NO. 19-6148

In the Supreme Court of the United States

CORNELIUS LORENZO WILSON,

Petitioners,

–v–

DENNIS GRIMES; SID J. GAUTREAUX, III; LINDA OTTESEN; CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE CONSOLIDATED GOVERNMENT; DR. RAMAN SINGH; TAMEYA YOUNG; AND KAREN COMEAUX,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS LINDA OTTESEN AND THE CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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JANUARY 27, 2020

QUESTIONS PRESENTED

1. Does systemic underfunding and understaffing of a municipal jail that knowingly causes significant delays for prisoners receiving access to outside medical care constitute an official policy or custom under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)?

2. Whether a substantive delay in medical care for a serious medical condition is an Eighth Amendment violation for a prisoner rather than simply a disagreement with his medical care?

LIST OF PARTIES

The parties named in the caption are the only parties to this proceeding.

Petitioners

The Petitioner is Cornelius Lorenzo Wilson.

Respondents

The Respondents are Dennis Grimes; Sid J. Gautreaux, III, Linda Ottesen, City of Baton Rouge/Parish of East Baton Rouge Consolidated Government, Dr. Raman Singh, Tamrya Young, and Karen Comeaux.

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STATEMENT OF CASE

A. Factual background

1. Cornelius Wilson Was Not Denied Medical Care for Lack of Funding.

Neither of the questions presented by Cornelius Wilson can be answered in the affirmative based upon the facts, as they existed in 2015, when Mr. Wilson was an inmate at the East Baton Rouge Parish Prison (hereinafter "EBRPP"). On August 27, 2015, a group of nurses that worked at the jail, led by Dr. Rani Whitfield, a part-time independent contractor with the City of Baton Rouge, provided medical care along with others to the inmates. The group complained about general shortage of nurses and the need for additional funds. Their appearance sparked a sensational feature story in the local newspaper that has been quoted in almost every suit filed since it was published. Dr. Whitfield is quoted as saying there has been a serious decline in the quality of healthcare at the jail. He also pointed out that the jail had a sicker prison population. This was Dr. Whitfield's personal opinion based on his observations of the prison medical staff based upon his approximate ten (10) hours per week shift working at the jail.

Prior to February, 2013, any inmate who required specialized care, or who suffered from a chronic illness requiring medication and treatment, was brought to the Earl K. Long Memorial Hospital. This hospital was a teaching hospital associated with the Louisiana State University Medical School. Inmates were treated at no cost to the City of Baton Rouge/Parish of East Baton Rouge

(hereinafter referred to as "City/Parish"). In February, 2013, the state legislature overhauled the complete charity hospital system in Louisiana and, as a result, on April 14, 2013, the Earl K. Long Memorial Hospital closed its doors. It then became the responsibility of the jail to provide the care that had previously been provided by the charity hospital. The state recognized that the closure of this hospital resulted in municipal jails all around the Baton Rouge area having to assume the obligation to provide medical care to its inmates at an unknown additional cost that could not be adequately budgeted. As a result, the Louisiana Department of Corrections became responsible for paying for medical expenses incurred outside of the jail. Had the medical staff at the EBRPP thought that Mr. Wilson needed medical care that was not available at the jail, he would have been transferred to Our Lady of the Lake Regional Medical Center, where he would have gotten the appropriate care at no cost to him or the City/Parish. Mr. Wilson did not get that specialized care because it was the opinion of all three (3) medical doctors who worked at the EBRPP, as well as the physicians who worked at various hospitals operated by the Department of Corrections that his condition did not require outside care.

2. There Was No Delay in Providing Medical Care to Mr. Wilson in Violation of the Eighth Amendment.

Mr. Wilson asserts that in February 2015, he began to experience symptoms consisting of a sore throat, hoarseness, persistent and productive cough. *See* App.33a at ¶ 1. According to Mr. Wilson, he complained to medical staff and, despite

his assertion to the contrary notwithstanding, he received treatment on every occasion. While Mr. Wilson claims not to have received medical care, the record contradicts that assertion. Mr. Wilson filled out a "medical request form" on February 7, 2015, at that time he complained of being hoarse and suffering from sinus trouble. *See* ROA ¶ 45. He made a second request for medical care on February 11, 2015. This time he stated that he had lost his voice and that his throat was congested with mucus. *See* ROA.879 ¶ 46. On February 14, 2015, Mr. Wilson was seen by Nurse Ricky Guillory, who administered Tylenol and throat lozenges for complaints of cough, nasal congestion, headache and malaise. *See* ROA.879 – 880, ¶ 47.

