

No. 22-_____

**In the
Supreme Court of the United States**

MICHELLE MCDONALD-WITHERSPOON
Administratrix Of The
ESTATE OF KENYADA JONES,
Petitioner

v.

AMBER BROWNE, JEANETTE PALMER,
PHILADELPHIA ADULT PAROLE & PROBATION
DEPARTMENT,
Respondents.

**On Petition for a Writ Of Certiorari
To The United States Court of Appeals
for the Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a probation officer with no medical or psychiatric training who is in charge of a mentally disabled (schizophrenic) person (who is out of jail on probation and who is waiting for his mother to arrive to take him for psychiatric treatment), and has that person arrested and returned to prison for the sole purpose of receiving psychiatric treatment in prison (thus preventing him from receiving treatment at a psychiatric hospital) based solely on the fact that he is mentally disabled (whereby he would not have been arrested and returned to jail if he were not mentally disabled), violates the disabled person's rights under the Equal Protection clause of the 14th Amendment to the US Constitution giving rise to a civil claim under 42 USC §1983 when the disabled person dies in prison a few days later from a medication overdose due to the failure to receive competent mental health treatment at the prison (where he was placed in general population and given a month's supply of medication to keep on his person in accordance with the prison's policy), where it was foreseeable that the disabled person would not receive the treatment he needed in prison thus placing him in serious risk of harm.

PARTIES TO THE PROCEEDINGS

Petitioner

-
- Michelle McDonald-Witherspoon as
administrator for the Estate of Kenyada Jones

Respondents

-
- Parole Officer Amber Browne
 - Parole Officer Jeanette Palmer
 - Philadelphia Adult Parole & Probation
Department

LIST OF PROCEEDINGS

U.S. District Court for the Eastern District of
Pennsylvania

No. 17-1914

*Michelle McDonald-Witherspoon, et al. v. City of
Philadelphia, et al.*

Final Judgment: 12/31/20

U.S. Court of Appeals for the Third Circuit

No. 21-1019

*Michelle McDonald-Witherspoon, et al. v. City of
Philadelphia, et al.*

Final Judgment: 1/26/22

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michelle McDonald-Witherspoon, the mother of the decedent Kenyada Jones and the Administratrix of his Estate, respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit in an unreported decision denied Petitioner Michelle McDonald-Witherspoon's petition for rehearing on January 26, 2022. That order, the Judgment of the Third Circuit and its Opinion are attached at the Appendix below.

JURISDICTION

Petitioner Michelle McDonald-Witherspoon's petition for rehearing to the Third Circuit Court of Appeals was denied on April 26, 2022. Michelle McDonald-Witherspoon invokes this Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this petition for a writ of certiorari within ninety days of the Third Circuit's Order denying rehearing.

STATUTORY PROVISIONS AND JUDICIAL RULES INVOLVED

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

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

STATEMENT OF THE CASE

Briefly, Decedent Kenyada Jones (“Jones”) was a man in his forties suffering from a qualified disability, paranoid schizophrenia, with a history of being in and out of psychiatric institutions. On 6/28/16 Jones was on probation and at the probation office in Philadelphia. He was acting worried and somewhat delusional, though was perfectly obedient and following all instructions and was no threat to anyone. He was with his probation officers, Respondents Amber Browne (“Browne”) and Jeannette Palmer (“Palmer”) (collectively “POs”). The POs knew his mother, Petitioner Michelle McDonald-Witherspoon (“MMW”) was on her way over to take him to the psychiatric hospital for treatment, as she had done many times before. However, POs preferred to have Jones arrested on the spot and taken to prison to get his psychiatric treatment there. They admitted in their notes and at deposition that the reason for taking him back to prison was to get psychiatric treatment. They misled the judge to get a warrant, making untrue statements to the Judge that Jones had technically violated his conditions of probation. At prison Jones’ psychiatric condition went untreated

and he was given a month's worth packet of pills; he promptly swallowed the whole packet and died of overdose on the jail cell floor within a few days of arriving at the prison. Petitioner brought civil claims against Respondents/POs for violation of the Equal Protection clause of the 14th Amendment to the US Constitution, under 42 USC §1983, among other claims. Petitioner produced expert reports that the lack of psychiatric treatment was the cause of the overdose and that the actions of the POs were totally out of line and not acceptable in any way. The District Court dismissed the claims on summary judgment. Petitioner appealed. The US Court of Appeals for the Third Circuit upheld the dismissal of the claims against the POs on the grounds that, according to the Court, they had a right to put him in jail for psychiatric treatment because he was mentally disabled and in need of treatment, and that putting him in jail as opposed to letting him go to a psychiatric hospital was just an innocent mistake. The Third Circuit made a legal error by failing to apply Jones' Constitutional rights. He was treated differently because of his mental disability. Had he not had a mental disability, he would not have been arrested and brought to prison. The arrest and imprisonment was a proximate cause of his death. Browne and Palmer's actions were so extreme as to shock the conscience. The danger to Decedent Kenyada Jones ("Jones") was foreseeable. A reasonable person would know that placing such a person in general population prison is dangerous. Having Jones arrested and placed in prison prevented him from going to a psychiatric hospital or emergency room, which is where his mother was planning to take him when she got to the parole office, and where he checked himself in voluntarily in the past. Moreover,

