

## OVERVIEW OF SECTION 1983 LITIGATION

### **Basic Principles; Post-*Heck/Wallace* Cases; Local Government Liability; Post-*Deshaney* Substantive Due Process Claims and Post-*Parratt/Hudson* Procedural Due Process Claims**

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#### **Author's Note**

This outline is arranged under various topic headings that indicate problem areas likely to be encountered in the litigation of section 1983 cases. **The outline is not a substitute for the excellent treatises that exist on section 1983, but is intended as a useful research tool to keep informed of very recent case law and trends in this rapidly developing area.**

Please be advised that I do not use research assistants to prepare these outlines, so that any errors are my own. Each updated outline attempts to remove cases that may no longer be good law or to indicate any negative history of a case where important. **It is important that you KeyCite any case you intend to rely on, especially a district court opinion.**

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## TABLE OF CONTENTS

<b>I. PRELIMINARY PRINCIPLES</b> .....	1
A. Deprivation of a Federal Right .....	1
B. Under Color of State Law.....	13
C. Statute of Limitations .....	65
D. No Respondeat Superior Liability .....	73
E. Individual Capacity v. Official Capacity Suits .....	93
F. Supervisory Liability v. Municipal Liability .....	109
1. Pre- <i>Iqbal</i> Cases.....	110
2. <i>Ashcroft v. Iqbal</i> .....	124
3. Post- <i>Iqbal</i> Liability-of-Supervisors Cases.....	126
G. No Qualified Immunity From Compensatory Damages for Local Entities; Absolute Immunity From Punitive Damages . . . .	488
H. No Eleventh Amendment Immunity for Local Entities /State Immunities Not Applicable .....	504
I. States: Section 1983 Does Not Abrogate 11th Amendment Immunity and States Are Not “Persons” Under Section 1983 .....	514
J. 28 U.S.C. § 1367(a): Supplemental Jurisdiction .....	521
K. Pre- <i>Iqbal</i> : No Heightened Pleading Requirement For <i>Monell</i> Claims.....	522
L. <i>Twombly</i> , <i>Iqbal</i> , and Post- <i>Iqbal</i> Cases Asserting <i>Monell</i> Claims..	530
M. Ethical Concerns for Government Attorneys.....	651
<b>II. <i>HECK</i> v. <i>HUMPHREY</i> &amp; <i>WALLACE</i> v. <i>KATO</i> : INTERSECTION OF SECTION 1983 AND <i>HABEAS CORPUS</i> .....</b>	<b>656</b>
A. <i>Heck</i> v. <i>Humphrey</i> .....	656
B. Application to Fourth Amendment Claims .....	659
1. <i>Wallace v. Kato</i> and False Arrest Claims .....	664
2. Post- <i>Wallace</i> Cases.....	664
3. Excessive Force Claims.....	685
C. <i>Heck</i> Does Not Apply to False Arrest Claims That Might Impugn an Anticipated Criminal Conviction .....	717
D. Fabrication-of-Evidence Claims: <i>McDonough</i> v. <i>Smith</i> .....	728
Post- <i>McDonough</i> Cases .....	732
E. <i>Edwards</i> v. <i>Balisok</i> .....	777

F. <i>Muhammad v. Close</i> .....	782
G. <i>Hill v. McDonough; Nelson v. Campbell</i> .....	788
H. <i>Wilkinson v. Dotson</i> .....	792
I. Challenges to Extradition Procedures.....	799
J. Suits Seeking DNA Testing .....	800
K. <i>Spencer v. Kemna: Heck’s Applicability When Habeas Corpus</i> is Unavailable .....	805
L. What Counts as Conviction or Favorable Termination? .....	852
M. Other Miscellaneous <i>Heck</i> Issues.....	886

**III. METHODS OF ESTABLISHING LOCAL GOVERNMENT**

<b>LIABILITY AFTER <i>MONELL</i></b> .....	<b>892</b>
<b>A. Liability Based on Policy Statements, Ordinances, Regulations</b> <b>or Decisions Formally Adopted and Promulgated by</b> <b>Government Rulemakers .....</b>	<b>894</b>
1. Examples of “Official Policy” Cases .....	898
a. Policies Sufficient for <i>Monell</i> Liability.....	898
b. Policies Not Sufficient for <i>Monell</i> Liability .....	923
2. Entity Liability for Facially Neutral Policy Adopted With Impermissible Motive .....	953
a. Entity vs. Individual Liability for Officials Performing Quasi-Judicial or Legislative Functions.....	957
b. Legislative Immunity & Testimonial Privilege .....	957
c. Waiver of Testimonial Privilege .....	958
3. Whose Policy is It? .....	959
a. Local Officials Enforcing State Law .....	959
b. Local Government Liability Where Local Entity Exercises Discretion or Control Over Enforcement of State Law .....	980
c. Inter-Governmental Agreements/Task Forces.....	994
d. Government Entity/Private Prison Management Agreements.....	1017
<b>B. Liability Based on “Custom or Usage” .....</b>	<b>1023</b>
<b>C. Liability Based on Inadequate Training, Supervision,</b> <b>Discipline, Screening or Hiring. ....</b>	<b>1140</b>
1. <i>City of Oklahoma City v. Tuttle</i> .....	1140
2. <i>City of Springfield v. Kibbe</i> .....	1142
3. <i>City of Canton v. Harris</i> .....	1142
4. Illustrative Post- <i>Canton</i> Cases .....	1161
a. “obviousness” cases.....	1161
b. constructive notice cases .....	1209

c. jail suicide cases.....	1247
5. <i>Bryan County v. Brown</i> .....	1267
6. <i>Connick v. Thompson</i> .....	1270
7. Post- <i>Brown</i> and Post- <i>Connick</i> Cases.....	1275
8. Note on “Deliberate Indifference” .....	1430
9. Note on <i>Kingsley v. Hendrickson</i> .....	1453
a. Pre- <i>Kingsley</i> Decisions .....	1455
b. Post- <i>Kingsley</i> Decisions .....	1467
10. Note on Fourth vs. Fourteenth Amendment Claims.....	1669
11. Note on “Shocks the Conscience” .....	1717
12. Derivative Nature of Liability.....	1781
13. Impact of Qualified Immunity on <i>Monell</i> Liability .....	1830
14. Note on Bifurcation.....	1843
15. Use of Public Reports and Experts to Establish Custom or Policy of Deliberate Indifference .....	1908
<b>D. Liability Based on Conduct of Policymaking Officials</b>	
Attributed to Governmental Entity .....	1921
1. <i>Pembaur v. City of Cincinnati</i> .....	1921
2. <i>City of St. Louis v. Praprotnik</i> .....	1927
3. <i>Jett v. Dallas Independent School District</i> .....	1981
4. Illustrative Lower Federal Court Cases .....	1986
5. Note on <i>McMillian v. Monroe County</i> .....	2005
6. Post- <i>McMillian</i> Cases by Circuit .....	2006

**IV. GOVERNMENT LIABILITY FOR VIOLATIONS OF DUE  
PROCESS: THE IMPACT OF *DESHANEY* ON SUBSTANTIVE  
DUE PROCESS CLAIMS AND *ZINERMON* ON PROCEDURAL  
DUE PROCESS CLAIMS.....**

	2128
<b>A. Liability Based on Failure to Provide Protective Services .....</b>	<b>2128</b>
1. <i>DeShaney v. Winnebago County Dept. of Social Services</i> ..	2129
2. “Getting Around” <i>DeShaney</i> .....	2139
a. “special relationship” or custody cases .....	2139
(i) public school .....	2155
(ii) foster care.....	2170
(iii) public housing/workplace.....	2183
b. state-created-danger cases .....	2200
c. entitlement cases.....	2261
d. equal protection cases.....	2270
<b>B. Liability Based on Failure to Provide Procedural Due Process..</b>	<b>2278</b>
1. <i>Parratt v. Taylor</i> .....	2278
2. <i>Hudson v. Palmer</i> .....	2279
3. <i>Logan v. Zimmerman Brush Co.</i> .....	2291

a. Note on <i>Manuel v. City of Joliet</i> .....	2304
b. Post- <i>Manuel</i> Cases .....	2307
4. <i>Mathews v. Eldridge</i> .....	2396
5. <i>Zinermon v. Burch</i> .....	2426
6. Post- <i>Zinermon</i> Decisions .....	2435
7. Summary on <i>Parratt/Hudson</i> Doctrine.....	2444
8. Note on <i>Sandin v. Conner</i> .....	2465

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## I. PRELIMINARY PRINCIPLES

### A. Deprivation of a Federal Right

Title 42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Note that a plaintiff must assert the violation or deprivation of a right secured by federal law. The Supreme Court has made clear, for example, that an officer's violation of state law in making an arrest does not make a warrantless arrest unreasonable under the Fourth Amendment where the arrest was for a crime committed in the presence of the arresting officer. *Virginia v. Moore*, 128 S. Ct. 1598, 1607 (2008). See also *Flynn v. Donnelly*, No. 18-2590, 2019 WL 6522890, at \*3 (7th Cir. Dec. 4, 2019) (not reported) ("In their brief, Pirro and Flynn stated without elaboration that they allege violations of 'Constitutionally protected rights to be free from illegal stops, questioning, interrogation, detention, charging, and incarceration.' But, even when repeatedly pressed at oral argument, they pointed only to state law for the proposition that their seizures violated the Fourth Amendment. A violation of state law, however, 'is completely immaterial as to the question of whether a violation of the federal constitution has been established.' . . . The appellants could not articulate what, apart from the illegitimate nature of the SAFE unit, purportedly violated their Fourth Amendment rights. Perhaps there was an argument to be made that deputizing civilians to make traffic stops violates the Fourth Amendment's standards apart from any violations of state law, but these plaintiffs did not make it. The judgment of the district court is AFFIRMED."); *Oglesby v. Lesan*, 929 F.3d 526, 534 (8th Cir. 2019) ("Officer Hein and Deputy Lesan did not violate the Fourth Amendment solely by arresting Oglesby outside of the Lincoln city limits."); *Cummings v. Dean*, 913 F.3d 1227, 1243 (10th Cir. 2019) ("[T]he district court's reasoning is flawed because it equates a violation of a clear obligation under *state* law . . . with a violation of clearly-established *federal* law. Whether Director Dean violated clearly-established state law in failing to set CBA-based rates, however, is an entirely separate question from whether that failure violated clearly-established federal law. And even if Director Dean had notice that his reading of the Act was incorrect as a matter of *state* law, this would not necessarily deprive him of qualified immunity from liability under *federal* law.");

*Hoffman v. Knoebel*, 894 F.3d 836, 845 (7th Cir. 2018) (“Everyone agrees that Knoebel and Snelling lacked any semblance of state-law authority to arrest DTC [Drug Treatment Court] participants. But, as *Virginia v. Moore*, 553 U.S. 164 (2008), makes clear, that flaw does not show that there was a federal constitutional violation. As the Court held in *Moore*, an arrest based on probable cause, even if prohibited by state law, does not violate the Fourth Amendment. . . . Knoebel and Snelling acted pursuant to facially valid state warrants, and so probable cause to support the arrests either existed, or they reasonably believed that it did. . . . That is not to say that all was well from a broader point of view. The extent to which Knoebel and Snelling exceeded their jurisdiction is quite troubling. Snelling was a bailiff whose arrest powers did not extend past the courthouse doors, and Judge Jacobi testified that he told Snelling not to arrest people. Knoebel had no conceivable basis for arrest authority, though in fairness she did not personally handcuff any participants. Both defendants misleadingly brought with them indicia of authority—badges, guns, and in one case a call of ‘police’—when they had no actual authority. But these are all matters of state law: no one argues that any other aspects of the arrest would offend the Fourth Amendment. The warrants were valid, no excessive force was used, and each plaintiff was promptly taken to the DTC. This does not add up to a Fourth Amendment violation.”); *Hurem v. Tavares*, 793 F.3d 742, 746-47 (7th Cir. 2015) (“We begin with a point that could, on its own, dispose of this argument: ‘state restrictions do not alter the Fourth Amendment’s protections.’ [citing *Virginia v. Moore*] . . . . A state may ‘choose[ ] to protect privacy beyond the level that the Fourth Amendment requires,’ but the Fourth Amendment requires only that an arrest be based upon probable cause, which ‘serves interests that have long been seen as sufficient to justify the seizure.’ . . . The remedy for a violation of such a state law is in state court. We recognized in *Gordon v. Degelmann*, 29 F.3d 295, 301 (7th Cir. 1994), that Illinois’s forcible entry statute imposes a prior procedural requirement before a person can be removed from a particular property: there must be a judicial hearing to determine a person’s entitlement to remain. We observed that this procedure went beyond what the Fourth Amendment requires and concluded that a police officer’s failure to afford the plaintiff the hearing mandated by state law ‘does not matter—not, at least, to a claim under the fourth amendment and § 1983,’ given the plaintiff’s violation of Illinois’s criminal trespass law. . . . So it is in Hurem’s case, and we decline his invitation to overrule *Gordon*.”); *Bruce v. Guernsey*, 777 F.3d 872, 876 (7th Cir. 2015) (“[T]he constitutionality of a mental-health seizure does not depend on whether the officer met each requirement spelled out by Illinois state law. Whether or not an officer complied with these state law conditions may have some evidentiary value when determining whether that officer’s conduct was reasonable, but a violation of the Illinois Mental Health and Developmental Disabilities Code does not constitute a *per se* violation of the Fourth Amendment. Our task instead is to see whether Harris and Guernsey had probable cause to believe that Bruce needed immediate hospitalization because she was a danger to herself or others.”); *Snider Intern. Corp. v. Town of Forest Heights, Md.*, 739 F.3d 140, 145 (4th Cir. 2014) (“A basic requirement of a 42 U.S.C. § 1983 violation is ‘the depriv[ation] of a right secured by the Constitution and laws of the United States.’ . . . Conduct violating state law without violating federal law will not give rise to a § 1983 claim. . . . We find Appellants’ third challenge, which concerns whether the citations comply with the Maryland statute, misplaced in a § 1983 claim. Even if the citations violated Maryland law, the noncompliance would not violate federal law and thus cannot

give rise to § 1983 relief. . . . The district court properly found that Appellants cannot pursue § 1983 relief for acts that allegedly violate only Maryland law.”); **Tebbens v. Mushol**, 692 F.3d 807, 818 (7th Cir. 2012) (“[I]t is firmly established that the Fourth Amendment permits an officer to make an arrest when he or she has probable cause to believe that an individual has committed or is committing an act which constitutes an offense under state law, *regardless* of whether state law authorizes an arrest for that particular offense.”); **Luckert v. Dodge County**, 684 F.3d 808, 819 (8th Cir. 2012) (“Failure to follow written procedures does not constitute *per se* deliberate indifference. If this were so, such a rule would create an incentive for jails to keep their policies vague, or not formalize policies at all. And the record in this case does not show any evidence, nor are we aware of any precedent, from which jail officials would know a thirty-minute suicide watch—as opposed to a twenty-minute watch—is constitutionally impermissible, or that keeping a suicide notebook is constitutionally required.”); **Johnson v. Phillips**, 664 F.3d 232, 238 (8th Cir. 2011) (“That Phillips lacked authority under state law to make an arrest does not establish that his conduct violated the Fourth Amendment. . . . The outstanding warrant gave Phillips probable cause to arrest Johnson, and that probable cause satisfied the Fourth Amendment.”); **Rieck v. Jensen**, 651 F.3d 1188, 1191, 1194 (10th Cir. 2011) (“[T]he Supreme Court has made it clear that the Fourth Amendment does not track property law. Twice the Supreme Court has held that a trespass by law-enforcement officers did not violate the Fourth Amendment. . . . [T]he end of the driveway near the gate did not fall within the curtilage of Rieck’s home, and Jensen’s entry into this area did not violate the Fourth Amendment.”); **Ault v. Speicher**, 634 F.3d 942, 947 (7th Cir. 2011) (“[E]ven if Plaintiff could show that Defendant violated Illinois law, failure to comply with state procedures does not demonstrate the violation of Plaintiff’s clearly established constitutional due process rights.”); **Porro v. Barnes**, 624 F.3d 1322, 1329, 1330 (10th Cir. 2010) (“Policies are often prophylactic, setting standards of care higher than what the Constitution requires. And that’s surely the case here. While the putative federal policy may totally forbid the use of tasers on immigration detainees, the Constitution doesn’t go so far. The use of tasers in at least *some* circumstances – such as in a good faith effort to stop a detainee who is attempting to inflict harm on others – can comport with due process. . . . Simply put, the failure to enforce a prophylactic policy imposing a standard of care well in excess of what due process requires cannot be – and we hold is not – enough by itself to create a triable question over whether county officials were deliberately indifferent to the Constitution. This isn’t to say, of course, a county’s failure to train its employees in a prophylactic policy is always or categorically irrelevant to the question of deliberate indifference. We need and do reject only Mr. Porro’s claim that such a failure *alone* suffices to make out a claim of deliberate indifference.”); **Marksmeier v. Davie**, 622 F.3d 896, 901 (8th Cir. 2010) (“Despite Marksmeier’s contention, it is unnecessary to decide whether Officer Davie was acting within his primary jurisdiction at the time he arrested Marksmeier because even if the arrest violated Nebraska law, it did not violate the Fourth Amendment. . . . Even assuming Nebraska law limited Officer Davie’s geographic jurisdiction, Officer Davie had probable cause to believe Marksmeier committed a sexual assault on JP and a physical assault on SP, thus no Fourth Amendment violation occurred.”); **Edgerly v. City and County of San Francisco**, 599 F.3d 946, 956 n.14, 957 (9th Cir. 2010) (“In our previous opinion, we held that Edgerly’s arrest was unconstitutional and that the Officers were not entitled to qualified immunity in light of the state

law restriction on arrests for first-time offenses of this kind. . . We withdrew our opinion after the Supreme Court decided *Virginia v. Moore*, in which it held that such state arrest restrictions are irrelevant to our Fourth Amendment inquiry. . . We are now bound by *Moore*, and to the extent that *Bingham* and *Reed* are inconsistent with *Moore*, they are effectively overruled. . . . *Bull*, however, left undisturbed our line of precedent requiring reasonable suspicion to strip search arrestees charged with minor offenses who are not classified for housing in the general jail population. . . This precedent controls here because Edgerly was never placed in the general jail population, but was merely cited and released at the station.”); ***Francis v. Giacomelli***, 588 F.3d 186, 195 (4th Cir. 2009) (“Commissioner Clark maintains that the Mayor did not have authority to terminate the Police Commissioner’s employment, an allegation with which the Maryland Court of Appeals agreed in part. . . but that fact does not change the Fourth Amendment analysis. The fact that the Court of Appeals determined that Clark’s firing was inconsistent with the Public Local Law of Baltimore City does not alone support the claim that the searches and seizures conducted in connection with the Mayor’s effort to terminate Clark’s employment violated the Fourth Amendment.”); ***Holder v. Town Of Sandown***, 585 F.3d 500, 507, 508 (1st Cir. 2009) (“We have relied on *Moore* to hold that when a prisoner’s conversation with his attorney was recorded in violation of a state regulation, that violation of state law did not operate to nullify, for purposes of Fourth Amendment analysis, the client’s consent to the recording. *United States v. Novak*, 531 F.3d 99, 102 (1st Cir.2008). Our colleagues in other circuits have reached similar conclusions. In *Walker v. Prince George’s County, Maryland*, 575 F.3d 426, 430 (4th Cir.2009), the Fourth Circuit, relying on *Moore*, held that, even if a county ordinance required a police officer to verify that the owner of a wolf lacked a license before seizing the wolf, breach of that requirement would not establish a violation of the Fourth Amendment. In *United States v. Brobst*, 558 F.3d 982, 989-90 (9th Cir.2009), the Ninth Circuit relied on *Moore* to reject an argument that a seizure and arrest was constitutional only if it complied with the protections from search and seizure afforded by Montana law. These cases demonstrate that *Moore* applies not only to cases where certain crimes are explicitly made unarrestable offenses, but also to cases where state procedural requirements are not followed. . . We therefore conclude that the New Hampshire statute is irrelevant to the Fourth Amendment analysis that we must undertake to resolve the present claim. . . . From the foregoing analysis, we must conclude that, at the time he arrested Mr. Holder, the officer had sufficient information to conclude that the state offense of simple assault had taken place.”); ***Bowling v. Rector***, 584 F.3d 956, 970 (10th Cir. 2009) (“We conclude that the warrant was valid under the Fourth Amendment. Whether or not Rector’s alleged conduct in seeking the warrant violated Oklahoma law, it did not violate Bowling’s constitutional rights.”); ***Swanson v. Town of Mountain View, Colo.***, 577 F.3d 1196, 1201 (10th Cir. 2009) (“We agree with the plaintiffs that Colorado law does not permit officers to enforce traffic infractions outside their home jurisdiction. As we held in *United States v. Gonzales*, 535 F.3d 1174, 1182 (10th Cir.2008), when officers stop a suspect for a ‘traffic violation outside their jurisdiction, they violate[ ] Colorado law.’ But this violation of Colorado law does not necessarily mean the defendants violated the plaintiffs’ federal constitutional rights.”); ***Pasco ex rel. Pasco v. Knoblauch***, 566 F.3d 572, 579 (5th Cir. 2009) (“The district court concluded that Knoblauch’s conduct violated clear Fourth Amendment law because Knoblauch ‘was acting contrary to police department protocol’ when he bumped Pasco

off the road. However, the fact that Knoblauch acted contrary to his supervisor's order is constitutionally irrelevant. Violations of non-federal laws cannot form a basis for liability under § 1983, and qualified immunity is not lost because an officer violates department protocol.”); **Creusere v. Weaver**, 2009 WL 170667, at \*7 (6th Cir. Jan. 26, 2009) (“Creusere alleges that KEPSB [Kentucky Education Professional Standards Board] failed to follow its own procedures because it did not give him a copy of a report in 1995 and did not hold a hearing in a timely fashion after charges were brought against Creusere. Even taking these allegations as true, it is not a constitutional violation for a state agency not to follow its own procedures. . . . Therefore, KEPSB’s alleged failure to give a copy of the report to Creusere is not a constitutional violation, nor is its delay in holding a hearing. . . . Since no constitutional violation occurred, the KEPSB members are entitled to rely upon qualified immunity for their actions.”); **Taake v. County of Monroe**, 530 F.3d 538, 542 (7th Cir. 2008) (“Our caselaw already explains that mere breaches of contract by the government do not support substantive due process claims under the Constitution, . . . but we will explain it again, for the sake of future litigants who may think it a good idea to bring regular state-law contract claims to federal court *via* § 1983. When a state actor breaches a contract it has with a private citizen, and the subject matter of that contract does not implicate fundamental liberty or property interests, the state acts just like any other contracting private citizen . . . . [T]he proper tribunal to adjudicate issues arising from the contract (or alleged contract) is a state court . . . .”); **Wilder v. Turner**, 490 F.3d 810, 814(10th Cir.2007) (“Of course a ‘violation of state law cannot give rise to a claim under Section 1983.’ *Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1164 (10th Cir.2003). ‘Section 1983 does not . . . provide a basis for redressing violations of *state law*, but only for those violations of *federal law* done under color of state law.’ *Jones v. City and County of Denver*, 854 F.2d 1206, 1209 (10th Cir.1988). ‘While it is true that state law with respect to arrest is looked to for guidance as to the validity of the arrest since the officers are subject to those local standards, it does not follow that state law governs.’ *Wells v. Ward*, 470 F.2d 1185, 1187 (10th Cir.1972). Nor, perhaps more importantly, are we bound by a state court’s interpretation of federal law-in this case the Fourth Amendment.”); **Steen v. Myers**, 486 F.3d 1017, 1023 (7th Cir. 2007) (“The question of whether Myers’s training indicated that he should stop the pursuit likewise does not raise questions that implicate the Constitution. Various sections of the pursuit manual are quoted by both sides to support arguments about whether Myers complied with department directives. As the Court in *Lewis* noted, however, a failure to comply with departmental policy does not implicate the Constitutional protections of the Fourteenth Amendment.”); **Andujar v. Rodriguez**, 480 F.3d 1248, 1252 n.4 (11th Cir. 2007) (“Whether a government official acted in accordance with agency protocol is not relevant to the Fourteenth Amendment inquiry. . . . Thus, Andujar’s argument that a City of Miami Rescue Policy required Newcomb and Barea to transport Andujar to a treatment facility, even if correct, is without consequence.”); **United States v. Laville**, 480 F.3d 187, 196 (3d Cir. 2007) (“[W]e hold that the unlawfulness of an arrest under state or local law does not make the arrest unreasonable *per se* under the Fourth Amendment; at most, the unlawfulness is a factor for federal courts to consider in evaluating the totality of the circumstances surrounding the arrest.”); **Thompson v. City of Chicago**, 472 F.3d 444, 455 (7th Cir. 2006) (“Whether Officer Hesper’s conduct conformed with the internal CPD General Orders concerning the use of force on an assailant was irrelevant to the jury’s determination of whether his actions on

December 5, 2000 were ‘objectively reasonable’ under the Fourth Amendment. It may be that Officer Hesse’s possible violation of the CPD’s General Orders is of interest to his superiors when they are making discipline, promotion or salary decisions, but that information was immaterial in the proceedings before the district court and was properly excluded. Instead, the jury in all probability properly assessed the reasonableness of Officer Hesse’s split-second judgment on how much force to use by considering testimony describing a rapidly evolving scenario in which Thompson attempted to evade arrest by leading the police on a high speed chase, crashed his car, and actively resisted arrest.”); **Hannon v. Sanner**, 441 F.3d 635, 638 (8th Cir. 2006) (“Hannon’s action is premised on an alleged violation of the constitutional rule announced in *Miranda* and subsequent decisions. The remedy for any such violation is suppression of evidence, which relief Hannon ultimately obtained from the Supreme Court of Minnesota. The admission of Hannon’s statements in a criminal case did not cause a deprivation of any ‘right’ secured by the Constitution, within the meaning of 42 U.S.C. § 1983.”); **Bradley v. City of Ferndale**, 148 F. App’x 499, 2005 WL 2173780, at \*6 (6th Cir. Sept. 8, 2005) (“[T]he violation of city policy is not in and of itself a constitutional violation under 42 U.S.C. § 1983.”); **Waubanascum v. Shawano**, 416 F.3d 658, 667 (7th Cir. 2005) (“Waubanascum suggests that Shawano County showed deliberate indifference by its ‘long-standing custom of granting courtesy licenses without conducting investigations of the applicants.’ Thus, he argues, ‘Shawano County’s policy was deliberately indifferent to a known risk to foster children.’ Waubanascum seems to propose that state laws and regulations assume that failure to perform background checks necessarily will expose foster children to risk, thus constituting deliberate indifference. This argument misstates the legal standard, because it sidesteps the requirement that there be knowledge or suspicion of actual risk and substitutes the possibility of risk arising from the county’s custom. Undoubtedly, foster children would be exposed to a heightened degree of risk if foster license applicants were subjected to no background checks at all. We may assume that it is this very concern that underlies Wisconsin’s laws and regulations requiring such background checks before a foster license may be granted. But a failure to abide by a general statutory requirement for background checks cannot substitute for the requirement of actual knowledge or suspicion in the foster home context. . . . As noted, it is unclear that Shawano County actually did violate Wisconsin law in effect at the time that the county granted Fry the courtesy foster license. But in any event, state law does not create a duty under the federal constitution, so even if Shawano County failed to abide by Wisconsin law, this would not by itself amount to a violation of Waubanascum’s due process rights.”); **Tanberg v. Sholtis**, 401 F.3d 1151, 1164, 1165 (10th Cir. 2005) (“Although plaintiffs frequently wish to use administrative standards, like the Albuquerque SOPs, to support constitutional damages claims, this could disserve the objective of protecting civil liberties. Modern police departments are able – and often willing – to use administrative measures such as reprimands, salary adjustments, and promotions to encourage a high standard of public service, in excess of the federal constitutional minima. If courts treated these administrative standards as evidence of constitutional violations in damages actions under § 1983, this would create a disincentive to adopt progressive standards. Thus, we decline Plaintiffs’ invitation here to use the Albuquerque Police Department’s operating procedures as evidence of the constitutional standard. The trial court’s exclusion of the SOPs was particularly appropriate because Plaintiffs wished to admit not only evidence of the SOPs

themselves, but also evidence demonstrating that the APD found that Officer Sholtis violated the SOPs and attempted to discipline him for it. Explaining the import of these convoluted proceedings to the jury would have been a confusing, and ultimately needless, task. The Albuquerque Chief of Police followed the recommendation of an internal affairs investigator to discipline Officer Sholtis both for making an impermissible off-duty arrest and for use of excessive force. An ad hoc committee subsequently reversed this decision. Additional testimony would have been necessary to help the jury understand the significance of these determinations and the procedures used to arrive at these contradictory results. This additional testimony explaining the procedures used at each step in the APD's investigation and decision-making would have led the jury ever further from the questions they were required to answer, and embroiled them in the dispute over whether Officer Sholtis's actions did or did not violate the SOPs. At the end of this time-consuming detour through a tangential and tendentious issue, the jury would have arrived at the conclusion that the APD itself seems to have been unable to resolve satisfactorily the question whether Plaintiffs' arrest violated the APD SOPs. . . . The similarity of the SOP addressing excessive force to the objective standard employed by state and federal law would render jury confusion even more likely, tempting the jury to conclude that if experienced police officers interpreted Officer Sholtis's actions as a violation of SOPs employing the same standards as the law, then Officer Sholtis must also have violated legal requirements. When, as here, the proffered evidence adds nothing but the substantial likelihood of jury confusion, the trial judge's exclusion of it cannot be an abuse of discretion.").

*But see United States v. Proano*, 912 F.3d 431, 439-40 (7th Cir. 2019) ("Proano . . . argues that the government's evidence of his training was inadmissible, relying mostly on *Thompson v. City of Chicago*, 472 F.3d 444 (7th Cir. 2006). *Thompson* concerned 42 U.S.C. § 1983, and it held that the CPD's General Orders (essentially, formal policy statements) were not relevant to proving whether force was constitutional. . . This is because the Fourth Amendment, not departmental policy, sets the constitutional floor. . . Since *Thompson*, however, we have clarified that there is no per se rule against the admission of police policies or training. . . We explained in *Aldo Brown* that such a rule would be especially excessive in the § 242 context, where an officer's intent is at issue and the defendant has a constitutional right to present a defense. . . *Thompson* did not address whether evidence of police policy or training can be relevant to intent; § 1983, unlike § 242, is a civil statute that lacks a specific-intent requirement. . . *Thompson* therefore offers no guide here. Still, Proano presses, even if some evidence of training may be relevant, the government's evidence in this case was not because it concerned CPD-specific training. Proano seizes on language from *Aldo Brown*, which said that evidence of 'widely used standardized training or practice[s]' could be relevant to show an officer's intent in § 242 cases. . . Proano characterizes the CPD's training as 'localized' and not 'widely used,' and therefore not relevant. That characterization is suspect; the CPD is the second-largest police force in the country. . . Regardless, neither *Aldo Brown* nor common sense limits the pool of admissible training-related evidence of intent to national, model, or interdepartmental standards. Assuming those standards exist, . . . only evidence of training that the officer actually received can be relevant to his state of mind. . . Proano's remaining arguments go to the weight of the evidence, not its relevance. He

asserts that the prohibition on shooting into windows and crowds was not relevant because that training did not concern cars. But as the district court reasonably concluded, four or five people in the back of a car could constitute a crowd. Proano also asserts that his firearms training was not relevant because that training occurred in a controlled environment. Yet Jamison testified that the firearms training was not training for training's sake, but rather it was intended to have real-world application. Proano's arguments were ones for the jury, not us. . . . The probative value of an officer's training, like most any evidence, depends on case-specific factors. Those factors are too many to list, but no doubt included are the training's recency and nature, representativeness of reasonable practices, standardization, and applicability to the circumstances the officer faced. Whatever its ultimate strength, evidence of an officer's training can be relevant in assessing his state of mind. The district court carefully assessed the evidence and the state-of-mind inquiry in this case, and it did not abuse its discretion in admitting the evidence of Proano's training.”).

*See also Walton v. Dawson*, 752 F.3d 1109, 1122 (8th Cir. 2014) (“Here, Sheriff Dawson determined the ‘best method[ ]’ in this old jail, without cameras, was to lock the cell doors overnight, and he concluded that ‘[h]ad this policy been followed[,] it may have prevented this very serious incident.’. . . Of course, violating an internal policy does not *ipso facto* violate the Constitution, but when that policy equates to the constitutional minimum under the totality of the circumstances, we appropriately focus on the objectively unconstitutional conduct which breaches the policy. . . . Prison officials are not at liberty to violate the Constitution merely because doing so also happens to violate a prison policy.”).

*Compare McMullen v. Maple Shade Tp.*, 643 F.3d 96, 99, 100 (3d Cir. 2011) (“Although it is true that an arrest made in violation of state law does not necessarily give rise to a federal constitutional claim, . . . the issue in this appeal is whether an arrest pursuant to an allegedly *invalid* municipal ordinance directly offends the federal constitutional right to be free from unlawful arrest. . . . Thus, in certain circumstances, an arrest pursuant to a law that is unambiguously invalid for reasons based solely on state law grounds may constitute a Fourth Amendment violation actionable under § 1983. Here, however, McMullen has failed to state a viable Fourth Amendment claim because he cannot plead that the ordinance pursuant to which he was arrested is unambiguously invalid.”) *with McMullen v. Maple Shade Tp.* 643 F.3d 96, 101 & n.1, 102 (3d Cir. 2011) (Jordan, J., concurring) (“I join in the judgment of the Court that Maple Shade Township is not liable under 42 U.S.C. § 1983 for passing the ordinance at issue here. However, I write separately because I would not proceed on this record to create a new precedential standard making the validity of a municipal ordinance under state law relevant to a Fourth Amendment inquiry. As the Majority notes . . . Maple Shade’s public drunkenness ordinance. . . has not been held invalid under New Jersey law and, to the contrary, can reasonably be read as being consistent with the state’s Alcoholism Treatment and Rehabilitation Act (“ATRA”). . . . The Majority accurately states that ‘§ 1983 provides a remedy for violations of federal, not state or local, law.’. . . Yet the Majority is creating a constitutional standard under which the Fourth Amendment reasonableness of an arrest turns on whether a local law is invalid for violating state, not federal, law. . . . [T]he question of whether the validity of a municipal ordinance under state law is relevant to a Fourth Amendment

inquiry is not one we need to address to resolve this case. Because the plaintiff's fundamental premise that the Maple Shade ordinance and ATRA are necessarily in conflict is unsound, we should simply point that out and affirm the District Court in a non-precedential opinion.”).

*See also Niarchos v. City of Beverly*, 831 F.Supp.2d 423, 434 & n. 13 (D. Mass. 2011) (“While this case is extraordinarily tragic on so many levels, I cannot ascribe legal responsibility to the defendants. The law is simply otherwise. I must find that the police did not restrain Danielle’s ‘freedom to act on h[er] own behalf,’ *DeShaney*, 489 U.S. at 200, and, hence, Danielle was not in the state’s custody. Therefore, Danielle had no constitutional right to the state’s protection. . . .I draw this conclusion as a matter of federal constitutional law, which imposes a relatively high standard for liability. I note that there was evidence that the BPD violated their own regulations and policies which provided that family members were not to respond to incidents involving other family members. . . . The problem is that evidence of the violation of state policies is simply not enough under these circumstances to establish a violation of a federal constitutional right.”); *Mata v. City of Farmington*, 798 F.Supp.2d 1215, 1234, 1235 (D.N.M. 2011) (“Given the controlling law, the Court finds that evidence of violations of SOPs and training is irrelevant to whether Mata’s and J.A.M.’s rights under the Fourth Amendment were violated. [citing *Tanberg*] Because this evidence is not relevant, the Court finds that this evidence is ‘not admissible,’ and the Court will exclude this evidence.”); *Taylor v. Martin*, No. 3:08 CV 2217, 2010 WL 1751991, at \*2 (N.D. Ohio Apr. 30, 2010) (“[T]he fact that Taylor’s arrest violated Ohio law is not determinative of whether his arrest violated the Fourth Amendment. . . . Therefore, the appropriate inquiry is not simply whether Martin complied with Ohio law in arresting Taylor, but whether his conduct violated clearly-established Fourth Amendment standards.”); *Lillo v. Bruhn*, No. 3:06cv247/MCR/EMT, 2009 WL 2928774, at \*4 (N.D. Fla. Sept. 9, 2009) (“Although the Baker Act establishes the substantive, state law standard for involuntary commitment, it has no effect on the Fourth Amendment. Indeed, it is irrelevant for Fourth Amendment purposes whether a seizure or an arrest violated state law, as long as it was supported by probable cause.”); *McGee v. City of Cincinnati Police Dept.*, No. 1:06-CV-726, 2007 WL 1169374, at \*5 n.4 (S.D. Ohio Apr. 18, 2007) (“Plaintiff argues that the CCA’s finding that Officer Rackley’s use of his taser against Plaintiff violated Cincinnati Police Department procedure on use of force demonstrates that Officer Rackley used excessive force against Plaintiff. . . .However, the CCA’s finding is not dispositive. A city’s police department may choose to hold its officers to a higher standard than that required by the Constitution without being subject to or subjecting their officers to increased liability under § 1983. Violation of a police policy or procedure does not automatically translate into a violation of a person’s constitutional rights.”); *Philpot v. Warren*, No. Civ.A.1:02-CV2511JOF, 2006 WL 463169, at \*7 (N.D. Ga. Feb. 24, 2006) (“As an initial matter, the court notes the fact that Cobb County ultimately terminated Defendant Warren for his actions in this case would not necessarily preclude a determination that Defendant Warren is entitled to qualified immunity. Defendant Warren’s supervisors terminated him based upon an analysis of the policies of the Cobb County Police Department. Plaintiff has not argued that these policies are coextensive with the constitutional parameters of the Fourth Amendment in the search and seizure context, or that those parameters were clearly established as a matter of law at the time of the

incident. The fact that the Cobb County Police Department may hold its officers to a different standard than that constitutionally mandated in the Eleventh Circuit is not before this court. The role of the Cobb County Police Department was to determine whether Defendant Warren violated department policy and whether his actions warranted punishment. The role of this court is to determine whether Defendant Warren is entitled to qualified immunity as a matter of law. See also *Durruthy v. Pastor*, 351 F.3d 1080, 1092 (11th Cir.2003) (concluding that officer's violation of department's internal policy does not vitiate finding of probable cause based on objective facts); *Craig v. Singletary*, 127 F.3d 1030, 1044 (11th Cir.1997) (probable cause involves only constitutional requirements and not any local policies.); *Chamberlin v. City of Albuquerque*, No. CIV 02-0603 JB/ACT, 2005 WL 2313527, at \*4 (D.N.M. July 31, 2005)(Plaintiff barred from introducing as evidence "the Albuquerque Police Department's SOP's to support its allegation that [officer] acted unreasonably in directing his police service dog to attack the [plaintiff] in violation of his Fourth Amendment rights."); *Wilhelm v. Knox County, Ohio*, No. 2:03-CV-786, 2005 WL 1126817, at \*14 (S.D. Ohio May 12, 2005) (not reported) ("[T]he Court recognizes that the Sixth Circuit has held that (1) a defendant cannot be liable under § 1983 unless he or she violated one of a plaintiff's federal constitutional rights, and (2) a state right 'as an alleged misdemeanor to be arrested only when the misdemeanor is committed in the presence of the arresting officer [is] not grounded in the federal constitution and will not support a § 1983 claim.' . . . The issue is whether probable cause to arrest existed, not whether the arrest violated state law. Accordingly, because probable cause to believe that a crime had occurred existed, Bradley's § 1983 false arrest claim under the Fourth Amendment must fail.").

