW THEREFORE, IT IS HEREBY ORDERED that:

1. Defendants' Objections to Magistrate Judge Thynge's Report And Recommendation Regarding Motion To Dismiss Plaintiffs' Third Amended Complaint (D.I. 166) are ***OVERRULED.***

2. The Report and Recommendation Regarding Motion To Dismiss Plaintiff's Third Amended Complaint (D.I. 165) is ***ADOPTED*** and Defendants' Motion To Dismiss Plaintiff's Third Amended Complaint (D.I. 153) is ***DENIED***.

DATE: 2-18-11 /s/ Mary P. Thynge
UNITED STATES
MAGISTRATE JUDGE