what about fear: the average person fears going to prison very much; a person in a paranoid state fears prison more than we can imagine. There was certainly a lack of rational basis to arrest and imprison Jones on that occasion. Sending a paranoid schizophrenic having a psychotic episode to general population prison in Philadelphia for the purpose of getting psychiatric treatment is not rational. The discriminatory intent is inherent in Browne and Palmer's own statements. According to them, they arrested and imprisoned because he was a schizophrenic/manic depressive in need of treatment. They would not have arrested him if he had no mental disability. That is discrimination: whether they did it for "his own good" or otherwise. Browne and Palmer's reckless disregard for Jones' risk of serious harm meets the qualified immunity standard.

Had Jones not been a schizophrenic Palmer/Browne would not have had him arrested, and he would not have died in prison. This is a violation of Jones' right to Equal Protection under the Fourteenth Amendment to the US Constitution. That is sufficient to state a §1983 claim and, as against PAPPD a claim under Title II of the Americans with Disabilities Act. 42 USC § 12101 et seq. ("ADA") and §504 of the Rehabilitation Act of 1973 ("RA"). The Third Circuit's Opinion is in conflict with established precedent. "We therefore find that by relying on Block's race as one factor supporting the denial of his parole application, the Board violated Block's right to the equal protection of the laws. Absent a compelling governmental interest, the equal protection clause

forbids different treatment of similarly situated individuals on the basis of race.” Block v. Potter, 631 F.2d 233, 241 (3d Cir. 1980). The Equal Protection clause applies to parolees. The Panel Opinion fails to apply the Equal Protection clause to Kenyada Jones, a mentally disabled man suffering from schizophrenia. This appeal has vital importance to the citizens of Pennsylvania and the United States. The Philadelphia parole office is treating those with psychiatric disabilities differently than those without. State actors Palmer and Browne were carrying out a discriminatory scheme: parole officers are sending schizophrenics to prison because they are schizophrenic. This is not for the parolee’s own benefit, because the parole officers doing this have no medical degrees or training and do not consult with any medical professional when carrying out these decisions. In fact, as this case shows, they are doing the opposite. They are going against law and medicine by not calling in the police or letting him go on his own. If this were a non-disabled person who they thought was acting strangely, they would call in the police to do a 302 evaluation by law, to see if he needed emergency psychiatric care, or they would tell him to go home. But because he was mentally disabled and they thought themselves to be his psychiatric overseers, they made the medical decision themselves to send him to prison, a horrible thing to do to a person in a paranoid state. If Respondent Philadelphia Adult Parole and Probation Department (“PAPPD”) wants to have a Mental Health Unit and treat psychotic parolees differently than able-minded parolees, then they should have some minimal amount of accountability for the safety of the public they serve. Let them go before a jury and explain themselves. Maybe next time they

will have someone on call with psychiatric training with whom to confer before acting. An innocent man died because of this system, and more will follow unless the system is fixed. The civil law provides for that fix by simply forcing people to act reasonably. Cut corners if you must, take it easy on yourself, but not at the expense of the lives of the mentally disabled whom you took charge over against their will. Then, the Equal Protection Clause of the US Constitution, 14th Amendment, says No, treat the mentally disabled equally with their able-minded brothers lest the country become divided; and the Due Process clause concurs. The Third Circuit Opinion also conflicts with *Malley v. Briggs*: “The United States Court of Appeals for the First Circuit reversed, holding that an officer who seeks an arrest warrant by submitting a complaint and supporting affidavit to a judge is not entitled to immunity unless the officer has an objectively reasonable basis for believing that the facts alleged in his affidavit are sufficient to establish probable cause. 748 F.2d 715 (1984). We granted certiorari in order to review the First Circuit's application of the "objective reasonableness" standard in this context. 471 U.S. 1124 (1985). We affirm.” *Malley v. Briggs*, 475 U.S. 335, 339 (1986). Browne and Palmer knew Kenya was not going to New York – he was a schizophrenic having a manic delusion. They were holding him there to wait for his mother to pick him up and take him to the hospital. When she got delayed in her arrival they arrested him. They were not objectively reasonable when they called the judge to falsely accuse Kenya of being in the process of traveling to NY. The Third Circuit Opinion also is in conflict with *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996), by not applying the State-Created Danger

doctrine. All four elements set forth therein fit the facts of this case, provided that the evidence be seen in the light most favorable to the non-moving party. Plaintiff produced a parole officer/police procedure expert report, a psychiatric expert report and a general medical expert report, cited rules and statutes of proper procedure. Browne and Palmer violated all the standards. You don't send a sick man to prison because he's sick. That is not medical care. Disney World has a medical care unit too. But this analogy is too kind. To a paranoid schizophrenic, prison is far scarier than space mountain. Browne and Palmer did the worst thing possible, making a so-called medical decision without any medical training, and doing it under circumstances that did not seem very medically-oriented. His mother took too long getting there, they had a busy schedule that day, so suddenly they become overly concerned and arrest him 'for his own good.' It was foreseeable that a psychotic going to general lockup is a bad combination.