See also *Graham v. Sheriff of Logan County*, 741 F.3d 1118, 1124-26 (10th Cir. 2013) ("Ms. Graham's focus on appeal is not on whether she consented as a factual matter but on whether a prisoner can *legally* consent to sex with one of her custodians. She argues that under 'evolving standards of decency' even consensual intercourse with a prisoner is cruel and unusual punishment. . . . We decline to go so far. . . . [I]t is a matter of first impression in this circuit whether consent can be a defense to an Eighth Amendment claim based on sexual acts. Other courts are divided in their approach to consensual sexual intercourse between guards and inmates. The Sixth and Eighth Circuits have ruled that consensual sexual intercourse does not rise to the level of an Eighth Amendment violation. [citing cases] Some district courts have taken the opposite approach, holding that a prison guard has no consent defense in an Eighth Amendment civil-rights case alleging sexual relations. [collecting cases] More recently, the Ninth Circuit adopted a middle ground in *Wood v. Beauclair*, 692 F.3d 1041 (9th Cir.2012). . . . The court elected to create a rebuttable presumption of nonconsent. . . . The state official can rebut the presumption by showing that the sexual interaction 'involved no coercive factors.' . . . The court declined to provide an extensive list of factors but remarked that in addition to words or behavior showing opposition, coercive factors could include 'favors, privileges, or any type of exchange for sex.' . . . In short, there is no consensus in the federal courts on whether, or to what extent, consent is a defense to an Eighth Amendment claim based on sexual contact with a prisoner. As a matter of public policy, Ms. Graham's position has force. We cannot imagine a situation in which sexual activity between a prison official and a prisoner would be anything other than highly inappropriate. But not all

misbehavior by public officials, even egregious misbehavior, violates the Constitution. The Supreme Court has warned against constitutionalizing (or unconstitutionalizing, if that can be a word) tortious conduct by government agents. . . . Absent contrary guidance from the Supreme Court, we think it proper to treat sexual abuse of prisoners as a species of excessive-force claim, requiring at least some form of coercion (not necessarily physical) by the prisoner’s custodians. We agree with the Ninth Circuit that ‘[t]he power dynamics between prisoners and guards make it difficult to discern consent from coercion.’ . . . But there is no difficulty presented by the facts relied on by Ms. Graham in this case. Even were we to adopt the same presumption as the Ninth Circuit, the presumption against consent would be overcome by the overwhelming evidence of consent. Ms. Graham’s rights under the Eighth Amendment were not violated.”). *See also Baca v. Rodriguez*, 554 F. App’x 676, 2014 WL 292453, \*2 (10th Cir. Jan. 28, 2014) (“Here, Ms. Baca did not allege any facts in the amended complaint from which it could reasonably be inferred that Mr. Rodriguez coerced her into having sex with him. As a result, Ms. Baca did not state a claim for an Eighth Amendment violation against Mr. Rodriguez, and the district court properly dismissed the amended complaint as to CCA and the supervisory defendants.”)

*See also Hermiz v. Budzynowski*, No. 16-11214, 2017 WL 1245079, at \*3 (E.D. Mich. Apr. 5, 2017) (“The Court finds . . . that the public interest in disclosure of the policy materials in this case is substantial. The defendants correctly point out that police policy statements do not define the constitutional standard by which their use of force must be judged. However, if the policy documents in question articulate directions for the deployment of force that are consistent with the pertinent constitutional standard, and if the defendants were made aware of the policies or received training based on them, then they may have a much harder time arguing that reasonable officers in their position would not have been aware of particular constitutional boundaries on their use of force against the plaintiff. Therefore, even though the materials may not be directly dispositive of the question whether the use of force was reasonable, they may be informative for the Court or the jury on the issue of whether the defendants are entitled to qualified immunity. The public certainly has a compelling interest in full access to information about the basis of that determination, whenever and however it is made, either at the summary judgment stage of the case or at trial.”); *Brock v. Harrison*, No. 2:14-CV-0323, 2015 WL 7254204, at \*3 (S.D. Ohio Nov. 17, 2015) (“Defendant’s first motion *in limine* to exclude evidence of policy violations presents a closer call. Although the Court agrees with Defendant that, in theory, a violation of internal policies does not establish a constitutional violation, the facts surrounding the vehicle chase in this case (including Defendant’s actions that may or may not have violated Gallia County policies) are too intertwined with the subsequent use of force for the Court to conclude that they are inadmissible for any purpose. It simply is premature at this stage to conclude that Plaintiff cannot present evidence of a policy violation without any context as to how Plaintiff intends to present that evidence or how that evidence ties into the circumstances leading up to the shooting. The authority Defendant cites in his motion does not alter this conclusion. The fact that courts have declined to find constitutional violations in cases in which a defendant violated internal policies does not make such evidence inadmissible for any purpose in this case.”); *McAtee v. Warkentin*, 2007 WL 4570834, at \*4 (S.D. Iowa Dec. 31, 2007) (“The court will admit evidence of the North Liberty pursuit and

ramming policies. They will not be admitted to support any claim that Kyle Wasson was deprived of Fourth Amendment rights by Chief Warkentin's decision to pursue a high-speed chase. The *Scott* decision makes it clear that the decision to engage in a high-speed chase alone cannot support a Fourth Amendment claim. Similarly, the plaintiff will not be permitted to argue for responsibility based on the failure of Chief Warkentin to abandon the pursuit. . . However, the pursuit is part and parcel of the events giving rise to Kyle Wasson's ultimate death. The extent to which Chief Warkentin was willing to violate internal policies crafted for the safety of the police and public may be probative of other issues concerning the chief's judgment and intent on the evening in question. An appropriate jury instruction will be given, upon request, to place this evidence in its proper context.").

Also note that compliance with state law does not mean there is no constitutional violation for purposes of liability under Section 1983. *See, e.g., Smith v. Kansas City, Missouri Police Dept.*, 586 F.3d 576, 581 (8th Cir. 2009) (following standard operating procedure does not necessarily make officer's conduct reasonable); *Gronowski v. Spencer*, 424 F.3d 285, 297 (2d Cir. 2005) ("[W]e conclude that appellants' civil service defense provides no basis to vacate the judgment. We do not agree that appellants could not have violated § 1983 if they complied with a state law that shares one of § 1983's purposes. The fact that City officials had discretion to lay off Gronowski and did not violate civil service law in failing to reinstate her in the Consumer Protection Office does not foreclose the possibility that retaliation for the exercise of her constitutional rights motivated these actions. If there is sufficient evidence supporting a finding of illegal retaliation, we will not overturn a verdict arriving at such finding. Regardless of the City officials' conformity with civil service law, they must still refrain from violating rights protected under the United States Constitution.").

*See also Gandara v. Bennett*, 528 F.3d 823, 825, 826 (11th Cir. 2008) ("The question presented in this matter is whether a foreigner who has been arrested and detained in this country and alleges a violation of the consular notification provisions of the Vienna Convention on Consular Relations (the "Treaty") can maintain an action under 42 U.S.C. § 1983. The answer to this question hinges on whether or not individual rights are bestowed by the Treaty. Although we find the issue a close one with strong arguments on both sides, we ultimately conclude the answer is 'no.' . . . This Circuit has not expressly addressed the issue of whether the Vienna Convention contains private rights and remedies enforceable in our courts through § 1983 by individual foreign nationals who are arrested or detained in this country. We have previously commented, however, on the issue of private rights in the context of criminal cases and indicated that we would follow the lead of the First and Ninth Circuits. *See United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir.2000) (the First and Ninths circuits have indicated that Article 36 does not create privately enforceable rights)."); *Mora v. People of the State of New York*, 524 F.3d 183, 203, 204 (2d Cir. 2008) ("In sum, there are a number of ways in which the drafters of the Vienna Convention, had they intended to provide for an individual right to be informed about consular access and notification that is enforceable through a damages action, could have signaled their

intentions to do so. . . . That they chose not to signal any such intent counsels against our recognizing an individual right that can be vindicated here in a damages action.”).

## **B. Under Color of State Law**

In order to establish liability under § 1983, the plaintiff must prove that she has been deprived of a federal statutory or constitutional right by someone acting “under color of” state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). See also *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982) (“state action” under Fourteenth Amendment equated with “under color of law” for Section 1983 purposes) and *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001) (discussing different tests for determining whether conduct of private actor constitutes ‘state action’ and finding state action on basis of ‘pervasive entwinement’ of state with challenged activity); *Blankenship v. Buenger*, 653 F. App’x 330, 336 (5th Cir. 2016) (“While the inquiry is ‘necessarily fact-bound,’ whether state action exists is a question of law for the court; it is not a ‘fact’ that can be admitted.” Footnotes omitted)

In *Monroe v. Pape*, 365 U.S. 167, 180 (1961), the Court held that acts performed by a police officer in his capacity as a police officer, even if illegal or not authorized by state law, are acts taken ‘under color of’ law. As the Supreme Court stated in *United States v. Classic*, 313 U.S. 299, 326 (1941), “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.”

Note that generally, a public defender does not act “under color of state law” when providing counsel to a defendant in a criminal proceeding. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981). But see *Carter v. City of Montgomery*, 473 F.Supp.3d 1273, \_\_\_\_ (M.D. Ala. 2020), *infra*.

## **Examples:**

### **D.C. CIRCUIT**

*McGovern v. Brown*, 891 F.3d 402 (D.C. Cir. 2018) (special police officers who were commissioned by the District of Columbia and employed by private university were acting under color of state law, for § 1983 purposes, when they arrested attendee who engaged in standing protest during university-sponsored event on campus).

*Johnson v. Government of Dist. of Columbia*, 734 F.3d 1194, 1201 (D.C. Cir. 2013) (“We agree with the district court that even assuming that the District had notice of the strip search practices and that those practices were unconstitutional, the District lacked the discretion necessary for class members to prevail. Given that Dillard was at all times acting under color of federal law, . . .the District had no authority to prevent him from conducting strip searches of arrestees upon their

arrival at the Superior Court. Relying on two circuit court decisions, one by this Court and one by the Sixth Circuit, *see Warren*, 353 F.3d 36; *Deaton v. Montgomery County*, 989 F.2d 885 (6th Cir.1993), for the proposition that ‘[i]t does not matter if the transferor has no control over the facility in which it places its prisoners,’ . . . class members believe they can prevail even if Dillard was at all times a federal official acting under color of federal law. In each of the cited cases, however, the municipality had contracted to send its prisoners to a penal facility; even though the municipality exercised no direct control over policies and practices at the facility, it retained power to cancel the contract in the event of constitutional violations. *See Warren*, 353 F.3d at 37; *Deaton*, 989 F.2d at 885. Here, by contrast, nothing in the record suggests that the District could have held presentment hearings somewhere other than the Superior Court. And although class members insist that the District had statutory authority to bypass the Superior Court Marshal and deliver pre-presentment arrestees directly to Superior Court judges, the statutory provisions class members rely on are ambiguous at best. Thus, the District’s failure to embrace class members’ statutory interpretation hardly demonstrates ‘deliberate indifference to the rights’ of arrestees.”)

*Williams v. United States*, 396 F.3d 412, 414 (D.C. Cir. 2005) (federal police officer who arrested plaintiff for violation of D.C. law did not act under color of state law).

*Brown v. Short*, No. 08-1509 (RMC), 2010 WL 2989837, at \*4 (D.D.C. July 30, 2010) (“The Court finds that at the time DSO Short searched Ms. Brown, she was not acting at the behest of a Superior Court judge or carrying out her courtroom duties. Therefore, to the extent that the Superior Court can be described as a ‘state’ court, DSO Short was not exercising power derived from state law and she was not clothed with that authority. DSO Short was following U.S. Marshal policy without regard to the order of a judicial officer. In this position, she was a federal actor analogous to the U.S. Marshall for the Superior Court, to whom Section 1983 does not apply.”)

*Maniaci v. Georgetown University*, 510 F.Supp.2d 50, 62, 70 (D.D.C.,2007) (“[T]he Court notes that various circuits have applied Section 1983 and its limitations as set forth in *Monell* to private institutions such as Georgetown University where such private institutions employ quasi-state actors. [collecting cases] . . . Plaintiff’s Amended Complaint contains facts that, if taken as true, sufficiently raise a colorable claim that the Georgetown Public Safety Officers were acting under the color of law by exercising their state-granted authority to arrest or actions related thereto. The Public Safety Officers in this case were not merely verbally conveying a store policy (and thus functioning in a private capacity) . . . On several occasions, Plaintiff sets forth facts that indicate that his physical liberty was restrained and that he was aware of the power asserted over him by the Public Safety Officers. . . Allegedly, he was physically grabbed and ‘violently jerked ... from his seat.’ . . He was ‘surrounded by six campus police offers and was pushed against a glass window.’ . . His exit was blocked, and he was ‘told not to go anywhere.’ . . Accordingly, at this time, the Court shall not dismiss Plaintiff’s Section 1983 claim on the grounds that the Public Safety Officers were not acting under color of state law, as Plaintiff has alleged facts sufficient to suggest that an arrest or actions related thereto occurred.”).

## FIRST CIRCUIT

*United States v. Martínez-Mercado*, 919 F.3d 91, 99-100 (1st Cir. 2019) (“Although courts have had frequent occasion to interpret section 1983’s ‘color of law’ requirement, ‘there is no bright line test for distinguishing “personal pursuits” from activities taken under color of law.’. . . We have previously instructed that a state actor does not act under color of law unless his ‘conduct occurs in the course of performing an actual or apparent duty of his office, or unless the conduct is such that the actor could not have behaved in that way but for the authority of his office.’. . . More specifically, this court trains its attention ‘on the nature and circumstances of the officer’s conduct and the relationship of that conduct to the performance of his official duties.’. . . ‘The key determinant is whether the actor ... purposes to act in an official capacity or to exercise official responsibilities pursuant to state law.’. . . Martínez-Mercado argues, therefore, that the conspiracy at issue here did not involve conduct committed in the performance of any actual or pretended official duty. The facts show otherwise. The conspirators literally employed the colors of the law in the form of a marked on-duty police vehicle to do what no private individual could do - - divert private and police interlopers by creating the appearance of legitimate police involvement. The plan also addressed the risk of a citizen call to the police by exploiting López-Torres’s official capacity to forestall any investigation at the scene. López-Torres and Ramos-Figueroa were part of the conspiracy and present at the scene of the heist precisely because they possessed the official authority to ensure that it would proceed uninterrupted. This was surely enough to support a jury finding that the conspirators acted under color of law.”)

*Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1, 13 (1st Cir. 2015) (“We summarize succinctly. In their action against the Gun Shop, the plaintiffs do not challenge either the confiscation of their firearms or the police’s authority to transfer those firearms to a bonded warehouse for storage. Rather, they challenge the imposition of storage charges and the subsequent auctioning of their firearms after they failed to pay those storage charges. But the facts evidenced in the summary judgment record, even when viewed in the light most favorable to the plaintiffs, do not show that state action, as opposed to private action, produced these asserted harms. Although the activities undertaken by the Gun Shop were authorized by state law, mere compliance with the strictures of state law cannot transmogrify private action into state action. Nor is it enough that the state set in motion the subsequent actions taken by the Gun Shop: but-for causation is simply insufficient to conjure a finding of state action. Whatever rights (if any) the plaintiffs may have against the Gun Shop, they have made out none under section 1983.”)

*Klunder v. Brown Univ.*, 778 F.3d 24, 34 (1st Cir. 2015) (“Seeing no meaningful distinction between Brown in the present case and Harvard in *Krohn*, we agree with the district court that Brown University is not a state actor subject to federal jurisdiction under § 1983. Brown’s motion for partial summary judgment was properly granted.”)

*Santiago v. Puerto Rico*, 655 F.3d 61, 70 (1st Cir. 2011) (“We are not the first court to reach the conclusion that transportation to and from school is not an exclusive state function. Considering

strikingly similar facts, the Third Circuit found that a private bus company and its employees were not subject to liability under section 1983 even though, by transporting pupils to and from public schools, they ‘were carrying out a state program at state expense.’ . . . Just as education is not exclusively a state function because it is regularly performed by private entities, . . . so too student transportation falls outside the exclusive purview of the state . . . [F]reedom to choose alternatives removes school busing from the realm of services that are traditionally exclusively reserved to the state.”)

***Burke v. Town of Walpole***, 405 F.3d 66, 88 (1st Cir. 2005) (private forensic odontologist who rendered bite mark opinion at request of District Attorney’s Office was acting under color of law and eligible for qualified immunity).

***Martinez v. Colon***, 54 F.3d 980, 987 (1st Cir. 1995) (an unintended shooting of a police officer at the police station, during the course of harassment and taunting by a fellow officer who was on duty and in uniform, did not constitute conduct under color of law where the court concluded that the behavior of the harassing officer represented a “singularly personal frolic[,]” and in no way was or purported to be in furtherance of the exercise of any police power).

***Arias v. Bernard***, No. 17-CV-516-SM, 2021 WL 185031, at \*1 n.1 (D.N.H. Jan. 19, 2021) (“Although several of the named defendants are police officers employed by the cities of Nashua and Manchester, New Hampshire, they appear to have been ‘detailed’ to work on a federal drug interdiction task force. Accordingly, the parties have assumed that, for purposes of this suit, all defendants are properly treated as federal agents.”)

***Carr v. Metro. Law Enforcement Council, Inc.***, CIV.A. 13-13273-JGD, 2014 WL 4185482, \*8 (D. Mass. Aug. 20, 2014) (“MetroLEC contends that since it ‘consists of local police and sheriff departments, it is a municipal organization or entity.’ . . . Ms. Carr argues that ‘MetroLEC is a private corporation performing delegated police functions normally reserved to the State[,]’ and is therefore covered by § 1983. . . . As detailed herein, the record is not sufficiently developed to determine the status of MetroLEC vis-à-vis the various statutes at issue in this litigation. For purposes of § 1983, however, this court concludes that MetroLEC is subject to liability, at a minimum as a private entity assuming powers traditionally exclusively reserved to the State. Moreover, as the parties seemingly agree, its liability will be assumed to be coterminous with those of a municipality under § 1983. MetroLEC is authorized by Mass. Gen. Laws ch. 40, § 4J, which provides for public safety mutual aid agreements. . . . [I]n light of the fact that MetroLEC is an entity separate from its components, it may, in fact, be considered a ‘person’ under § 1983. . . . Moreover, since MetroLEC is a private actor which has ‘assumed a traditional public function,’ it qualifies as a ‘state actor’ which may be subject to liability under § 1983. . . . Thus, MetroLEC is subject to liability under § 1983.”)

***Chandler v. Greater Boston Legal Services***, No. 13-12979-GAO, 2013 WL 6571938, \*5 n.10 (D. Mass. Dec. 10, 2013) (“Notwithstanding any dispute Chandler may have with the quality of

legal services performed on his behalf by a GBLs lawyer, acts or omissions by counsel do not give rise to a cause of action under 42 U.S.C. § 1983 because counsel does not act under the color of state law in performing a lawyer's traditional function as counsel and therefore cannot be sued under § 1983 as an agent of the state. *See Polk County v. Dodson*, 454 U.S. 313, 471 (1981); *Malachowski v. City of Keene*, 787 F.2d 704, 710 (1st Cir. 1986). *See also Dunker v. Bissonnette*, 154 F.Supp.2d 95, 105 (D. Mass. 2001) (Stearns, J.).”

*Sonia v. Town of Brookline*, 914 F.Supp.2d 36, 42, 43 (D. Mass. 2012) (“A procedural irregularity is worth noting at the outset. Most challenges to the color-of-law element in § 1983 cases are raised jointly by the defendant officers and municipalities and opposed by the plaintiffs. Here, the Officers join the plaintiff in opposing the Town of Brookline’s contention that they did not act under color of law. In effect, the officers ‘admit’ that they were acting under color of law. Whether or not the Officers are overcome by honesty or, more likely, are seeking to buttress their cross-claims against the Town of Brookline for contribution and indemnification, their admission does not control the analysis. An officer cannot consent to have acted ‘under color of law.’ *See Barreto–Rivera*, 168 F.3d at 46 (explaining color of law analysis depends upon totality of circumstances but particularly upon officer’s purpose at time of the act). It also warrants mention at the outset that this case is in a different procedural posture than those described above. The district courts in those cases were called upon to examine the factual record to decide whether there were sufficient indicia of public action to support a jury finding in favor of the plaintiff on the color-of-law issue. This Court’s task is simpler. It need not weigh the evidence or take a position on which party’s version of the events is more credible. In considering a motion to dismiss, this Court must simply decide whether the facts alleged in the complaint, if proven, are sufficient to support a finding that the officers acted under color of state law. The color-of-law issue is a close one. On the one hand, a number of factors support a finding that the Officers were not acting under color of law. The dispute was at a private residence. The Officers were off duty and out of uniform. They were highly intoxicated. They were not responding to an unruly bachelor party; they *were* the unruly bachelor party. . . . Neighbors who witnessed the brawl called the police, apparently unaware that the police were the ones allegedly doing the beating. On the other hand, there are multiple indicia of state action that support a finding in favor of the plaintiff. The Officers identified themselves as police. They photographed the plaintiff’s license plate, handcuffed the plaintiff during the altercation and informed him that he was under arrest, all forms of police techniques and functions. Finally, the plaintiff reasonably perceived that the Officers were acting as police officers. It is the combination of these factors that persuades the Court that it is premature to rule that none of the Officers was acting under color of law at any point during the incident. While the Officers allegedly precipitated the dispute, as did the police in *Barreto–Rivera* and *Zambrana–Marrero*, they employed a ‘symbol of police authority’ when they placed plaintiff under arrest. In contrast to the officer’s actions in *Parilla–Burgos*, shooting someone does not project police authority as uniquely as does the act of detaining someone in the name of the sovereign. Accordingly, the Court finds that plaintiff has pled sufficient facts to claim that the Officers acted under color of law.”)

*Miller v. City of Boston*, 586 F.Supp.2d 5, 7 (D. Mass. 2008) (“The City first argues that it is

never liable for the misconduct of special officers. The only authority the City offers for this assertion is the text of the 1898 statute giving the City authority to license these special officers and virtually identical language in a corresponding police department rule. . . . The statute gives licensed special officers ‘the power of police officers to preserve order and to enforce the laws and ordinances of the city.’ . . . The statute goes on to state that ‘the corporation or person applying for an appointment under this section shall be liable for the official misconduct of the officer.’ . . . BPD argues that because the statute makes the special officers’ employer liable for their misconduct, the City cannot be liable. . . . The mere fact that the statute holds the employer of special officers liable, however, does not necessarily mean that the City may not also be held liable for the misconduct of special officers. Under the terms of the statute, special officers are granted the ‘power of police officers.’ Inasmuch as the statute grants special officers the authority of police officers, it seems logical to treat them as such for purposes of the City’s liability. Because Plaintiff’s complaint is deficient in other respects, however, this court assumes without deciding that the City may be held liable for special officer misconduct to the same extent as it may be liable for the misdeeds of other city employees.”).

*Shah v. Holloway*, No. 07-10352-DPW, 2009 WL 2754406, at \*7 (D. Mass. Aug. 20, 2009) (“After reviewing the record at the motion to dismiss stage, I found the need for further discovery to determine whether facts justified treating this case as one in which federal agents acted in concert with state agents under circumstances justifying recognition of a Section 1983 claim against them for depriving Shah of Fourth Amendment rights. Shah and the defendants agree that SA Holloway and a Boston Police officer did act in concert during the time they observed, stopped, and detained Shah. However, Shah has not offered any evidence that suggests that SA Holloway’s – or any other Federal Agent’s – actions were derived from state, rather than federal, authority. SA Czellec does state that after consulting with his Boston Police counterpart, he selected the nearby local police station as the location to which he would transport Shah. But SA Czellec received instructions from the Secret Service supervisors at the IDCC, not from the Boston Police, to move Shah. Even viewing the evidence in the light most favorable to Shah, I find that no reasonable inference can be made that the Federal Agents conspired with or acted in concert with state officials under color of state law to deprive Shah of his civil rights. Rather, the evidence indicates that the Federal Agents acted under authority of their Secret Service chain of command and pursuant to their own judgment, albeit seeking and obtaining assistance from state actors.”).

*Carmack v. MBTA*, 465 F.Supp.2d 18, 27 (D. Mass. 2006) (“In evaluating whether the conduct of an otherwise private actor constitutes indirect state action, courts conventionally have traveled a trio of analytic avenues, deeming a private entity to have become a state actor if (1) it assumes a traditional public function when it undertakes to perform the challenged conduct, or (2) an elaborate financial or regulatory nexus ties the challenged conduct to the State, or (3) a symbiotic relationship exists between the private entity and the State. . . . The satisfaction of any one of these tests requires a finding of indirect state action. . . . In addition, where ‘[t]he nominally private character of [an organization] is overborne by the pervasive entwining of public institutions and public officials in its composition and workings, and there is no substantial reason to claim

unfairness in applying constitutional standards to it,' the conclusion is that there is state action. . . The inquiry, under any of these theories, is necessarily fact-intensive, and the ultimate conclusion regarding state action must be based on the particular facts and circumstances of the case. . . This court finds that Mr. Carmack has alleged enough facts to support a claim that MBCR [Massachusetts Bay Commuter Railroad Company] was a state actor based on the traditional public function and symbiotic relationship theories.”)

## SECOND CIRCUIT

*Cancel v. Amakwe*, 551 F. App'x 4, \*6, \*7 (2d Cir. 2013) (“While we have recognized that a police officer’s self-identification and use of a service pistol can constitute acting under color of state law, *see Jocks v. Tavernier*, 316 F.3d 128, 134 (2d Cir.2003), the action at issue must be ‘made possible only because the wrongdoer is clothed with the authority of state law,’ *West v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L.Ed.2d 40 (1988). Here, even crediting Cancel’s allegation that Gibson identified himself as a police officer, Cancel’s theory of the City’s delegation of police powers to private businesses is insufficient by itself plausibly to allege that Gibson was acting under color of state law. Gibson was employed by a private business at the time of the alleged assault, and any authority he had over Cancel and other citizens derived solely from that role and was not made possible only because he was ‘clothed with the authority of state law.’ Accordingly, Cancel’s claims against Gibson were properly dismissed.”)

*Fabrikant v. French*, 691 F.3d 193, 211 (2d Cir. 2012) (“We therefore conclude that animal rescue organizations such as the SPCA—independent contractors to which, under New York law, municipalities can delegate authority to perform animal control—are state actors for purposes of § 1983 when they perform surgery on animals in their care while those animals are being kept from their owners by the authority of the state, following searches and seizures carried out by the agencies pursuant to warrants.”)

*Jocks v. Tavernier*, 316 F.3d 128, 134 (2d Cir. 2003) (“[W]hen an officer identifies himself as a police officer and uses his service pistol, he acts under color of law.”).

*Pagan v. Westchester County*, No. 12 Civ. 7669(PAE)(JCF), 2014 WL 982876, \*24, \*25 (S.D.N.Y. Mar. 12, 2014) (adopting R & R) (“Aramark contends that all of the claims against it should be dismissed because it is an ‘independent contractor’ and not a state actor liable under 42 U.S.C. § 1983. The role of providing food to inmates is the responsibility of the state. . . Here, Westchester County has a duty to provide nutritionally adequate food to those incarcerated within its facility. The County has contracted with Aramark to perform this governmental function. Thus, Aramark is serving a public function in providing daily meals to inmates. . . Here, Aramark provides food for the inmates at the Jail pursuant to a contract with the County. The Jail provides oversight for Aramark’s services. Aramark’s ‘seemingly private behavior’ can be treated as that of the state given that the challenged action, proper food service, flows directly from the obligations of the government entity and is performed under its supervision. . . The role of

Aramark as food provider is similar to that of private physicians paid to care for inmates at state and local facilities. In these cases, courts have consistently held that the physician is acting under color of state law when providing treatment to inmates. . . Furthermore, other courts have held that Aramark is acting under color of state law for § 1983 liability when it provides food to state inmates. [collecting cases] Aramark argues repeatedly that as an independent contractor it is not acting under color of state law. While state employment, as a general rule, is sufficient to render the defendant a state actor, an employer-employee relationship is not necessary to a determination of state action or action taken under color of state law. . . It is the function of the private actor within the state system, not ‘the precise terms of his employment, that determines whether his actions can fairly be attributed to the State ....’ . . . As such, the Court concludes that Aramark is acting under color of state law for purposes of § 1983 liability by providing daily meals to the inmates at the Jail, a duty Westchester County ordinarily owes to the inmates.”)

*Rodriguez v. Winski*, No. 12 Civ. 3389(NRB), 2013 WL 5379880, \*9, \*10 (S.D.N.Y. Sept. 26, 2013) (“[S]ummoning police or requesting that police take action to disperse OWS protestors simply does not suffice to constitute joint action or to convert the private party into a state actor. . . . [T]hese allegations demonstrate that police responding to protest sites reached independent decisions as to what action, if any, to take and how. Plaintiffs simply cannot show the substitution of private judgment for police judgment necessary to constitute joint action. Instead, plaintiffs explicitly plead the very opposite as to defendant Brookfield, which allegedly ‘actually transferr[ed] discretion and authority to [the] NYPD to order OWS participants off of publicly accessible open areas.’ . . . In sum, plaintiffs’ allegations cannot support an inference of joint action with the City or the police against Mitsui or the Brookfield defendants.”)

### THIRD CIRCUIT

*Borrell v. Bloomsburg Univ.*, 870 F.3d 154, 161-62 (3d Cir. 2017) (“Richer’s decision was to enforce the hospital’s preexisting policy requiring employees to participate in drug tests when asked, and GMC had already fired four other nurses for violating the same policy. Neither Bloomsburg nor its agreement with Geisinger played any part in creating the policy enforced in this case; the agreement merely made clear that Geisinger’s employee policies would govern the behavior of clinical students while they were working at the hospital. In light of the controlling legal principles we have articulated, the question boils down to which entity—the hospital or the university—exercised the authority to terminate Borrell for a violation of Geisinger policies. . . . Notwithstanding his consultation with others, Richer made the decision to fire someone working at GMC due to her violation of a preexisting policy of the hospital, and he had the authority to do so based on his position there. ‘[T]he authority of state officials ... was wholly unnecessary to effectuate Borrell’s dismissal from the NAP.’ . . . Accordingly, we must reverse the District Court’s holding that GMC and Richer were state actors.”)

*Kach v. Hose*, 589 F.3d 626, 649 & n.22 (3d Cir. 2009) (“On this particular record, no reasonable finder of fact could conclude that Pennsylvania authorities exercised control over any element of

the particular conduct Kach describes. Hose was charged with supervising and maintaining a secure environment for schoolchildren. In clear violation of his mandate, Hose engaged in an impermissible relationship with one of the very schoolchildren whose safety he was supposed to ensure. Kach has not presented evidence to suggest that Hose's actions were committed on anyone's initiative but his own or with anything other than his own interests in mind. Instead, the record leaves no room for doubt that Hose 'was bent on a singularly personal frolic[,]’ *Martinez v. Colon*, 54 F.3d 980, 987 (1st Cir.1995) (footnote omitted), and thus his conduct is not cognizable as state action for § 1983 purposes. . . . Because Hose was not acting under color of state law when he committed the acts that form the basis of Kach's § 1983 claim against him, we need not decide if Kach's constitutional rights were violated. Accordingly, Kach's § 1983 claim against Hose fails as a matter of law. . . . We do not foreclose the possibility that, under other circumstances, a private security guard employed in a public school could qualify as a state actor.”).

*Marcus v. McCollum*, 394 F.3d 813, 818 (3d Cir. 2004) (noting Circuit agreement that officers are not state actors during private repossession if they act only to keep the peace).

*Foster v. City of Philadelphia*, CIV.A. 12-5851, 2014 WL 5027067, \*22 (E.D. Pa. Oct. 8, 2014) (“Even towing companies, which have less responsibility than salvors under Pennsylvania law, have been held to be state actors, albeit in other jurisdictions. . . . Since salvors engage in more conduct than towing companies under the Abandoned Vehicle Code, it follows inexorably that a salvor like Century Motors is a state actor.”)

*Adams v. Springmeyer*, 17 F.Supp.3d 478, 506 (W.D. Pa. 2014) (“In 2008, Sciulli was assigned to work for the ATF as a federally deputized Task Force Officer. . . . Local law enforcement officials working in such a capacity are generally regarded as federal agents. . . . Since it is undisputed that Sciulli was attempting to execute federal arrest warrants in his capacity as a federal Task Force Officer, the Defendants' motion for summary judgment will be granted with respect to the § 1983 claims brought against him.”)

*Fleck v. Trustees of University of Pennsylvania*, 995 F.Supp.2d 390, 401-03 (E.D. Pa. 2014) (“The Supreme Court has left open the circumstances under which private security officers may be deemed to perform public functions for purposes of § 1983 suits. While our Court of Appeals has not refined its *Henderson* holding, other federal courts have found state action where a security guard is employed by a police department, *Travers v. Meshriy*, 627 F.2d 934 (9th Cir.1980), or works jointly with a township police officer, *Padover v. Gimbel Bros., Inc.*, 412 F.Supp. 920 (E.D.Pa.1976) (Ditter, J.). On the other hand, a security guard was held not to be a state actor where no state or municipal police power was involved, see *Wade v. Byles*, 83 F.3d 902 (7th Cir.1996), or when a college security guard, despite also being a local police officer, acts solely in his college-guard capacity, see *Robinson v. Davis*, 447 F.2d 753 (4th Cir.1971). To be sure, ‘[w]here private security guards are endowed by law with plenary police powers such that they are *de facto* police officers, they may qualify as state actors under the public function test,’ *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629, 637 (6th Cir.2005) (citing *Henderson* ). . . . The

Penn Police Department’s so-called patrol zone extends well beyond the borders of the University campus to encompass a large slice of West Philadelphia—roughly between Market Street and Baltimore Avenue, from 43rd Street to the Schuylkill River—an area that includes the Masjid Al Jamia Mosque at 4228 Walnut Street. . . Penn police officers are ‘highly-trained in a number of specialized areas including: emergency response, crisis and hostage negotiation, dignitary protection, traffic safety, motorcycle and bicycle patrol.’. . The Department maintains a fifteen-person Detective Unit that conducts criminal investigations and crime scene analysis. *Id.* The Penn Police Department has been accredited through the Commission on the Accreditation of Law Enforcement Agencies—a standard-setting body, since March of 2001. Its officers have worked with a Drug Enforcement Administration task force, *United States v. Ford*, 618 F.Supp.2d 368 (E.D.Pa.2009) (Pollak, J.), and with FBI investigators on credit-card identity theft, *United States v. Barr*, 454 F.Supp.2d 229 (E.D.Pa.2006) (Rufe, J.). Here, Officers Cooper, Michel and Thammavong were on patrol on a street within the Penn Police Department’s patrol zone, and when their efforts to maintain public order failed, they arrested two instigators of the disturbance. Accordingly, we find that Pennsylvania law endows the Penn Police Department with the plenary authority of a municipal police department in the patrol-zone territory, once the ‘exclusive prerogative’ of the City of Philadelphia. But the Penn Police Department is not an entity capable of being sued. Rather, the University itself, *i.e.*, the Trustees of the University of Pennsylvania, is the proper defendant for purposes of a § 1983 suit (along with the named individual officers). . . Penn’s police officers therefore are state actors for Section 1983 purposes.”)