On February 24, 2015, Mr. Wilson was seen by Dr. Whitfield, who treated Mr. Wilson's continued complaints of sore throat, hoarseness, and sinus congestion. This time Dr. Whitfield prescribed Mucinex and an antibiotic, amoxicillin. *See* ROA. 880, ¶ 48. On March 6, 2015, Mr. Wilson saw Dr. Whitfield once more to renew his prescription for medication. *See* ROA.880, ¶ 49. On March 16, 2015, Mr. Wilson filled out yet another medical request form stating that he had lost his voice completely and was in pain. *See* ROA.880, ¶ 50. On March 18, 2015, Dr. Whitfield again saw Mr. Wilson for treatment where he diagnosed hoarse pharyngitis cough. Dr. Whitfield prescribed an antibiotic, cephalexin, and expectorant, Mucinex, and a steroid named Medrol. Mr. Wilson's condition did not improve. On March 21, 2015, Mr. Wilson was seen by Dr. Stuart. Mr. Wilson complained that his voice was not

improving. He saw Dr. Stuart again on April 11, 2015, and this time requested to go to the hospital. *See* ROA.881, ¶ 56.

On or about April 20, 2015, Mr. Wilson presented himself at sick-call requesting to *see* a doctor. *See* ROA.881, ¶ 57. On that occasion, Nurse Vincent Bradley saw Mr. Wilson on April 21, 2015 and indicated he referred Mr. Wilson to a physician. Nurse Bradley prescribed Tylenol and throat lozenges. *See* ROA.882, ¶ 58. On April 24, 2015, Dr. Bridges examined Mr. Wilson. Dr. Bridges prescribed once again Mucinex. *See* ROA. 882, ¶ 60. On April 29, 2015, Dr. Whitfield once again prescribed Keflex, to treat Mr. Wilson's sore throat complaint. On May 7, 2015, Nurse Raine examined Mr. Wilson to find that his condition had not changed. On May 12, 2015, however, Dr. Bridges examined Mr. Wilson who had the same symptomology as previously. Presumably the same medication was continued. ROA 883, ¶ 68. On June 11, 2015, Mr. Wilson once again made a sick call and was examined by Nurse Raine. ROA 883, ¶ 69 – 70. Mr. Wilson was seen by nurses and was treated by Dr. Whitfield, Dr. Stuart, and various nurses more or less on a weekly basis through the month of August until August 31, 2015. At that time, Dr. Stuart recommended Mr. Wilson be referred to an ear, nose and throat specialist. This request was submitted to the Department of Corrections, who approved the appointment on September 21, 2015 for Mr. Wilson to be seen by a specialist at Our Lady of the Lake Hospital.

On or about October 9, 2015 an appointment was made for a Telemed appointment with the ENT which took place on October 28, 2015. *See* ROA.885 –

886, ¶ 84. The examining physician felt as though the TeleMed examination was inadequate and DOC was to schedule a face-to-face appointment with that specialist; however, Mr. Wilson was transferred by DOC from EBRPP to Jackson Parish Correctional Center prior to the appointment being met. *See* ROA.886, ¶ 86. Mr. Justice Marshall held, in *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285 (1976), that while deliberate indifference to a prisoner's serious medical illness or injury constitutes cruel and unusual punishment in violation of the Eighth Amendment, the complaint showing that the prisoner had been seen and treated by medical personnel on seventeen occasions within a three (3) month period was insufficient to state a cause of action against that physician, both in his capacity as treating physician and medical director of correction of the corrections department. Mr. Wilson was seen and treated at least twenty times between February and August. Surely, Mr. Wilson, like Mr. Gamble has failed to fairly asserted a cause of action based upon deliberate indifference.

3. Linda Ottesen Was Not Deliberately Indifferent to Mr. Wilson's Medical Needs.

The record clearly demonstrates that any delay providing was in access to specialized medical care rather than the denial of medical care in general.