REASONS FOR GRANTING THE WRIT

To avoid future deaths to mentally disabled persons on parole and probation who will be wantonly arrested and imprisoned by "mental unit probation officers" to get "psychiatric treatment" in prison due solely to the fact of their disability, thus violating their Equal Protection rights.

CONCLUSION

For the foregoing reasons, Petitioner Michelle McDonald-Witherspoon respectfully requests that

this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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JULY 22, 2022

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Third District affirming appeal.....5a

Order of the US District Court for the EDPA
Entering final judgment.....22a

**ORDER OF THE US COURT OF APPEALS FOR
THE THIRD CIRCUIT ON PETITION FOR
REHEARING (01/26/2022)**

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

MICHELLE MCDONALD-WITHERSPOON,
Individually and as administratrix of the
estate of Kenyada Jones,

Plaintiff-Appellant

v.

CITY OF PHILADELPHIA; WARDEN
GERALD MAY; CORIZON HEALTH, INC.;
VIVIAN GANDY, MD; MARIAMMA
SAMUEL, RN; JENNIFER
MARCINKOWSKI, MA; MHM SERVICES
INC, a/k/a MHM Correctional Services, Inc.;
DEBORAH HARRIS-WHITE, LSW; CHERYL
BLADWIN, MSW; AMBER E. BROWNE;
JEANETTE PALMER

Defendant-Appellees,

No. 21-1019
PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, McKEE,
AMBRO, JORDAN, HARDIMAN, GREENAWAY,
JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS,
PORTER, MATEY, PHIPPS, and *FISHER, Circuit
Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz Circuit Judge

Dated: January 26, 2022

CJG/cc: Nicole A. Feigenbaum, Esq.

Jennifer MacNaughton, Esq. Stephen H. Cristal,
Esq.

*Hon. D. Michael Fisher vote is limited to the panel rehearing only.

**ORDER OF THE US COURT OF APPEALS FOR
THE THIRD CIRCUIT ON THE APPEAL
(12/21/2021)**

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

MICHELLE MCDONALD-WITHERSPOON,
Individually and as administratrix of the
estate of Kenyada Jones,

Plaintiff-Appellant

v.

CITY OF PHILADELPHIA; WARDEN
GERALD MAY; CORIZON HEALTH, INC.;
VIVIAN GANDY, MD; MARIAMMA
SAMUEL, RN; JENNIFER
MARCINKOWSKI, MA; MHM SERVICES
INC, a/k/a MHM Correctional Services, Inc.;
DEBORAH HARRIS-WHITE, LSW; CHERYL
BLADWIN, MSW; AMBER E. BROWNE;
JEANETTE PALMER

Defendant-Appellees,

No. 21-1019

Appeal from the United States District Court for the
Eastern District of Pennsylvania (D.C. No. 2-17-cv-
01914) District Judge: Hon. John R. Padova

Submitted Under Third Circuit L.A.R. 34.1(a)

December 10, 2021 _____

Before: SHWARTZ, PORTER, and FISHER, Circuit
Judges.

App.4 a

This cause came to be considered on the record of the United States District Court for the Eastern District of Pennsylvania and was submitted on December 10, 2021.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the Orders of the District Court entered on August 25, 2017, August 23, 2018, and August 25, 2020 are hereby AFFIRMED. All of the above is in accordance with the Opinion of this Court. Costs are to be taxed against Appellant.

ATTEST:

s/ Patricia S. Dodszuweit Clerk

Dated: December 21, 2021

**OPINION OF THE US COURT OF APPEALS FOR
THE THIRD CIRCUIT ON THE APPEAL
(12/21/2021)**

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

MICHELLE MCDONALD-WITHERSPOON,
Individually and as administratrix of the
estate of Kenyada Jones,

Plaintiff-Appellant

v.