***Kelly v. N.J. Dept. of Corrections***, No. 11–7256 (PGS), 2012 WL 6203691, \*6, \*7 (D.N.J. Dec. 11, 2012) (“Federal courts are split on the question whether organizations that operate halfway houses, and their employees, are state actors for purposes of § 1983. [collecting cases] In this action, in any event, Plaintiff has failed to allege any facts that would suggest that Community Education Centers functioned as a state actor. For example, Plaintiff does not describe the nature of the contractual relationship, if any, with the New Jersey Department of Corrections. He does not describe the nature of the services provided, or the nature of the population to whom those services are provided. . . Moreover, Plaintiff has failed to allege any facts that would suggest that Community Education Centers promulgated any policy or practice that encouraged the conduct he challenges here. Accordingly, Plaintiff has failed to state a claim against Community Education Centers. As the allegations made by Plaintiff are insufficient to establish that Community Education Center functioned as a ‘state actor,’ they similarly are insufficient to establish that counselors employed by Community Education Centers or its facilities functioned as state actors.”)

#### **FOURTH CIRCUIT**

***Davison v. Randall***, 912 F.3d 666, 681 (4th Cir. 2019) (“Put simply, Randall clothed the Chair’s Facebook Page in ‘the power and prestige of h[er] state office,’. . . and created and administered the page to ‘perform[ ] actual or apparent dut[ies] of h[er] office[.]’ . . Additionally, the specific actions giving rise to Davison’s claim—Randall’s banning of Davison’s Virginia SGP Page—‘are linked to events which arose out of h[er] official status.’. . Randall’s post to the Chair’s Facebook

Page that prompted Davison’s comment informed the public about what happened at the Loudoun Board and Loudoun County School Board’s joint meeting. And Davison’s comment also dealt with an issue related to that meeting and of significant public interest—School Board members’ alleged conflicts of interest in approving financial transactions. That Randall’s ban of Davison amounted to an effort ‘to suppress speech critical of [such members’] conduct of [their] official duties or fitness for public office’ further reinforces that the ban was taken under color of state law. . . Considering the totality of these circumstances, the district court correctly held that Randall acted under color of state law in banning Davison from the Chair’s Facebook Page.”)

*U.S. v. Day*, 591 F.3d 679, 687-89 (4th Cir. 2010) (Virginia’s conferral of authority on armed security officers to effect an arrest for an offense occurring in their presence did not render them de facto police officers, as would justify a finding that officers acted as government agents when they arrested and interrogated defendant, for purposes of the Fourth and Fifth Amendments, where not only was arrest power of armed security officers more circumscribed than that of police officers, who could arrest on basis of reasonable grounds or probable cause to suspect a person of having committed a felony not in their presence, but it was also essentially the same as that of any private citizen).

*Philips v. Pitt County Memorial Hosp.*, 572 F.3d 176 (4th Cir. 2009) (discussing various tests for state action and concluding that hospital’s Board of Trustees did not act under color of state law in temporarily suspending physician’s practice privileges).

*Rossignol v. Voorhaar*, 316 F.3d 516, 523, 524, 527 (4th Cir. 2003) (“Defendants executed a systematic, carefully-organized plan to suppress the distribution of *St. Mary’s Today*. And they did so to retaliate against those who questioned their fitness for public office and who challenged many of them in the conduct of their official duties. The defendants’ scheme was thus a classic example of the kind of suppression of political criticism which the First Amendment was intended to prohibit. The fact that these law enforcement officers acted after hours and after they had taken off their badges cannot immunize their efforts to shield themselves from adverse comment and to stifle public scrutiny of their performance. . . .We would thus lose sight of the entire purpose of § 1983 if we held that defendants were not acting under color of state law. Here, a local sheriff, joined by a candidate for State’s Attorney, actively encouraged and sanctioned the organized censorship of his political opponents by his subordinates, contributed money to support that censorship, and placed the blanket of his protection over the perpetrators. Sheriffs who removed their uniforms and acted as members of the Klan were not immune from § 1983; the conduct here, while different, also cannot be absolved by the simple expedient of removing the badge.”).

*Durham v. Rapp*, 64 F. Supp. 3d 740, 746-47 (D. Md. 2014) (“The Court concludes that Durham is not barred from suing Vogt under § 1983 simply because Vogt is an FBI agent. The only question is whether Vogt was acting under color of state law when he was serving as a commissioner of the MPTC [Maryland Police Training Commission]. Since it was Maryland state law that created the MPTC and bestowed upon it its powers and duties including those exercised by Vogt, it can be

fairly said that Vogt must be regarded as a state actor as to the circumstances presented in this lawsuit. He has cited no federal law that required him to serve as an MPTC commissioner. Thus, he was acting under color of state law. For that reason, he is not subject to suit under *Bivens* because he was not acting under color of federal law.”)

## FIFTH CIRCUIT

*Gomez v. Galman*, 18 F.4th 769, 776 (5th Cir. 2021) (“Viewing his complaint in the light most favorable to Gomez—as we must—we determine that he has adequately pleaded facts which establish that Galman and Sutton acted under the color of law. First, Gomez alleges that when he exited the bar, Sutton ‘acting as a police officer, gave Mr. Gomez a direct order to stop and not leave the patio area of the bar.’ Gomez obeyed this order. Then, when he attempted to drive away after getting violently beaten, Sutton and Galman ‘ordered him to stop’ and ‘ordered [him] to step out of his vehicle.’ Gomez claims that ‘[b]ecause they acted like police officers, [he] believed he was not free to leave, and did as he was ordered.’ These allegations are key. A victim usually does not follow orders from someone who just attacked him without good reason to do so. He is even less likely do so when—as alleged here—the victim was in the process of escaping his attackers. The fact that Gomez stopped and exited his vehicle at his attackers’ commands lends significant credence to his allegation that he believed them to be police officers, because the complaint offers no reason for Gomez to obey Galman and Sutton unless they were ‘acting by virtue of state authority.’ . Gomez alleges other facts indicating that Galman and Sutton ‘misused or abused their official power.’ . . For example, Gomez asserts that the officers ‘forced him onto his stomach, and placed his hands behind his back in a police hold as they were trained to do during an arrest, and effected an arrest of Mr. Gomez.’ This caused Gomez to ‘believe[ ] he was being arrested.’ The use of the police hold further indicates that Galman and Sutton were abusing their official power and exercising their authority as officers in their efforts to harm Gomez. Further, Sutton ‘called for backup in continuing to make an arrest’ and Defendants ‘identified themselves to NOPD dispatch as NOPD officers.’ Gomez concedes that by the time the officers called for backup he was unconscious. Nevertheless, Defendants’ call for backup—and especially their identification of themselves as officers of the law—adds to the ‘air of official authority’ that pervaded the assault. . . Taken together, these allegations are sufficient to plead that the officers misused their official power. Accordingly, the district court erred in finding that Galman and Sutton did not act under color of law.”)

*Gomez v. Galman*, 18 F.4th 769, 782-83 (5th Cir. 2021) (Ho, J., concurring) (“As a strictly doctrinal matter, this is a close case. Gomez alleges that he believed his assailants were police officers, and that for that reason, he complied with their orders, rather than flee to avoid further injury. But he never explains *why* he believed the defendants were police officers. He does not allege that they wore uniforms, displayed their badges, or otherwise presented themselves to him as police officers. And it is not Gomez’s subjective beliefs, but the officers’ conduct, that determines whether the defendants acted ‘under color of [state law]’ as required under 42 U.S.C. § 1983. . . So I can see how the district court might have concluded that this case

cannot proceed under § 1983. That said, I am not prepared to dismiss all of Gomez’s claims at this time. Some circuits have recognized that a plaintiff’s subjective beliefs may bear ‘some relevance’ to the color of law determination. . . . In addition, there is at least some support in our circuit precedent for the proposition that the officers here acted under color of state law because they later called for police backup. . . . In light of these authorities, I am happy to reverse in part and remand for further proceedings, and therefore concur. Moreover, although reasonable minds can debate whether the misconduct alleged here is actionable under § 1983, it is unquestionably contemptible. Accepting the allegations in the complaint as true, as we must at this stage, Jorge Gomez is a U.S. citizen and decorated military veteran of Honduran descent. On the night in question, he visited a local bar, proudly wearing his military regalia. Officers Galman and Sutton ordered Gomez to approach. They called him a ‘fake American’ and a ‘liar’ and told him to ‘go back’ to wherever he came from. They attempted to strip off his military clothing. And then they brutally beat him until two bystanders intervened to stop the attack. They left Gomez sprawled across a patio table, bruised and bloodied. After he managed to get up, Gomez entered his car and began driving away. But the officers ordered him to stop and exit his vehicle. Believing he had no choice, Gomez complied. The officers then knocked Gomez to the ground, forced him onto his stomach, held his arms behind his back, and beat him unconscious. ‘Nothing is more corrosive to public confidence in our criminal justice system than the perception that there are two different legal standards.’ . . . If the allegations in this case are true, the officers have not merely brutalized one man—they have badly undermined public trust in law enforcement. And unfortunately, the misconduct alleged here is not unique. . . . I agree that the district court should not have dismissed Gomez’s claims against the officers at this early stage in the proceedings. Accordingly, I concur.”)

*Pikaluk v. Horseshoe Entertainment, LLP*, 810 F. App’x 243, \_\_\_ (5th Cir. 2020) (“The district court granted summary judgment based on its conclusion that the Officers conducted an ‘independent investigation’ after receiving the call from Horseshoe. We disagree. As we will explain, the lack of independent investigation is a significant factor in Pikaluk’s malicious prosecution claim. But even without evidence of an independent investigation, summary judgment on Pikaluk’s § 1983 claim was still proper because of the lack of evidence of any ‘interdependence’ or ‘meeting of the minds’ between the state officials and the Horseshoe Defendants. We thus affirm the district court’s grant of summary judgment on Pikaluk’s § 1983 claim.”)

*Ayala-Gutierrez v. Doe*, No. 16-20164, 2017 WL 3722804, at \*1 (5th Cir. Aug. 28, 2017) (not reported) (“Ayala-Gutierrez argues that he has stated a claim under § 1983 because GEO is a state actor that derives its authority to operate Joe Corley Detention Facility from the state of Texas. He additionally argues that he has stated a claim under *Bivens* because GEO is a federal employee insofar as it acts under the color of federal law in operating Joe Corley Detention Facility. This court has rejected these arguments in *Eltayib v. Cornell Companies, Inc.*, 533 Fed.Appx. 414, 414-15 (5th Cir. 2013). *Eltayib* held that GEO and their employees are not subject to suit as state actors under § 1983 because they manage a federal prison, and § 1983 applies to constitutional violations by state—not federal—officials. . . . It additionally held that GEO and its employees cannot be liable

as private actors under *Bivens*. *Id.* (citing *Minneci v. Pollard*, 565 U.S. 118, 131, 132 S.Ct. 617, 181 L.Ed.2d 606 (2012), and *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 63-64, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001)). Ayala-Gutierrez therefore has shown no error on the part of the district court in dismissing his complaint for failure to state a claim.”)

*Moody v. Farrell*, No. 16-60684, 2017 WL 3530156, at \*4 (5th Cir. Aug. 17, 2017) (“[E]vidence that a private citizen reported criminal activity or signed a criminal complaint does not suffice to show state action on the part of the complainant in a false arrest case. . . The plaintiff must further ‘show that the police in effecting the arrest acted in accordance with a “preconceived plan” to arrest a person merely because he was designated for arrest by the private party, without independent investigation.’ . . . As Farrell argues, the record indisputably shows that the Lowndes County Sheriff’s Department conducted an investigation and independently determined that probable cause existed to arrest Moody. . . . In light of the undisputed facts that Officer Cooper investigated Farrell’s allegations for almost a year and that two state officials found probable cause, it is reasonable to infer, at most, that Farrell pressured Officer Cooper to pursue arrest. In this way, Farrell, like the defendant in *Bartholomew*, influenced the actions of the police but did not determine them. A jury could not reasonably infer that Farrell’s pressure destroyed the independence of Officer Cooper’s investigation.”)

*Doe v. United States*, 831 F.3d 309, 314-17 (5th Cir. 2016) (“The plaintiffs rely on the ‘nexus’ test, under which the state’s involvement is such that the private actor’s conduct can fairly be treated as that of the state itself. . . In essence, the plaintiffs assert that CCA derived its authority to run the detention center from the subcontract with Williamson County, meaning the CCA defendants were acting under color of state law. . . . [T]he plaintiffs argue here, the fact that the plaintiffs are federal detainees is irrelevant. Whether state action exists depends ‘on the nature of the defendant’ and not the nature of the plaintiff. . . . As an initial matter, resolving whether an action is ‘fairly attributable to the State’ “begins by identifying the specific conduct of which the plaintiff complains[.]” . . . In *Cornish*, a guard at a private corrections facility that housed juveniles sued under Section 1983 after he was fired. . . . Affirming dismissal, we said that the facility’s ‘role as an employer’ did not constitute state action. . . . This is true even if the facility’s role in ‘providing juvenile correctional services was state action.’ . . . We said that it was immaterial that the facility’s guards were subject to state regulations, or that a state contract authorized the facility’s operations. . . . Here, the specific conduct complained of is the CCA defendants’ failure to follow ICE’s transport policy, which the plaintiffs allege facilitated Dunn’s crimes. Thus, following *Cornish*’s reasoning, the CCA defendants’ relevant role on which we must focus is in detaining aliens pending a determination of their immigration status pursuant to ICE specifications. This is fundamentally a federal function. Relatedly, we once held that a CCA guard at a detention center housing federal detainees was the equivalent of a federal corrections officer. *United States v. Thomas*, 240 F.3d 445, 448 (5th Cir. 2001). Furthermore, even if we focus on the subcontract. . . . its terms support a finding that Williamson County’s involvement in running the detention center was minimal. The subcontract delegated all responsibility for housing detainees pursuant to ICE standards to CCA. Williamson County is permitted to employ a representative to serve as a

‘liaison,’ but it has no involvement in the day-to-day operations of the detention center regardless of whether it pressured CCA to remove Hernandez. Other provisions of the subcontract merely facilitate an administrative payment between Williamson County and CCA, provide indemnification to Williamson County, and require CCA to notify county officials if there is an emergency at the detention center. This leaves the fact of the subcontract’s existence as the sole connection to the state. We have said that the ‘[a]cts of ... private contractors do not become acts of the government by reason of their significant or even total engagement in performing in public contracts.’ See *Cornish*, 402 F.3d at 550. *Henderson* and *Alvarez*, moreover, are distinguishable on their facts. The state in both cases exhibited more control over the relevant correctional facilities than Williamson County had over the detention center here. In *Henderson*, the jail was county owned and operated; it unequivocally derived its existence from the state. . . No private contractor was involved. . . *Alvarez* involved a county-owned jail, which was operated by a private contractor and housed state and federal prisoners. . . The district court said the contract with the Marshals Service to house some federal prisoners did not change the character of the private contractor’s relevant function as the operator of the county jail. . . Here, again, the detention center — which houses only federal aliens detained by ICE — is owned and operated by CCA alone, not Williamson County or the state of Texas. ICE promulgates all policies and procedures by which the detention center must operate through the service agreement and subcontract. The plaintiffs’ case centers on the CCA defendants’ violation of one of those policies. *Henderson* and *Alvarez* are not on point.”)

***Rundus v. City of Dallas, Tex.***, 634 F.3d 309, 315 (5th Cir. 2011) (“We hold that the facts here clearly indicate SFOT is not a state actor; it runs a private event on public property. The pervasive entwinement present in *Brentwood* is not presented in the facts before us. The City has no say in SFOT’s internal decision making, and had no role in enacting or enforcing the restriction on distribution of literature. Nor are we convinced by Rundus’s argument that Appellees’ mutual commitment to improve Fair Park demonstrates state action, because SFOT improves only the portions of Fair Park that will attract more fairgoers. In short, the facts presented are not sufficiently analogous to *Brentwood* to conclude that SFOT is a state actor.”)

***Bustos v. Martini Club Inc.***, 599 F.3d 458, 464, 465 (5th Cir. 2010) (“Whether an officer is acting under color of state law does not depend on his on- or off-duty status at the time of the alleged violation. . . . If an officer pursues personal objectives without using his official power as a means to achieve his private aim, he has not acted under color of state law. . . . [H]ere, Bustos does not allege facts to suggest that the officers who assaulted him misused or abused their official power. His allegations suggest that, at the time of the incident, the officers were off-duty and enjoying drinks at the bar with female companions. . . . [B]ecause he asserts no facts that would suggest that the use of force by Officers Goodwin and Cantu was a misuse of their power as state officers, he has not sufficiently alleged that their actions were under color of state law.”).

***Barkley v. Dillard Dept. Stores, Inc.***, No. 07-20482, 2008 WL 1924178, at \*3 (5th Cir. May 2, 2008) (not published) (“Although Dillard’s notified Wilkinson of the shoplifter, Wilkinson made

an independent decision to chase after and attempt to apprehend the suspect. These facts are in contrast with those in *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93 (5th Cir.1975) (per curiam), in which we found that Brookshire was a state actor because ‘the police and [Brookshire] maintained a pre-conceived policy by which shoplifters would be arrested based solely on the complaint of the merchant.’. . . There is no evidence of a pre-conceived policy in this case. Therefore, based on the facts described above, we conclude that the district court did not err in deciding that Dillard’s was not a state actor. Consequently, we affirm summary judgment for Dillard’s.”).

*Cornish v. Correctional Services Corp.*, 402 F.3d 545, 550, 551 (5th Cir. 2005) (CSC’s decision to terminate plaintiff’s employment was made in its role as private prison management employer and could not be attributed to Dallas County or State of Texas).

*Rosborough v. Management & Training Corporation*, 350 F.3d 459, 461 (5th Cir. 2003) (agreeing with Sixth Circuit and with district courts ‘that have found that private prison-management corporations and their employees may be sued under § 1983 by a prisoner who has suffered a constitutional injury.”).

## SIXTH CIRCUIT

*Phillips v. Tangilag*, 14 F.4th 524, 532-34 (6th Cir. 2021) (“[A]n individual need not be a formal ‘public employee’ to qualify as a state actor because governments have long carried out their duties using private agents. . . . To decide whether a seemingly private party is a ‘state’ actor, the Supreme Court has applied different tests in different settings. . . . In this prison setting, the Court has opted for a ‘public-function’ test. . . . It has recognized that the states can privatize most functions (like the provision of electricity or education) without turning the parties who take on these tasks into ‘government’ agents. . . . Yet a few public functions—those the government has ‘traditionally *and* exclusively’ performed—cannot be delegated to private parties in this way without the Constitution’s limits accompanying the delegation. . . . The Court has extended this public-function logic to some doctors who care for prisoners. The Constitution does not generally impose a positive duty on states to offer medical care to those within their jurisdictions. . . . When, however, a state imprisons individuals and deprives them of the liberty to care for themselves, it takes on a ‘duty’ through the Eighth Amendment to ensure their wellbeing. . . . And states may not entirely outsource this constitutional duty to a private entity. . . . The Supreme Court thus held that an orthopedic specialist became a state actor when he operated a clinic providing twice-a-week care to inmates at a prison hospital. . . . Although this doctor saw many other patients, he had ‘voluntarily assumed’ the state’s ‘obligation to provide adequate medical care to’ inmates by entering into a contract for that care. . . . Our court likewise held that a psychiatrist who saw a pretrial detainee was a state actor because she offered her services under a formal agreement with the county. . . . At the same time, private parties do not automatically become ‘state’ actors simply by caring for prisoners. Consider a hospital with an emergency room that generally must treat all patients who seek care for life-threatening conditions. . . . Does this hospital become a state actor

whenever a prisoner gets rushed there for a medical emergency? The Seventh Circuit has held to the contrary, reasoning that the hospital had not voluntarily agreed to accept the state's special responsibility' to its prisoners. . . We have likewise emphasized the lack of a contract between a state and a doctor when finding that the doctor was not a state actor. See *Scott v. Ambani*, 577 F.3d 642, 649 (6th Cir. 2009). In *Scott*, a prison doctor referred an inmate with cancer to an outside hospital for radiation treatment. . . We found that the hospital oncologist who treated the prisoner was not a state actor because there was 'no contractual relationship' between the oncologist and the state. . . The prison doctor had referred the patient to the hospital generally, so the prisoner could have been treated by any of the staff oncologists. . . The state also had no influence over the oncologist's care of the prisoner; she decided on the proper treatment based solely on 'her own training, experience, and independent medical judgment.' . This case falls somewhere between these decisions. On the one hand, Dr. Jefferson is a private orthopedic surgeon who saw Phillips at his private office and who spoke with Dr. Tangilag about Phillips's MRI. That was the extent of his participation in Phillips's care. Unlike the doctors in *West* and *Carl*, Jefferson had no written contract with Kentucky to provide care to its prisoners. Instead, Phillips was referred to Jefferson in the same way that any ordinary patient might be referred to him. In *West*, moreover, the Supreme Court emphasized that the doctor had performed his duties 'at the state prison,' which the Court thought would inevitably affect the doctor's care. . . Here, by contrast, no evidence suggests that Phillips's status as a prisoner affected Dr. Jefferson's care. . . . On the other hand, Dr. Tangilag referred Phillips specifically to Dr. Jefferson. This fact distinguishes Jefferson from the oncologist in *Scott*, who cared for the prisoner by happenstance because the referral had been to the hospital. . . This fact also makes this case resemble *Conner v. Donnelly*, 42 F.3d 220 (4th Cir. 1994). There, the Fourth Circuit held that an orthopedic physician was a state actor when he treated a prisoner at his private office pursuant to a prison doctor's referral. . . The court reached this result even though the state and physician had no written contract. . . Here, moreover, Jefferson knew that Phillips was a prisoner when he accepted the referral and so could be said to have in some respects assumed the state's duty to provide medical care. . . At day's end, we opt not to decide whether Dr. Jefferson qualified as a state actor. Even if he did, Phillips has not shown that he was deliberately indifferent to Phillips's serious medical needs. We thus can resolve this appeal solely on the deliberate-indifference element.")

***United States v. Miller***, 982 F.3d 412, 422-23 (6th Cir. 2020) ("When should a private party's actions be 'fairly attributable' to the government and trigger the Constitution's protections? . . . One approach to this constitutional 'agency' question would be to review our legal traditions and consider situations in which our laws have historically imputed one person's conduct to another. After all, 'traditional agency principles were reasonably well ensconced in the law at the time of the founding[.]'. . Yet the Supreme Court has stated that '[w]hat is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity.' . It has adopted a fact-bound approach to this attribution question, one that uses 'different factors or tests in different contexts.' . Sometimes, the Court uses a 'function' test that asks whether a private party performs a public function. . . Other times, the Court uses a 'compulsion' test that asks whether the government compelled a private party's action. . . Still other times, the Court uses a 'nexus' test that asks

whether a private party cooperated with the government. . . As the party seeking to suppress evidence, Miller must prove that Google’s actions were government actions under one of these tests. . . He has fallen short.”)

***Howell v. Father Maloney’s Boys’ Haven, Inc.***, 976 F.3d 750, 753-54 (6th Cir. 2020) (“Across the country, there’s near uniformity that foster homes do not count as state actors. [collecting cases] Like most foster homes, the Haven houses, educates, and provides day-to-day care to the children under its roof. And like most foster homes, the Haven has no power to remove children and place them under appropriate care or in juvenile correctional facilities—the kinds of things state actors traditionally may do. All in all, Kentucky has not ‘traditionally *and* exclusively’ performed these functions, . . . and the Haven is not standing in its shoes when offering these eleemosynary services. . . .Howell claims that *West v. Atkins*. . . advances her cause. That’s not the case. *West* held that a physician under contract to provide medical services to state inmates in a state prison qualified as a state actor under § 1983. . . In *West*, the ‘state itself was directly responsible for managing’ the facility in which the alleged constitutional violation occurred. . . The Haven in contrast is ‘privately run.’ . . *West* also involved a ‘correctional setting,’ a prototypical state function ‘designed to remove individuals ‘from the community.’ . . Far from incarcerating children placed under its care, the Haven facilitates their continuing engagement and presence in the community. This is not a remotely comparable exertion of state power.”)

***Siefert v. Hamilton County***, 951 F.3d 753, 761 (6th Cir. 2020), *cert. denied*, 141 S. Ct. \_\_\_\_ (2020) (“[T]he Sieferts present specific factual allegations, detailing a deep and symbiotic relationship between Children’s [Hospital] and the county. From the Sieferts’ perspective, it would have been hard to know who could discharge Minor Siefert—Hamilton County or Children’s. And when the distinction between the state and private party breaks down to that degree, a private party becomes a state actor in § 1983 cases. . . All this means today is that the Sieferts have alleged enough facts to keep Children’s in this lawsuit. . . But a ‘plaintiff[’s] ability to survive a motion to dismiss with respect to the state-actor question does not necessarily mean that they could survive summary judgment.’ . . The Sieferts have unlocked the door to discovery, not to liability. And in the end, Children’s may show that it was not a state actor. But at this point, it is too soon to know.”)

***Morris v. City of Detroit***, 789 F. App’x 516, \_\_\_\_ (6th Cir. 2019) (“Taking the facts in the light most favorable to plaintiffs, we assume that Adams was on duty, even though she had clocked out at 4:00 pm before going to plaintiffs’ home. She was scheduled to work until 6:00 pm that day, and the police investigation report found that she was on duty. Adams was not in uniform when she went to plaintiffs’ house, but she had her badge, handcuffs and service revolver with her. The only item she used during the incident was her service revolver. Although Adams used her gun, which was state-issued equipment, she did not manifest the requisite showing of state-granted authority to act under color of law. The sole purpose for Adams being at Morris’ house was to collect a personal debt of \$300. Adams did not purport to be conducting police-related business, nor did she attempt to use her status as a police officer advantageously during the altercation. The

fact that Adams used her department-issued weapon during a private dispute is not enough to establish she was acting under color of law.”)

**King v. United States**, 917 F.3d 409, 433 (6th Cir. 2019), *cert. denied sub nom. King v. Brownback*, 140 S. Ct. \_\_\_\_ (2020) (“Plaintiff’s claims against Detective Allen may not be brought under § 1983 because Detective Allen’s conduct is fairly attributable only to the United States and not to the State of Michigan. . . Although Detective Allen was a detective with the Grand Rapids Police and was therefore employed by the state, Detective Allen was working full time with an FBI task force at the time of the incident at issue. Plaintiff has not alleged or demonstrated that the state was involved in authorizing or administering the task force; instead, it appears that the FBI managed the operation with the benefit of state resources. Detective Allen’s ‘official character’ at the time of the incident was therefore ‘such as to lend the weight of the [United States] to his decisions.’ . . As a deputized federal agent, Detective Allen carried federal authority and acted under color of that authority rather than under any state authority he may have had as a Grand Rapids Police detective.”)

**Winkler v. Madison County**, 893 F.3d 877, 904 (6th Cir. 2018) (“A private entity, such as Healthcare, that contracts to provide medical services at a jail can be held liable under § 1983 because it is carrying out a traditional state function.”)

**Middaugh v. City of Three Rivers**, No. 15-1140, 2017 WL 1179375, at \*4-5 (6th Cir. Mar. 29, 2017) (not reported), *on remand from Piper v. Middaugh*, 136 S. Ct. 2408 (2016) (per curiam) (“To determine whether an officer’s conduct transforms a private repossession into state action, our cases have looked for decades to the purpose and effect of the conduct, ‘distinguish[ing] between conduct designed to keep the peace and activity fashioned to assist in the repossession.’ . . . Officers ‘cross the line’ into state action when they ‘take an active role in a seizure or eviction,’ *Cochran*, 656 F.3d at 310, and ‘affirmatively intervene to aid the reposessor,’ *id.* (quoting *Marcus v. McCollum*, 394 F.3d 813, 818 (10th Cir. 2004)). . . . We find that the Officers’ conduct crossed the line, rendering the repossession state action. By driving Chrystal onto the Middaughs’ property and enabling her to seize the car without objection, the Officers ‘affirmatively intervene[d] to aid the reposessor.’ . . Thus, the Officers’ conduct was sufficient for state action.”)

**Partin v. Davis**, 675 F. App’x 575, 587 (6th Cir. 2017) (“Although Franklin County and the Ikard Defendants shared a contractual relationship, no facts in the record suggest that the parties were ‘pervasive [ly] entwined.’ . . During the process of executing the Writ, Deputy Tyler phoned Jason Ikard to perform a towing service. The deputy chose Jason Ikard because his company had towed seized cars for the county before, and it was the only one capable of moving tractor-trailers. Ikard then drove the Partins’ trucks to a holding facility. Other than asking Ikard to drive the seized trucks, Deputy Tyler shared no information about the legal basis for the execution. As the deputy explained, the Ikard Defendants played ‘no role in the seizure of the property identified in the Writ of Execution other than handling the logistics of transporting the tractor-trailers.’ Accordingly, their involvement in the Writ-enforcement process falls short of demonstrating the close nexus

with Franklin County necessary to expose them to § 1983 liability. We thus find the Ikard Defendants' role in the seizure insufficient to make them state actors under § 1983.”)

*Meadows v. Enyeart*, 627 F. App'x 496, 501 (6th Cir. 2015) (“The Defendants in this case are public officials who hired a private attorney to send a cease-and-desist letter. Enyeart and Miglioizzi did not act out of a state-imposed duty. Rather, they were motivated to safeguard their personal reputations. Nor did the Defendants threaten to initiate anything other than private legal action against the Meadowses. Because any person may hire a private attorney to threaten private legal action, it cannot be said that the letter was ‘possible only because [the Defendants were] clothed with the authority of state law.’. . . Rather, the ‘nature of the act performed’ was ‘functionally equivalent to that of any private citizen.’. . . Therefore, the Defendants did not act under color of state law in sending the cease-and-desist letter, and the Meadowses cannot recover in a § 1983 action on the basis of that letter.”)

*Carl v. Muskegon County*, 763 F.3d 592, 595-98 (6th Cir. 2014) (“The only issue before the court is whether Dr. Jawor, a private psychiatrist, acted under color of state law. Private individuals may be considered state actors if they exercise power ‘possessed by virtue of state law’ and if they are ‘clothed with the authority of state law.’. . . The question turns on whether the private individual’s actions can be fairly attributed to the state. . . Our court has identified three tests to resolve the state-actor inquiry: the public-function test, the state-compulsion test, and the nexus test. . . The parties agree that this case implicates the public-function test, which ‘requires that the private [individual] exercise powers which are traditionally exclusively reserved to the state.’. . . The Sixth Circuit has interpreted this test narrowly; rarely have we attributed private conduct to the state. . . Nevertheless, Carl argues that Dr. Jawor is a state actor under the public-function test and that *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), supports his position. We agree. We start from the basic premise that states must provide medical care to those in custody. . . A state may not escape § 1983 liability by contracting out or delegating its obligation to provide medical care to inmates. . . Dr. Jawor engaged in a public function by evaluating Carl, an individual involuntarily in custody. Attributing Dr. Jawor’s conduct to the state is appropriate because Dr. Jawor performed a function that the state would typically carry out. . . It makes no difference that Carl was assessed for psychiatric treatment as opposed to medical care more generally. . . The right to both kinds of care is protected under the Eighth Amendment. True enough, Dr. Jawor did not have a direct employment relationship with Muskegon County Jail to provide psychiatric services to detainees. She was, however, under contract with the county, through its agency CMH, to administer services to pretrial detainees held at the Jail. . . Whether Dr. Jawor was employed directly by the state does not control whether she was a state actor. . . As it stands, the district court’s holding—finding no state action—would incentivize the state to contract out, piece by piece, features of its prison healthcare system. In turn, each private actor providing medical care could disclaim liability under § 1983, downplaying their role in the prison system as so nominal that they should not be considered state actors. Sanctioning a state’s delegation of duties in this manner is incompatible with *West*, which admonishes that ‘[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide

adequate medical treatment to those in its custody.’ *West*, 487 U.S. at 56, 108 S.Ct. 2250. In the face of today’s expansion of healthcare outsourcing and prison privatization, these activities, many of which are necessary and well-intentioned, do not absolve a state from adhering to constitutional precepts.”)

***Bishawi v. Ne. Ohio Corr. Ctr.***, 628 F. App’x 329, 342 (6th Cir. 2014) (“Bishawi argues that CCA, NEOCC, and its employees should be considered state actors because the prison was under contract with the City of Youngstown, Ohio, for conveyance of the land on which the prison was built and because NEOCC was subject to State of Ohio inspections. To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Federal Constitution or laws and that the violation was committed by a person acting under color of state law. . . . When a defendant is a private entity, the entity can be held liable under § 1983 only if its conduct may be ‘fairly attributable to the state.’ . . . At the time of the events complained of, Bishawi was incarcerated at NEOCC, a private prison owned and operated by CCA, a private corporation, to provide services for the federal government. Because NEOCC does not provide services on behalf of the state, neither NEOCC nor CCA were acting under the color of state law for the purposes of § 1983. Further, NEOCC’s employees cannot be considered state actors because they are employees of a privately operated prison, operated for the federal government. Thus, the district court correctly found that § 1983 is not applicable to this case.”)

***Barkovic v. Hogan***, No. 11–2335, 2012 WL 5862468, \*3, \*4 (6th Cir. Nov. 19, 2012) (not reported) (“This case, like *Chapman*, presents a situation where there are ‘unanswered questions of fact regarding the proper characterization of the actions.’ . . . Hogan was on duty that morning at the courthouse for official business. In fact, the business involved one of Barkovic’s cases. Barkovic argues that Hogan was in the jury room, an area of the courthouse where he could only have been pursuant to his official duties. The record is unclear, however, as to the exact nature of the ‘jury room’ and whether this was a restricted area. Additionally, the two men had previous encounters, all involving official duties rather than personal pursuits. Hogan’s anger toward Barkovic stemmed from his role as a police officer. There is evidence that the verbal dispute resulted from Barkovic’s insulting comments to other police officers that morning and that the fight escalated when Hogan felt he needed to ‘defend the dignity of his department.’ Barkovic also claims that Hogan’s status as a police officer emboldened him to assault Barkovic. On the other hand, Hogan argues that he did not assault Barkovic pursuant to a duty given to him by the state. He claims that he did not assert his authority as a police officer, and it is undisputed that Hogan was not in uniform or displaying a badge or a weapon. Hogan, however, also contends in his state immunity defense that he was acting during the course of his employment and within the scope of his authority in accordance with his department’s guidelines and procedures. Thus, as in the *Chapman* case, there is a dispute of fact to be presented to the jury, and summary judgment is inappropriate.”)

***Barkovic v. Hogan***, No. 11–2335, 2012 WL 5862468, \*4, \*5 (6th Cir. Nov. 19, 2012) (not reported) (McKeague, J., dissenting) (“Summary judgment is proper here because even if

Barkovic's version of events be accepted as true, there is insufficient support for the conclusion that Hogan acted under color of state law. The majority pays lip service to the correct standard—a public employee acts under color of state law when he 'exercise[s] power possessed by virtue of state law and made possible only because [he or she] is clothed with the authority of state law.' . . . However, the majority neglects to apply this standard. The majority opinion nowhere explains how Hogan could have been exercising state-given authority when he pushed Barkovic into the doorframe. In *Chapman*, the factfinder could reasonably have concluded that the security officer was exercising state-given power because he was dressed in uniform and engaging in activities bearing a relationship to law enforcement. Hogan, on the other hand, although present in the courthouse pursuant to a subpoena and therefore on official business, was not in uniform and was clearly not acting in a law enforcement capacity or exercising any power possessed by virtue of state law when he shoved Barkovic. The majority notes that it is unclear whether the jury room was a restricted area. So what? The altercation did not occur there; it took place in a public hallway. The majority also notes that Hogan's status as a police officer was relevant to the background relationship between the two men, but this fact is irrelevant to deciding whether Hogan was exercising state-given power when he shoved Barkovic in response to verbal insults. Finally, although Barkovic alleges that Hogan's status as a police officer 'embolden[ed]' him to attack Barkovic, Barkovic cites no record support for this allegation nor any authority for the notion that it is relevant. In the end, the factual disputes in this case are immaterial. Even under Barkovic's version of events, Hogan's actions were not made possible only because of his state-given powers. But for his official status, Hogan could still have pushed Barkovic. In my opinion, the district court properly granted summary judgment on Barkovic's § 1983 claim for excessive force in violation of his Fourth and Fourteenth Amendment rights, and Barkovic was properly left to pursue his state law remedies for assault and battery in state court. I respectfully dissent.")