Once again, the allegations of fact recited in detail in the complaint clearly demonstrate that Mr. Wilson's claim against Linda Ottesen, Medical Director Prison Medical Services should be dismissed. In fact, no allegations of fault are made against Ms. Ottesen except to assert that she is one of the defendants who

plaintiff charged with deliberate indifference. The only real disagreement between Mr. Wilson and Linda Ottesen had to do with the type of medical care that should have been rendered. Accordingly, the complaint fails to state a facially plausible claim that Ms. Ottesen was deliberately indifferent to a serious medical need. *See Thomas v. Chevron USA, Inc.*, 832 F.3d 586, 590 (5th Cir. 2016); *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 421-22 (5th Cir. 2017); *Gobert v. Caldwell*, 463 F.3d 339,345-346 (5th Cir. 2006).

Whether the plaintiff received the treatment or accommodation that he believes he should have is not the issue because a prisoner's mere disagreement with his medical treatment, absent exceptional circumstances, does not support a claim of deliberate medical indifference. *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006). Nor do negligence, neglect, medical malpractice or unsuccessful medical treatment give rise to a § 1983 cause of action. *See Zaunbreaker v. Gaudin*, 2016 WL 536874 (5th Cir. Feb. 10, 2016), "subjective recklessness as used in the criminal law" is the appropriate definition of "deliberate indifference" under the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 839-40 (1994). A prison official acts with deliberate indifference only if the official (1) "knows that inmates face a substantial risk of serious bodily harm," and (2) "disregards that risk by failing to take a reasonable measure to abate it." *Gobert v. Caldwell*, *supra*, 436 F.3d at 346; quoting *Farmer v. Brennan*, *supra*, 511 U.S. at 847. The deliberate indifference standard sets a very high bar: the plaintiff must be able to establish that the defendants "refused to treat him, ignored his complaints, intentionally treated him

incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs. *Domino v. Texas Dept. of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001) quoting *Estelle v. Gamble*, *supra*.

REASON TO DENY THE PETITION

I. A DELAY IN PROVIDING SPECIALIZED MEDICAL CARE, ABSENT DELIBERATE INDIFFERENCE, DOES NOT CONSTITUTE EIGHTH AMENDMENT VIOLATION.

A mere delay in providing medical treatment does not amount to a constitutional violation without both deliberate indifference and resulting substantial harm. *Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006). We respectfully submit to this Hon. Court that based upon the law and the evidence, Linda Ottesen in both her individual and representative capacities is not guilty of deliberate indifference to any serious medical condition and, accordingly, is not liable unto him for any sums whatsoever.

As stated by the Hon. Fifth Circuit Court of Appeal in its per curiam opinion, the District Court " . . . correctly concluded that [plaintiff's] factual allegations, taken as true, complain of the delay in providing access to medical specialist rather than the denial of medical care and, therefore, effectively constitute only a disagreement with his medical treatment." *See Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993). Therefore, Mr. Wilson failed to state in his complaint a facially plausible claim that Linda Ottesen was deliberately indifferent to any serious medical need. *See Thomas v. Chevron USA, Inc.*, 832 F.3d 586, 590 (2016).

II. NEITHER LINDA OTTESEN IN HER INDIVIDUAL CAPACITY AND THE CITY/PARISH, IN HER OFFICIAL CAPACITY, IS GUILTY OF A CONSTITUTIONAL TORT IN VIOLATION OF 42 U.S.C. 1983.

In order for the City/Parish to be liable onto the plaintiff under § 1983 the plaintiff must identify an unconstitutional municipal policy or custom that caused his injury. *Monell v. Dep't. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018; 56 L.Ed.2d 611 (1978). A plaintiff may not identify such a policy merely because he was harmed as a result of some interaction with that municipality (Parish). He must also identify a particular policy or custom which allegedly caused the deprivation of a constitutionally protected right. *Colle v. Brazos County Texas*, 98 F.3d 245 (5th Cir. 1993); *Treece v. Louisiana*, 74 F.2d 315 (5th Cir. 2003).

Plaintiff has failed to assert the City/Parish had in effect a policy or custom adherence to which caused the injuries he allegedly suffered while incarcerated. In order for the City/Parish to be liable under § 1983, plaintiff must prove three (3) elements: 1. An official policy or custom, which; 2. A policy maker can be charged with actual or constructive knowledge; and 3. A violation of constitutional rights whose "moving force, is that policy or procedure. *Monell*, *supra; Parm v. Shumate*, 513 F.2d 135 (5th Cir. 2007), cert. denied 129 Ct. 42, 172 L.Ed.2d 21 (2008). The U.S. Supreme Court specifically held in *Monell* that local government agencies cannot be liable for damages resulting from a constitutional tort under § 1983 pursuant to a theory of *respondeat superior*. Requiring an official policy or custom ensures that a local government entity will be held liable only for those deprivations resulting from the decisions of those officials whose acts may be said to be those of the government

entity. *Board of County Commissioners of Brian County v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L.Ed.2d 626 (1997).