CITY OF PHILADELPHIA; WARDEN
GERALD MAY; CORIZON HEALTH, INC.;
VIVIAN GANDY, MD; MARIAMMA
SAMUEL, RN; JENNIFER
MARCINKOWSKI, MA; MHM SERVICES
INC, a/k/a MHM Correctional Services, Inc.;
DEBORAH HARRIS-WHITE, LSW; CHERYL
BLADWIN, MSW; AMBER E. BROWNE;
JEANETTE PALMER

Defendant-Appellees,

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No. 21-1019

Appeal from the United States District Court for the
Eastern District of Pennsylvania (D.C. No. 2-17-cv-
01914)

District Judge: Hon. John R. Padova _____

Submitted Under Third Circuit L.A.R. 34.1(a)

December 10, 2021 _____

Before: SHWARTZ, PORTER, and FISHER, Circuit Judges. (Filed: December 21, 2021)

OPINION^{*}

SHWARTZ, Circuit Judge.

This appeal addresses whether the District Court correctly dismissed federal and state claims against the City of Philadelphia (the “City”), the Philadelphia Adult Parole and Probation Department (“PAPPD”), and probation officers Amber Browne and Janette Palmer arising from the death of an incarcerated adult who struggled with schizophrenia and depression. For the reasons set forth below, the District Court properly dismissed all claims, and we will therefore affirm.

I

Kenyada Jones had a history of mental illness, including schizophrenia and depression. He was arrested during a visit with his probation officer, Amber Browne, and her supervisor, Janette Palmer, and held at Curran-Fromhold Correctional Facility. While there, he overdosed on blood pressure medication and died.

Jones’ mother, Plaintiff Michelle McDonald-Witherspoon, sued, among others, the City, PAPPD, Browne, and Palmer (collectively, “Defendants”) in Pennsylvania state court, asserting violations of 42 U.S.C. § 1983, the Americans with Disabilities Act

^{*} This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent. (“ADA”), 42 U.S.C. § 12101 et seq., the Rehabilitation Act, 29 U.S.C. § 701 et seq., and state law. After the case was removed to the United States District Court for the Eastern District of Pennsylvania, Defendants moved to dismiss the complaint. The District Court granted the motions in

part and denied them in part (“First Order”). See McDonald- Witherspoon v. City of Philadelphia (“McDonald I”), No. CV 17-1914, 2017 WL 3675408 (E.D. Pa. Aug. 25, 2017).

Plaintiff filed an amended complaint that asserted largely the same claims but added factual allegations and additional defendants not at issue in this appeal. Defendants moved to dismiss the amended complaint, which the District Court granted in part and denied in part (“Second Order”). See McDonald-Witherspoon v. City of Philadelphia (“McDonald II”), No. CV 17-1914, 2018 WL 4030702 (E.D. Pa. Aug. 23, 2018).¹

Following discovery, the City, Browne, and Palmer moved for summary judgment on the surviving claims, which the District Court granted (“Third Order”). See McDonald-Witherspoon v. City of Philadelphia (“McDonald III”), 481 F. Supp. 3d 424 (E.D. Pa. 2020).

Plaintiff appeals the portions of the District Court’s orders concerning certain claims against the City, PAPPD, Browne, and Palmer.² II³

¹ The District Court granted Plaintiff leave to file a second amended complaint but only to identify the names of additional defendants not at issue in this appeal. Plaintiff filed a second amended complaint, but the Court struck portions of it as exceeding the permitted amendments. Plaintiff did not appeal this order.

Plaintiff asserts that the District Court erred in its First Order, which dismissed (1) Plaintiff’s § 1983 “deliberate indifference to serious medical need” claim against Browne and Palmer; and (2) Plaintiff’s ADA claim against PAPPD. To determine whether dismissal under Fed. R. Civ. P. 12(b)(6) was

warranted, we accept as true and recite below the complaint's relevant factual allegations. In her complaint, Plaintiff alleged that Jones was a "disabled individual, having a permanent and serious disability diagnosed as paranoid schizophrenia, schizoaffective disorder, depressive disorder, bipolar disorder, psychotic disorder and/or similar diagnoses" and that "[t]his mental disorder caused [Jones] to be weaker and more vulnerable than the general population and in need of special assistance." J.A. 26 (Complaint) ¶ 9. Plaintiff then alleged that while "on parole/probation for a DUI charge, [Jones] visited his parole officer Browne where he was seen and handled by Browne and Palmer," and that Plaintiff "told Browne that [Plaintiff] was on her way to Browne's office to pick up [Jones]," but that "by the time she got there, [Jones] had already been taken away" to jail. J.A. 26 (Complaint) ¶ 12.

² The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367. We have jurisdiction under 28 U.S.C. § 1291.

³ We review de novo a district court's order granting a motion to dismiss under Federal Rule of Procedure 12(b)(6). *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 273 (3d Cir. 2004). To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted). We disregard "a pleading's legal conclusions" but "assume all remaining factual allegations to be true" and construe them in the light most favorable to the plaintiff. *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 790 (3d Cir. 2016).