*Hensley v. Gassman*, 693 F.3d 681, 691, 692 (6th Cir. 2012) ("In the instant case, the Deputies' actions between the time of their arrival and the time Sheila got into the Buick were more than mere police presence and reflect circumstances other courts have found indicative of state action: (1) the Deputies arrived at the Hensley residence with, and at the request of, Gassman; (2) Deputy Scott ordered Hensley Jr., at least once, to move from between the Buick and the tow truck, as Hensley Jr. was attempting to thwart the repossession; (3) the Deputies ignored Hensley Jr.'s demands to leave the property; (4) Deputy Gilbert told Hensley Jr. that Gassman was taking the Buick; and (5) Deputy Scott ignored both Sheila's protest and her explanation and told Sheila that Gassman was still going to take the Buick. . . . The circumstances of this case are somewhat unique because, rather than dissuading Sheila from objecting, the Deputies' conduct prompted her to do so. We need not dwell on these facts, however, because the Deputies concede that Deputy Scott's act of ordering Gassman to tow the Buick to the road, which the Deputies claim was necessary to resolve the situation, was state action. . . . More importantly, although the Deputies do not expressly concede the point, it cannot be reasonably disputed that their conduct of breaking the car window, removing Sheila, and ordering her to remove her belongings from the car was state action. Equally clear is that this conduct was not only active participation, but was instrumental to Gassman's success in completing the repossession. Sheila asserted her right to object not only through words,

but by physically taking control of the Buick. At that point, Gassman’s right to pursue his self-help remedy terminated, and he was required to cease the repossession. . . . Regardless, the Deputies’ subsequent actions, which enabled Gassman to seize the Buick sans Sheila, resolved the stalemate in favor of Gassman—the party neither factually nor legally entitled to the Buick.”)

***Cochran v. Gilliam***, 656 F.3d 300, 307, 308 (6th Cir. 2011) (“[I]n cases where police officers take an active role in a seizure or eviction, they are no longer mere passive observers and courts have held that the officers are not entitled to qualified immunity. . . . This is particularly true when there is neither a specific court order permitting the officers’ conduct nor any exigent circumstance in which the government’s interest would outweigh the individual’s interest in his property. . . . Here, the record contains photos showing at least one of the two Gilliam brothers carrying items out of the house and helping the Landlords load Cochran’s property into a pickup truck. These affirmative acts take the Gilliams beyond the acts of the deputies in *Soldal* who never entered the house or physically moved any of the property. The Gilliams’ actions place them squarely within the Supreme Court’s reaffirmation that a physical seizure of the property constitutes a Fourth Amendment violation. Further, the Gilliams interposed themselves between Cochran and the Landlords to allow the Landlords to take Cochran’s property. The Gilliams allegedly threatened to arrest Cochran if he interfered with the Landlords’ actions, and sent away the state police officer that Cochran had called for assistance. Then, in a scenario similar to that in *Soldal*, Don Gilliam, aware of the possible questionable nature of the removal of Cochran’s belongings, attempted to clarify the situation by calling the county attorney. The Gilliams then even went so far as to buy Cochran’s TV from the Landlords. These acts, taken together, indicate the Gilliams’ presence that day went beyond the constitutionally permissible detached keeping of the peace function and crossed over into a ‘meaningful interference’ with Cochran’s property.”)

***Norris v. Premier Integrity Solutions, Inc.***, 641 F.3d 695, 698 (6th Cir. 2011) (private drug testing corporation acted under color of state law in using “direct observation” method of taking urine samples for analysis where company conducted the tests for the government after the Administrative Office of the Courts had approved company’s policies and methods and “where judges in Kentucky viewed the direct observation testing method as ‘essential.’”).

***Paige v. Coyner***, 614 F.3d 273, 280 (6th Cir. 2010) (“The district court thus erred in applying *Blum* to the instant case and by framing the issue as whether Bunnell Hill’s actions in firing Paige could be fairly attributed to the state. *Blum*’s tests are limited to suits where the private party is the one allegedly responsible for taking the constitutionally impermissible action. Here, Coyner is clearly a state actor because she works on behalf of local government entities, and Paige contends that Coyner violated § 1983 when Coyner called Bunnell Hill and made false statements in retaliation for Paige’s criticism of the proposed interstate project. Paige has therefore properly alleged state action.”)

***Powers v. Hamilton County Public Defender Com’n***, 501 F.3d 592, 613, 614 (6th Cir. 2007) (“Powers alleges that the Public Defender engages in an across-the-board policy or custom of

doing nothing to protect its indigent clients’ constitutional rights not to be jailed as a result of their inability to pay court-ordered fines. Unlike the plaintiff in *Polk County*, Powers does not seek to recover on the basis of the failures of his individual counsel, but on the basis of an alleged agency-wide policy or custom of routinely ignoring the issue of indigency in the context of non-payment of fines. Although we acknowledge that requesting indigency hearings is within a lawyer’s ‘traditional functions,’ the conduct complained of is nonetheless ‘administrative’ in character for the reasons already described: Powers maintains that the Public Defender’s inaction is systemic and therefore carries the imprimatur of administrative approval. . . .He argues that the Public Defender systematically violates class members’ constitutional rights by failing to represent them on the question of indigency. Given the reasoning of *Polk County*, it makes sense to treat this alleged policy or custom as state action for purposes of § 1983. The existence of such a policy, if proven, will show that the adversarial relationship between the State and the Public Defender – upon which the *Polk County* Court relied heavily in determining that the individual public defender there was not a state actor – has broken down such that the Public Defender is serving the State’s interest in exacting punishment, rather than the interests of its clients, or society’s interest in fair judicial proceedings.”).

***Lindsey v. Detroit Entertainment, L.L.C.***, 484 F.3d 824, 830, 831 (6th Cir. 2007) (where security personnel were not licensed by state, detention of plaintiffs could not be attributed to state action)

***Swiecicki v. Delgado***, 463 F.3d 489, 496, 497 (6th Cir. 2006) (“Here, we believe the record establishes that Delgado was a state actor from the beginning of the incident in question because he ‘presented himself as a police officer.’ . . . Our conclusion is based not only on Delgado’s attire, badge, and weapons, but also on the fact that Delgado told Swiecicki that ‘[w]e can either do this the easy way or the hard way.’ . . . Rather than calmly asking Swiecicki to leave the stadium, Delgado, while wearing his uniform and carrying his official weapons, threatened Swiecicki and forcibly removed him from the bleachers. This evidence, combined with the fact that Delgado was hired by Jacobs Field to intervene ‘in cases requiring police action’ suggests that his warning to Swiecicki amounted to a threat of arrest. Delgado apparently believed, moreover, that the incident was one requiring ‘police action’ because he approached Swiecicki before Labrie had a chance to further investigate. In sum, this was more than a case in which a civilian employed by the Indians peaceably ejected an unruly fan from a baseball game – a procedure clearly contemplated by the rules and regulations of Jacobs Field. Delgado, in full police uniform, forcibly removed Swiecicki in the escort position. All of this evidence, when considered together, indicates that Delgado was acting under color of state law at the time he removed Swiecicki from the bleachers.”)

***Durante v. Fairlane Town Center***, 201 F. App’x 338, 2006 WL 2986452, at \*2, \*3 (6th Cir. Oct. 18, 2006) (“The term ‘public function’ is a bit of a misnomer, at least in the context of private actors. As explained by the First Circuit, ‘[i]n order for a private actor to be deemed to have acted under color of state law, it is not enough to show that the private actor performed a public function.’ *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 258 (1st Cir.1994). Rather, the private actor must perform a public function which has traditionally and exclusively been reserved to the State.

*Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). This test is difficult to satisfy. ‘While many functions have been traditionally performed by governments, very few have been exclusively reserved to the State.’ . . . There are instances, however, when the performance of certain functions by a private security officer crosses the line from private action to state action. For example, the Seventh Circuit has held that private police officers licensed to make arrests could be state actors under the public function test. *Payton v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 184 F.3d 623, 627-30 (7th Cir.1999). The key distinction lies in whether the private defendant’s police powers delegated by the State are plenary, or merely police-like. In the latter instance, the private action is not one considered exclusively reserved to the State, and is thus not undertaken under color of law. There is no evidence before us that the FTC security guards were licensed under M.C.L. § 338.1079. The fact that they were security guards does not, in itself, imply that they were licensed – M.C.L. § 338.1079(2) expressly provides that private security guards are not required to be licensed. Durante did not allege that they were so licensed, nor did he take any depositions or seek discovery on this issue. Accordingly, *Romanski* lends Durante no support. Nor does Durante find support elsewhere under federal or state law. First, a plaintiff who argues that a private actor acted under color of state law must offer some historical analysis on whether the power exercised is one that is traditionally the exclusive prerogative of the state. . . . Durante has offered no historical analysis of a merchant’s arrest and transport powers (if any) for criminal trespass under Michigan law. . . . Moreover, even if Durante had offered some historical analysis, he has not shown that the FTC defendants exercised a power exclusively left to the State of Michigan, and delegated to them by the State. Numerous cases decline to find that a private security guard acted under color of state law based on the authority of the common law shopkeeper’s privilege.”).

*Chapman v. Higbee Company*, 319 F.3d 825, 834, 835 (6th Cir. 2003) (en banc) (“Here, the Dillard’s security officer who stopped and searched Chapman was an off-duty sheriff’s deputy, wearing his official sheriff’s department uniform, badge, and sidearm. . . . Moreover, the Dillard’s security officer was obligated to obey Dillard’s policies and regulations while on-duty at the store. Although the state played no part in the promulgation of these policies, their strip searching provision directly implicates the state: ‘Strip searches are prohibited. If you suspect that stolen objects are hidden on [the shopper’s] person, call the police.’ During the incident at issue, the Dillard’s security officer did not represent himself as a police officer, threaten to arrest Chapman, wave his badge or weapon, or establish any contact with the sheriff’s department. He did however initiate a strip search by requiring Chapman to enter a fitting room with the sales manager to inspect her clothing. Because Dillard’s policy mandates police intervention in strip search situations, a reasonable jury could very well find that the initiation of a strip search by an armed, uniformed sheriff’s deputy constituted an act that may fairly be attributed to the state. Additionally, if Chapman did not feel free to leave, as a result of the security officer’s sheriff’s uniform, his badge, or his sidearm, a reasonable jury could find the detention was a tacit arrest and fairly attributable to the state.”).

*Neuens v. City of Columbus*, 303 F.3d 667, 670, 671 (6th Cir. 2003) (“[T]he district court erred when it accepted Bridges’ stipulation that he was acting under color of law and considered only the second prong of § 1983 analysis. Because there is no indication in the record that Defendant-Appellant was acting under color of law at the time of the incident, we also conclude that the district court erred in denying Officer Bridges’ summary judgment motion. . . . The record clearly demonstrates that Bridges was acting in his private capacity on the morning of December 26, 1998. Bridges was not in uniform, he was not driving in a police car, and he did not display a badge to Neuens or anyone else at the Waffle House restaurant. Bridges was not at the Waffle House pursuant to official duties; rather, he was out with his personal friends for social reasons. Neither Bridges nor his friends made any suggestions that Bridges was a police officer. . . . If after its independent review the district court concludes that Bridges did not act under color of state law, we instruct the district court to dismiss the complaint for failure to state a claim upon which relief may granted.”)

*Blair v. Harris*, No. 08-CV-15090, 2010 WL 3805588, at \*6 (E.D. Mich. Sept. 23, 2010) (“Guided by the principles extracted from the foregoing cases, the Court concludes in this case that Plaintiff has failed to establish that Gregory Harris was acting under color of law when he shot Marquise Blair. The only evidence Plaintiff relies upon is that when Harris observed Blair trying to steal his personal vehicle, he yelled, ‘Halt. Stop. Police. It’s a police officer’s van.’ It is undisputed that Harris was off-duty at the time. He was not in his uniform and he did not flash his badge. While it is true that Harris had his gun drawn and pursued Blair as he tried to escape apprehension, the uncontroverted evidence shows that the gun was Harris’s personal handgun, not his service revolver. . . While the shooting of Plaintiff’s decedent is tragic, focusing, as the Court must, on the nature of the defendant officer’s actions and the factual context out of which those actions arose, the Court finds that Harris’s actions do not rise to the level of a constitutional deprivation as they were not taken ‘under color of law.’”)

## SEVENTH CIRCUIT

*DiDonato v. Panatera*, 24 F.4th 1156, 1161-62 (7th Cir. 2022)(“To plead that a defendant acted under color of state law, a § 1983 plaintiff must allege that a defendant’s invocation of state authority in one way or another facilitated or enabled the alleged misconduct. That the defendant is a state employee is not enough. ‘[S]tate officials or employees who act without the cloth of state authority do not subject themselves to § 1983 suits.’ . . . The district court applied these exact principles and determined that DiDonato failed to allege that Panatera acted under color of state law. We reach the same conclusion after taking our own independent look at the allegations in DiDonato’s second amended complaint. . . . DiDonato’s complaint describes behavior that, while abhorrent, was ‘wholly unconnected’ to Panatera’s employment. . . DiDonato and Panatera did not encounter each other as paramedic and patient, but as private persons together in Panatera’s home. Panatera’s ‘actions were those of a private citizen in the course of a purely private social interaction.’ . . Any action or inaction was not under color of state law. Because we agree with the district court that DiDonato failed to allege that Panatera acted under color of state law, we need

not immerse ourselves in any aspect of the court’s reasoning under *DeShaney*. We instead stop on the state action point and AFFIRM the dismissal of DiDonato’s § 1983 claim.”)

***First Midwest Bank Guardian of Estate of LaPorta v. City of Chicago***, 988 F.3d 978, 987 (7th Cir. 2021) (“A *Monell* plaintiff must establish that he suffered a deprivation of a federal right *before* municipal fault, deliberate indifference, and causation come into play. LaPorta’s claim fails at this first step. He did not suffer a deprivation of a right secured by the federal Constitution or laws. It’s undisputed that Kelly was not acting under color of state law when he shot LaPorta. His actions were wholly unconnected to his duties as a Chicago police officer. He was off duty. He shot LaPorta after they spent a night out drinking together and had returned to his home to continue socializing at the end of the evening. Kelly’s actions were those of a private citizen in the course of a purely private social interaction. This was, in short, an act of private violence.”)

***Ferguson v. Cook County Correctional Facility/Cermak***, 836 F. App’x 438, \_\_\_ (7th Cir. 2020) (not reported) ([W]e do not agree with the district court that Ferguson’s claims fail because, having posted his individual bond and having left Cermak (i.e., jail), he was not in custody at the time. Though someone on bail subject to electronic monitoring arguably is not in custody, . . . the events at Mt. Sinai happened before Ferguson was taken home. A deputy sheriff brought a handcuffed Ferguson to and from Mt. Sinai in his cruiser, so Ferguson was in the custody of the Cook County Sheriff’s Department until he was released at his apartment. *See DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

. . . Of course, the mere fact that Ferguson was in custody at the time is not sufficient to expose the Mt. Sinai defendants to § 1983 liability. . . Dismissal was still proper because they did not act under the color of state law. . . Private actors do not expose themselves to suit under § 1983 simply by being involved in the involuntary commitment process, although a private actor may function as a state actor if compelled by the state to commit a mentally ill patient or if contracted by the state to provide detainees with medical care. . . Here, the allegations do not support an inference that Mt. Sinai had to admit Ferguson. Illinois law does not force a receiving institution to commit a patient; instead, medical professionals must conduct an independent examination and release a patient who, in their judgment, does not require commitment. . . Additionally, Ferguson’s complaint makes clear that Balawender had Ferguson sent to Mt. Sinai under the civil-commitment laws because he was *not* a detainee anymore, so Mt. Sinai was not acting as a contractor for detainee healthcare.”)

***Harnishfeger v. United States***, 943 F.3d 1105, 1120 (7th Cir. 2019) (“The defendants argue that *Knutson* does not control here, not because the Indiana Army National Guard is materially different from the Wisconsin Air National Guard, but because Harnishfeger was a member of a federal program when Kopczynski demanded her removal. The proper focus, however, is not on the target of the action but on the actor. . . The defense argument implies that any public or private VISTA sponsor (the Indianapolis Public Schools or a local Boys and Girls Club, for example) becomes a federal agent whenever it hosts a VISTA volunteer, a view we find untenable. The

defense points out that Harnishfeger's VISTA position was federally funded and subject in part to federal guidelines. But both factors were present in *Knutson* as well, see *id.* at 767 ("the federal government provides salaries, benefits, and supplies to full-time Guard officers and technicians"), 768 ("Wisconsin adopts and [defendant] opts to utilize federal substantive and procedural rules"), and that did not 'alter the state-law character' of the Wisconsin Air National Guard's actions. . . In demanding Harnishfeger's removal from her VISTA placement, Lieutenant Colonel Kopczynski was a Guard officer exercising her supervisory authority over the Guard's Family Program Office for the Guard's benefit and in furtherance of the Guard's mission. That was action under color of state law, so § 1983 offers a remedy.")

***Martin v. Milwaukee County***, 904 F.3d 544, 554-57 (7th Cir. 2018) ("Generally, scope of employment is a fact issue. . . But, as the district court here correctly noted, when the facts are undisputed, and all reasonable inferences therefrom lead to but one conclusion, judgment as a matter of law is appropriate and required. 'Wisconsin courts have stated that it is proper to decide the scope of employment issue on a motion for summary judgment as long as the underlying facts are not in dispute and reasonable inferences leading to conflicting results cannot be drawn from the undisputed facts.' . . Courts have phrased the scope test for § 895.46 in slightly different but compatible ways. We distill the test to its essence. An act *is not* in the scope unless it is a natural, not disconnected and not extraordinary, part or incident of the services contemplated. An act *is not* in the scope if it is different in kind from that authorized, far beyond the authorized time or space, or too little actuated by a purpose to serve the employer. But an act *is* in the scope if it is so closely connected with the employment objectives, and so fairly and reasonably incidental to them, that it may be regarded as a method, even if improper, of carrying out the employment objectives. We must consider the employee's intent and purpose, in light of subjective and objective circumstances. Here, we may take it as granted that the sexual assaults occurred during the authorized time and space limits of Thicklen's employment (although there may be some question about whether Thicklen was actually authorized to be in the particular locations of the sexual assaults at the times he perpetrated them). But even when viewing the evidence in the light most favorable to Martin and the verdict, we hold no reasonable jury could find the sexual assaults were in the scope of his employment. No reasonable jury could conclude the sexual assaults were natural, connected, ordinary parts or incidents of contemplated services; were of the same or similar kind of conduct as that Thicklen was employed to perform; or were actuated even to a slight degree by a purpose to serve County. No reasonable jury could conclude the sexual assaults were connected with the employment objectives (much less closely connected) or incidental to them in any way. No reasonable jury could regard the sexual assaults as improper methods of carrying out employment objectives. The evidence negates the verdict. Uncontested evidence at trial demonstrated County thoroughly trained Thicklen not to have sexual contact with inmates. County expressly forbade him from having sexual contact with an inmate under any circumstances, regardless of apparent consent. County's training warned him that such sexual contact violates state law and the Sheriff's Office's mission. County not only instructed him not to rape inmates; it also trained him how to avoid or reject any opportunity or invitation to engage in any sort of sexual encounter with inmates. . . .Martin failed to offer any evidence the sexual assaults were

natural, connected, ordinary parts or incidents of the services contemplated. She presented no evidence from which a reasonable jury could conclude these sexual assaults were similar to guarding inmates. And she presented no evidence from which a reasonable jury could conclude the sexual assaults were actuated in any way by a purpose to serve County. . . . This case is distinguishable from cases involving excessive force by police officers. Some force, even deadly force, is sometimes permissible for police officers. But the rapes in this case were not part of a spectrum of conduct that shades into permissible zones. Inmate rape by a guard usually involves no gray areas. . . . We do not hold sexual assault could never be within the scope. We simply conclude that on these facts, even when viewed most favorably to Martin and the verdict, no reasonable jury could find these sexual assaults were within the scope.”)

*Robinett v. City of Indianapolis*, 894 F.3d 876, 881-82 (7th Cir. 2018) (“An employee acts within the scope of his employment when his conduct is ‘of the same general nature as that authorized by the public employer’ or ‘incidental to the conduct authorized by the employer.’ . . . An employee can act under color of state law, meanwhile, even when he ‘misuse[s]’ state power. . . . That is to say, he can be held liable for conduct beyond what ‘the State in fact authorized.’ . . . Our cases underscore the difference between ‘scope of employment’ and ‘under color of state law.’ . . . No doubt there are some cases in which the two standards will align, but for issue-preclusion purposes, it is enough to note that one does not inexorably lead to the other. In short, the statute protects public employees who act within the scope of their employment from having to foot the bill for defense costs in a civil-rights action regardless of the outcome. Win or lose, however, the employee must have been acting within the scope of his employment; a mere allegation to that effect is not enough to put the public employer on the hook for the cost of the defense. Both the statutory text and precedent make this clear. The judge found that Robinett acted as a private person, not a police officer, when he failed to come to Carmack’s aid. Robinett doesn’t contest that determination. Because he was not acting within the scope of his public employment, the City need not shoulder the financial burden of his defense.”)

*Robinett v. City of Indianapolis*, 894 F.3d 876, 884-85 (7th Cir. 2018) (Rovner, J., dissenting) (“That the employee here successfully defended on the ground that he was not acting under color of state law or within the scope of his public employment is irrelevant. What matters is that he was sued as a public employee who ‘**could be**’ subject to liability under a statute that applies only to public employees. His defense, by the way, also benefitted his public employer, who would have been on the hook at least for any compensatory damages and possibly for punitive damages had the plaintiff been successful. Nothing in the statute ranks defenses. Robinett was found not liable because he successfully convinced a court that he was not acting under color of state law, but he well could have been liable. The color-of-law analysis in this case is a closer call than it appears at first glance. Anders went to Robinett not only as a friend but as a person who could identify a police-placed tracking device for what it was. And Robinett responded using knowledge that he likely gained as a police officer, confirming that the device was what Anders suspected it to be. Robinett even directed Anders to place the device back on his car and to leave his former wife (who had a protective order) alone, acts a police officer might well take in the

scope of his employment and under color of state law. Granted, a competent police officer who was fully aware of the situation would also have alerted the department that Anders knew he was being tracked and had the ability to remove the device or otherwise evade detection. In any case, the questions of scope of employment and color of state law required litigation through discovery and all the way to summary judgment in this case, subjecting Robinett to extensive attorney's fees solely because he was a public employee. This is just the type of case the legislature likely meant to cover with its promise of indemnification for fees for its public employees. . . . Robinett's successful defense of this claim benefitted the City of Indianapolis to Robinett's detriment. The record reveals that Robinett held a second job at the local Olive Garden restaurant. Whatever this suggests about the pay scale for Indianapolis police officers, it tells us that Robinett is probably ill-equipped to pay more than \$20,000 in attorney's fees and costs that he incurred defending himself against the civil rights charges leveled against him as a police officer. The plain language of the statute directs the City of Indianapolis to indemnify Robinett for the fees he incurred here. I respectfully dissent.")

*Miller v. Vohne Liche Kennels, Inc.*, 600 F. App'x 475, 477 (7th Cir. 2015) ("It is true that delegating an exclusive public function to a private entity does not absolve a state of its constitutional obligations. See *West v. Atkins*, 487 U.S. 42, 54–55 (1988), *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 824–26 (7th Cir.2009). Yet the activities that have been held to fall within a state's exclusive function are few. See *Terry v. Adams*, 345 U.S. 461 (1953) (administration of elections); *Marsh v. Alabama*, 326 U.S. 501 (1946) (operation of a company town); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974) (eminent domain); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (preemptory challenges in jury selection); *Evans v. Newton*, 382 U.S. 296 (1966) (operation of a municipal park). The fact that a 'private entity performs a function that serves the public does not transform its conduct into state action.' *Wade v. Byles*, 83 F.3d 902, 905 (7th Cir.1996). And while delegation of a state's entire police power to a private entity may turn that entity into a state actor, that is not what happened here. . . Police protection in Plymouth is provided by the Plymouth Police Department. VLK is not authorized by the City or the State of Indiana to engage in police powers akin to those of a Plymouth police officer. True, the Training Board has approved the use of VLK-trained dogs by police officers in Indiana. Training drug-sniffing dogs and their handlers, however, is not an exercise exclusively reserved to the state. . . Thus, because VLK could not have engaged in state action by training the dog, Miller does not have a plausible claim against the companies under § 1983.")

*Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 740–41 (7th Cir. 2015) ("[T]he Archdiocese argues—and the district court found—that the Committee performs a 'public function' making it a governmental actor. Under this test, a private entity is a governmental actor when it is performing an action that is 'traditionally the exclusive prerogative of the State.' . . This test is rarely met. . . The Archdiocese argues that the Committee is basically stepping into the shoes of the Trustee. First, that theory is belied by the fact that the Committee can, and does, conflict with the Trustee. Were they performing the same function, they would presumably be on the same page. Second, the goal and purpose of the committee is to act on behalf of and for the creditors.

Conversely, the goal of the Trustee is to ‘promote the integrity and efficiency of the bankruptcy system for the *benefit of all stakeholders—debtors, creditors, and the public.*’. There is some overlap between their functions—*e.g.*, both engage in restructuring discussions and converse with the court regarding the status of the case and the debtor’s estate—but the traditional function of the governmental entity is to act as an impartial supervisor of the bankruptcy process for the benefit of all. The Committee, however, is far from impartial. The Archdiocese also argues, and the district court found, that a debtor-in-possession performs a public function, and when the Committee obtained derivative standing to pursue avoidance claims, it stepped into the shoes of the debtor-in-possession, thereby becoming a governmental actor. . . The problem for the Archdiocese is that the debtor-in-possession does not perform an action that is ‘*traditionally the exclusive prerogative of the State.*’. . . As the Code makes clear, the ‘trustee’ avoids transfers-not the United States Trustee or any other governmental entity. . . It is not the government or even a governmental actor that traditionally avoids transfers, but rather individual trustees and debtor-in-possession. This is not the exclusive prerogative of the government. . . Although each determination of an entity’s governmental actor status is fact- and case-specific, our conclusion that the Committee is not a governmental actor is supported by the Supreme Court’s precedent. . . . There might be a ‘nexus,’ between the Committee and the government, but it is not a close one. . . For all these reasons, we find the Committee is not acting under the color of law and so RFRA does not apply. Therefore we need not address the Committee’s argument that RFRA’s application here would create federalism issues.”).

***Belbachir v. County of McHenry***, 726 F.3d 975, 978, 979 (7th Cir. 2013) (“Had the contract between the federal government and McHenry County to house aliens suspected of being forbidden to enter or remain in the United States made the county jail a federal instrumentality and its personnel (maybe including Centegra’s employees, though they were not employees of the jail) federal officers, the jail staff would be suable for federal constitutional violations under the doctrine of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), rather than under section 1983. But the contract did not federalize McHenry County Jail, which continued to house nonfederal as well as federal prisoners. Cases similar to this, allowing section 1983 claims by federal prisoners against county or city employees, are legion. [collecting cases] Although Centegra’s employees are not public employees, they rightly do not deny that in performing functions that would otherwise be performed by public employees, they were acting under color of state law and therefore could be sued under section 1983. . . Otherwise state and local government could immunize itself from liability under section 1983 by replacing its employees with independent contractors.”)

***Rice ex rel. Rice v. Correctional Medical Services***, 675 F.3d 650, 671-73 (7th Cir. 2012) (“We have our doubts as to whether the district court was correct in categorizing Cenicerros as a private rather than a state actor. Rice was treated by Cenicerros in fulfillment of the jail’s obligation to provide medical care, including necessary psychiatric care, to Rice as an inmate of the jail. The orders committing Rice to a private facility simply reflect a judicial determination, solicited by Rohrer as the jail’s mental health care provider, that Rice required more intensive psychiatric

treatment than could be provided to him at the jail, and treatment that had to be provided without his consent. And the record suggests that it was not happenstance or judicial fiat that resulted in Oaklawn's selection as the facility to which Rice would be committed on the first two occasions in October 2003 and May 2004 (and as one of the four facilities to which he could have been committed in October 2004). Rather, the facts support the inference that Rice was committed to Oaklawn because of Oaklawn's voluntary, contractual undertaking to provide psychiatric services to the jail's inmates. . . The commitment orders did not alter Rice's status as a pretrial detainee. Because he was incarcerated, the jail had an obligation to address Rice's serious medical needs. . . That obligation included a duty to provide psychiatric care to Rice as needed. . . If Rice had been committed to the state's own facility for treatment by state-employed physicians, there would be no question that those physicians would qualify as state actors who could be liable for any deliberate indifference to his psychiatric needs . . . This would be true whether Rice were committed to a psychiatric unit within the jail . . . or instead transferred to a state-owned facility outside of the jail . . . . That Rice was instead committed to the care of a private psychiatrist—or, in the third instance, was refused care by that psychiatrist—whose employer had contracted to provide psychiatric care to the jail's inmates, arguably does not alter the analysis materially. The Supreme Court has not yet addressed whether medical care provided to a prisoner in a private facility outside of the prison walls constitutes state action. However, in *West*, the Court held that medical care provided on the grounds of the prison by a private physician under contract with the state does constitute state action. . . . Although the court cited the location of the treatment as one factor supporting its conclusion, . . . nothing in its analysis suggests that the result necessarily would have been different had the care been provided at a private facility. . . . Instead, central to the court's analysis was that the care was provided under contract with the prison in fulfillment of the prison's obligation to provide for the inmate's medical needs. That is arguably just as true here as it was in *West*. One might infer that on each of the three occasions when the court ordered Rice's involuntary commitment, Cenicerros and Oaklawn became involved not because the court chose Oaklawn for its own reasons, or because Oaklawn was otherwise obliged to provide psychiatric care to all who sought it, as an emergency room might be, . . . but rather because Oaklawn had voluntarily agreed to provide inpatient psychiatric care to the jail's inmates when needed. . . . Had it been possible for Rice to receive inpatient care from Cenicerros on the premises of the jail, there would be no question that Cenicerros would qualify as a state actor under both *West* and *Rodriguez*. And the district court's focus on the court-ordered nature of Rice's commitments implicitly presumes that had Rice been accepted for admission at Oaklawn in the absence of such an order, the same might be true. . . The court viewed the judicial commitment orders as superseding Oaklawn's voluntary assumption of the jail's duty to provide psychiatric care to its inmates. But the record suggests that the orders had much more to do with overruling Rice's will than with Oaklawn's willingness to treat Rice on its premises. . . . On these facts, a factfinder might conclude that Oaklawn and Cenicerros were not dragooned into treating Rice as a result of the court's commitment orders, but rather had voluntarily assumed that role by virtue of Oaklawn's contract with the jail. . . We need not ultimately resolve Cenicerros' status, however, because as we discuss later in this opinion, we conclude that the facts do not support a finding of deliberate indifference on Cenicerros' part. We have voiced our doubts about the district court's conclusion that Cenicerros

was not a state actor because that is the sole basis on which the district court resolved the Estate’s claim against Cenicerros and because, given the widespread practice of outsourcing jail and prison medical services to private contractors, it is certain that this issue will recur. We do not consider what we have said here to be binding, but we do wish any future court’s exploration of this issue to take into consideration the circumstances we have highlighted as relevant to the state-actor determination.”)

*Javier v. City of Milwaukee*, 670 F.3d 823, 831, 832 (7th Cir. 2012) (“[T]he key question in the Javiers’ statutory claim against the City was whether Glover was acting as a vigilante for his own purposes or as a police officer when he shot Prado. . . Glover’s inquest testimony suggested that he pursued and shot Prado pursuant to his off-duty responsibilities under the ‘always on duty’ rule because Prado had tried to run him over and appeared to point a gun at him. The City challenged Glover’s version of events, noting its inconsistency with other evidence and arguing that the shooting was part and parcel of a purely personal dispute. But because the jury had to decide whether Glover used excessive force under color of law *and* whether his actions were within the scope of his employment, there was a great risk that jurors would conflate the two. . . . The City conveyed the incorrect impression that because Glover had been criminally charged, he could not have been acting within the scope of his employment. The two are not mutually exclusive. Without an instruction telling the jury that the law is precisely the opposite—that Glover’s conduct could be criminal, excessive, and outside his authority and still be within the scope of his employment—the jury was missing a critical ‘relevant legal principle[ ]’ and was likely ‘confuse[d] or mis[led].’ . . The jury needed to hear *from the court* that the scope-of-employment concept recognizes that an officer can exceed or abuse his authority—even intentionally or criminally—and still be acting within the scope of his employment. The judge should not have refused the Javiers’ proposed limiting instruction or their modified scope-of-employment instruction.”)

*Wilson v. Price*, 624 F.3d 389, 392-95 (7th Cir. 2010) (City alderman’s actions in savagely beating employee of automobile repair shop until he was unconscious and suffered broken jaw, after employee refused to move illegally parked cars for which alderman had received complaints from his constituents and refused to find owner of shop upon alderman’s request, were not made “under color of state law,” within meaning of § 1983 , providing civil action against state official or employee for deprivation of federally guaranteed right, even assuming that alderman was at shop conducting legislative investigation in accordance with Illinois law, since alderman crossed line from legislative role that was within scope of his aldermanic duties and entered realm of law enforcement that was wholly unrelated to his legislative duties upon demanding that employee move cars.)

*Lewis v. Downey*, 581 F.3d 467, 471 n.3 (7th Cir. 2009) (“An interesting question not presented by either party is the applicability of § 1983 to employees of a local correctional facility that is housing federal inmates under contract between the federal and local governments. *See* 18 U.S.C. § 4002. A county employee caring for federal prisoners arguably becomes a *federal* actor, rather than the requisite *state* actor, rendering § 1983 inapplicable. . .Because it is not currently before

us, we reserve our answer to the question for another day. We doubt, however, that the contractual relationship does anything to change the status of county jail employees as *state* actors. *Cf. Logue v. United States*, 412 U.S. 521, 528-32 (1973) (declining, for purposes of federal government liability under the Federal Tort Claims Act, to characterize as federal employees county jailers who were caring for federal prisoners).”).

***Rodriguez v. Plymouth Ambulance Service***, 577 F.3d 816, 826, 827, 830 (7th Cir. 2009) (“The situation before us today is not identical to the one before the Court in *West*. However, in applying *West*, our focus must be on the particular *function* of the medical care provider in the fulfillment of the state’s obligation to provide health care to incarcerated persons. . . . When a party enters into a contractual relationship with the state penal institution to provide specific medical services to inmates, it is undertaking freely, and for consideration, responsibility for a specific portion of the state’s overall obligation to provide medical care for incarcerated persons. In such a circumstance, the provider has assumed freely the same liability as the state. Similarly, when a person accepts employment with a private entity that contracts with the state, he understands that he is accepting the responsibility to perform his duties in conformity with the Constitution. . . . We cannot tell, on the face of the complaint alone, the relationship of Plymouth, and through it, the EMTs, to the prison system or to Mr. Rodriguez. *West* requires that this trilateral relationship be analyzed in order to determine whether their actions fairly can be attributed to the state.”).

***Johnson v. LaRabida Children’s Hospital***, 372 F.3d 894, 897 (7th Cir. 2004) (privately employed special police officer not entrusted with full powers possessed by the police does not act under color of state law).

***Byrne v. City of Chicago***, No. 19 C 1383, 2019 WL 6609297, at \*3 (N.D. Ill. Dec. 5, 2019) (“As noted, the complaint alleges in the alternative that Schuler, while in his apartment, either encouraged his girlfriend Byrne to shoot herself with his gun or himself shot her. Because neither action related in any way to the performance of a police duty, Schuler is not alleged to have acted under color of state law. . . . Even if Schuler was technically on duty that evening, even if Byrne was shot with Schuler’s CPD-issued service weapon, and even if Byrne knew that Schuler was a CPD officer, governing precedent holds that the dispositive question is whether Schuler’s conduct ‘related in some way to the performance of the duties of [his] office.’ . . . Neither of Schuler’s alleged actions—encouraging Byrne after a night of drinking to shoot herself in the face, or shooting Byrne himself—bore any relationship to the performance of his police duties. Schuler accordingly was not acting under color of state law.”)

***Pindak v. Dart***, 125 F.Supp.3d 720, (N.D. Ill. 2015) (“In sum, despite the various factual disputes—regarding the meaning of the Post Orders, the appearance of the guards’ uniforms, and the relationship between the guards and the deputies—the fact that the Plaza is a public forum by itself requires the conclusion that the guards act under color of state law when deciding whether or not to remove panhandlers from the Plaza.”)

***Pindak v. Cook County***, No. 10 C 6237, 2013 WL 1222038, \*5 (N.D. Ill. Mar. 25, 2013) (“The court agrees with Plaintiff that the alleged regulation of his speech in a public forum is a public function. Plaintiff has adequately asserted that Securitas officers were regulating his speech when they interfered with his peaceful panhandling because there was no apparent security threat from his conduct. Nothing in the record suggests that Plaintiff’s presence or actions posed a threat to other citizens on Daley Plaza. When Securitas personnel allegedly banned Plaintiff while he was making only non-threatening overtures, they took on the mantle of state actors regulating speech in a public forum. Plaintiff has adequately alleged to survive a motion to dismiss that Securitas is liable pursuant to § 1983 because its officers were performing a public function.”)

***Green v. Wexford Health Sources***, No. 12 C 50130, 2013 WL 139883, \*5, \*6 (N.D. Ill. Jan. 10, 2013) (“The Supreme Court has long recognized that private physicians and nurses who contract with the State to provide medical care to prisoners act ‘under color of law’ for purposes of § 1983. See, e.g., *West v. Atkins*, 487 U.S. 42 (1988); *Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650, 671 (7th Cir.2012). The defendants’ attempt to distinguish this case from *West* based on different contractual terms regarding liability and indemnification is unavailing: ‘[i]t is the physician’s function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State.’ *West*, at 55–56. The Supreme Court did not, in *Minnecci*, explicitly overturn a long line of established law on who may be a § 1983 defendant. See *Winchester v. Marketti*, No. 11 C 9224, 2012 WL 2076375, \*2–3 (N.D.Ill. Jul. 8, 2012) (Zagel, J.). *Minnecci* does not bar the plaintiff’s civil rights claims.”)