In order to establish an "official policy" the plaintiff must prove the establishment of such policy in one of three (3) ways. 1. When the appropriate municipal official or governing body promulgates a generally applicable statement of policy and a subsequent act complained of is simply an implementation of that policy. 2. Where no official rule has been designated as policy but federal law has been violated by an act of the policy maker itself. 3. And even if the policy maker did not act affirmatively so long as the need to take some action to control agents of the government is so obvious in order to avoid a violation of constitutional rights that the policy maker can rightly said to be "deliberately indifferent." *City of Canton v. Harris*, 489 U.S. 378, 390, 109 S. Ct. 1197, 1205, 103 L. Ed.2d 412 (1989).

Plaintiff has failed to identify any custom or procedure utilized by the City/Parish that would constitute deliberate indifference to the medical care needs of those persons incarcerated there. The City/Parish cannot be held liable for unintentional oversights. In order to recover the plaintiff must prove that the City/Parish disregarded a known or obvious consequence of its actions. *Evett v. DETNTFF*, 330 F.3d 681 (5th Cir. 2003).

III. CORNELIUS WILSON HAS FAILED TO PLEAD MENS REA AS A PREREQUISITE TO DELIBERATE INDIFFERENCE AND THEREFORE FAILS TO STATE A CAUSE OF ACTION.

While Mr. Wilson asserts deliberate indifference on behalf of Linda Ottesen and the City/Parish, he fails to plead "subjective recklessness as used in the criminal law unquote as discussed in *Farmer v. Brennan*, *supra*, 511 U.S. 825, 839-

40 (1994). The prison official acts with deliberate indifference only if the official "knows that inmates face a substantial risk of serious bodily harm," and "disregards at risk by failing to take reasonable measures to abate it. *Gobert v. Caldwell*, *supra*, 463 F.3d at 346. The deliberate indifference standard sets a very high bar. One, where the claimant must be able to establish that the defendants "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Domino v. Texas Dept of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001).

IV. LINDA OTTESEN IS IMMUNE FROM SUIT IN BOTH HER INDIVIDUAL AND OFFICIAL CAPACITIES.

Qualified immunity provides government officials performing discretionary functions with a shield against civil damage liability, so long as their actions are reasonably connected with the rights they are alleged to have violated. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1984). Determining whether an official enjoys immunity, is a two-pronged test. 1. The party asserting immunity must determine whether the plaintiff has demonstrated a violation of a clearly established federal constitutional or statutory right and, 2. Whether the official's actions violated that right to the extent that an objectively reasonable person would have known. *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002). Plaintiff has failed to meet his burden under the first prong of the qualified immunity inquiry, for failure to demonstrate an Eighth Amendment violation. Such is Mr. Wilson's burden in light of the fact that defendant has raised the defense of qualified immunity. *Estate*

of Davis v. City of N. Richland Hills, 406 F.3d 375 (5th Cir. 2005) a prison official acts with deliberate indifference only when he knows that inmates face a substantial risk of serious bodily harm and he disregards at risk by failing to take reasonable measures to abate it. *Farmer*, *supra*, 511 U.S. at 847. Unsuccessful medical treatment, Acts of negligence, or medical malpractice do not constitute deliberate indifference, nor does a prisoner's disagreement with his medical treatment, absence, exceptional circumstances. "Furthermore, the decision whether to provide additional treatment is "a classic example of a matter for medical judgment." *Domino*, *supra*, 239 F.3d 752. Deliberate indifference "is an extremely high standard to meet" *Hernandez*, *supra*, 380 F.3d at 882 a high standard that Mr. Wilson has not met. Accordingly, Linda Ottesen in both her individual and official capacities, is protected from litigation by virtue of qualified immunity.

CONCLUSION

We respectfully submit that the Court deny plaintiff's Petition for Writ of Certiorari in light of the fact that the Fifth Circuit Court of Appeals' decision affirming the district court's dismissal of Mr. Wilson's complaint, pursuant to Federal Rules of Civil Procedure 12(b)(6) is correct.

Respectfully submitted,

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