A

The District Court dismissed Plaintiff's § 1983 deliberate indifference to serious medical need claim, construing it as a "vulnerability to suicide claim" and concluding that the allegations against Browne and Palmer were "insufficient to plausibly show that Browne and Palmer acted with reckless indifference to Jones's vulnerability to suicide." McDonald I, 2017 WL 3675408, at *6. We agree that the § 1983 claim warranted dismissal, but affirm the dismissal on slightly different grounds. Before us, and in her complaint, Plaintiff asserts a deliberate indifference to serious medical need claim that is broader than a vulnerability to suicide claim. "[D]eliberate indifference to serious medical needs of prisoners . . . [is conduct] proscribed by the Eighth Amendment," and therefore, "deliberate indifference to a prisoner's serious illness or injury states a cause of action under [42 U.S.C.] § 1983." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). To succeed on this claim, a plaintiff must demonstrate "(1) that the defendants were deliberately indifferent to [his] medical needs and (2) that those needs were serious." *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999) (citing *Estelle*, 429 U.S. at 106). The deliberate indifference element requires that the defendant "recklessly disregard a substantial risk of serious harm," and therefore negligence or medical malpractice is not enough. *Palakovic v. Wetzels*, 854 F.3d 209, 227 (3d Cir. 2017) (citations omitted). Generally, deliberate indifference is met when the defendant "(1) knows of a prisoner's need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment based on a non-medical reason; or (3) prevents a prisoner from

receiving needed or recommended medical treatment.” Rouse, 182 F.3d at 197. Here, the complaint does not plausibly allege that Browne and Palmer intentionally refused to provide Jones medical care or otherwise recklessly disregarded a substantial risk of serious harm. Rather, the complaint reveals that Jones received medical care precisely because of Browne and Palmer’s decision to detain him. The adequacy of that medical care, however, is not alleged to be within their control. See *Giddings v. Joseph Coleman Ctr.*, 473 F. Supp. 2d 617, 626 (E.D. Pa. 2007) (holding that a parole officer’s decision to “take[] [an inmate] to a nearby prison where he would receive, and actually did receive, immediate medical attention” for a self-inflicted cut observed the day prior “fall[s] far short of the level of delay and denial of necessary treatment required to rise to the level of an Eighth Amendment violation”), *aff’d*, 278 F. App’x 131 (3d Cir. 2008) (non-precedential). Thus, the complaint does not plausibly allege that Browne and Palmer intentionally refused to provide Jones medical care, delayed providing him medical treatment, or prevented him from receiving medical care. Therefore, the District Court appropriately dismissed Plaintiff’s deliberate indifference claim.⁴

B

The District Court also correctly dismissed Plaintiff’s ADA claim against PAPPD because Eleventh Amendment immunity bars the claim.

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. The “immunity extends to entities that are considered arms of the state.” *Bowers v. Nat’l Collegiate Athletic Ass’n*, 475 F.3d 524, 545 (3d Cir. 2007). However, Congress can abrogate the immunity when acting within its constitutional authority. *Id.* at 550. In Title II of the ADA, Congress acted within its constitutional authority in abrogating the immunity when a Title II claim concerns “conduct that actually violates the Fourteenth Amendment.” *United States v. Georgia*, 546 U.S. 151, 159 (2006) (emphasis omitted). Here, PAPPD’s Eleventh Amendment immunity bars Plaintiff’s ADA Title II claim. PAPPD is an arm of Pennsylvania. The complaint alleges that employees of PAPPD “unlawfully” searched, arrested, and incarcerated Jones based upon his mental disability and race, J.A. 26-27, 29 (Compl. ¶¶ 13, 14, 24, 30), but these conclusory assertions, without more, are insufficient to plausibly allege that PAPPD violated Jones’ Fourteenth Amendment rights. Therefore, the District Court appropriately dismissed Plaintiff’s ADA claim against PAPPD.⁵

⁴ Plaintiff included no additional factual allegations in the amended complaint to overcome this dismissal, and her attempts to include additional factual allegations in the second amended complaint exceeded the limited amendments the District Court permitted. See *Krantz v. Prudential Invs. Fund Mgmt. LLC*, 305 F.3d 140, 144 (3d Cir. 2002) (“A District Court has discretion to deny a plaintiff leave to amend where the plaintiff was put on notice as to the deficiencies in his complaint, but chose not to resolve them.”). Therefore, the First Order’s

dismissal is not impacted by the subsequent pleadings.

III

Plaintiff also appeals the Second Order's dismissal of Plaintiff's claim under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, against PAPPD. Focusing on the allegations in the amended complaint, her § 504 claim against PAPPD is based on the actions of its employees, Browne and Palmer. Section 504 of the Rehabilitation Act provides, in relevant part, that "[n]o . . . individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). To successfully assert a § 504 claim, a plaintiff must prove, among other things, that the "disabled" person was "precluded from participating in a program or receiving a service or benefit because of [his] disability." *CG v. Pa. Dep't of Educ.*, 734 F.3d 229, 235 (3d Cir. 2013) (citing *Chambers ex rel. Chambers v. Sch. Dist. of Philadelphia Bd. of Educ.*, 587 F.3d 176, 189 (3d Cir. 2009)). This element "requires disability to be the sole cause of discrimination," which means "an alternative cause is fatal to a[] [Rehabilitation Act] claim because disability would no longer be the sole cause." *Id.* at 236 n.11.