***Boyle v. Torres***, 756 F.Supp.2d 983, 994, 995 (N.D. Ill. 2010) (“The UCPD Officers’ argument is bottomed on the assumption that private police or security forces do not exercise full police powers, and thus are not state actors, if they do not perform every function performed by municipal police officers. It is difficult to see how this assumption can be correct. . . . In any event, there can be no question that the UCPD’s role is one that has traditionally been the exclusive prerogative of the state: they carry guns, they wear police uniforms, and they patrol their territory in squad cars; they have the ongoing authority to detain citizens and place them in handcuffs; they have the authority to demand that individuals furnish them with ID. When the ensemble of the officers’ powers and functions is kept in view, there can be no doubt that they are state actors.”)

## **EIGHTH CIRCUIT**

***Doe v. North Homes, Inc.***, 11 F.4th 633, 637-39 (8th Cir. 2021) (“The power to decide to incarcerate a person rests with the state. . . . And so, only the state can decide to delegate that power. . . . Even so, we can see how that conclusion may seem at odds with *Richardson v. McKnight*’s statement: ‘correctional functions have never been exclusively public.’ . . . But *Richardson* expressly limited its scope to § 1983 immunity, not § 1983 liability. . . . And, in upholding a qualified-immunity denial, *Richardson* expressly left the state-actor question for the district court to decide. . . . While one circuit saw *Richardson* as dispositive on the public-function question, others did not. [citing cases] Against that legal landscape and through the *Iqbal* standard,

we sift the facts alleged here. Doe alleged that North Homes cared for juveniles whose liberties the state (counties) decided to restrict. She also alleged that the state (agencies) agreed to empower North Homes to run two units, through which North Homes could deprive residents of their liberties. And she alleged that the state (legislature, agencies, and courts) gave North Homes the power to detain residents in a correctional facility whenever it wanted and for whatever reason it saw fit. While conceding Doe's inability to leave the DOC unit, North Homes could not tell us *why* she could not leave (i.e., whose authority kept her there). True, involuntary commitment may not amount to a public function . . . but Doe's complaint did not rest on the involuntary character of her commitment. . . Instead, she alleged that North Homes moved her to, and detained her in, a *corrections* unit, where the alleged abuse occurred. . . She also alleged that North Homes later detained her in the *corrections* unit to punish and silence her efforts to report abuse. Construing the complaint in her favor, we conclude that Doe plausibly alleged that North Homes's exercise of a public function (the state's authority to detain her) caused her involuntary detention in a *corrections* unit. As a result, we disagree with the decision to dismiss Doe's § 1983 claims at the pleading stage.")

*Doe v. North Homes, Inc.*, 11 F.4th 633, 639-41 (8th Cir. 2021) (Gruender, J., dissenting) ("To state a claim under § 1983, a plaintiff must allege facts sufficient to show that the defendant acted under color of state law and that the defendant's conduct violated a federally protected right. . . Only the first element is at issue here. Although '§ 1983 excludes from its reach merely private conduct,' . . . 'a private entity can qualify as a state actor,' triggering § 1983 liability, 'in a few limited circumstances[.] . . One such circumstance is 'when the private entity performs a traditional, exclusive public function.' . . The private party must be performing a function that was 'traditionally the *exclusive* prerogative of the State.' . . The court concludes that Doe alleged facts sufficient to show that North Homes qualifies as a state actor under the public-function test. I disagree. Although the court alludes to several functions, it never identifies one that is both 'the *exclusive* prerogative of the State,' . . . and a function that Doe alleged North Homes was performing when she suffered the abuse. . . . [I]nvoluntary detention is not a function that Doe alleged North Homes was performing when she suffered the abuse. On the contrary, the complaint indicated that Doe's foster mother and Kanabec County enrolled Doe in North Homes. . . And in any event, involuntary detention is not an exclusive public function. . . . So, what *does* the court think transformed North Homes into a state actor for § 1983 purposes? The court stresses Doe's allegation that the abuse occurred after she was transferred to a unit in the corrections facility due to behavioral issues. . . But the location where North Homes housed Doe does not change the fact that North Homes was neither incarcerating her as punishment for a crime nor detaining her 'involuntarily' in the relevant sense. . . If involuntary criminal confinement is likely not an exclusive public function . . . and involuntary *civil* confinement is definitely not an exclusive public function, . . . then it is difficult to see why *voluntary civil* confinement should nonetheless qualify as an exclusive public function simply because it occurs in a unit licensed by the state department of corrections. Thus, I agree with the district court that Doe did not allege facts sufficient to show that North Homes qualified as a state actor under the public-function test.

I also agree with the district court that Doe did not allege facts sufficient to show that North Homes qualified as a state actor under the joint-action test. . . . To survive a motion to dismiss, a plaintiff ‘must allege, at the very least, that there was a mutual understanding, or a meeting of the minds, between the private party and the state actor.’ . . . Further, the plaintiff must allege a ‘close nexus not merely between the state and the private party, but between the state and the alleged deprivation itself.’ . . . After carefully reviewing Doe’s complaint, the district court concluded that it fell short of this demanding standard. After doing the same, I agree. For the foregoing reasons, I would affirm the district court’s dismissal of Doe’s complaint. Accordingly, I respectfully dissent.”)

***Campbell v. Reisch***, 986 F.3d 822, 827-28 (8th Cir. 2021) (“In short, we think Reisch’s Twitter account is more akin to a campaign newsletter than to anything else, and so it’s Reisch’s prerogative to select her audience and present her page as she sees fit. She did not intend her Twitter page ‘to be like a public park, where anyone is welcome to enter and say whatever they want.’ . . . Reisch’s own First Amendment right to craft her campaign materials necessarily trumps Campbell’s desire to convey a message on her Twitter page that she does not wish to convey. . . . even if that message does not compete for room as it would, say, in a campaign newsletter. While Reisch’s posts open up an interactive space where Twitter users may speak, that doesn’t mean that Reisch cannot control who gets to speak or what gets posted. It’s her page to manage as she likes. Though Campbell and others may not like how Reisch runs her page, ‘the place to register that disagreement is at the polls,’ . . . or, at least, on Campbell’s own page. We therefore reverse and remand for the district court to enter judgment in Reisch’s favor.”)

***Campbell v. Reisch***, 986 F.3d 822, 828-31 (8th Cir. 2021) (Kelly, J., dissenting) (“Missouri State Representative Cheri Toalson Reisch appeals the district court’s adverse judgment that she violated Mike Campbell’s First Amendment rights by blocking him from her Twitter account. Because I believe Reisch was acting under color of state law when she blocked Campbell, I respectfully dissent. . . . Under 42 U.S.C. § 1983, ‘a public employee acts under color of state law while acting in [her] official capacity or while exercising [her] responsibilities pursuant to state law.’ . . . Here, the court’s determination that Reisch was not acting under color of state law rests on its finding that Reisch used her Twitter account mainly to ‘position herself for more electoral success down the road.’ In my view, this finding is neither supported by the record nor dispositive of the state-action inquiry. . . . On this record, and given the focus of the ‘under color of state law’ inquiry on the ‘actual or purport[ed]’ relationship between Reisch’s conduct and her official duties, . . . I cannot conclude that Reisch used her Twitter account primarily for campaign purposes, let alone that she made such a showing by a preponderance of the evidence. Instead, evidence that Reisch blocked Campbell ‘to suppress speech critical of [her] conduct of official duties or fitness for public office,’ . . . strengthens the inference that her conduct was attributable to the state. . . . Just as public officials ‘may not preclude persons from participating’ in the public-comment portion of a town hall meeting ‘based on their viewpoints,’ . . . Reisch cannot block users from her Twitter account because she dislikes their opinions. But this is precisely what Reisch did. The weight of the evidence, including Reisch’s own testimony at trial and during her deposition, shows

that Reisch blocked Campbell (and others) because she thought he shared the view of Missouri State Representatives Bruce Franks and Kip Kendrick that she engaged in ‘unacceptable’ behavior as a public official. Because Reisch, acting under color of state law, was ‘impermissibly motivated by a desire to suppress a particular point of view’ when she blocked Campbell, . . . I believe she discriminated against Campbell based on his viewpoint, thereby violating the First Amendment. For these reasons, I would affirm the district court’s judgment.”)

***Johnson v. Phillips***, 664 F.3d 232, 239, 240 (8th Cir. 2011) (“Phillips contends that he did not commit a constitutional violation because he was not acting under color of law at the time of the alleged sexual assault. In his view, once he removed Johnson’s handcuffs, everything that followed—the conversation about homeless shelters, the drive to a second location, and the assault itself—occurred while he was acting in his capacity as a civilian, not as a city official. . . . Here, Phillips first effected a traffic stop, arrested Johnson on an outstanding warrant, and searched her car. Then, while wearing a police uniform and operating a police car, he released Johnson from the patrol car and directed her to follow him in her car. A reasonable factfinder believing these facts could conclude that Phillips was purporting to act as a police officer performing official duties when he led Johnson to the empty parking lot and committed the sexual assault. The district court thus properly rejected Phillips’s motion to dismiss this claim.”)

***Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.***, 509 F.3d 406, 423 (8th Cir. 2007) (In this case, the state effectively gave InnerChange its 24- hour power to incarcerate, treat, and discipline inmates. InnerChange teachers and counselors are authorized to issue inmate disciplinary reports, and progressive discipline is effectuated in concert with the DOC. Prison Fellowship and InnerChange acted jointly with the DOC and can be classified as state actors under § 1983 .”).

***Wickersham v. City of Columbia***, 481 F.3d 591, 598, 599 (8th Cir. 2007) (To be sure, the mere invocation of state legal procedures, including police assistance, does not convert a private party into a state actor. . . . The contributions of the Columbia police go beyond the kind of neutral assistance that would normally be offered to private citizens in enforcing the law of trespass. . . . When a private entity has acted jointly and intentionally with the police pursuant to a ‘customary plan,’ it is proper to hold that entity accountable for the actions which it helped bring about. . . . Since Salute and the city were knowingly and pervasively entangled in the enforcement of the challenged speech restrictions, we conclude that Salute was a state actor when it interfered with appellees’ expressive activities. The district court did therefore not err in holding that Salute’s curtailment of appellees’ freedom of expression constituted state action and was actionable under § 1983.”).

***Moore v. Carpenter***, 404 F.3d 1043, 1046 (8th Cir. 2005) (When a police officer is involved in a private party’s repossession of property, there is no state action if the officer merely keeps the peace, but there is state action if the officer affirmatively intervenes to aid the reposessor enough that the repossession would not have occurred without the officer’s help. . . .”).

## NINTH CIRCUIT

*Pasadena Republican Club v. Western Justice Center*, 985 F.3d 1161, 1171-72 (9th Cir. 2021) (“In all, WJC and its agents were not state actors for purposes of the Club’s § 1983 claims. The Club fails to allege that the City has ‘undertaken a complex and deeply intertwined process’ with WJC to discriminate against the Club by canceling its speaking event. . . The Club also fails to allege that the City ‘has so deeply insinuated itself into this process that [WJC’s] conduct constituted state action.’ . . . When the City executed the Lease, it was not delegating final policy-making authority on political speaking events in the City; it was simply conveying a property interest—the right of occupancy—in the premises. WJC maintained the authority to decide who, when, for what reason, and for how long a visitor could occupy the premises during nonbusiness hours. Therefore, when WJC executed—and rescinded—the rental agreement with the Club, WJC was exercising its discretionary authority on its own behalf as the holder of a possessory interest in the Property. WJC was not exercising any ‘policymaking authority for a particular city function’ on behalf of the City. . . And, of course, there is no claim that renting out event space during nonbusiness hours is a ‘traditional, exclusive public function.’ The government does not, without more, become vicariously liable for the discretionary decisions of its lessee. Accordingly, the undisputed facts show that the City did not delegate any final policy-making authority that caused the Club’s alleged constitutional injury.”)

*Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747, 752-54, 757 (9th Cir. 2020) (“The specific alleged conduct Rawson challenges includes involuntarily committing him without legal justification, knowingly providing false information to the court, and forcibly injecting him with antipsychotic medications without his consent. . . The relevant inquiry is therefore whether Defendants’ role as custodians, as litigants, or as medical professionals constituted state action. . . . As in *West*, any deprivation effected by Defendants here was in some sense caused by the State’s exercise of its right, pursuant to both its police powers and *parens patriae* powers, to deprive Rawson of his liberty for an extended period of involuntary civil commitment. . . . In that sense, Defendants were ‘clothed with the authority of state law’ when they detained and forcibly treated Rawson beyond the initial 72-hour emergency evaluation period. . . Thus, under *West*, if Defendants ‘misused [their] power by demonstrating deliberate indifference to’ Rawson’s rights to liberty, refusal of treatment, and/or due process, ‘the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State’s exercise of its right to’ civilly commit Rawson for purposes of protecting both the public and Rawson himself. . . These facts, in light of *West*, weigh in favor of finding that Defendants acted under color of state law. . . . The Court reasoned in *West* that the State has an Eighth Amendment obligation ‘to provide adequate medical care to those whom it has incarcerated,’ and that the State employs private contract physicians, and relies on their professional judgment, to fulfill this obligation. . . Similarly here, the State has a Fourteenth Amendment obligation toward those whom it has ordered involuntarily committed. . . In the now-vacated *Pollard* opinion, where we held that employees of a privately-operated prison acted under color of state law, we rejected the notion that ‘by adding an additional layer, the

government can contract away its constitutional duties’ by having private actors rather than state actors perform some of the work. . . Accordingly, the State’s particular Fourteenth Amendment duties toward persons involuntarily committed weighs toward a finding of state action in this case. . . Defendants also argue that the prosecutor’s role here is analogous to the public defender in *Polk County v. Dodson*, . . . and therefore that the prosecutor is not a state actor when prosecuting commitment petitions. We disagree. The prosecutor here is not advocating for the private interests of the hospital or mental health professionals. Neither the prosecutor’s nor Defendants’ ‘professional and ethical obligation[s] ... set [them] in conflict with the State.’. . Instead, Defendants cooperate with the executive arm of the State to further the *State’s* interest in protecting both the public and the patient. . . Accordingly, the role played by the county prosecutor here, in practice and by statute, supports a finding of state action by the Defendants. . . Although Defendants were nominally private actors, exercised professional medical judgment, and were not statutorily required to petition for additional commitment, . . . on balance, the facts weigh toward a conclusion that they were nevertheless state actors. As in *Jensen*, the State here has ‘undertaken a complex and deeply intertwined process [with private actors] of evaluating and detaining individuals’ for long-term commitments, and therefore, ‘the state has so deeply insinuated itself into this process’ that ‘[the private actors’] conduct constituted state action.’. . Just as *West* found state action with private contract physicians rendering treatment services for prisoners at a state prison, we hold the same under the arrangement the State has devised for involving private actors in long-term involuntary commitments. Defendants were not merely subject to extensive regulation or subsidized by state funds. . . Given the necessity of state imprimatur to continue detention, the affirmative statutory command to render involuntary treatment, the reliance on the State’s police and *parens patriae* powers, the applicable constitutional duties, the extensive involvement of the county prosecutor, and the leasing of their premises from the state hospital, we conclude that ‘a sufficiently close nexus between the state and the private actor’ existed here ‘so that the action of the latter may be fairly treated as that of the State itself.’. . We therefore conclude that Defendants were acting under color of state law with respect to the actions for which Rawson attempts to hold them liable. We reverse the district court’s grant of summary judgment to the contrary and remand for further proceedings.”)

***Hyun Ju Park v. City and County of Honolulu***, 952 F.3d 1136, 1140 (9th Cir. 2020) (“Our circuit has developed a three-part test for determining when a police officer, although not on duty, has acted under color of state law. The officer must have: (1) acted or pretended to act in the performance of his official duties; (2) invoked his status as a law enforcement officer with the purpose and effect of influencing the behavior of others; and (3) engaged in conduct that ‘related in some meaningful way either to the officer’s governmental status or to the performance of his duties.’. . . Park’s claims against Naki and Omoso fail at the first step. The complaint does not plausibly allege that either officer was exercising, or purporting to exercise, his official responsibilities during the events that led to her injuries. Both officers were off-duty and dressed in plain clothes, drinking and socializing at the bar in their capacity as private citizens. They never identified themselves as officers, displayed their badges, or ‘specifically associated’ their actions with their law enforcement duties. . . Thus, even accepting Park’s allegations as true, there is no

sense in which Naki and Omoso performed or purported to perform their official duties on the night in question.”)

*Pistor v. Garcia*, 791 F.3d 1104, 1114-15 (9th Cir. 2015) (“[W]hether the defendants were acting under color of state or tribal law when they seized the gamblers is a necessary inquiry for the purposes of establishing the essential elements of the gamblers’ § 1983 claim . . . . As we have long recognized, ‘actions under section 1983 cannot be maintained in federal court for persons alleging a deprivation of constitutional rights under color of tribal law.’ . . . The tribal defendants can thus be held liable under § 1983 only if they were acting under color of *state*, not tribal, law at the time they seized the gamblers.”)

*Naffe v. Frey*, 789 F.3d 1030, 1036-39 (9th Cir. 2015) (“Although we have never decided if and when a state employee who moonlights as a blogger acts under color of state law, we have considered more generally when the actions of off-duty state employees give rise to § 1983 liability. . . .*Stanewich*, *McDade*, and *Anderson* establish our framework for determining whether Naffe pleaded facts sufficient to support her allegation that Frey acted under color of state law. Under those cases, a state employee who is on duty, or otherwise exercises his official responsibilities in an off-duty encounter, typically acts under color of state law. . . . That is true even if the employee’s offensive actions were illegal or unauthorized. . . . A state employee who is off duty nevertheless acts under color of state law when (1) the employee ‘purport[s] to or pretend[s] to act under color of law,’ *Stanewich*, 92 F.3d at 838; *McDade*, 223 F.3d at 1141, (2) his ‘pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others,’ *Anderson*, 451 F.3d at 1069, and (3) the harm inflicted on plaintiff ‘“related in some meaningful way either to the officer’s governmental status or to the performance of his duties[]”’. . . . On the other hand, a government employee does not act under color of state law when he pursues private goals via private actions. . . . Naffe’s § 1983 claim fails under this framework for several reasons. First, Naffe’s factual allegations do not give rise to the reasonable inference that Frey harmed Naffe while on duty or when ‘exercising his responsibilities pursuant to state law.’ . . . Frey is a county prosecutor whose official responsibilities do not include publicly commenting about conservative politics and current events. . . . Second, Frey’s comments about Naffe are not sufficiently related to his work as a county prosecutor to constitute state action. . . . Third, the facts Naffe pleads do not support her claim that Frey ‘purported or pretended to act under color of [state] law’ when he blogged about her. . . . To the contrary, Frey frequently reminded his readers and followers that, although he worked for Los Angeles County, he blogged and Tweeted only in his personal capacity. . . . And although Frey drew on his experiences as a Deputy District Attorney to inform his blog posts and Tweets, that alone does not transform his private speech into public action. . . . In sum, Naffe seeks to support her allegation of state action by claiming repeatedly that Frey acted ‘[i]n his capacity as a Deputy District Attorney’ when he criticized her online. But she does not allege facts that support this claim. And, as the district court correctly held, a bare claim of state action does not withstand a Rule 12(b)(6) motion.”)

***George v. Edholm***, 752 F.3d 1206, 1216 (9th Cir. 2014) (“To hold Dr. Edholm personally liable as a state actor, George must establish not only that Edholm was induced to act as he did, but also that Edholm intended to assist Freeman and Johnson in obtaining evidence for their investigation. . . We hold only that Edholm’s actions could be attributed to the state, based on our holding that a reasonable jury could conclude that Freeman and Johnson provided false information, encouragement, and active physical assistance to Edholm. We do not reach the different question whether a jury could conclude that Edholm is himself liable under § 1983.”)

***Tsao v. Desert Palace, Inc.***, 698 F.3d 1128, 1140 (9th Cir. 2012) (“Desert Palace’s behavior qualifies as state action under the joint action test thanks to its system of cooperation and interdependence with the LVMPD. First, under the SILA program, some Desert Palace security personnel have the authority, normally reserved to the state, to issue a citation to appear in court for the crime of misdemeanor trespassing. To gain this authority, security guards must take a training course given by the LVMPD. This delegation of authority by the police department, Crumrine explained, helps ‘alleviate some of the manpower concerns of the police’ by relieving them from responding to every claim of trespassing that arises at a casino. Security guards with SILA authority may not arrest a suspect who has an outstanding arrest warrant, so they routinely call the LVMPD’s records department to get information concerning warrants. The citations that security guards issue are no different from those issued by police officers, and failure to respond to them by appearing in court constitutes a separate offense. . . Desert Palace and the state are therefore joint participants in the SILA program, which produces benefits that accrue to both Desert Palace and the LVMPD.”)

***Florer v. Congregation Pidyon Shevuyim***, 639 F.3d 916, 926 (9th Cir. 2011) (“While CPSNA had entered into a contract with DOC to provide religious instruction and guidance to inmates, the contract cannot reasonably be read to require Defendants to provide Florer with a Torah, calendar, or rabbi visit. Defendants are not state actors under the public-function analysis.”)

***Ibrahim v. Department of Homeland Sec.***, 538 F.3d 1250, 1257 (9th Cir. 2008) (“Ibrahim reads our decision in *Cabrera* as making an exception to this rule where, as here, federal officials recruit local police to help enforce federal law. But we created no such exception in *Cabrera*; instead, we reaffirmed the long-standing principle that federal officials can only be liable under section 1983 where there is a ‘sufficiently close nexus between the State and the challenged action of the[federal actors] so that the action of the latter may be fairly treated as that of the State itself.’ . . . California had nothing to do with the federal government’s decision to put Ibrahim on the No-Fly List, nothing to do with the Transportation Security Administration’s Security Directives that told United Air Lines what to do when confronted with a passenger on the No-Fly List, and nothing to do with Bondanella’s decision to order the San Francisco police to detain Ibrahim.”).

***Maggio v. Shelton***, No. 2:14-CV-01682-SI, 2015 WL 5126567, at \*8 (D. Or. Sept. 1, 2015) (“Dr. Anderson. . . is not an emergency room doctor. Based on the facts alleged by Plaintiff, Dr. Anderson had more than an ‘incidental and transitory relationship’ with Plaintiff. Indeed, Dr.

Anderson agreed to provide medical care to Plaintiff, a state prisoner. As alleged by Plaintiff, Dr. Anderson treats many prisoners who are referred to him by ODOC. Plaintiff saw Dr. Anderson on four separate occasions: once for the initial referral, again for the surgery, again for the pin removal, and once again after Plaintiff complained about pain lasting for months after the procedure. The fact that Plaintiff was sent back to Dr. Anderson by TRCI staff on multiple occasions, even after Plaintiff complained about the medical treatment he received from Dr. Anderson, suggests that Dr. Anderson ‘voluntarily’ . . . accepted TRCI’s delegation of its duty to provide Plaintiff’s medical care. Considering the relationship between TRCI, ODOC, Plaintiff, and Dr. Anderson, the Court concludes that Plaintiff sufficiently alleges that Dr. Anderson effectively engaged in a public function by providing medical care to Plaintiff, a person involuntarily in the custody of the state.”)

*Guzman-Martinez v. Corrections Corp. of America*, No. CV–11–02390–PHX–NVW, 2012 WL 5907081, at \*10-\*12 (D. Ariz. Nov. 26, 2012) (“It is undisputed that CCA operates the Center under a contract with the City, which transfers to CCA the City’s obligations and benefits obtained through a contract with ICE. It also is undisputed that operating a prison traditionally is a governmental function and private operators of a state prison generally are considered as acting under color of state law. [collecting cases] However, it is disputed whether CCA and its employees ‘exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’ . . . Whether the CCA operates the immigration detention center under color of state law or under color of federal law is determinative because, ‘by its very terms, § 1983 precludes liability in federal government actors.’ . . . The CCA Defendants contend they were not state actors because Plaintiff was in ICE custody at the time of the alleged incidents, detention of aliens is exclusively within federal authority, and CCA’s authority derived from the federal government. Plaintiff contends that ‘CCA Defendants are state actors by virtue of CCA’s contractual relationship with [the City of] Eloy.’ The specific conduct complained of is: (1) CCA’s and DeRosa’s failure to implement policies and practices to prevent assault, sexual assault, and abuse of transgender immigrant detainees by detainees and guards and failure to appropriately monitor and supervise detention conditions of transgender immigrant detainees and (2) Mohn’s and Adams’ failure to adequately evaluate the risk to Plaintiff as a transgender woman detainee and failure to properly classify and place Plaintiff in safe housing with adequate supervision. Even if the specific conduct complained of deprived Plaintiff of a constitutional right, Plaintiff was detained at the Center by ICE under federal law, not by the City under state law. Adopting policies and practices regarding ICE detention of immigrants is ‘both traditionally and exclusively governmental,’ . . . but it is traditionally the ‘exclusive prerogative’ of federal government, not state government. . . . CCA’s authority and obligation to adopt policies and practices regarding the classification, housing, monitoring, and supervision of transgender immigrant detainees, if any, is delegated by ICE through contracts with the City. Thus, the public function test is not met under the circumstances alleged here. . . . Under the joint action test, courts consider whether the state has knowingly accepted benefits derived from unconstitutional conduct, thereby becoming interdependent with the private entity and a joint participant in the challenged activity. . . . Without more, governmental funding and extensive regulation do not establish governmental involvement

in the actions of a private entity. . . . To be liable under the joint action test, not only must the private party be a willful participant with the State or its agents in an activity that deprives a plaintiff of her constitutional rights, but also the private party's actions must be 'inextricably intertwined' with those of government. . . . Here, the Amended Complaint does not allege that the state or the City have knowingly accepted benefits derived from unconstitutional conduct or that the City and CCA or its employees acted jointly in the challenged activity. Even if the contract between the City and CCA imposed extensive regulation and provided governmental funding, it would be insufficient to establish joint action. The contract merely acted as a conduit for transferring regulation and funding from ICE to CCA. . . . Under the compulsion test, courts consider whether the coercive influence of the state effectively converts a private action into a state action. . . . The Amended Complaint does not allege that the state or the City coerced CCA or its employees to take any action. . . . Under the nexus test, courts consider whether there is such a close nexus between the state and the challenged action that the action may be fairly treated as that of the state itself. . . . The Amended Complaint does not allege that the challenged action may be fairly treated as that of the state or the City itself. . . . The Amended Complaint does not allege facts sufficient to demonstrate that CCA, DeRosa, Mohn, or Adams deprived Plaintiff of a constitutional right while acting under color of state law. Therefore, Count I fails to state a claim upon which relief can be granted against CCA, DeRosa, Mohn, or Adams.”)

***Beck v. City of Portland, Or.***, No. CV-10-434-HU, 2010 WL 4638892, at \*6, \*7 (D. Or. Nov. 5, 2010) (“These cases, *Huffman*, *Van Ort*, and *Traver*, collectively point to several types of factors relevant to the query of when an off-duty police officer purports or pretends to act pursuant to official authority. First are the indicia of authority such as wearing a uniform, displaying badge, brandishing a weapon, identifying oneself as an officer, issuing commands, or intervening in a dispute. Other considerations may include the officer's role at the time, such as the fact that Gibson was actually hired to perform security under a formal arrangement with the police department. Finally, as explained in *Van Ort*, while mere recognition as a police officer does not turn private acts into acts under color of state law, there are situations where an officer may exert such ‘meaningful, physical control’ over another ‘on the basis of his status as a law enforcement officer’ that the officer's actions may amount to official conduct under color of state law. Sheffer argues that walking down the sidewalk in her neighborhood, outside the jurisdiction where she is employed, off-duty, and out-of-uniform, and stepping into the street in front of a neighbor's car with no allegation that she flashed a badge or identified herself as a police officer in any way, and then motioning for her neighbor to stop, are not actions taken under color of state law. Furthermore, Sheffer argues that, under *Van Ort*, simply because plaintiff knew Sheffer to be a Portland police officer does not transform her actions into actions taken under color of state law. Plaintiff argues that Sheffer acted under pretense of state employment by asserting her state-authorized ability to stop moving vehicles as well as to run license plate searches. . . . Plaintiff argues that it was precisely because Sheffer was ‘cloaked’ in the authority of the state that she had the audacity to walk into a public street and stand in front of a moving vehicle and direct plaintiff to pull over. Although the issue is close, I agree with defendant. As defendant notes, she was off-duty, out of uniform, and not in her jurisdiction. She did not flash a badge. She did not have a weapon. She did not issue an

oral command to stop. She did not identify herself in any way as a police officer. Additionally, her actions were made in the context of what appears to have been a personal dispute between plaintiff and Sheffer. And while plaintiff may have known that Sheffer was a police officer, that alone does not cloak Sheffer's actions with official authority. If that were the test, a police officer's every action would be subject to a federal constitutional claim by any family member, neighbor, friend, etc. based only on the status of being in law enforcement. The caselaw does not support such a standard.")

***Committee for Immigrant Rights of Sonoma County v. County of Sonoma***, No. C 08-4220 RS, 2010 WL 2465030, at \*4 (N.D. Cal. June 11, 2010) ("When a Santa Rosa sheriff's deputy stops, detains, arrests, or jails an individual he or she is cloaked with the authority of state law, regardless of whether an ICE agent requested the action. The officer's uniform, badge, gun, vehicle, are all provided by the state or county, not federal authorities. The power to engage in law enforcement activities comes from the state. Although the Santa Rosa sheriffs may have been working with ICE agents to enforce federal law, they necessarily acted under color of state law.")

***Joseph v. Dillard's, Inc.***, No. CV-08-1478-PHX-NVW, 2009 WL 5185393, at \*13 (D. Ariz. Dec. 24, 2009) ("While the Ninth Circuit appears not to have addressed this specific context, the Fifth Circuit has decided that a private employer of an off-duty police officer does not act under color of law unless the officer 'failed to perform an independent investigation, and that evidence of a proper investigation may include such indicators as an officer's interview of an employee, independent observation of a suspect, and the officer writing his own report.' . . . Plaintiff utterly failed to address this argument in her response. However, the issue may be resolved on the facts and evidence already presented. Plaintiff's section 1983 claim is predicated on Villarreal's actions in taking her to the floor and arresting her for alleged assault. . . . Therefore, the question is whether Villarreal, an undisputed state actor, performed an independent investigation before arresting Plaintiff for assault. The undisputed facts indicate that he did. No Dillard's employees directed or requested Villarreal to arrest Plaintiff for assault. In fact, at no point did any Dillard's employees direct or request Villarreal to investigate or arrest Plaintiff for any crime. The extent of Dillard's involvement in the incident was to inform Villarreal that it wanted Plaintiff to leave the store. Only when Plaintiff was moving toward the exit did Villarreal lunge at and arrest her for alleged assault. Villarreal independently observed Plaintiff's actions and the Phoenix Police Department prepared its own police report after the incident. Because the state conducted its own investigation, Dillard's was not acting under color of law during the incident.").

*See also* ***Pollard v. Geo Group, Inc.***, 629 F.3d 843, 854-58 (9th Cir. 2010), *rev'd on other grounds sub nom*, ***Minneci v. Pollard***, 132 S. Ct. 617 (2012) ("[T]he threshold question presented here is whether the GEO employees can be considered federal agents acting under color of federal law in their professional capacities. We conclude that they can. . . . We note at the outset that the one federal court of appeal to have directly addressed the question – the Fourth Circuit – has held that employees of private corporations operating federal prisons are not federal actors for purposes of *Bivens*. Neither the Supreme Court nor our court has squarely addressed whether employees of

a private corporation operating a prison under contract with the federal government act under color of federal law. That said, we have held that private defendants can be sued under *Bivens* if they engage in federal action. . . . In our view, there is no principled basis to distinguish the activities of the GEO employees in this case from the governmental action identified in *West*. Pollard could seek medical care only from the GEO employees and any other private physicians GEO employed. If those employees demonstrated deliberate indifference to Pollard’s serious medical needs, the resulting deprivation was caused, in the sense relevant for the federal-action inquiry, by the federal government’s exercise of its power to punish Pollard by incarceration and to deny him a venue independent of the federal government to obtain needed medical care. On this point, *West* is clear. . . . The relevant function here is not prison management, but rather incarceration of prisoners, which of course has traditionally been the State’s ‘*exclusive* prerogative.’ . . . Likewise, in the § 1983 context, our sister circuits have routinely recognized that imprisonment is a fundamentally public function, regardless of the entity managing the prison. . . . In accord with *West* and other federal courts of appeal, we hold that there is but one function at issue here: the government’s power to incarcerate those who have been convicted of criminal offenses. We decline to artificially parse that power into its constituent parts – confinement, provision of food and medical care, protection of inmate safety, etc. – as that would ignore that those functions all derive from a single public function that is the sole province of the government: ‘enforcement of state-imposed deprivation of liberty.’ . . . Because that function is ‘traditionally the *exclusive* prerogative of the [government],’ it satisfies the ‘public function’ test under *Rendell-Baker*.”)

## TENTH CIRCUIT

***VDARE Foundation v. City of Colorado Springs***, 11 F.4th 1151, 1168 (10th Cir. 2021) (“In sum, the allegations don’t show that the City ever threatened or ordered the Resort to take any action akin to what the Commission did to distributors in *Bantam Books*. Nor does it allege that the City sent police officers to intimidate anyone as in *Bantam Books*. . . . Likewise, VDARE hasn’t pleaded that the Resort and the City were intertwined through regulatory, administrative, financial, or contractual regimes, such as those discussed in *Blum* and its progeny or in *Gallagher*, which could have given the City direct influence over the Resort. As well, VDARE’s allegations don’t compare to the facts in *R.C. Maxwell*, *Hammerhead*, *X-Men*, or *Penthouse*, cases in which a government official directly communicated with a private third party in an effort to pressure that party to take a specific action. In sum, we agree with the district court that ‘for unconstitutional state action to exist, state law must direct and/or state agencies and officials must commit conduct that directly violates a party’s [F]irst [A]mendment rights.’ . . . The City didn’t engage in such conduct here. Thus, we conclude that VDARE hasn’t plausibly alleged that the Resort’s cancellation of the Conference was state action.”)

***Big Cats of Serenity Springs, Inc., v. Rhodes***, 843 F.3d 853, 870-71 (10th Cir. 2016) (“The district court nonetheless concluded the ‘enlistment of state law enforcement’ was sufficient to hold federal officers liable under § 1983. The court and the government rely on an unpublished district court case from California for support, *Reynoso v. City & County of San Francisco*, No. C 10-

00984 SI, 2012 WL 646232 (N.D. Cal. Feb. 28, 2012). In that case, San Francisco police officers entered the plaintiff's residence to search for drugs. But the court found substantial concerted action by the state and federal officials. 'After the premises was secured, the ATF agents "merely substituted themselves for the agents of the City and County of San Francisco in the break-in of plaintiffs' home and took up the search and seizure initiated by the City and County of San Francisco authorities.'" . . . Because the federal defendants were significant participants in the *state scheme*, those federal defendants' actions could ' "fairly be attributed to the state."' . . . The circumstances here are quite different. The deputies were not actively engaged in pursuing a common law enforcement objective. Nor were they attempting to vindicate any state or county interest. They were only operating under the false assumption that the entry was authorized under federal law and pursuant to court order. In sum, the complaint does not allege the federal and state actors shared an unconstitutional goal. Nor do we find sufficient state cooperation, considering the local deputies' entire involvement consisted of complying with the requests of the APHIS inspectors. More accurately, the federal officials are better seen as acting under color of *federal law*—the AWA—when they instructed the state officials to cut the locks. Because the federal officials did not act under color of state law, the district court erred in denying the government's motion to dismiss the § 1983 claim.")

***Wittner v. Banner Health***, 720 F.3d 770, 774-77, 780 (10th Cir. 2013) ("Plaintiffs' state action theory, as set out in the complaint, hinges entirely on the state statutory scheme allowing seventy-two-hour involuntary mental health holds and NCMC's role thereunder as a 'designated facility.' Plaintiffs contend the state of Colorado transformed the medical facility and its health care employees into state actors by assuming the power to authorize the involuntary commitment of mentally ill persons and delegating that power to designated facilities which the state regulates. In so doing, plaintiffs argue, the state assumed the duty to provide constitutionally adequate medical care for the involuntarily committed patient, and NCMC and its employees acted under color of state law when it contracted to perform the state's obligation of care. . . . Without more, . . . a statutory grant of authority for a short-term involuntary hold in a private hospital does not pass the nexus/compulsion test for turning private action of the hospital or the certifying doctor into state action. . . . Plaintiffs cite to some out-of-circuit district court decisions finding involuntary commitment of the mentally ill to be a public function and thus state action. But this view has been rejected in our circuit. . . . Using public function reasoning, some courts have applied *West* to private *prisons*. See *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir.2003) (quoting *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir.1991)). But we and other circuits following *Spencer*, 864 F.2d 1376, have declined to import this 'public function' label onto short-term involuntary mental health holds in private *hospitals*. See *Harvey*, 949 F.2d at 1131; *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254 (1st Cir.1994). *West* anticipated *Brentwood's* focus on all relevant quantitative and qualitative facts by supplementing its public function reasoning with joint action and symbiotic relationship analyses, finding it relevant that contracted doctors were not given unfettered discretion but were required to cooperate with state prison personnel. . . . But that does not help plaintiffs because the facts alleged here do not create a close question under any of the four tests.")