⁵ To the extent Plaintiff challenges the District Court's dismissal of her § 1983 equal protection claim against PAPPD, the First Order likewise appropriately dismissed the claim as barred by PAPPD's Eleventh Amendment immunity. See *Kentucky v. Graham*, 473 U.S. 159, 169 n.17 (1985)

(explaining that “§ 1983 was not intended to abrogate a State’s Eleventh Amendment immunity”). The amended complaint alleges alternative causes for Browne and Palmer’s decision to detain of Jones: (1) because of Jones’ psychiatric disability, and (2) for Jones’ own safety because he was unstable and his car was unfit to drive. This alternative cause, which is unrelated to Jones’ disability, is fatal to Plaintiff’s Rehabilitation Act claim, and therefore the District Court properly dismissed this claim.

IV⁶

Plaintiff also appeals the Third Order, which granted summary judgment on her

(1) state-created danger claim against Browne and Palmer; (2) equal protection claim against Palmer and Browne; (3) Monell claim against the City; and (4) state tort claims against Browne and Palmer.

Discovery produced the factual record upon which the summary judgment motions were based, and we next recite the material facts.

⁶ Our review of the Third Order granting summary judgment is plenary, *Mylan Inc. v. SmithKline Beecham Corp.*, 723 F.3d 413, 418 (3d Cir. 2013), and we view the facts and make all reasonable inferences in favor of the nonmovant Plaintiff, *Hugh v. Butler Cty. Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005). Summary judgment is appropriate where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). On summary judgment, the moving party is entitled to judgment as a matter of law when the nonmoving party fails to make “a sufficient showing on an essential element of her case with respect to which she has the burden of

proof.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Jones had a history of drug use and mental illness, including schizophrenia and depression. One day while on probation⁷ and living with Plaintiff, Jones had a manic episode and exhibited signs of paranoia. Concerned for Jones’ safety, his family members attempted to disable his vehicle to prevent him from leaving the house. They were unsuccessful, and Jones drove away.

Plaintiff, afraid for her son’s safety, called Jones’ probation officer, Browne, asking that she invite Jones to her office where Plaintiff would meet Jones and involuntarily commit him. Jones arrived at Browne’s office in a “manic” state, with smoke emanating from the hood of his car. J.A. 382. Browne notified Plaintiff that Jones had arrived, but after over two hours of Jones becoming increasingly agitated, Palmer obtained an arrest warrant based on Jones’ probation violation for having an open bill related to a DUI offense committed while on probation. By the time Plaintiff arrived at the office, Jones had already been taken to jail.

At the jail, Jones met with several social workers and healthcare professionals who prescribed, among other things, blood pressure medication, which Jones was allowed to keep on his person (“KOP”). During his initial and follow-up evaluations, Jones denied both having suicidal thoughts and engaging in prior suicide attempts. Four days after entering the jail, Jones overdosed on the blood pressure medication and died.

⁷ Jones was on parole for an aggravated assault conviction when he committed a DUI, but the parties usually refer to him as having been on probation.

A

We will first examine Plaintiff's Fourteenth amendment state-created danger claim. To prevail, a plaintiff must prove: (1) "the harm ultimately caused was foreseeable and fairly direct," (2) "the state actor acted in willful disregard for the safety of the [victim]," (3) "there existed some relationship between the state and the [victim]," and (4) "the state actors used their authority to create an opportunity that otherwise would not have existed for the [harm] to occur." *Est. of Smith v. Marasco*, 430 F.3d 140, 153 (3d Cir. 2005) (citations omitted). The second element is satisfied only when the state actor's conduct "shocks the conscience." *Id.* The "exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case," and when the state actor is in a "hyperpressurized environment" (as opposed to a situation where the state actor has "the luxury of proceeding in a deliberate fashion") conscience-shocking behavior usually requires a showing that the state official "deliberately harmed the victim." *Id.* (citation omitted).

Here, Browne and Palmer were in a hyperpressurized environment. One officer observed Jones arrive at PAPPD's office driving "very erratically, driving from one side to the other trying to park the vehicle almost hitting people out of control," J.A. 439, with his car smoking from the hood. Browne explained that when Jones arrived at her office, he was in a "manic" state, his "demeanor was just kind of all over the place, [he] was very

loud,” “he was bouncing from question to question,” and “[a]t one point, he bust out in song and sung [Browne] a full song very loudly.” J.A. 382. Browne’s supervisor, Palmer, also met with Jones and explained that Jones was “extremely agitated,” “rambling,” “pushing the table,” and that he “banged the wall” with his hands. J.A. 429- 30. Palmer recounted that Jones was frustrated because he “wanted to go to New York to save his brother from ISIS.” J.A. 430. After over two hours of Jones becoming increasingly agitated and expressing an intent to leave the state in an unfit automobile, Browne and Palmer detained Jones for a violation of probation and took him “into custody . . . for his own safety.” J.A. 237. Given Jones’ behavior and Browne and Palmer’s concerns for his safety, no reasonable jury could have found that Browne and Palmer’s decision to detain Jones, particularly given that they obtained a warrant for his arrest based upon an independent violation of probation, was conscience-shocking behavior. Therefore, the District Court properly granted summary judgment in favor of Browne and Palmer on Plaintiff’s state-created danger claim.

B

The District Court also correctly granted summary judgment in favor of Browne and Palmer on Plaintiff’s equal protection “class of one” claim. To prevail on a Fourteenth Amendment equal protection clause claim under a “class of one” theory, a plaintiff must prove “(1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment.” *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir.

2006) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

Here, Plaintiff has not satisfied the first and third elements. Plaintiff failed to identify similarly situated individuals who Browne and Palmer treated differently. See *id.* at 239. Additionally, given Jones' behavior at the probation office coupled with the fact that Browne and Palmer learned that Jones "was in technical violation [of his probation]," J.A. 431, and that he intended to leave the state, which itself would violate the terms of his probation, no reasonable juror could find that Browne and Palmer had no rational basis for detaining Jones. Therefore, the District Court properly granted summary judgment in favor of Browne and Palmer on this claim.

C

The District Court also correctly granted summary judgment in favor of the City on Plaintiff's § 1983 Monell claim. Under Monell, a plaintiff "must demonstrate that the violation of his rights was caused by either a policy or a custom of the municipality." *Berg v. Cnty. of Allegheny*, 219 F.3d 261, 275 (3d Cir. 2000) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). Thus, the plaintiff must "identif[y] a municipal policy or custom [that he claims violates his rights and then . . .] he must demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Id.* at 276 (quotation marks and citation omitted). If "the policy or custom does not facially violate federal law, causation can be established only by demonstrat[ing] that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." *Id.* (quotation marks and citation

omitted). In other words, “[a] showing of simple or even heightened negligence will not suffice.” *Id.* There are two policies that may be implicated here, but neither provides a basis for relief. First, the City maintained a policy on inmate suicide prevention (the “Policy”). The Policy instructs “[a]ll correctional staff [to] remain alert for indications that inmates are possible self-injury risks” and requires them to conduct “a formal, self-injury risk assessment process, and standardized observation and intervention procedures” to ensure proper monitoring. J.A. 443.⁸ Here, staff members conducted two self-harm evaluations of Jones during his four-day imprisonment, and, during both evaluations, Jones denied having suicidal thoughts or engaging in prior suicide attempts. Given these denials, which contributed to a staff member’s assessment that Jones’ “[s]uicide risk appear[ed] low at this time,” J.A. 258, no reasonable juror could find that the City was the “moving force” behind Jones’ suicide, *Berg*, 219 F.3d at 276, or that the City was deliberately indifferent to a known or obvious risk of Jones committing suicide. The second policy involves allowing inmates to keep certain medications in their

⁸ Plaintiff does not argue that the Policy is facially invalid, but instead asserts that staff acting under the Policy improperly failed to prevent Jones’ suicide. possession, rather than requiring them to obtain the medication from the dispensary. Dr. Vivian Gandy, a healthcare provider at the jail, explained that “[n]ormally for specific medication, narcotics, seizure meds, those meds would not be given KOP, but for hypertensive meds, that could be KOP unless there

was some specific reason for that individual not to have it on [his] person” and “[t]here was no reason” for her to order ‘no KOP’ here because she did not know of Jones’ prior suicide attempts and Jones did not say that he was having suicidal thoughts. D.C. Dkt. No. 93-14. Even if in hindsight the healthcare professionals acting under these policies improperly assessed Jones’ suicide risk before permitting him to keep his blood pressure medication on his person, this does not establish that there was a policy of indifference that would subject the City to Monell liability. See Palakovic, 854 F.3d at 228 (explaining that where there is a “dispute . . . over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law,” and will “[d]efer[]” to prison medical authorities’ “diagnosis and treatment of patients” (quotation marks omitted)). Therefore, the District Court properly granted summary judgment in favor of the City on Plaintiff’s Monell claim.