*Phillips v. Tiona*, No. 12–1055, 2013 WL 239891, \*12–\*15 (10th Cir. Jan. 23, 2013) (not reported) (“Structurally, CCA is in no way a public entity. It is a private, for-profit, business corporation, listed on the New York Stock Exchange, in the business of, among other things, the private management of prisons and other correctional facilities under contract with all three federal corrections agencies, sixteen states, and local municipalities. It is the fifth-largest corrections system in the nation behind only the federal government and three states. It houses more than 80,000 inmates in more than 60 facilities, 44 of which are company-owned, and it employs nearly 17,000 people. CCA operates three correctional facilities in the State of Colorado, under contract with the State: Bent County Correctional Facility, Crowley County Correctional Facility, and, as relevant here, Kit Carson Correctional Center. The State of Colorado contracts with CCA pursuant to state statute authorizing the CDOC ‘to permanently place state inmates classified as medium custody and below in private prisons,’ Colo.Rev.Stat. § 17–1–104.9, subject to legislation comprehensively regulating such prisons. . . Functionally, private prisons like KCCC only partly mirror prisons operated by the state. . . As indicated above, the State of Colorado remains intimately involved. Private prisons in Colorado must, among other things, ‘abide by operations standards for correctional facilities adopted by the executive director of the department of corrections.’ . . Notably, inmates assigned to private prisons remain officially in the custody of the CDOC, and the CDOC retains sole authority to assign and transfer inmates, make final determinations on disciplinary matters affecting liberty interests, make decisions that affect sentences or time served, including earned time credits, make recommendations to the state board of parole, develop work requirements, and determine eligibility for any form of release from a correctional facility. . . By outsourcing the incarceration of its prisoners, the State relieves itself of significant expenses, from those related to housing prisoners and providing food, medical, dental and other care, plus a full range of programs, to security, and the burden of payroll and state benefits to staff and administrators. In addition the State avoids exposure to the risks and expense of litigation and judgments. CCA personnel have no claim on benefits from the State, and CCA, by statute, indemnifies the State and its employees from all liabilities, including those stemming from civil rights claims; and it must carry insurance to back up that indemnification. . . .The line separating a State-operated prison from one operated by a private corporation is not just cosmetic. There are important differences, creating a material and significant asymmetry. Thus, for instance, whereas the State and its CDOC employees enjoy Eleventh Amendment immunity from damages suits under § 1983 for their official actions, . . . and CDOC employees in their individual capacities enjoy qualified immunity in § 1983 damages actions, CCA and its private prison employees enjoy neither. They are fully exposed to the numerous civil rights suits brought by inmates. . . .On the other hand, unlike federal prisoner suits against government employees, federal prisoners at a privately run federal prison cannot bring a *Bivens* . . . action against the private corporation that manages the prison, or its privately employed personnel working there, when there is a remedy under state tort law. See *Malesko*, 534 U.S. at 72–73; *Minnecci*, 132 S.Ct. at 620. But that prohibition is more than offset by the ability to bring actions for simple negligence—a ground not available, for instance, in an Eighth Amendment claim under § 1983. . . . And, with respect to the application of Title II of the ADA, states *may*, for certain conduct, enjoy sovereign immunity from

ADA suits for money damages where that conduct does not actually violate the Fourteenth Amendment. . . If it is determined that Title II of the ADA applies to them, private prison management corporations will have no such opportunity for protection. Finally, Title II of the ADA does not apply to federal prisoners in federal prisons, including those privately managed by corporations such as CCA. That is so because Title II covers only states and defined appendages thereof. . . Importantly, regulations issued by the Attorney General implementing Title II suggest that states may not avoid the responsibility to provide services to disabled prisoners by contracting away those obligations. Thus, prison assignments should not make a material difference. . . . The remedy for violations of the regulation, and such conditions, is not to sue the jails for breach of contract under a third-party beneficiary theory, or for violations of the ADA, but to sue the state for failing to meet its own obligations under the ADA. . . .Mr. Phillips has not joined the State as a party, so we do not pursue the matter here. The point is, however, that it would be a mistake to assume some stark difference in disability accommodations between Colorado inmates in State-run prisons and those in private facilities operated under contract. . . In any event, while all these considerations bear somewhat on the problem, in the end we are still faced directly with a question of statutory interpretation: Is CCA a public entity? Is it an instrumentality of government in the same sense as a ‘department, agency, or special purpose district’? We think not. In the absence of clarification on the point in the 2008 Amendments to the ADA or any of the regulations issued before or since, we agree with the reasoning of the Second Circuit in *Green* that the proper canon of construction to apply is *noscitur a sociis* (a word is known by the company it keeps), and that ‘instrumentality’ refers to a traditional government unit or one created by a government unit. Accordingly, we join the Eleventh Circuit and the overwhelming majority of other courts that have spoken directly on the issue, and hold that Title II of the ADA does not generally apply to private corporations that operate prisons. In particular, it does not apply to CCA with respect to the management of KCCC. And the complaint fails to state a claim against CCA upon which relief could be granted for an alleged violation of the ADA.”)

***M.S. v. Belen Consol. Sch. Dist.***, No. 15-CV-912-MCA-SCY, 2017 WL 3057662, at \*6 (D.N.M. July 18, 2017) (“Viewing the undisputed facts of this case in the light most favorable to M.S., a jury could reasonably find that Esquibel was acting under color of state law when he sexually abused M.S. Like the teacher in *Doe* who took advantage of his position as a teacher and coach to seduce and sexually abuse a student, Esquibel took advantage of his position as SRO and his affiliation with the Belen Police Department softball team to sexually abuse M.S. . . . In sum, viewing the actions taken by Esquibel that lay the groundwork for the acts of sexual abuse, and the actions taken by Esquibel to hide the abuse, as a continuing course of conduct as did the Courts in *Griffin*, *Doe*, and *Giordano*, a jury could reasonably conclude that Esquibel used his position as the SRO to befriend M.S., to sexually abuse her, and to prevent her from disclosing the abuse. For all of the foregoing reasons, a jury could reasonably conclude that Esquibel’s actions were taken under color of state law.”)

***Baumann v. Federal Reserve Bank of Kansas City***, No. 12-cv-01310-CMA-MEH, 2013 WL 4757264, 1 n.1 (D. Colo. Sept. 3, 2013) (“The parties cite no Tenth Circuit authority, nor is the

Court aware of any, commenting on whether FRLEOs [Federal Reserve Law Enforcement Officers] are governmental actors for purposes of § 1983. In certain contexts, courts have found Federal Reserve Banks and/or their employees to be federal actors or instrumentalities. [collecting cases] However, other courts, particularly in the tort context, have held that Federal Reserve Banks and/or their employees are not governmental actors. [collecting cases] In light of the latter opinions which, as opposed to the former ones, address causes of action reasonably analogous to Plaintiff's § 1983 claim, and given the lack of authority on point in the Tenth Circuit, the Court will refrain from disrupting the parties' agreement that FRLEOs 'are not government employees.'")

## ELEVENTH CIRCUIT

*Charles v. Johnson*, 18 F.4th 686, 697 (11th Cir. 2021) ("When a private citizen steps in to render brief, *ad hoc* assistance to a police officer, *Jackson* and *Lugar* are immediately distinguishable. The citizen clearly does not make use of state processes against his personal enemy, and the state is clearly not reaching out to the citizen to form a partnership. Because no other form of citizen-state collaboration applies, the only thread of precedent that could cover the private citizen's actions is the conspiracy thread. We need not determine what the specifics of the conspiracy must be, because it is clear in this case that there is no evidence of a conspiracy whatsoever. The communication between Leckie and Deputy Thacker consisted only of Leckie asking: 'Sir, can you get a cuff on him?' This is not an agreement between the two, and it is certainly distinguishable from the conspiracies examined by the Supreme Court in *Price* and *Adickes*. The Seventh Circuit reached the same conclusion under similar facts in *Proffitt v. Ridgway*. In *Proffitt*, a police officer accepted a bystander's offer to help restrain an arrestee. . . Our sister circuit held that 'the rendering of brief, *ad hoc* assistance' did not transform a bystander into a state actor. . . We hold that a civilian's rendering of brief, *ad hoc* assistance to a law enforcement officer is not state action, absent proof of a conspiracy to violate the constitutional rights of another. Summary judgment in favor of Leckie was therefore proper.")

*Harper v. Professional Probation Servs. Inc.*, 976 F.3d 1236, 1240 n.5 (11th Cir. 2020) ("As already noted, in the district court PPS didn't contest that it was a state actor for either purpose. To the extent PPS now disputes (however obliquely) that it was a state actor, we hold that it was. Where 'deprivations of rights under the Fourteenth Amendment are alleged,' the under-color-of-law and state-action requirements 'converge.' . . State action includes 'the exercise by a private entity of powers traditionally exclusively reserved to the [s]tate.' . . More specifically, when the government 'delegates adjudicative functions to a private party,' the latter qualifies as a state actor. . . Because as we explain below, PPS was performing delegated judicial functions, it was a state actor for both § 1983 and Fourteenth Amendment purposes.")

*Myers v. Bowman*, 713 F.3d 1319, 1329-31 (11th Cir. 2013) ("A person acts under color of state law when he acts with authority possessed by virtue of his employment with the state . . . or when the manner of his conduct . . . makes clear that he was asserting the authority granted him and not acting in the role of a private person. . . . The dispositive issue is whether the official was acting

pursuant to the power he/she possessed by state authority or acting only as a private individual. . . Our precedents in *Almand* and *Butler* illustrate that an officer cannot be held liable for a constitutional tort when he acts in a private capacity. . . Murry did not act under color of law when he reported to police that someone had stolen his dog because, in reporting the crime, he act[ed] only as a private individual. . . and not in his official capacity or while exercising his responsibilities pursuant to state law. . . . The theft occurred in connection with a private dispute and not a matter that was before Murry in his official capacity as a magistrate judge, and Murry alleged a theft of private property, not any property that belonged to the government. . . The Myers argue that Murry acted under color of law because he reported the theft using his government-issued SouthernLINC communications system, but we disagree. In *Butler*, we held that the corrections official did not act under color of law even though she used the gun and handcuffs she carried while on duty. . . Likewise, Murry did not act under color of law because he used the SouthernLINC communications device. And the SouthernLINC system was not a proprietary technology of the government. Any citizen could have purchased the technology, and Evans testified that ordinary citizens sometimes reported crimes directly to police officers using a SouthernLINC device or cellular phone instead of by calling a police dispatcher. And if Murry did not have a SouthernLINC device, he could have reported the crime using a cellular phone or other device. Thus there is no reason to believe that [Murry] would not have done, or been able to do, what [he] did to [the Myers] without the use of his SouthernLINC radio, and we must conclude that Murry did not act under color of law. . . The Myers also argue that Murry acted under color of law because Miller would not have pursued the Myers outside of his jurisdiction unless he received the instruction from a government official, but this argument fails too. [T]he primary focus of the color of law analysis must be on the conduct of the [defendant], not the victim or a third-party. . . and the record does not support the conclusion that Murry act[ed] pursuant to the power [he] possessed by state authority. . . . Nor was the arrest made possible only because [Murry] [wa]s clothed with the authority of state law. . . Although Murry's position as a magistrate judge affected Miller's decision to pursue the Myers, Evans acted at all times within his jurisdiction, and it was Evans who caused the Myers to stop their vehicle. Evans would have arrested the Myers even if Miller had stopped his vehicle at the city limits. Although Murry instructed Evans to remove Dustin from the vehicle, the record establishes that Evans would have made the arrest even if Murry had not been present at the scene or directed Evans to remove Dustin from the vehicle. Evans had probable cause to arrest the Myers for a felony theft, and Evans approached the truck with his gun drawn and directed Dustin to place his hands outside the vehicle before Murry gave any direction to Evans. By the time Murry instructed Evans to remove Dustin from the vehicle, Evans was already in the process of arresting Dustin. Murry therefore did not invoke his authority as a magistrate judge to cause the arrest of Dustin. Although Murry invoked his authority as a magistrate judge when he threatened Dustin at the scene of the arrest, that threat occurred after police arrested the Myers and fails to create a reasonable inference that Murry acted under color of law when he reported the theft of the dog. . . Murry is entitled to a summary judgment against the claim for false arrest because he did not act under color of law.”)

***Butler v. Sheriff of Palm Beach County***, 685 F.3d 1261, 1267, 1268 (11th Cir. 2012) (“As in *Almand*, Collier’s conduct, or misconduct, was not accomplished because of her status as a corrections officer. Just as ‘any thug or burglar could have committed the same violent acts’ as the officer in *Almand*, 103 F.3d at 1515, any irate mother with an anger management problem could have done what Collier did. . . . This case actually presents a weaker basis for a finding of action under color of state law than the *Almand* case did. Unlike the defendant in that case, Collier did not use her law enforcement position to strike up a relationship with the victim or to initially gain access to the house where the assault took place. It was Collier’s house and she walked in just like any private individual returning home from work. Collier’s discovery of a naked man in her daughter’s closet was not the result of an official search by a law enforcement officer. When Collier punched Butler, she was acting as an enraged parent; she was not purporting to exercise her official authority to subdue a criminal for purposes of an arrest. When she handcuffed and detained Butler, Collier did not purport to be exercising her authority to arrest a criminal. When she called her husband, she was acting as a wife and parent, not as an officer. And when Collier called her place of work, a boot camp facility for minors, for advice about whether Butler could be charged with a crime, she did no more than an ordinary citizen could do by simply requesting information from law enforcement authorities about whether Butler’s conduct was criminal. Although Collier did use the pistol that she wore as an officer, any adult without a felony record can lawfully possess a firearm (and tens of millions do). A law enforcement officer who gets into an after-hours dispute with her domestic partner that tragically escalates into a shooting does not act under color of law merely because the weapon used is the firearm the officer carries on duty. As for the handcuffs, the law does not restrict possession of them to law enforcement officers. In any event, there is no reason to believe that Collier would not have done, or been able to do, what she did to Butler without her handcuffs. They were incidental, not essential, to his detention. . . . If the allegations are true, Collier’s treatment of Butler was badder than old King Kong and meaner than a junkyard dog. She might even have acted like the meanest hunk of woman anybody had ever seen. Still, the fact that the mistreatment was mean does not mean that the mistreatment was under color of law. Because the alleged mistreatment of Butler was not inflicted under color of law, the district court correctly dismissed his § 1983 claims. Butler will have to seek his remedies under state law and in state court.”).

***Carter v. City of Montgomery***, 473 F.Supp.3d 1273, \_\_\_\_ (M.D. Ala. 2020) (“Mr. Kloess . . . contends that he cannot be held liable under § 1983 because public defenders are not state actors. Generally, that argument holds true: ‘a public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.’ *Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981). But a public defender may be a public actor when performing some administrative functions. . . . And legal activities cross the line into administrative functions when they become systemic. A public defender’s systemic inaction ‘carries the imprimatur of administrative approval.’ . . . Ordinary policies may not subject a public defender to liability under § 1983. When, however, a public defender engages across the board in a practice that systemically deprives defendants of their constitutional rights, ‘the adversarial relationship between the State and the Public Defender—upon which the *Polk County* Court relied

heavily in determining that the individual public defender there was not a state actor—has broken down such that the Public Defender is serving the State’s interest in exacting punishment, rather than the interests of its clients, or society’s interest in fair judicial proceedings.’ . . Mr. Carter alleges that kind of breakdown: that Mr. Kloess served the City’s interest rather than his own as part of an unconstitutional a ‘pay-or-stay’ scheme. Mr. Kloess testified that he has requested indigency determinations in the past, but he also testified that he could not name a single defendant for whom he requested such a hearing. . . Whether Mr. Kloess actually sought such hearings is a question of credibility that must go to a jury. . . If a jury chooses not to credit Mr. Kloess’s assertion that he has requested indigency determinations, it could conclude that Mr. Kloess systemically deprived defendants of indigency hearings. Therefore, Mr. Kloess is not entitled to summary judgment on the grounds that he is not a state actor.”)

### C. Statute of Limitations

*Wallace v. Kato*, 127 S. Ct. 1091, 1094, 1095 (2007) (“Section 1983 provides a federal cause of action, but in several respects relevant here federal law looks to the law of the State in which the cause of action arose. This is so for the length of the statute of limitations: It is that which the State provides for personal-injury torts. *Owens v. Okure*, 488 U.S. 235, 249-250, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *Wilson v. Garcia*, 471 U.S. 261, 279-280, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) . . . . While we have never stated so expressly, the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law.”).

*See also Reed v. Goertz*, 995 F.3d 425, 431 (5th Cir. 2021), *pet. for cert. filed*, No. 21-442 (U.S. Sept. 20, 2021) (“‘We determine the accrual date of a § 1983 action by reference to federal law.’ . . Our court has not previously decided when the injury accrues in a denial of post-conviction DNA testing claim. However, we have explained that that the limitations period for a § 1983 claim ‘begins to run “the moment the plaintiff becomes aware the he has suffered an injury or has sufficient information to know that he has been injured.”’ . . The question in this case is when Reed had sufficient information to know of his alleged injury. Reed alleges that he was denied access to the physical evidence that he wished to test. An injury accrues when a plaintiff *first* becomes aware, or should have become aware, that his right has been violated. . . Here, Reed first became aware that his right to access that evidence was allegedly being violated when the trial court denied his Chapter 64 motion in November 2014. Reed had the necessary information to know that his rights were allegedly being violated as soon as the trial court denied his motion for post-conviction relief. Moreover, Reed did not need to wait until he had appealed the trial court’s decision to bring his § 1983 claim. The Supreme Court has emphasized ‘that § 1983 contains no judicially imposed exhaustion requirement; absent some other bar to the suit, a claim is either cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed.’ . . Reed could have brought his claim the moment the trial court denied his Chapter 64 motion because there was a ‘complete and present cause of action’ at that time. . . Because Reed knew or should have known of his alleged injury in November 2014, five years before he brought his § 1983 claim, his claim is time-barred.”); *Dibrell v. City of Knoxville, Tennessee*, 984 F.3d 1156, 1161-63 (6th

Cir. 2021) (“Dibrell’s false-arrest-and-imprisonment claim and his malicious-prosecution claim are thus specific versions of a general unreasonable-seizure claim alleging the same *constitutional* theory: that the officers seized (and continued to seize) Dibrell without probable cause (or even reasonable suspicion for the initial temporary stop). *Manuel*, 137 S. Ct. at 918; *compare Tlapanco v. Elges*, 969 F.3d 638, 654 n.3 (6th Cir. 2020), *with id.* at 658–60 (Thapar, J., concurring). Yet § 1983 sometimes adopts different *statutory* rules to govern the portion of a detention that preceded legal process (for which the torts of false arrest and false imprisonment might offer the best analogy) as compared to the portion that succeeded it (for which the tort of malicious prosecution might offer the best analogy). *Wallace*, 549 U.S. at 389–90. Here, for example, the officers raised a statute-of-limitations defense to Dibrell’s false-arrest-and-imprisonment claim but only a merits defense to his malicious-prosecution claim. We address each defense in turn. . . . In this § 1983 context, the Court has started its accrual analysis with the standard rule: that a claim accrues when the plaintiff has a complete cause of action. . . . Our § 1983 caselaw, by contrast, has started the accrual analysis with the competing discovery rule: that the claim accrues when the plaintiff knows of, or should have known of, that cause of action. *See King v. Harwood*, 852 F.3d 568, 578 (6th Cir. 2017); *Johnson*, 777 F.3d at 843. Do our cases imbibing this ‘bad wine’ warrant reconsideration in light of the Supreme Court’s recent teachings? We need not resolve this tension now because Dibrell’s claims would be untimely either way. If the standard rule were to apply here, the limitations period for a claim involving a false arrest and imprisonment would ‘commence to run’ from the date of the wrongful arrest because the plaintiff has a complete cause of action at that point. . . . And if the discovery rule were to apply, Dibrell’s knowledge that he had been arrested (allegedly wrongfully) would start the clock on the same date. Either approach thus would have triggered the statute of limitations on February 17, 2014. But the Court has not ended with the standard rule in this § 1983 context. Rather, it has proceeded to look to the accrual rules for the tort most like the constitutional claim at issue. [citing *McDonough*] In *Wallace*, moreover, the Court made clear that the torts of false arrest and false imprisonment have special accrual rules. . . . These torts, which again challenge a detention without legal process, accrue at the earlier of two dates. . . . They accrue when the false *imprisonment* ends with the plaintiff’s release. . . . Or, if the plaintiff remains detained, they alternatively accrue when the *false* imprisonment ends with the issuance of legal process—when, for example, the plaintiff is brought before a magistrate. . . . ‘From that point on,’ a plaintiff relying on the law of torts to challenge any continuing detention must assert a malicious-prosecution claim. . . . Dibrell’s claim is untimely under these rules. His detention ended on February 18, 2014, when he was released on bond, so the limitations period likely started then. . . . Dibrell makes no claim that the bond requirements imposed as a condition of his release qualified as a continuing ‘detention’ for statute-of-limitations purposes, so we need not consider that theory. . . . And regardless, his bond hearing likely triggered *Wallace*’s alternative accrual rule tied to the issuance of legal process. . . . At the latest, this ‘legal process’ issued when he was indicted in April 2015. . . . Whether measured from the date of his bond hearing or the date of his indictment, the one-year statute of limitations had long run when Dibrell sued in September 2018.”); *Lockett v. County of Los Angeles*, 977 F.3d 737, 740-42 (9th Cir. 2020) (“Federal courts borrow from state law to determine any applicable statute of limitations for § 1983 claims, including tolling provisions. . . . In this case, while Lockett filed his *Monell* claim against the

County two years and five months after his arrest by the deputies—outside of the two-year statute of limitations—his attempted murder charge was pending for eight months. Consequently, his claim against the County may proceed if § 945.3 tolled his civil action while he was in custody. To answer whether § 945.3 governs, we look to whether Lockett’s *Monell* claim is ‘based upon conduct of the peace officer relating to the offense for which the accused is charged.’ Cal Gov’t Code § 945.3. . . . While the County correctly argues that *Monell* liability is limited to the ‘acts of the municipality,’ . . . the peace officer’s conduct still constitutes an *element* of a *Monell* claim. Under this understanding of the law, it is clear that the officers’ conduct is the ‘but for’ cause of Lockett’s *Monell* claim. Here, Lockett alleges that two deputies severely kicked, punched, and beat him with a baton during his arrest in violation of his right to be free from excessive force—a constitutional violation. In turn, Lockett’s *Monell* claim alleges that the County of Los Angeles allowed the proliferation of racially motivated gangs or cliques among Sheriff’s deputies, including the two deputies involved in his case, which resulted in the constitutional violation he suffered. To succeed on the latter, Lockett must prove the former. Accordingly, the deputies’ conduct necessarily lies at the heart of Lockett’s *Monell* claim, *Heller*, 475 U.S. at 799, and his *Monell* claim is ‘based upon conduct of the peace officer[s]’ within the meaning of § 945.3. His claim was, thus, tolled while his attempted murder charge was pending.”); ***Randall v. City of Philadelphia Law Dep’t***, 919 F.3d 196, 199 (3d Cir. 2019) (“Here, even after Pennsylvania dropped the charges against Randall, he remained detained. He argues that this detention was part of a continuing practice by the defendants. So, he says, his limitations period did not begin to run until his release on December 24, 2015. If that is right, then his suit was timely. . . . But the continuing-violation doctrine focuses on continuing *acts*, not *effects*. . . In other words, the doctrine relies on a *defendant’s* continuing acts, not a *plaintiff’s* continuing injury. Here, New Jersey and Delaware County detained Randall past August 2015. But New Jersey and Delaware County are not defendants. No *defendant* detained Randall beyond August 2015. Nor does it matter that Randall’s arrest and prosecution were but-for causes of his continued detention in New Jersey and Delaware County. Continued detention was an *effect* of his Philadelphia arrest and prosecution, not an *act* (or omission in the face of a duty to act) by any defendant. And he has not alleged that the defendants somehow enrolled New Jersey or Delaware County as their agents in detaining him. So that detention did not trigger the continuing-violation doctrine. To be clear, our holding is about the timeliness of Randall’s case, not its merits. For the continuing-violation doctrine is a timeliness rule, not a merits rule. His continued detention could be relevant to liability or damages; we need not decide that. But it has no bearing on his suit’s timeliness.”); ***Battle v. Ledford***, 912 F.3d 708, 715-20 (4th Cir. 2019) (“Virginia law provides an elaborate administrative grievance process for prisoner complaints. Exhaustion of this remedy involves at least three levels of review. . . A prisoner has 30 days to submit a formal grievance, and corrections administrators are then given another 180 days to resolve the grievance. . . Given this structure, Virginia’s no-tolling rule, as applied to prisoners seeking to bring § 1983 claims, frustrates the goals of § 1983 and is thus clearly ‘inconsistent’ with settled federal policy. . . First, application of the no-tolling rule would frustrate the purpose of compensating prisoners who have sustained constitutional injuries. Under Virginia regulations — as implemented by state officials — as much as seven months could be subtracted from the period in which a prisoner can file a federal claim. This inevitable and

indeterminate reduction in limitations would be wholly contingent on the efficiency of administrators and the complexity of the case. And as other circuits have noted and common sense suggests, a state’s grievance process may extend beyond the state’s regulatory deadlines. . . . Application of a no-tolling rule here would also fail to serve § 1983’s second primary goal — deterrence. Instead, this rule would enable state officials to shrink a prisoner’s filing window and so limit his opportunity to bring a claim. In this way, a no-tolling rule would even create perverse incentives for prison commissioners to extend regulatory deadlines and for wardens and investigators to stall in their review of individual grievances, for doing so might limit government officials’ legal exposure. . . . In sum, because Virginia’s no-tolling rule is inconsistent with federal law and policy, we cannot apply it here. . . . Notwithstanding this analysis, the officers contend that Virginia’s no-tolling rule necessarily comports with federal policies because a separate federal law — the PLRA — imposes the relevant exhaustion requirement. But by enacting the PLRA, Congress did not endorse such a no-tolling rule or diminish the interests underlying § 1983. To so conclude would be to overread the PLRA’s silence on tolling, misread the PLRA’s purpose, and ignore the text of § 1983 and § 1988. . . . Because we hold that Virginia’s no-tolling rule is inconsistent with § 1983, we must determine a proper remedy. Battle asks that we apply federal equitable tolling principles to account for the time lost during his 83-day mandatory exhaustion period. We agree with Battle (and our sister circuits) that those principles apply during this period. . . . [E]very circuit that has confronted a state no-tolling rule and reached this question has applied federal law to equitably toll § 1983 limitations during the PLRA exhaustion period. [citing cases from seven other circuits] . . . [T]he inquiry here is objective. All a court must do is determine the point of exhaustion and run the limitations period from that date. We therefore reject the officers’ invitation to deviate from the path followed by seven other circuits. Battle’s limitations period must be tolled for the 83 days in which he exhausted his administrative remedies, as he was required to do before bringing suit. This satisfies the goals of § 1983 and the PLRA while also comporting with principles of equity: it gives Battle the benefit of the full limitations period applicable to other litigants, no more and no less. In sum, Battle’s § 1983 complaint is timely; it was filed within two years of the date he exhausted administrative remedies required by the PLRA.”); *Spak v. Phillips*, 857 F.3d 458, 462-66 (2d Cir. 2017) (“The fact that the accrual of Section 1983 claims is analyzed under federal common law, while the merits of those claims are analyzed under the law of the state where the tort occurred, has led to some confusion concerning the standards used to define a ‘favorable termination’ in the malicious prosecution context. This is because a malicious prosecution claim accrues when the underlying prosecution terminates in favor of the accused, *id.*, but ‘favorable termination’ is also a substantive element of a state law tort claim, *see, e.g., Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980). While the same phrase—‘favorable termination’—is used in both the accrual analysis and the merits analysis of a Section 1983 suit, it is analyzed under a different legal standard in each context. When the question before a federal court is at what point a malicious prosecution claim accrued, ‘favorable termination’ is analyzed under federal common law, because the timing of accrual is a question of federal law. *See, e.g., Wallace*, 549 U.S. at 388. When, by contrast, a federal court is analyzing the substantive merits of a plaintiff’s claim, the definition of ‘favorable termination’ is analyzed under state law. . . . What constitutes a ‘favorable termination’ may turn out to be the same in each context,

but not necessarily so. However, even if ‘favorable termination’ in a particular case is unclear as a matter of state law, it can still be conclusively resolved as a matter of claim accrual under federal law. Thus, the fact that a *nolle prosequi* constitutes a favorable termination under Connecticut state law may be relevant to our accrual inquiry, but it is not dispositive. Unless a *nolle* also constitutes a ‘favorable termination’ under federal common law, then Spak’s claim did not accrue for Section 1983 purposes upon entry of the *nolle*. . . . Under Connecticut law, a prosecutor may decline to prosecute a case by entering a *nolle prosequi*. . . . The effect of a *nolle* is to terminate a particular prosecution against the defendant. However, a *nolle prosequi* is not the equivalent of a dismissal of a criminal prosecution with prejudice, because jeopardy does not attach. . . . The statute of limitations on the *nolled* charge continues to run, and the prosecutor may choose to initiate a second prosecution at any time before the limitations period expires. . . . A prosecution can only be reinstated following a *nolle*, however, by the filing of a new charging document and a new arrest. . . . If a new prosecution is not commenced, Connecticut law requires that within thirteen months of the *nolle* ‘all police and court records and records of the state’s or prosecuting attorney’ related to the prosecution be erased. . . . We agree with the district court that as a general matter a *nolle prosequi* constitutes a ‘favorable termination’ for the purpose of determining when a Section 1983 claim accrues. . . . The weight of authority on the common law of malicious prosecution supports this conclusion. . . . We agree with the district court that as a general matter a *nolle prosequi* constitutes a ‘favorable termination’ for the purpose of determining when a Section 1983 claim accrues. . . . The weight of authority on the common law of malicious prosecution supports this conclusion. . . . To be sure, courts and common law authorities state that a *nolle* does not constitute a favorable termination when it is entered for reasons that are ‘not indicative of the defendant’s innocence.’ . . . However, this qualifier is defined narrowly. It generally only includes *nolles* that are caused by the defendant—either by his fleeing the jurisdiction to make himself unavailable for trial or delaying a trial by means of fraud. It also includes any *nolle* entered in exchange for consideration offered by the defendant (*e.g.*, cooperation). . . . Spak disputes this conclusion, and cites our decision in *Murphy v. Lynn* which states that the termination of a prosecution must be ‘conclusive[ ]’ in order to satisfy the favorable termination requirement of a Section 1983 claim. . . . *Murphy* involved a malicious prosecution claim originating in New York, while Spak’s claim accrued in Connecticut, but it is nonetheless relevant because favorable termination for accrual purposes is a matter of federal law which does not vary from state to state. Spak contends that a *nolle prosequi* is not a ‘conclusive’ termination of a prosecution because jeopardy does not attach when a *nolle* is entered and the prosecuting attorney may file new charges against the same defendant for the same criminal act at any time before the statute of limitations on the underlying crime has run. This argument misreads our holding in *Murphy*. It is true that, strictly speaking, a *nolle prosequi* only terminates a specific prosecution by vacating a charging instrument; it does not prevent a prosecutor from re-charging the same defendant for the same criminal conduct at some point in the future. . . . Under the common law, however, a termination of the existing prosecution is sufficient for a malicious prosecution claim to accrue. . . . So long as a particular prosecution has been ‘conclusively’ terminated in favor of the accused, such that the underlying indictment or criminal information has been vacated and cannot be revived, then the plaintiff has a justiciable claim for malicious prosecution. At that point, all of the issues relevant to the claim—

such as malice and lack of probable cause . . . are ripe for adjudication. Nothing in our opinion in *Murphy* can be read to contravene this longstanding common law rule. We are mindful that both our court, *see DiBlasio v. City of New York*, 102 F.3d 654, 658 (2d Cir. 1996), and the Supreme Court have warned against the possibility of parallel civil and criminal litigation arising from the state’s prosecution of the same defendant for the same criminal offense[.] [citing *Heck*] However, we read our precedent and the Supreme Court’s dicta in *Heck v. Humphrey* to counsel only against duplicative litigation on issues of guilt and probable cause arising out of the same accusatory instrument. . . *Heck* and its progeny generally deal with Section 1983 suits that are filed by plaintiffs asserting that a prior criminal conviction is invalid, and seeking to recover damages for the state’s abuse of legal process. Those decisions thus require that the plaintiff demonstrate that the outstanding conviction has been conclusively invalidated in a manner that demonstrates his innocence before he can pursue his civil claim. . . They do not address the type of termination at issue here, in which a plaintiff was never convicted of a criminal offense, but the charges against him were dismissed in a manner that did not preclude future prosecution under a different charging instrument. We do not read those opinions to prevent such a plaintiff from bringing suit on the basis of vacated charges simply because he might be prosecuted again in the future, even successfully. . . Indeed, while it is theoretically possible that a prosecutor could revive a *nolled* case, and obtain a criminal conviction against a defendant who has already received a favorable civil judgment in a malicious prosecution suit, we think that this is highly unlikely to occur in practice. . . Moreover, preventing plaintiffs from bringing suit for malicious prosecution once a *nolle* is entered would be inconsistent with the purpose of Section 1983. . . When the state institutes criminal charges maliciously and without probable cause and requires a defendant to appear before a court and answer those charges, it violates the Fourth Amendment’s guarantee against unlawful seizure. . . The accused is entitled to seek recovery for such a wrongful seizure as soon as the charges are vacated. His day in court should not be delayed merely because the state remains free to bring a similar prosecution in the future. Lastly, Spak’s contention that his claim accrued not upon entry of the *nolle*, but thirteen months later when records of the charges against him were automatically erased pursuant to Connecticut state law, *see* Conn. Gen. Stat. § 54-142a(c)(1), is meritless. Connecticut courts have made clear that the erasure provision Spak cites is a purely administrative measure. . . . Moreover, the erasure of records pertaining to a prosecution does not preclude the prosecuting attorney from filing new charges against the same defendant at some point in the future. . . This statute therefore provides no more ‘conclusive’ bar to future criminal proceedings than the *nolle* itself.”); ***Rapp v. Putman***, 644 F. App’x 621, 626 (6th Cir. 2016) (“The district court erred in identifying the applicable statute of limitations for plaintiff’s Fourth Amendment malicious-prosecution claim. The district court relied on the two-year statute of limitations for state-law malicious prosecution claims, M.C.L. § 600.5805(5). But plaintiff’s malicious-prosecution claim is based on the Fourth Amendment and § 1983, not state law. Ever since *Wilson v. Garcia*, 471 U.S. 261 (1985), courts apply a single statute of limitations for all § 1983 claims arising in a particular state. In Michigan, it is the three-year statute of limitations for personal-injury claims. *Carroll*, 782 F.2d at 44; M.C.L. § 600.5805(10). Thus, the district court should have applied a three-year statute of limitations, not a two-year one. Even under defendants’ preferred accrual date—July 27, 2012, when plaintiff’s conviction was reversed—plaintiff’s

November 11, 2014, complaint was filed within three years of that date. Thus, the district court erred in holding that plaintiff's Fourth Amendment malicious-prosecution claim is time-barred."); *Bradford v. Scherschligt*, 803 F.3d 382, 387-89 (9th Cir. 2015) ("Here, Bradford alleges a violation of his due process rights based on the initiation of criminal charges that were based on allegedly fabricated evidence. The constitutional violation and resultant injury thus began on the date that the State brought charges against Bradford. Yet, unlike *Jackson*, in which the date of vacatur was the date on which the government could no longer use the unlawful evidence against the plaintiff, or *Rosales-Martinez*, in which the date of vacatur was also the date on which all charges were conclusively resolved, Bradford's conviction was vacated in a manner that specifically permitted the pursuit of the same charges against him based on the same evidence. . . The inquiry here is therefore not as simple as merely identifying the onset date of injury. Indeed, the limitations period 'on common-law torts do[es] not always begin on the date that a plaintiff knows or has reason to know of his injury.' . . To determine the proper date of accrual, we look to the common law tort most analogous to Bradford's claim. . . As we have explained, the right at issue in a *Devereaux* claim is the right to 'be free from [criminal] charges' based on a claim of deliberately fabricated evidence. . . In this regard, it is similar to the tort of malicious prosecution, which involves the right to be free from the use of legal process that is motivated by malice and unsupported by probable cause. . . In a recent case, the Fourth Circuit provided a helpful analysis of the accrual rules for malicious prosecution claims. . . There, the Fourth Circuit was tasked with determining when a certain *Brady*-based § 1983 claim had accrued. . . The court first recognized that under *Wallace*, a court evaluates the proper accrual date for a claim by identifying the common law analogue for the § 1983 claim and applying any 'distinctive' accrual rules associated with that common law analogue. . . Likening it to a malicious prosecution claim, the court held that the § 1983 claim had accrued when prosecutors entered a *nolle prosequi* rather than the date on which the court had originally granted the plaintiff a new trial. . . The court noted that a malicious prosecution claim does not accrue until the proceedings against the plaintiff have 'terminated "in such manner that [they] cannot be revived."' . . We find this reasoning persuasive. Setting the accrual date for Bradford's *Devereaux* claim as the date of acquittal is logical. If Bradford's original 1996 trial had resulted in an acquittal, his *Devereaux* claim would have accrued on the date the charges against him were dismissed. . . The analysis is the same in the retrial setting where, as here, the government pursues the same charges based on the same evidence after the vacatur of the original conviction. In this instance, setting the triggering date for the onset of the limitations period as the date of acquittal also makes practical sense. Had Bradford brought his claims immediately after his conviction was vacated, Detective Scherschligt would almost certainly have moved to stay proceedings on the grounds that a retrial was imminent and that a conviction would produce a *Heck* bar against Bradford's claims. . . Thus, Detective Scherschligt would not only not be prejudiced by a delay in reaching the merits, he might well have benefitted from it. We recognize, however, that the result may be different under other factual circumstances. For example, a similar claim could accrue upon vacatur of a conviction if the conviction was set aside in a manner precluding the government from maintaining charges on evidence presented at the initial trial. . . But in this case, Bradford remained subject to the very same charges based on the same evidence, which forms the basis of his claim, until his February 10, 2010, acquittal. His claim

seeking to vindicate his right to be free from those criminal charges based on the allegedly fabricated evidence did not accrue until the charges were fully and finally resolved and could no longer be brought against him. . . We therefore conclude that Bradford filed the underlying action within the three-year statute of limitations period, and it was error to dismiss his deliberate fabrication of evidence claim as time-barred.”); *Woods v. Illinois Dept. of Children and Family Services*, 710 F.3d 762, 768, 769 (7th Cir. 2013) (“To sum up, we reiterate our holding that the limitations period applicable to *all* § 1983 claims brought in Illinois is two years, as provided in 735 ILCS 5/13–202, and this includes § 1983 claims involving allegations of failure to protect from childhood sexual abuse . . . . Woods filed his complaint long after the limitations period had expired, and so it was properly dismissed. His arguments for applying a different limitations period are foreclosed by Supreme Court and circuit precedent, and there is nothing that can be achieved from an evidentiary hearing.”); *Mata v. Anderson*, 635 F.3d 1250, 1252, 1253 (10th Cir. 2011) (“We reject Mr. Mata’s argument that his First Amendment retaliatory-prosecution claim did not accrue until the charges against him were dismissed. We note that a § 1983 malicious prosecution claim, which requires favorable termination as an element, does not accrue until the alleged malicious prosecution terminates in favor of the plaintiff. *Wilkins v. DeReyes*, 528 F.3d 790, 801 n. 6 (10th Cir.2008) (citing *Heck v. Humphrey*, 512 U.S. 477, 484-86 (1994)). Unlike a malicious prosecution claim, however, a First Amendment retaliatory-prosecution claim does not require a favorable termination of the underlying action. . . . Mr. Mata’s First Amendment retaliatory-prosecution claims accrued when he knew or had reason to know of the alleged retaliatory prosecution[.]”).

*See also DePaola v. Clarke*, 884 F.3d 481, 487 (4th Cir. 2018) (“Consistent with these views expressed by our sister circuits, we conclude that a prisoner may allege a continuing violation under Section 1983 by identifying a series of acts or omissions that demonstrate deliberate indifference to a serious, ongoing medical need. The statute of limitations does not begin to run on such a claim for a continuing violation of a prisoner’s Eighth Amendment rights until the date, if any, on which adequate treatment was provided. . . A plaintiff’s claim of a continuing violation may extend back to the time at which the prison officials first learned of the serious medical need and unreasonably failed to act. . . Accordingly, to assert a Section 1983 claim for deliberate indifference under the ‘continuing violation’ doctrine, a plaintiff must (1) identify a series of acts or omissions that demonstrate deliberate indifference to his serious medical need(s); and (2) place one or more of these acts or omissions within the applicable statute of limitations for personal injury. . . Thus, this principle does not apply to claims that are based on ‘discrete acts of unconstitutional conduct,’ or those that fail to identify acts or omissions within the statutory limitation period that are a component of the deliberate indifference claim. . .In the present case, DePaola has alleged a continuing violation of deliberate indifference to his serious mental illnesses. He alleges that he notified VDOC of his mental illnesses during the prison intake process and ‘repeatedly’ sought ‘help’ from officials and medical staff at Red Onion. He asserts that despite this notice to the defendants, and given the ongoing nature of his mental illnesses, the defendants have violated and ‘continue to’ violate his rights by failing to provide any treatment or access to a psychiatrist or a psychologist.”)

**Note:** *Johnson v. Lucent Technologies Inc.*, 653 F.3d 1000, 1007, 1008 & n.6 (9th Cir. 2011) (“We hold that Johnson’s § 1981 retaliation claim is subject to the four-year statute of limitations in § 1658, . . . and not the two-year statute of limitations applicable to personal injury actions pursuant to Cal.Code Civ. Pro. § 335.1. Johnson’s retaliation claim is therefore timely. . . . In so holding, we join the Eleventh and the Seventh Circuits, the only circuits that have had the opportunity to consider the issue. [citing cases]”)

#### **D. No *Respondeat Superior* Liability**

In *Monell v. Dept. of Social Services*, 436 U.S. 658, 690-91 (1978), the Supreme Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), to the extent that *Monroe* had held that local governments could not be sued as “persons” under § 1983. *Monell* holds that local governments may be sued for damages, as well as declaratory and injunctive relief, whenever

the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers. Moreover, . . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s decisionmaking channels.

*Monell* rejects government liability based on the doctrine of *respondeat superior*. Thus, a government body cannot be held liable under § 1983 merely because it employs a tortfeasor. 436 U.S. at 691-92. *But see United States v. Town of Colorado City*, 935 F.3d 804, 808-11 (9th Cir. 2019) (“Colorado City argues that the district court erred by construing the statute as imposing liability on governments for patterns of constitutional violations committed by their officers and agents. It asserts that § 12601 requires the United States to demonstrate that the Towns ‘instituted an official municipal policy’ of violating residents’ constitutional rights. The United States, on the other hand, contends that the statute ‘imposes liability on municipalities for patterns of constitutional violations [that] their law enforcement officers commit, without requiring an additional showing that the municipality’s policy or custom caused those violations.’ This issue—whether § 12601 imposes *respondeat superior* liability<sup>3</sup>—is one of first impression in our circuit. . . Colorado City relies on the premise that, by including ‘pattern or practice’ in § 12601, Congress used ‘language with a well-defined meaning [ ] developed under [*Monell v. Department of Social Services*. . . for municipal liability.’ That contention, however, confuses the relationship between general liability rules in civil rights statutes and the Supreme Court’s decision in *Monell*. ‘[T]he general rule regarding actions under civil rights statutes is that *respondeat superior* applies.’ . . . In *Monell*, the Court carved out an exception to this general rule by holding that a municipality may not be held liable pursuant to 42 U.S.C. § 1983 for the actions of its subordinates. Instead, to establish municipal liability, a plaintiff must show that a local government’s ‘policy or custom’ led to the plaintiff’s injury. . . . In reaching its holding, the Court relied on ‘the language of § 1983,

read against the background of the [statute’s] legislative history.’ . . . Because § 1983 imposes liability only where a state actor, ‘under color of some official policy, “causes” an employee to violate another’s constitutional rights,’ the Court reasoned that Congress did not intend to impose vicarious liability on municipalities ‘solely on the basis of the existence of an employer-employee relationship with a tortfeasor.’ . . . Moreover, in the Civil Rights Act of 1871—the predecessor statute to § 1983—Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.’ . . . *Monell*’s holding remains the exception to the general rule. . . . We have declined to bar *respondeat superior* liability in other contexts. In *Bonner*, for example, we held that *respondeat superior* liability applies to claims pursuant to § 504 of the Rehabilitation Act of 1973 because ‘[t]he application of *respondeat superior* ... [is] entirely consistent with the policy of that statute, which is to eliminate discrimination against the handicapped.’ . . . And, in *Duvall v. County of Kitsap*, we held that *respondeat superior* liability applies to claims brought pursuant to Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132. . . . We likewise decline to extend *Monell*’s holding to claims pursuant to § 12601. . . . First, § 12601, unlike § 1983, does not include the words ‘under color of any law, statute, ordinance, regulation, custom or usage.’ That difference is important because, by including ‘custom’ in § 1983, Congress expressly contemplated imposing liability on actors who violated constitutional rights under an official policy. The absence of that language from § 12601, therefore, suggests that Congress did not intend to limit liability to those acting under an official law or policy. Instead, the plain text of § 12601 shows that any government agent who engages in a pattern or practice of conduct that deprives persons of their constitutional rights violates § 12601. Second, § 12601 does not limit liability to those who ‘cause [citizens or persons] to be subjected’ to a deprivation of their constitutional rights. The *Monell* Court interpreted that language, which appears in § 1983, as imposing liability ‘on a government that, under color of some official policy, “causes” an employee to violate another’s constitutional rights.’ . . . The lack of that causal phrase in § 12601 suggests that Congress did not intend to limit local governments’ liability to situations when ‘the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.’ . . . Taken together, these statutory clues persuade us that Congress intended to allow for *respondeat superior* liability against local governments pursuant to § 12601. In arguing that the statutory text supports its position, Colorado City relies on the fact that the phrase ‘pattern or practice’ appears in both § 1983 and § 12601. That phrase, it claims, ‘refers to the same language necessary to show a “custom” under *Monell*.’ We acknowledge that Congress used ‘pattern or practice’ in both statutes, and are mindful that ‘[a] basic principle of interpretation is that courts ought to interpret similar language in the same way, unless context indicates that they should do otherwise.’ . . . That principle, however, does not necessarily support Colorado City’s argument, for Congress has also used ‘pattern or practice’ literally, rather than as a term of art, in several statutes. . . . Under those statutes, the United States must demonstrate only that the conduct alleged ‘was not an isolated or accidental or peculiar event.’ . . . It need not show the existence of an official policy or custom. For this reason, Congress’s use of ‘pattern or practice’ in § 12601 does not support the weight that Colorado City wishes to place upon it. Congress could have used the phrase to refer to an official policy or custom, as in § 1983, but it also could have used the phrase

to refer to a regular event, as in the statutes cited above. Our interpretation of the statute aligns with our recognition that although ‘[§] 12601 shares important similarities with § 1983[,] .... the language of § 12601 goes even further than § 1983.’. . Had Congress wished to eliminate *respondeat superior* liability under § 12601, it could have easily done so with explicit statutory language. . . Its decision not to do so suggests that it intended for § 12601, like most civil rights statutes, to allow for *respondeat superior* liability. . . . Section 12601 provides a civil cause of action to the United States Attorney General when a local government’s agents ‘engage in a pattern or practice of conduct ... that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.’. . Because the statutory language does not demonstrate that Congress intended to exclude local governments from *respondeat superior* liability, we hold that § 12601 imposes liability based on general agency principles. Accordingly, the district court did not err in its construction of § 12601.”)

The rationale of *Monell* has been mechanically applied to private corporations sued under section 1983. *See, e.g., Greene v. Crawford County, Michigan*, 22 F.4th 593, 617 (6th Cir. 2022) (“We agree with the district court that, ‘[e]ven if [CMH] were considered a municipality for purposes of a *Monell* claim,’ there is no evidence of a ‘policy that resulted in any alleged violation of Mr. Greene’s constitutional right to be free from deliberate indifference.’. . CMH contracted with the Crawford County Jail to provide mental health services. Even if the estate was correct that CMH should have trained its employees to seek medical care for inmates experiencing withdrawal or delirium tremens, it points to no evidence of ‘prior instances of unconstitutional conduct’ involving CMH that would have placed CMH ‘clearly on notice that the training in this particular area was deficient and likely to cause injury.’. . We therefore affirm the grant of summary judgment in favor of CMH.”); *Dean v. Wexford Health Sources, Inc.*, 18 F.4th 214, 235 (7th Cir. 2021) (“*Monell* governs Wexford’s liability in this case because we, like our sister circuits, treat private corporations acting under color of state law as municipalities. *Iskander v. Vill. of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982); *see also Shields v. Ill. Dep’t of Corr.*, 746 F.3d 782, 789–96 (7th Cir. 2014) (tracing the development of the doctrine and questioning its foundations).”); *Harper v. Professional Probation Servs. Inc.*, 976 F.3d 1236, 1244 n.10 (11th Cir. 2020) (“There is one loose end, which the parties haven’t raised on appeal but which is necessary to resolving the plaintiffs’ due-process claim: When suing a corporate entity under § 1983, a plaintiff must show that the entity itself committed or caused the constitutional violation. . . Because § 1983 doesn’t hold employers vicariously liable for the acts of their employees, the plaintiffs here must demonstrate that the unconstitutional actions of PPS’s employees were taken pursuant to a ‘policy or custom ... made ... by those whose edicts or acts may fairly be said to represent official policy.’. . . At the motion-to-dismiss stage, the plaintiffs have alleged a sufficient basis to conclude that PPS’s ‘policy or custom’ caused their injuries. PPS, they say, ‘typically’ (and ‘often’) extended probation sentences from 12 to 24 months and ‘[g]enerally’ added substantive terms of probation. They further contend that PPS’s conduct was part of ‘one central scheme’ that it operated ‘in materially the same manner every day, with every person assigned to PPS.’ And, of course, they assert that PPS subjected each of them to similar constitutional violations on different occasions.”); *Palakovic v. Wetzel*, 854 F.3d 209, 232 (3d

Cir. 2017) (“The Palakovics also asserted a vulnerability to suicide claim against MHM, the corporation providing medical services at SCI Cresson. To state a claim against a private corporation providing medical services under contract with a state prison system, a plaintiff must allege a policy or custom that resulted in the alleged constitutional violations at issue. *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 583–84 (3d Cir. 2003). Therefore, the question is whether the Palakovics sufficiently alleged that MHM had a policy or custom that resulted in a violation of Brandon’s Eighth Amendment rights. . . . The Palakovics alleged that MHM’s policies of understaffing and failing to provide proper treatment resulted in Brandon’s isolation, untreated mental illness, and eventual suicide. At the motion to dismiss stage, these allegations are sufficient to proceed to discovery. Absent discovery, the Palakovics could not possibly have any greater insight into MHM’s exact policies or their impact on Brandon.”); *Pyles v. Fahim*, 771 F.3d 403, 410 n.23 (7th Cir. 2014) (“Although Wexford is a private corporation, we analyze claims against the company as we would a claim of municipal liability.”); *Rouster v. County of Saginaw*, 749 F.3d 437, 453 (6th Cir. 2014) (“Private corporations that ‘perform a traditional state function such as providing medical services to prison inmates may be sued under § 1983 as one acting under color of state law.’ *Street v. Corrections Corp. of Am.*, 102 F.3d 810, 814 (6th Cir.1996) (internal quotation marks omitted). However, private corporations cannot be held liable on the basis of respondeat superior or vicarious liability. *Id.* at 818.”); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (“Every one of our sister circuits to have considered the issue has concluded that the requirements of *Monell* do apply to suits against private entities under § 1983. [collecting cases] Like those circuits, we see no basis in the reasoning underlying *Monell* to distinguish between municipalities and private entities acting under color of state law.”); *Johnson v. Dossey*, 515 F.3d 778, 782 (7th Cir. 2008) (“Like public municipal corporations, they cannot be sued solely on that basis: a ‘private corporation is not vicariously liable under § 1983 for its employees’ deprivations of others’ civil rights.’ . . . However, like a municipality, a private corporation can be liable if the injury alleged is the result of a policy or practice, or liability can be ‘demonstrated indirectly ‘by showing a series of bad acts and inviting the court to infer from them that the policy-making level of government was bound to have noticed what was going on and by failing to do anything must have encouraged or at least condoned ... the misconduct of subordinate officers.’”); *Smedley v. Corrections Corporation of America*, 175 F. App’x 943, 946 (10th Cir. 2005) (“While it is quite clear that *Monell* itself applied to municipal governments and not private entities acting under color of state law, it is now well settled that *Monell* also extends to private defendants sued under § 1983. *See e.g., Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1216 (10th Cir.2003) (collecting circuit court cases). As such, a private actor such as CCA ‘cannot be held liable solely because it employs a tortfeasor – or, in other words ... cannot be held liable under § 1983 on a respondeat superior theory.’ . . . As we understand it, Ms. Smedley appears to argue that because corporations could be held liable under 42 U.S.C. § 1983 both before and after *Monell*, it ‘simply defies logic to state that the traditional liability that existed for corporations prior to’ *Monell* ‘should somehow be abrogated as a result of the Supreme Court extending liability under § 1983 to municipalities where no such liability existed before.’ . . . We disagree. The Tenth Circuit, along with many of our sister circuits, has rejected vicarious liability in a § 1983 case for private actors based upon *Monell*. . . As Ms. Smedley has failed to provide any evidence that CCA

had an official policy that was the ‘direct cause’ of her alleged injuries, summary judgment for CCA was appropriate.”); *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 728 (4th Cir. 1999) (“We have recognized, as has the Second Circuit, that the principles of § 1983 municipal liability articulated in *Monell* and its progeny apply equally to a private corporation that employs special police officers. Specifically, a private corporation is not liable under § 1983 for torts committed by special police officers when such liability is predicated solely upon a theory of respondeat superior.”); *Buckner v. Toro*, 116 F.3d 450, 452 (11th Cir. 1997) (“We conclude that the Supreme Court’s decision in *Wyatt* has not affected our decision in *Howell v. Evans*. The policy or custom requirement is not a type of immunity from liability but is instead an element of a § 1983 claim. Accordingly, we affirm the district court’s finding that the *Monell* policy or custom requirement applies in suits against private entities performing functions traditionally within the exclusive prerogative of the state, such as the provision of medical care to inmates.”).

*See also Stearns v. Inmate Services Corp.*, 957 F.3d 902, 909-10 (8th Cir. 2020) (“Whether, in the end, ISC had policies and customs that caused the conditions of Stearns’s confinement, is a jury question. . . ISC has no express policy for the length of time a prisoner should be kept in transit. However, ISC policies clearly contemplate transports as long as 7 to 10 days. Further, the record, including affidavits by other prisoners transported by ISC, shows that it was well within ISC practice to pick up and drop off prisoners on multi-state journeys such as this one. If ISC is found to have a custom of extending a pretrial detainee’s transport in this way, given the totality of the circumstances present in this case, a jury could reasonably view the extension as causing conditions that are excessive in comparison to the presumed goal of securely transporting Stearns from Colorado to Mississippi. . . Therefore, viewing the totality of the circumstances endured by Stearns, ISC is not entitled to summary judgment as a matter of law.”)

*See also Graening v. Wexford Health Services*, No. CV 1:20-00400, 2021 WL 972278, at \*9–10 (S.D.W. Va. Mar. 15, 2021) (“In *Powell v. Shopco Laurel Co.*, the Fourth Circuit made the limits of *Monell* applicable to private corporations acting under color of state law. . . Thus, to state a claim against a private corporation under § 1983, a plaintiff must plausibly allege that a ‘policy or custom’ of the defendant caused of the unlawful conduct at issue. . . . Plaintiff’s *Monell* allegations are essentially two: (1) Nurse New stated, in the presence of Dr. Garcia, that Wexford was withholding referrals to specialists for all but life-threatening illnesses; (2) as of the time plaintiff filed his complaint, he had been seeking a referral unsuccessfully for over six months despite alarming symptoms. Defendants argue that this is not enough. The court disagrees. It does not matter that New was a low-level employee. Plaintiff is not saying that New came up with this policy, only that his statement reveals its existence. While only one allegation, it is a fairly powerful one. If it is true that New said it, as the court must assume, then it is plausible that Wexford had a policy of wrongfully withholding referrals to inmates. This fact, together with the currently unexplained delay in plaintiff’s case, is sufficient to state a claim under *Monell*.”); *S.K. v. Lutheran Services Florida, Inc.*, No. 217CV691FTM99MRM, 2018 WL 2100122, at \*11-12 (M.D. Fla. May 7, 2018) (“When plaintiff brings a § 1983 claim against a private entity under contract with the State, plaintiff must allege that the violation of rights was the result of an official

policy or custom. . . Plaintiff must identify the policy or custom which caused his injury so that liability will not be based upon an isolated incident, . . . and the policy or custom must be the moving force of the constitutional violation. . . . Contrary to the entity defendant's assertions, the Court finds that plaintiff has sufficiently alleged a policy or custom that was the moving force behind the failure to provide plaintiff and other foster children with adequate dental care. Plaintiff has alleged more than mere isolated incidents as plaintiff states in detail numerous instances where foster children were overdue for dental examinations and put at risk of dental harm . . . . Taking these allegations as true, the Court concludes that S.K. has adequately pled a § 1983 claim against the entity defendants for violating S.K.'s constitutional rights to proper medical treatment and reasonable safety via an official custom or policy.”); **Callaway v. City of Austin**, No. A-15-CV-00103-SS, 2015 WL 4323174, at \*6 n.2 (W.D. Tex. July 14, 2015) (“The Fifth Circuit has yet to adopt this holding, but every circuit that has considered the issue has extended *Monell*'s rejection of respondeat superior liability to private corporations. [collecting cases.]”); **Harris v. Secretary, Dept. of Corrections**, No. 2:12-cv-153-Ftm-29DNF, 2013 WL 6069161, \*7 n.3 (M.D. Fla. Nov. 18, 2013) (“Private contractors that run prisons do act under color of state law for purposes of § 1983 liability. . . Nevertheless, as explained herein, the principle that respondeat superior is not a cognizable theory of liability under § 1983 holds true regardless of whether the entity sued is a state, municipal, or private corporation.”); **Combs v. Leis**, No. 1:12cv347, 2013 WL 781993, \*3 (S.D. Ohio Mar. 1, 2013) (“A private entity which contracts with the state to perform a traditional state function such as providing medical services to prison inmates may be sued under § 1983 as one acting “under color of state law.”. . . However, a private entity cannot be held vicariously liable for the actions of its agents. . . Therefore, a plaintiff must (1) identify a policy or custom; (2) connect the policy or custom to the private entity; and (3) show that executing that policy amounted to deliberate indifference to the plaintiff's illness.”); **Ford v. Wexford Health Sources, Inc.**, No. 12 C 4558, 2013 WL 474494, \*9 (N.D. Ill. Feb. 7, 2013) (“The Court now turns to Ford's official capacity claim against Wexford brought pursuant to *Monell* and its progeny. Wexford, a private corporation contracted by the Illinois Department of Corrections, is subject to a *Monell* claim for Section 1983 liability just as any municipality would be.”); **Green v. Wexford Health Sources**, No. 12 C 50130, 2013 WL 139883, \*11 (N.D. Ill. Jan. 10, 2013) (“In analyzing a section 1983 claim against a private corporation, the court uses the same principles that would be applied in examining claims against a municipality. . . An inmate bringing a claim against a corporate entity for a violation of his constitutional rights must show that the corporation supports a ‘policy that sanctions the maintenance of prison conditions that infringe upon the constitutional rights of the prisoners.’. . . Because liability is not premised upon the theory of vicarious liability, the corporate policy ‘must be the “direct cause” or “moving force” behind the constitutional violation.’. . . In the case at bar, the plaintiff has alleged no facts whatsoever that suggest an inadequate treatment ‘policy’ on the part of Wexford.”); **Jones v. Correctional Medical Services, Inc.**, 845 F.Supp.2d 824, 835 (W.D. Mich. 2012) (“Defendant is correct that CMS cannot be held liable under Section 1983 on a supervisory liability theory. Because CMS was providing medical services to inmates under contract with MDOC, it may properly be sued under Section 1983. *See Hicks v. Frey*, 992 F.2d 1450, 1458 (6th Cir.1993). But the Supreme Court disallowed Section 1983 *respondeat superior* liability in *Monell*. . . . Instead, a government body—or a nongovernmental entity such

as CMS, in this case—can be found liable under Section 1983 where a constitutional wrong arises from execution of that entity's policies or customs.”); *Carrea v. California*, No. EDCV 07-1148-CAS (MAN), 2009 WL 1770130, at \*8 (C.D. Cal. June 18, 2009) (“[P]laintiff cannot pursue Section 1983 claims against the Radiology Group merely because it employed medical personnel who allegedly provided plaintiff with constitutionally inadequate medical care. Rather, plaintiff must allege the elements of municipal liability under *Monell* . . . . The Radiology Group, of course, is not a municipality. While the Ninth Circuit has not addressed whether a private corporation or other entity acting under color of state law should be treated as a municipality for purposes of Section 1983 liability, other circuits, as well as several district courts in the Ninth Circuit, have concluded that a private corporation is liable under Section 1983 only when its official policy or custom causes a deprivation of constitutional rights.”); *Archuleta v. Correctional Healthcare Management, Inc.*, No. 08-cv-02477-REB-BNB, 2009 WL 1292838, at \*2 (D. Colo. May 8, 2009) (“Initially, it should be noted that CHM, having contracted to provide services typically provided by local government, is considered to be the ‘functional equivalent’ of the municipality. See *Buckner v. Toro*, 116 F.3d 450, 452 (11th Cir.), cert. denied, 118 S.Ct. 608 (1997). See also *Powell v. Shopco Laurel Co.*, 678 F.2d 504, 506 (4th Cir.1982); *Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (7th Cir.1982); *Taylor v. Plousis*, 101 F.Supp.2d 255, 263 (D.N.J.2000); *Miller v. City of Philadelphia*, 1996 WL 683827 at \* 8 (E.D.Pa. Nov. 25, 1996). . . For this reason, neither CHM nor any of its employees may be held liable simply on the basis of *respondeat superior*. . . More specifically, to support their claim that CHM’s alleged failure to implement appropriate policies that could have prevented plaintiff’s injuries, ‘plaintiff[s] must demonstrate the [CHM’s] inaction was the result of Adeliberate indifference’ to the rights of its inhabitants.”); *Deese v. City of Jacksonville, Fla.*, No. 3:06-cv-733-J-34HTS, 2008 WL 5158289, at \*15 (M.D. Fla. Dec. 9, 2008) (“When a private entity like [CMS] contracts with a county to provide medical services to inmates, it performs a function traditionally within the exclusive prerogative of the state. . . In so doing, it becomes the functional equivalent of the municipality. . . Thus, the standard applicable for imposing liability in this § 1983 action on the COJ is equally applicable to CMS.”); *Lassoff v. New Jersey*, 414 F.Supp.2d 483, 494, 495 (D.N.J. 2006) (“The Amended Complaint alleges that Bally’s security personnel conspired with Trooper Nepi to deprive him of his constitutional rights. . . In particular, Lassoff asserts that Bally’s security personnel acted in concert with Trooper Nepi, denying Lassoff the assistance of counsel during their joint custodial questioning of Lassoff. . . He further alleges that he was in the custody and control of Bally’s security personnel when Trooper Nepi beat him. . . ‘Although not an agent of the state, a private party who willfully participates in a joint conspiracy with state officials to deprive a person of a constitutional right acts ‘under color of state law’ for purposes of § 1983.’ . . Thus, Defendants Flemming and Denmead do not escape potential liability by virtue of being private security guards. . . Bally’s motion to dismiss, however, requires further analysis. Bally’s, the corporate entity, is not alleged to have acted in concert or conspired with Trooper Nepi. Instead, Lassoff seeks judgment from Bally’s on a vicarious liability theory. Neither the Third Circuit nor the Supreme Court has answered whether a private corporation may be held liable under a theory of *respondeat superior* in § 1983 actions. However, the Supreme Court’s decision in *Monell v. Department of Social Services* provides guidance. . . *Monell* held that municipalities could not be held vicariously liable in § 1983 actions. Extrapolating

the Court's reasoning in that case, other courts, including this one, have ruled that private corporations may not be held vicariously liable. See *Taylor v. Plousis*, 101 F.Supp.2d 255, 263 & n. 4 (D.N.J.2000). . . . The same result should obtain here. Accordingly, the § 1983 claims against Bally's will be dismissed."); *Olivas v. Corrections Corporation of America*, No. Civ.A.4:04-CV-511-BE, 2006 WL 66464, at \*3 (N.D. Tex. Jan. 12, 2006) ("It is appropriate to apply the common law standards that have evolved to determine § 1983 liability for a municipal corporation to a private corporation; thus, a private corporation performing a government function is liable under § 1983 only if three elements are found. . . . The first is the presence of a policymaker who could be held responsible, through actual or constructive knowledge, for enforcing a policy or custom that caused the claimed injury. . . . Second, the corporation must have an official custom or policy which could subject it to § 1983 liability. . . . And third, a claimant must demonstrate that the corporate action was taken with the requisite degree of culpability, and show a direct causal link between the action and the deprivation of federal rights."); *Wall v. Dion*, 257 F. Supp.2d 316, 319 (D. Me. 2003) ("Though, it does not appear to me that the First Circuit has addressed this question head on, Courts of Appeal in other circuits have expressly concluded that when a private entity contracts with a county to provide jail inmates with medical services that entity is performing a function that is traditionally reserved to the state; because they provide services that are municipal in nature the entity is functionally equivalent to a municipality for purposes of 42 U.S.C. § 1983 suits. . . . Following the majority view that equates private contractors with municipalities when providing services traditionally charged to the state, Wall's claims against these movants will only be successful if they were responsible for an unconstitutional municipal custom or policy."); *Mejia v. City of New York*, 119 F. Supp.2d 232, 276 (E.D.N.Y. 2000) (noting that Second Circuit and other circuits have held 'that a private corporation cannot be held liable in the absence of the showing of an official policy, practice, usage, or custom.'").

For a thoughtful and refreshing opinion questioning the application of *Monell* to private corporations, see *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782, 785, 786, 789-92, 795-96 (7th Cir. 2014), cert. denied, 135 S. Ct. 1024 (2015) (Hamilton, J., joined by Posner, J., with Tinder, J., concurring) ("This case illustrates the often arbitrary gaps in the legal remedies under § 1983 for violations of federal constitutional rights. Viewing the evidence through the lens of summary judgment, we can and must assume that Shields is the victim of serious institutional neglect of, and perhaps deliberate indifference to, his serious medical needs. The problem he faces is that the remedial system that has been built upon § 1983 by case law focuses primarily on individual responsibility. Under controlling law, as a practical matter, Shields must come forward with evidence that one or more specific human beings acted with deliberate indifference toward his medical needs. Shields has not been able to do so. The Illinois Department of Corrections and its medical services contractor, Wexford, diffused responsibility for Shields' medical care so widely that Shields has been unable to identify a particular person who was responsible for seeing that he was treated in a timely and appropriate way. Several of the individual defendants employed by Wexford were aware of portions of Shields' course of treatment, but no one person was responsible for ensuring that Shields received the medical attention he needed. No one doctor knew enough that a jury could find that he both appreciated and consciously disregarded Shields' need

for prompt surgery. The problem Shields faces also raises a serious question about how we should evaluate the responsibility of a private corporation like Wexford for violations of constitutional rights. The question is whether a private corporation should be able to take advantage of the holding of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which requires a plaintiff suing a local government under § 1983 to show that the violation of his constitutional rights was caused by a government policy, practice, or custom. Our prior cases hold, but without persuasive explanations, that the *Monell* standard extends from local governments to private corporations. As we explain below, however, that conclusion is not self-evident. We may need to reconsider it if and when we are asked to do so. As state and local governments expand the privatization of government functions, the importance of the question is growing. Given the state of the controlling law, though, we must ultimately affirm the summary judgment for all defendants on the constitutional claims. . . . We consider first the claim against the Wexford corporation itself. The question posed here is how § 1983 should be applied to a private corporation that has contracted to provide essential government services—in this case, health care for prisoners. The answer under controlling precedents of this court is clear. Such a private corporation cannot be held liable under § 1983 unless the constitutional violation was caused by an unconstitutional policy or custom of the corporation itself. *Respondeat superior* liability does not apply to private corporations under § 1983. E.g., *Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (7th Cir.1982). Because Shields has no evidence of an unconstitutional policy or custom of Wexford itself, these precedents doom his claim against the corporation. For reasons we explain below, however, *Iskander* and our cases following it on this point deserve fresh consideration, though it would take a decision by this court sitting en banc or pursuant to Circuit Rule 40(e), or a decision by the Supreme Court to overrule those decisions. We start with the background of § 1983 and the Supreme Court cases relevant to the issue, then turn to circuit court decisions, and finally discuss reasons to question those circuit decisions and adopt a different approach for private corporations. . . . A close look at the reasoning of *Monell* provides no persuasive reason to extend its holding to private corporations. *Monell* gave two reasons for barring *respondeat superior* liability for municipalities under § 1983. First, the Court focused on the language of § 1983, which imposes liability on a person who ‘shall subject, or cause to be subjected,’ any person to a deprivation of Constitutional rights . . . .Second, the Court concluded that the legislative history of the Civil Rights Act of 1871 showed that Congress did not intend to impose *respondeat superior* liability on municipalities. . . . The rejection of *respondeat superior* liability for municipalities in *Monell* has been the subject of extensive analysis and criticism. . . . Perhaps the most important criticism to emerge from this literature is that *Monell* failed to grapple with the fact that *respondeat superior* liability for employers was a settled feature of American law that was familiar to Congress in 1871, when § 1983 was enacted. Congress therefore enacted § 1983 against the backdrop of *respondeat superior* liability, and presumably assumed that courts would apply it in claims against corporations under § 1983. . . .The Court’s reliance on the Sherman Amendment is also problematic. The rejection of the proposal to hold municipalities liable for actions of private citizens it could not control says little about whether a municipality should be held liable for constitutional torts committed by its own employees acting within the scope of their employment. . . . Given these flaws on the surface of its reasoning, *Monell* is probably best understood as simply having crafted a compromise rule that protected the budgets

of local governments from automatic liability for their employees' wrongs, driven by a concern about public budgets and the potential extent of taxpayer liability. Of course, the critiques of *Monell's* rejection of *respondeat superior* liability for municipalities have not yet persuaded the Supreme Court to reconsider that rule. Given our position in the judicial hierarchy, then, we are bound to follow *Monell* as far as municipal liability is concerned. We need not extend that holding, however, to the quite different context of private corporate defendants. [court proceeds to critically examine history, precedent, policy surrounding application of *Monell* to private corporations] For all of these reasons, a new approach may be needed for whether corporations should be insulated from *respondeat superior* liability under § 1983. Since prisons and prison medical services are increasingly being contracted out to private parties, reducing private employers' incentives to prevent their employees from violating inmates' constitutional rights raises serious concerns. Nothing in the Supreme Court's jurisprudence or the relevant circuit court decisions provides a sufficiently compelling reason to disregard the important policy considerations underpinning the doctrine of *respondeat superior*. And in a world of increasingly privatized state services, the doctrine could help to protect people from tortious deprivations of their constitutional rights. . . . The facts in this case are . . . an excellent example of the problems generated by barring *respondeat superior* liability for corporations under § 1983. On the facts before us, it appears that Wexford structured its affairs so that no one person was responsible for Shields' care, making it impossible for him to pin responsibility on an individual. If *respondeat superior* liability were available, Wexford could not escape liability by diffusing responsibility across its employees, and prisoners would be better protected from violations of their constitutional rights. In view of these considerations, we have considered the possibility of circulating an opinion overruling *Iskander* and its progeny on this point for consideration by the entire court under Circuit Rule 40(e). Since Shields has not asked us to overrule those cases and Wexford has not had occasion to brief the issue, we have decided not to take that approach. A petition for rehearing en banc would provide an opportunity for both sides to be heard on this issue, and our decision is of course subject to review on certiorari. For now, this circuit's case law still extends *Monell* from municipalities to private corporations.”).