D

Finally, the District Court correctly granted summary judgment in favor of Browne and Palmer on Plaintiff’s state law tort claims because they were protected by sovereign immunity when their actions led to Jones’ arrest and incarceration. Pennsylvania “officials and employees acting within the scope of their duties[] shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except [when Pennsylvania] specifically waive[s] the immunity.” 1 Pa. Cons. Stat. Ann. § 2310. Pennsylvania looks to the Restatement (Second) of Agency to determine whether conduct is within the scope of one’s employment. See *Butler v. Flo- Ron*

Vending Co., 557 A.2d 730, 736 (Pa. Super. Ct. 1989). An employee acts within the scope of her employment when the employee's conduct (1) "is the kind [the employee] is employed to perform," (2) "occurs substantially within the authorized time and space limits," and (3) "is actuated, at least in part, by a purpose to serve the [employer]." *Brumfield v. Sanders*, 232 F.3d 376, 380 (3d Cir. 2000) (quoting Restatement (Second) of Agency § 228, analyzing Pennsylvania sovereign immunity). Actions that are not expressly authorized by the employer may still be within the scope of employment "if they are clearly incidental to the [employer]'s business." *Shuman Estate v. Weber*, 419 A.2d 169, 173 (Pa. Super. Ct. 1980).

Plaintiff does not dispute that Browne and Palmer obtained a warrant for Jones' arrest for a technical violation of probation or that they did so during their workday and while they were at the PAPPD office. Plaintiff nevertheless argues that Browne and Palmer were not acting within the scope of their employment because they "lied to the judge directly" in securing the warrant. Appellant Br. at 23. Plaintiff, however, concedes that "attempting to leave the state . . . is a technical [] violation" of Jones' supervision, Appellant Br. at 23, and the record shows that Jones "wanted to go to New York to save his brother from ISIS," J.A. 430. Plaintiff also does not dispute that Jones had been arrested for a DUI offense, which was a violation of his probation. Given Jones' stated intention to leave Pennsylvania, which itself would violate his probation, and the fact his recent DUI arrest violated his probation, nothing in the record suggests that Browne and Palmer sought the warrant for a reason unconnected to their employment. Because no reasonable juror could find

that Browne and Palmer acted outside the scope of their employment, the District Court properly held that they were entitled to sovereign immunity on Plaintiff's state law claims.⁹

V For the foregoing reasons, we will affirm.

⁹ We will not consider Plaintiff's Fourth Amendment argument against Browne and Palmer because Plaintiff did not plead a Fourth Amendment unlawful seizure claim against them in either her initial or first amended complaint. Furthermore, her allegations concerning this claim in the second amended complaint were struck as beyond the scope of the permitted amendment and Plaintiff did not appeal the order striking those allegations. See *Hamer v. LivaNova Deutschland GmbH*, 994 F.3d 173, 179 n.23 (3d Cir. 2021) ("Because those claims were not raised in his complaint, we cannot consider them now as a basis for appeal.").

**ORDER OF THE US DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
ENTERING FINAL JUDGMENT (12/31/2020)**

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

MICHELLE MCDONALD-WITHERSPOON,
Individually and as administratrix of the
estate of Kenyada Jones,

Plaintiff

v.

CITY OF PHILADELPHIA; WARDEN
GERALD MAY; CORIZON HEALTH, INC.;
VIVIAN GANDY, MD; MARIAMMA
SAMUEL, RN; JENNIFER
MARCINKOWSKI, MA; MHM SERVICES
INC, a/k/a MHM Correctional Services, Inc.;
DEBORAH HARRIS-WHITE, LSW; CHERYL
BLADWIN, MSW; AMBER E. BROWNE;
JEANETTE PALMER

Defendants,

ORDER

AND NOW, this 31st day of December 2020,
upon consideration of Plaintiff's Petition to Approve
Settlement (Docket No. 170), and there being no
objection or opposition, IT IS HEREBY ORDERED
that the Petition is GRANTED. It is FURTHER
ORDERED as follows:

- (1) The settlement by and between Plaintiff
Michelle McDonald-Witherspoon and
Defendants MHM Services Inc. a/k/a MHM

Correctional Services Inc. and Corizon Health Inc., by and through their respective counsels, is hereby approve, and Plaintiff Michelle McDonald-Witherspoon as administratrix of the Estate of Kenyada Jones is hereby authorized and permitted to settle and compromise the claims of the Survival and wrongful Death claims (constituting all claims) of the Estate against these Defendants for the terms specified herein, and Plaintiff shall not be required to post bond.

- (2) The terms of this settlement are:
[REDACTED]
- (3) The distribution and allocation of settlement proceeds shall be as follows: [REDACTED]
- (4) By agreement of the parties, all claims and crossclaims against Defendants Deborah Harris-Whie LSW, Cheryl Baldwin MSW and Vivian Gandy MD are hereby dismissed voluntarily with prejudice.
- (5) This Order disposes of all remaining and outstanding claims in this lawsuit and is therefore certified as the final Order in the case for purposes of appeal or otherwise, and this case is hereby closed.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.