*But see Howell v. Wexford Health Sources, Inc.*, 987 F.3d 647, 654 (7th Cir. 2021) (“Wexford is not a municipal government. It is a private corporation that contracts with the Illinois Department of Corrections to provide healthcare services that the government is obliged to provide to incarcerated persons. Circuit precedent establishes at this time that private corporations acting under color of law also benefit from *Monell's* rejection of respondeat superior liability for an employee's constitutional violations. See *Shields v. Illinois Dep't of Corrections*, 746 F.3d 782, 786 (7th Cir. 2014) (following precedent but criticizing extension of *Monell* to private corporations). In a case against a private contractor that provides healthcare to incarcerated people, the ‘critical question’ for liability is ‘whether a municipal (or corporate) policy or custom gave rise to the harm (that is, caused it)’. . . . The most important doctrinal elaborations—individual versus official liability, qualified immunity, and *Monell* liability rather than respondeat superior—bear only a tenuous connection to the text of § 1983, let alone to its history. Repair of the creaky doctrinal structure, however, will need to come from the Supreme Court or Congress. For now we

do the best we can, recognizing the challenges that parties face in asserting and defending claims under the statute.”); **Beard v. Wexford Health Sources, Inc.**, 900 F.3d 951, 953 (7th Cir. 2018) (“*Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), holds that a municipal corporation cannot be vicariously liable if its employees deprive others of their civil rights. *Iskander* treats private corporations the same way, when their liability depends on performing governmental functions. Beard maintains that *Monell* should be limited to governmental litigants. But Beard has not explained how *Iskander* harmed him. We asked Beard’s counsel what additional damages he would have sought if Wexford could be found vicariously liable. He did not point to any. So we need not decide whether *Iskander* should be overruled; anything we say about the subject would be advisory.”); **Collins v. Al-Shami**, 851 F.3d 727, 734 (7th Cir. 2017) (“Under existing precedent, neither public nor private entities may be held vicariously liable under § 1983. . . . Though we have recently questioned whether the rule against vicarious liability should indeed apply to private companies, *see Shields v. Ill. Dep’t of Corr.*, 746 F.3d 782, 786, 789–95 (7th Cir. 2014), we again leave that question for another day. Dr. Al-Shami is not liable, so—even if the theory of *respondeat superior* were available—neither is his employer.”); **Perez v. Fenoglio**, 792 F.3d 768, 780 & n.5 (7th Cir. 2015) (“In this circuit, a private corporation cannot be held liable under § 1983 unless it maintained an unconstitutional policy or custom. . . . We recently examined the legal soundness of this rule in *Shields v. Ill. Dep’t of Corr.*, 746 F.3d 782, 789 (7th Cir.2014) (questioning whether the *Monell* principle, which shields municipalities from respondeat superior liability in actions brought under § 1983, is properly extended to private corporations), *cert. denied*, 135 S.Ct. 1024 (2015). However, the parties do not here challenge it.”); **Hahn v. Walsh**, 762 F.3d 617, 638-40 (7th Cir. 2014) (“The plaintiffs submit that they should be able to pursue a claim under § 1983 against HPL for its employees’ misconduct. In their view, we have erred in extending the limitation on municipal liability established in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), to private actors. *Monell* permits suits against municipal entities under § 1983, but only when a governmental policy or custom caused the constitutional deprivation; municipal entities cannot be liable for their employees’ actions under a respondeat superior theory. . . . Our cases have extended this limitation to private entities. . . . The plaintiffs ask us to ‘revisit these holdings’ because they are based on ‘historical misreadings’ and we are ‘free to revisit and reject [our] extension of *Monell* to private corporations.’ . . . As a preliminary matter, the plaintiffs have waived the issue of HPL’s respondeat superior liability because they failed to raise it before the district court. . . . Even if we were to reach the respondeat superior issue, we would not take the position urged by the plaintiffs. The plaintiffs point to no ‘intervening on-point Supreme Court decision’ that would permit us to overrule our prior cases. . . . Our considered decision in *Iskander* is compatible with the holding of every circuit to have addressed the issue. *See Shields v. Illinois Dep’t of Corr.*, 746 F.3d 782, 790 & n. 2 (7th Cir.2014) (collecting cases). Because the issue was waived or, alternatively, because it fails on the merits, we conclude that the plaintiffs’ argument for holding HPL liable on a respondeat superior theory is unavailing.”); **Washington v. Eaton**, No. 3:20-CV-1111(VLB), 2021 WL 3291658, at \*11 (D. Conn. Aug. 2, 2021) (“Strictly speaking, *Monell* dealt with a public employer. However, in the Second Circuit, the principle that public employers are not liable for constitutional torts of their employees under § 1983 has been extended to private employers. . . . In

opposition, Plaintiff provides a five-page block citation of the Seventh Circuit’s decision in *Shields v. Illinois Dep’t of Corr.*, 746 F.3d 782 (7th Cir. 2014), which explained in dicta that it would have applied the doctrine of respondeat superior to the facts of that case. . . Plaintiff argues that neither case cited by the university, *Rojas v. Alexander’s Dep’t Store, Inc.*, 924 F.2d 406 (2d Cir. 1990) and *Wells v. Yale Univ.*, 2011 U.S. Dist. LEXIS 82453 (D. Conn. July 28, 2011), discuss the arguments for limiting *Monell*’s application to private entities that were presented in *Shields*. *Shields* advances a critical, but ultimately unavailing view that *Monell*’s rejection of respondeat superior should be broadly reexamined and should not be extended to private entities. . . Nevertheless, the panel in *Shields* recognized that it was bound by controlling precedent. . . *Shields* acknowledged that every circuit to have considered the issue has extended *Monell* to private entities, shielding employers from vicarious liability. . . Since *Shields* was decided, no circuit has reversed its precedent nor adopted the panel’s reasoning in the first instance. Here, there has been no intervening change in the law by the U.S. Supreme Court. *Rojas v. Alexander’s Dep’t Store, Inc.* remains binding precedent in the Second Circuit. *Rojas* is consistently applied. . . Given the well-settled controlling law in this circuit, the Court dismisses Count Seven of the Complaint without leave to amend.”); *T.S. v. Twentieth Century Fox Television*, No. 16 C 8303, 2017 WL 1425596, at \*7 (N.D. Ill. Apr. 20, 2017) (“In Count V, Plaintiffs allege that the Fox Defendants are liable for their employees’ and agents’ conduct in relation to Plaintiffs’ § 1983 due process claim under the theory of respondeat superior. Plaintiffs base this claim on dicta in the Seventh Circuit’s decision *Shields v. Illinois Dept. of Corr.*, 746 F.3d 782, 789 (7th Cir. 2014), to preserve their argument as an alternative basis for liability in case this dicta becomes law. To clarify, in *Shields*, the Seventh Circuit recognized that under § 1983 a private corporation cannot be held liable based on the employee-employer relationship, namely, respondeat superior, but that this issue deserved ‘fresh consideration’ in the future. *See id.* at 789 (citing *Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982)). The Court thus grants the Fox Defendants’ motion with prejudice.”); *Scheidler v. Metro. Pier & Exposition Auth.*, No. 16-CV-4288, 2017 WL 1022077, at \*3 (N.D. Ill. Mar. 16, 2017) (“First, Plaintiff states that his argument that MPEA ‘is liable for the unconstitutional acts of its private agent, NPI, under the doctrine of *respondeat superior*’ is only an ‘alternative basis for liability.’. . . Plaintiff’s ‘alternative’ argument is that ‘the current law on *respondeat superior* under *Monell* should be modified or reversed \* \* \* so as to apply to a municipality such as MPEA in the context of a § 1983 claim.’. Plaintiff’s reasons for reversing *Monell* are that the ‘lack of *respondeat superior* liability under *Monell* is a much-criticized doctrine, especially in light of government privatization’ and permitting vicarious liability would be ‘consistent with other contexts’ where a corporation is barred from ‘evad[ing] its own statutory liability.’. . . Plaintiff’s argument is a non-starter. In 1978, the Supreme Court held that ‘a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.’. . . In light of its place in the federal judicial hierarchy, this Court cannot reverse the Supreme Court and nearly forty years of Seventh Circuit precedent adhering to *Monell* by holding that *respondeat superior* is now a viable theory of municipal liability under Section 1983. This Court is bound to follow *Monell*, and thus Plaintiff’s ‘alternative basis of liability’ fails to state a claim as a matter of law.”)

*See also Baker v. Fishman*, No. CV147583PGSTJB, 2017 WL 2873381, at \*3 n.3 (D.N.J. July 5,

2017) (“Although the Court is constrained to follow the Third Circuit’s non-precedential decision in *Weigher*, some courts have decided differently. *See, e.g., Hutchison v. Brookshire Bros., Ltd.*, 284 F. Supp. 2d 459, 472-73 (E.D. Tex. 2003); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 991 n.4 (W.D. Wash. 1997). As another court in this district opined:

The policy considerations which prompted the Supreme Court to reject qualified immunity for private prison guards are the same considerations which suggest that private corporations providing public services, such as prison medical care, should not be immune from *respondeat superior* liability under § 1983. In the context of a claim that the deprivation of medical care amounted to a constitutional violation, proof of such claim would almost certainly prove a case of ordinary state law malpractice where *respondeat superior* would apply. It seems odd that the more serious conduct necessary to prove a constitutional violation would not impose corporate liability when a lesser misconduct under state law would impose corporate liability.

*Taylor v. Plousis*, 101 F. Supp. 2d 255, 263 n.4 (D.N.J. 2000).”); *Pindak v. Dart*, 125 F.Supp.3d 720, 764-65 (N.D. Ill. 2015) (“In light of the Seventh Circuit’s willingness to revisit *Iskander*, Plaintiffs urge this court to hold Securitas vicariously liable for the actions of its employees under a theory of *respondeat superior*, even if they fail to establish that Truman and Kelly acted pursuant to an official policy or custom. The court is sympathetic to Plaintiffs’ request. In addition to the problems that the Seventh Circuit aptly identified in *Shields*, this case illustrates another kind of problem that arises from *Iskander*’s holding. Often, as may ultimately be the case here, there will be no individual ‘final policymaker’ or ‘final policy decision’ by the private corporation. Rather, the authority to determine the private entity’s policies and procedures will be divided among the private corporation and the relevant government agency or agencies. This case for example, presents much more complicated relationships between governmental and private entities than the Seventh Circuit considered in *Shields*. Here, the Public Building Commission (a municipal entity), hired MBRE (a private company) to manage the public building. MBRE in turn contracted with SMI, which was purchased by Securitas, and which itself employs subcontractors (for example, Waters is an employee of Star Detective Agency, a Securitas subcontractor. . . . In addition to the diffuse responsibilities within an organization—as the Court of Appeals noted in *Shields* – these complex relationships spread responsibility across public and private entities. In this case, for example, Coleman explained that several people were involved in updating the Post Orders. . . . This divided and overlapping authority presents difficult questions regarding causation and complicates the task of identifying who, if anyone, has final ‘policymaking’ authority within the meaning of *Monell*. As the Appellate Court recognized in *Shields*, these legal standards simultaneously encourage government agencies to delegate responsibility to private corporations and encourage those private corporations to structure their operations to evade liability. . . . While the court is sympathetic to Plaintiffs’ request, it remains bound by the holding in *Iskander*. After *Shields*, the Seventh Circuit revisited the question of permitting *respondeat superior* liability for private entities in § 1983 actions, but once again demurred because the plaintiffs had not preserved the question at the district court. . . . In dicta, however, the Seventh Circuit cautioned that *Iskander* remains the law. . . . Because *Iskander* precludes vicarious liability, the court is required to grant summary judgment to Securitas on Count III.”); *Medrano v. Wexford Health Sources, Inc.*, No.

13 C 84, 2015 WL 4475018, at \*7 (N.D. Ill. July 21, 2015) (“Medrano. . . urges the Court to deny Wexford’s motion to dismiss the *respondeat superior* claim on the basis of the reasoning expressed in *Shields v. Illinois Department of Corrections*, in which the Seventh Circuit questioned the rationale expressed in precedential case law for prohibiting *respondeat superior* liability for corporations under § 1983. . . Despite the *Shields* panel’s reasoning, this Court is bound to follow existing precedent. . . The Seventh Circuit was clear that the law of this Circuit ‘still extends *Monell* [and its prohibition on *respondeat superior* liability] from municipalities to private corporations.’. . . And shortly after its decision in *Shields*, the Seventh Circuit indicated it would not apply *respondeat superior* liability under § 1983 to corporations until an ‘intervening on-point Supreme Court decision’ requires it. *Hahn v. Walsh*, 762 F.3d 617, 640 (7th Cir.2014), *reh’g and suggestion for reh’g en banc denied* (Sept. 9, 2014). Thus, Medrano’s claim against Wexford based on *respondeat superior* must be dismissed.”); *Shehee v. Saginaw Cnty.*, No. 13-13761, 2015 WL 58674, at \*6-8 (E.D. Mich. Jan. 5, 2015) (“The Supreme Court has never extended *Monell* to private corporations acting under color of state law. But nearly every circuit to examine the issue, including the Sixth Circuit, has done so. *See Street v. Corr. Corp. of Am.*, 102 F.3d 810, 818 (6th Cir.1996) (quoting *Harvey v. Harvey*, 949 F.2d 1127, 1129–30 (11th Cir.1992) (collecting cases)). It is not clear why. *Street v. Correctional Corporation of America* was the first Sixth Circuit case to extend *Monell* to private corporations. It did so without any meaningful explanation as to why private corporations should be insulated from vicarious liability. The court’s more recent decisions provide no additional insight. *See Rouster v. Cnty. of Saginaw*, 749 F.3d 437, 453 (6th Cir.2014); *Savoie v. Martin*, 673 F.3d 488, 494 (6th Cir.2012); *Johnson v. Karnes*, 398 F.3d 868, 877 (6th Cir.2005). Perhaps it is time to question the rationale for allowing private contractors to avoid liability for the acts of its employees. [citing and quoting from *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782, 794 (7th Cir.2014)] A 2005 New York Times investigation described Prison Health Services as providing ‘flawed and sometimes lethal’ medical care. . . New York state investigators examining PHS ‘say they kept discovering the same failings: medical staffs trimmed to the bone, doctors under-qualified or out of reach, nurses doing tasks beyond their training, prescription drugs withheld, patient records unread and employee misconduct unpunished.’. . . One investigation found that the doctor overseeing care in several upstate New York State jails phoned in his treatment orders from Washington. . . In one investigative report, the chairman of the New York commission’s medical review board criticized PHS for being ‘reckless and unprincipled in its corporate pursuits, irrespective of patient care.’. . . “The lack of credentials, lack of training, shocking incompetence and outright misconduct” of the doctors and nurses in the case was “emblematic of P.H.S. Inc.’s conduct as a business corporation, holding itself out as a medical care provider while seemingly bereft of any quality control.”. . . [I]n cutting costs,’ the New York Times reported, ‘[PHS] has cut corners.’. . . Although the defendants offer several reasons why Dr. Lloyd changed Shehee’s medication, it appears that cost may have been a motivating factor. *Respondeat superior* liability would provide a powerful counter-weight to the financial incentive to skimp on patient care. *Shields* makes that case, too, providing a compelling argument for treating private corporations differently than government municipalities. Nonetheless, this Court is bound by Sixth Circuit precedent, and *Street v. Corrections Corp. of America*, 102 F.3d 810, 818 (6th Cir.1996), remains good law. Unless the Sixth Circuit reverses

course, *respondeat superior* provides no basis to hold a private corporation liable for the tortious acts of its employees. PHS cannot be held liable for Dr. Lloyd’s treatment decisions.”); ***Horton v. City of Chicago***, No. 13-CV-06865, 2014 WL 5473576, at \*4 n.2 (N.D. Ill. Oct. 29, 2014) (“In *Shields v. Illinois Dep’t of Corr.*, 746 F.3d 782 (7th Cir.2014), the Seventh Circuit suggested that it may overrule precedents establishing that private corporations cannot be found liable for § 1983 violations under a theory of *respondeat superior*. However, as long as those precedents remain good law, the Court is bound to apply the current rule that *respondeat superior* liability does not exist under § 1983, even where a corporate defendant acts under color of state law.”); ***Herrera v. Santa Fe Pub. Sch.***, 41 F.Supp.3d 1027, 1179-80 (D.N.M. 2014) (“*Monell* applies to corporations, including ASI New Mexico. Despite the Court’s initial puzzlement in the hearing, it is clear under Tenth Circuit law, and has been for decades, that *Monell*’s rule against vicarious liability applies to private corporations. . . . There is a fair question whether this is a wise rule. The Honorable David Frank Hamilton, Circuit Judge for the United States Court of Appeals for the Seventh Circuit, in an opinion which the Honorable Richard A. Posner, Circuit Judge for the United States Court of Appeals for the Seventh Circuit, joined, criticized this rule at length, noting that, in his view, *Monell*’s rule against vicarious liability incorrectly reads history, and stating that, in his view, the consensus among the federal courts of appeals extending *Monell*’s rule to private corporations was an error. [citing *Shields*] The Court agrees. Whatever the merits of this argument, however, Tenth Circuit precedent binds the Court on this point.”); ***Revilla v. Glanz***, 8 F.Supp.3d 1336, 1339-41 (N.D. Okla. 2014) (“While the Supreme Court has only applied *Monell* to municipalities, the Circuit Courts of Appeal have applied *Monell* to private entities, acting under color of law, that are sued under 42 U.S.C. § 1983. . . Thus, private corporations may not be held liable under § 1983 based upon *respondeat superior*, but may only be held liable where their policies caused a constitutional violation. . . The Seventh Circuit, very recently, called into question the reasoning behind applying *Monell* to private corporations. . . The reasoning of *Shields*, and its thorough analysis of Supreme Court precedent, provides potent arguments for *not* extending *Monell* to private corporations like CHC. However, this Court is bound to follow Tenth Circuit precedent, and the settled law in all Circuits to have decided the issue is that *Monell* extends to private corporations and thus they cannot be held liable on a *respondeat superior* basis for their employees’ conduct. Accordingly, in order to state a § 1983 claim against CHC, plaintiffs must satisfy *Monell* and must allege facts to show the existence of a CHC policy or custom by which each plaintiff was denied a constitutional right and that there is a direct causal link between the policy or custom and the injury alleged.”); ***Smith v. Corrections Corp. of America, Inc.***, 674 F.Supp.2d 201, 205 n.3 (D.D.C. 2009) (Several judges of this Court have concluded that for a private corporation to be held liable for the actions of its employees, a plaintiff must prove the employees acted pursuant to a corporate policy or custom. *See, e.g., Jackson v. Correctional Corp. of Am.*, 564 F.Supp.2d 22, 27- 28 (D.D.C. 2008); *Gabriel v. Corrections Corp. of Am.*, 211 F.Supp.2d 132, 137-38 (D.D.C. 2002). These cases based their holdings in part on the reasoning that where a private corporation provides a service ordinarily provided by a municipality, the corporation ‘stands in the shoes of the municipality and is subject to the same liability.’ *Jackson*, 564 F.Supp.2d at 27. Although these cases reach the correct result, the Court will not adopt their reasoning – the Supreme Court has never suggested that where a private actor under contract with

the state exercises power traditionally reserved to a state, that private actor is clothed with the liabilities and immunities of the state. Were the reasoning of these cases correct, a plaintiff who wanted to bring a section 1983 claim against a private actor exercising a traditional state prerogative would be barred from doing so because a state is not a ‘person’ within the meaning of section 1983. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989). No decision of the Supreme Court has adopted such a limited reading of section 1983. Cf. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting) (Supreme Court jurisprudence recognizes general rule that ‘state prisoner may sue a private prison for deprivation of constitutional rights’.”); *Cortlessa v. County of Chester*, No. Civ.A. 04-1039, 2006 WL 1490145, at \*3, \*4 (E.D. Pa. May 24, 2006) (“Count IX alleges that Primecare is liable, pursuant to 42 U.S.C. § 1983, for violations of Plaintiff’s Eighth Amendment right to medical treatment while incarcerated. Stated differently, Plaintiff claims that Primecare is responsible, on the basis of *respondeat superior* liability, for the deliberate indifference of its employees towards Plaintiff’s serious medical needs. Primecare has argued that it cannot be held liable under a theory of *respondeat superior* liability because it is an independent contractor for a municipality and, as such, should enjoy protection from vicarious liability similar to that granted to municipalities in *Monell* . . . . Primecare cites to *Natale v. Camden County Correctional Facility*, 318 F.3d 575 (3d Cir.2003) and a variety of decisions from other Circuit Courts and District Courts, for the proposition that private corporations such as Primecare cannot be held liable under Section 1983 on the basis of *respondeat superior*. . . . The Court has analyzed this issue and reaches the following conclusions. First, the issue of whether immunity from *respondeat superior* liability under Section 1983 extends to private contractors was not one of the two issues presented to the *Natale* Court. . . . The language relied on by Primecare is therefore merely dicta. As such, there is currently no Third Circuit authority requiring a decision in favor of Primecare. Second, the Court finds that there is clear disagreement among the federal courts concerning this issue. Both parties have cited persuasive authority for different conclusions. . . . Third, even if Primecare is correct and a *Monell*-type immunity applies to it, an entity entitled to such immunity can still potentially be held liable under Section 1983 based on a theory of failure to train its employees, which Plaintiff alleges. . . . At this stage, therefore, the Court is not prepared to conclude that Primecare is entitled to summary judgment on this claim.”); *Hutchison v. Brookshire Brothers, Ltd.*, 284 F.Supp.2d 459,472, 473 (E.D.Tex. 2003) (“The court now turns to the question of Brookshire Brothers’ liability. Defendants’ argue that, even if Plaintiff succeeds in proving concert of action between McCown and Shelton, Plaintiff’s Fourth Amendment claim against Brookshire Brothers ought to be dismissed because ‘[o]bviously there is no respondeat superior for § 1983 purposes.’ . . . Where Defendants brush aside Plaintiff’s claim in a single sentence, the court finds a more complicated issue. What is clear is that Defendants have cited the wrong precedent to support their statement of law. *Collins v. City of Harker Heights* stands for the proposition that a municipality (and not a private employer) generally ‘is not vicariously liable under § 1983 for the constitutional torts of its agents.’ . . . It is not so clear, however, that a private employer cannot be held vicariously liable under § 1983 when its employees act under color of law to deprive customers of constitutional rights. The court can find no case that supports this proposition, and the language of § 1983 does not lend itself to Defendants’ reading. . . . Though the Supreme Court has stated that § 1983

‘cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor,’ . . . the Court has made no similar statement regarding private employers. Indeed, there would be no textual basis for such a statement. Additionally, the court finds no persuasive policy justification for shielding private employers from vicarious liability. While the Supreme Court has found that Congress did not want to create a ‘federal law of respondeat superior ‘ imposing liability in municipalities in the § 1983 context because of ‘all the constitutional problems associated with the obligation to keep the peace,’ . . . this court cannot find any similar concerns implicated in the private context. Imposing liability on private corporations affects neither the state’s police power nor its ability to regulate its municipalities. Instead, allowing the imposition of vicarious liability would seem to keep Congress within its broad power to regulate interstate commerce. Thus, no significant federalism issues are raised when private employers are held liable for the constitutional torts of their employees. For these reasons, the court holds that neither *Monell* nor its progeny can be read to shield private corporations from vicarious liability when their employees have committed a § 1983 violation while acting within the scope of their employment. If Plaintiff can demonstrate that Shelton committed a Fourth Amendment violation in the course of his employment, Brookshire Brothers may be held liable. Such a violation would be ‘within the scope of employment’ if it were ‘ ‘actuated, at least in part, by a purpose to serve the [employer],’ even if it is forbidden by the employer.’ . . . The court infers that the scope of Shelton’s responsibilities to Brookshire Brothers includes handling customer disputes and ensuring that customers pay for their gas; this may be reasonably inferred from Plaintiff’s deposition testimony and Hill’s statement that Plaintiff had to talk to her manager. . . Shelton’s actions, as alleged by Plaintiff, allow the further inference that he was motivated at least in part by a desire to serve Brookshire Brothers. Though Shelton allegedly placed the siphoned gasoline into his own gas tank and collected no money for Brookshire Brothers, there is some evidence that Shelton first tried to collect on the alleged debt and resolve the dispute in favor of his employer. . . Thus Plaintiff has succeeded in demonstrating a genuine issue of material fact with regard to whether Shelton was acting within the scope of his employment. Defendants’ motion for summary judgment is DENIED with respect to Brookshire Brothers on this claim.”); *Taylor v. Plouisis*, 101 F. Supp.2d 255, 263 & n.4 (D.N.J. 2000) (“Neither the Supreme Court nor the Third Circuit has yet determined whether a private corporation performing a municipal function is subject to the holding in *Monell*. However, the majority of courts to have considered the issue have determined that such a corporation may not be held vicariously liable under § 1983. [citing cases] . . . Although the majority of courts to have reached this conclusion have done so with relatively little analysis, treating the proposition as if it were self-evident, the Court accepts the holdings of these cases as the established view of the law. However, there remains a lingering doubt whether the public policy considerations underlying the Supreme Court’s decision in *Monell* should apply when a governmental entity chooses to discharge a public obligation by contract with a private corporation. . . . An argument can be made that voluntarily contracting to perform a government service should not free a corporation from the ordinary respondeat superior liability. A parallel argument involves claims of qualified immunity which often protect government officials charged with a constitutional violation. If a private corporation undertakes a public function, there is still state action, but individual employees of that

corporation do not get qualified immunity. . . . The policy considerations which prompted the Supreme Court to reject qualified immunity for private prison guards are the same considerations which suggest that private corporations providing public services, such as prison medical care, should not be immune from respondeat superior liability under § 1983. In the context of a claim that the deprivation of medical care amounted to a constitutional violation, proof of such claim would almost certainly prove a case of ordinary state law malpractice where respondeat superior would apply. It seems odd that the more serious conduct necessary to prove a constitutional violation would not impose corporate liability when a lesser misconduct under state law would impose corporate liability.”).

On the liability of private corporations for failure to train, see *Miller v. City of Chicago*, No. 19 CV 4096, 2019 WL 6173423, at \*2 (N.D. Ill. Nov. 20, 2019) (not reported) (“Miller’s claims against Rodeway fail for another reason. Even if Rodeway or its employee acted under color of state law, a private corporation is treated like a municipality for § 1983 purposes. *Gaston v. Ghosh*, 920 F.3d 493, 494–95 (7th Cir. 2019); *Shields v. Ill. Dep’t of Corr.*, 746 F.3d 782, 789 (7th Cir. 2014). So, like a municipality, a corporation is not subject to vicarious liability for the actions of its employees. . . . To prevail on her claim, Miller must allege that the constitutional violation resulted from an ‘unconstitutional policy or custom of the corporation itself.’ . . . Miller has not adequately alleged that her injuries were the result of Rodeway’s ‘official policy or custom.’ . . . Miller argues that Rodeway did not train its employees to refuse access to police officers requesting access to guests’ rooms absent a search warrant, exigency, or consent. She labels this failure to train a policy. But liability attaches only where the corporation’s policymakers make ‘a deliberate choice to follow a course of action’ from ‘among various alternatives.’ . . . A failure to provide adequate training may be a basis for liability—if it has a direct casual connection to plaintiff’s injury—but ‘the plaintiff must show that the failure to train reflects a conscious choice among alternatives that evinces a deliberate indifference to the rights of the individuals with whom those employees will interact.’”); *Piercy v. Warkins*, No. 14 CV 7398, 2017 WL 1477959, at \*15–16 (N.D. Ill. Apr. 25, 2017) (“ACH argues that it cannot be held liable for failing to train the correctional officers, because ACH is only responsible for training its own employees. But courts in this district have allowed a private corporation to be liable for failing to train correctional officers on matters relating to the private corporation’s responsibilities. . . . Correctional officers would provide ACH employees with information about inmates’ health, so ACH had a contractual interest in the officers’ practice for obtaining and communicating that information. Indeed, there is evidence that correctional officers did give ACH employees information about inmates’ medical conditions. . . . There is enough evidence to create a dispute about whether correctional officers knew Piercy was vomiting blood, but failed to tell medical staff. Had they been adequately trained on how to use the protocols, Plaintiff contends, they would have known what to do about Piercy’s bloody vomit—specifically, they would have known to contact the ACH medical providers. Assuming that ACH required jail officials to use these protocols (which the court must do on Defendants’ summary judgment motion), Plaintiff claims that ACH did not train the officers on (1) when to consult the protocols that were intended to govern how the officers treated inmates when medical personnel were not present, and (2) how to reconcile allegedly conflicting protocols.

Defendants claim that Plaintiff's argument that officers were not adequately trained about whether to consult the protocols at all is a 'red herring because the officers never consulted the protocols regarding Piercy.' . . . ACH seems to argue that if the officers had consulted the protocols, then they would have called the provider . . . implying the fault lies, at most, with the officers, not ACH. But that is beside the point—when faced with an inmate who was vomiting blood, which the protocols clearly treat as a dire situation requiring immediate medical attention, officers did not consult them. The evidence of how much training officers received, moreover, is sufficiently vague that a reasonable jury could conclude that it was inadequate. Defendants also argue that more training on when to consult the protocols would not have 'affected the outcome' for Piercy. . . . Defendants again try to distinguish *Awalt*, where the court concluded that there was sufficient evidence for a jury to find that the failure to give the officers general training about when to consult medical professionals caused an inmate's death, after officers did not alert medical staff that he was having a seizure. . . . Here, contrary to Defendants' argument, the evidence of causation is even clearer: Defendants themselves acknowledge that if the officers had consulted the protocols, they probably would have alerted medical staff to Piercy's condition.”)

The Supreme Court has resolved the question of whether *Monell* applies to claims for only declaratory or prospective relief. See *Los Angeles County, Cal. v. Humphries*, 131 S.Ct. 447, 451, 452 (2010) (“We conclude that *Monell*'s holding applies to § 1983 claims against municipalities for prospective relief as well as to claims for damages. . . . The language of § 1983 read in light of *Monell*'s understanding of the legislative history explains why claims for prospective relief, like claims for money damages, fall within the scope of the 'policy or custom' requirement. Nothing in the text of § 1983 suggests that the causation requirement contained in the statute should change with the form of relief sought. . . . Respondents further claim that, where prospective relief is at issue, *Monell* is redundant. They say that a court cannot grant prospective relief against a municipality unless the municipality's own conduct has caused the violation. Hence, where such relief is otherwise proper, the *Monell* requirement 'shouldn't screen out any case.' . . . To argue that a requirement is necessarily satisfied, however, is not to argue that its satisfaction is unnecessary. If respondents are right, our holding may have limited practical significance. But that possibility does not provide us with a convincing reason to sow confusion by adopting a bifurcated relief-based approach to municipal liability that the Court has previously rejected. . . . For these reasons, we hold that *Monell*'s 'policy or custom' requirement applies in § 1983 cases irrespective of whether the relief sought is monetary or prospective.”). See also *Snyder v. King*, 745 F.3d 242, 250 (7th Cir. 2014) (“Both the parties and the district court spoke about the possibility of injunctive and declaratory relief against the County Defendants as though it were an issue totally distinct from whether Snyder adequately stated a *Monell* claim against those defendants. That was incorrect. The Supreme Court has squarely held that *Monell*'s 'policy or custom' requirement applies in Section 1983 cases irrespective of whether the relief sought is monetary or prospective. *Los Angeles Cnty., Cal. v. Humphries*, 131 S.Ct. 447, 453–54 (2010). Snyder cannot obtain injunctive or declaratory relief against the County Defendants for the same reason he cannot obtain nominal damages: he has not adequately pleaded a suit against them. It is therefore unnecessary to consider whether any claim for injunctive relief is moot.”).

*See also Felton v. Polles*, 315 F.3d 470, 482 (5th Cir. 2002) (“[R]equiring § 1981 claims against state actors to be pursued through § 1983 is not a mere pleading formality. One of the reasons why the § 1981 claim in this situation must be asserted through § 1983 follows. Although *respondeat superior* liability may be available through § 1981, . . . it is *not* available through § 1983....”); *United States v. City of Columbus*, No. CIV.A.2;99CV1097, 2000 WL 1133166, at \*8 (S.D. Ohio Aug. 3, 2000) (“In *City of Canton* . . ., the Supreme Court reaffirmed its rejection of liability under § 1983 based on a theory of vicarious liability because federal courts ‘are ill-suited to undertake’ the resultant wholesale supervision of municipal employment practices; to do so, moreover, ‘would implicate serious questions of federalism.’ This Court concludes that [42 U.S.C.] § 14141 is properly construed to similar effect. Its language does not unambiguously contemplate the possibility of vicarious liability and such legislative history as exists manifests a congressional intent to conform its substantive provisions to the standards of § 1983. . . . The Court therefore construes § 14141 to require the same level of proof as is required against municipalities and local governments in actions under § 1983.”).

**NOTE:** In *Barbara Z. v. Obradovich*, 937 F. Supp. 710, 722 (N.D. Ill. 1996), the court addressed the issue of “whether a political subdivision of a state, such as the School District, can sue (as opposed to being sued) under section 1983.” The court concluded that a school district is not an “other person” that can sue within the meaning of section 1983. *Id.* Accord *Housing Authority of Kaw Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183, 1192 (10th Cir.1991); *School Dist. of Philadelphia v. Pennsylvania Milk Marketing Bd.*, 877 F.Supp. 245, 251 n. 3. (E.D.Pa.1995); *Contra South Macomb Disposal Authority v. Washington Tp.*, 790 F.2d 500, 503 (6th Cir.1986); *Santiago Collazo v. Franqui Acosta*, 721 F.Supp. 385, 393 (D.Puerto Rico 1989).

*See also Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1276-83 (11th Cir. 2021) (“[T]he City argues that FLFNB, as an unincorporated association, is not a ‘person’ that may bring suit under § 1983. . . . There is some historical support for the City’s reading, but this view stands in tension with the text’s ordinary meaning, Supreme Court precedent, successive amendments to § 1983, and longstanding, settled practice. Absent clear direction from the Supreme Court, we decline the City’s invitation to bar all unincorporated associations (other than unions) from being able to sue under § 1983. . . . *Monell, Ngiraingas, and Will* each interpreted the first use of the word ‘person’ in § 1983, which relates to which entities may be proper § 1983 *defendants* – ‘[e]very person’ who under color of law causes a deprivation of federal rights shall be liable to the party injured. By contrast, today we interpret § 1983’s second use of the word ‘person’ – ‘any citizen or other person’ -- a phrase that delineates which entities may be proper § 1983 *plaintiffs*. . . . In order to decide whether FLFNB has a cause of action in this case, we must determine whether ‘other persons,’ in addition to including non-citizen individuals and corporate entities, extends to unincorporated associations. . . . All told, historical context suggests that the word “person” as used in Section 1 of the 1871 Civil Rights Act did not extend to unincorporated associations. But this does not end the analysis, because we are not interpreting Section 1 of the 1871 Civil Rights Act. Instead, we must apply § 1983 of Title 42 of

the United States Code as it exists *today*, that is, as thrice amended since its initial enactment in 1871. We must therefore account for any changes in the legal meaning of ‘person’ that may have informed Congress’s decision to perpetuate that term across amended versions of § 1983. . . . [B]y the time of the 1979 and 1996 amendments to § 1983, federal law made it quite clear that unincorporated associations were ‘persons’ that could sue to enforce constitutional rights under § 1983. It is telling that against this backdrop, Congress did not choose to restrict the scope of the term ‘person’ when it re-enacted amended versions of § 1983. . . . Whatever ‘person’ meant in 1871, its meaning included unincorporated associations by the time Congress ‘perpetuated’ the word ‘person’ in new versions of § 1983 in 1979 and 1996. . . . Even setting these textual and historical considerations aside, *Allee* suggests that an unincorporated entity like FLFNB, just like the unincorporated union in that case, is a ‘person’ for § 1983 purposes. . . . [T]he Court concluded, without limiting its reasoning, that unincorporated unions were § 1983 ‘persons.’ . . . In keeping with a broad reading of *Allee*, most federal courts to have confronted the question of whether a non-union unincorporated association is a ‘person’ under § 1983 have answered in the affirmative. [collecting cases] Moreover, there is a longstanding and robust practice of treating unincorporated associations as proper § 1983 plaintiffs as a matter of course. The Eleventh Circuit and an array of other courts have evaluated § 1983 claims brought by all manner of unincorporated associations seeking to vindicate a diverse array of constitutional interests -- including the Orlando and Santa Monica local Food Not Bombs chapters -- without even hinting that they lacked a § 1983 cause of action. [collecting cases] . . . . The Tenth Circuit, which holds that unincorporated associations cannot sue under § 1983, stands alone against the trend of treating unincorporated associations as ‘persons.’ . . . At bottom, in enacting § 1983, Congress ‘intended to give a broad remedy for violations of federally protected civil rights.’ . . . Absent some indication from the Supreme Court that unincorporated associations are not ‘persons,’ we decline the City’s invitation to upset longstanding practice recognizing that unincorporated associations are ‘persons’ that may sue under § 1983. . . . We hold that FLFNB is a person that may bring suit under § 1983.”); *Rural Water District No. 1 v. City of Wilson*, 243 F.3d 1263, 1274 (10th Cir. 2001) (agreeing with Sixth Circuit in *South Macomb* and holding that water district, a quasi-municipality, could sue under § 1983 to enforce federal statutory rights).

### **E. Individual Capacity v. Official Capacity Suits**

When a plaintiff names an official in his individual capacity, the plaintiff is seeking “to impose personal liability upon a government official for actions he takes under color of state law.” *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). *See also Community House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 966 (9th Cir. 2010) (“We simply cannot find anything in the record that suggests that either the parties or the district court appreciate the difference between personal and official capacity § 1983 lawsuits. When asked during oral argument about the capacities of the defendants, CHI’s counsel could not recall what was in the complaint. Thus, it is an appropriate time to republish the Supreme Court’s explanation of this important distinction.”) [The court goes on to reference language from *Kentucky v. Graham*].

See also *Tran v. City of Holmes Beach*, No. 19-13470, 2020 WL 4036588, at \* \_\_\_ n.3 (11th Cir. July 17, 2020) (not reported) (“The City and the Department assert, as another reason why the third amended complaint is a shotgun pleading, that the Hazens have failed to specify in what capacity many of the defendants are being sued. The Hazens allege that they are suing the unnamed city and state officials in their ‘official *or* individual capacity.’ . . . That is a failing, the argument goes, because it affects how those officials must defend against the Hazens’ claims: in an individual-capacity claim a defendant may assert the defense of qualified immunity, . . . while in an official-capacity claim the plaintiff must establish that a governmental ‘policy or custom’ was behind the alleged violation of federal law, see *Hafer v. Melo*, 502 U.S. 21, 25 (1991). That may (or may not) be a reason to dismiss a complaint as a shotgun pleading. A number of district courts in this Circuit have ruled that it is. [collecting cases] But we need not decide that question because multiple grounds for dismissal are not required.”); *Enoch v. Hamilton County Sheriff’s Office*, No. 19-3428, 2020 WL 3100192, at \*3 (6th Cir. June 11, 2020) (not reported) (“[S]tate officials sued in their individual capacities may not avail themselves of the State’s sovereign immunity. See *Hafer v. Melo*, 502 U.S. 21, 31 (1991). Here, Enoch and Corbin sued the Deputies for money damages in their individual capacities. . . Therefore, Defendants-Appellants’ defense of immunity under the Eleventh Amendment fails as a matter of law.”); *Gordon v. Schilling*, 937 F.3d 348, 362 (4th Cir. 2019) (“[T]he defendants assert that Amonette can be held liable only in his official capacity for creating and enforcing the challenged policies. We disagree. The defendants are correct that Gordon pursues a deliberate indifference claim against Amonette in his personal capacity in that Gordon ‘seek[s] to impose personal liability’ on Amonette for actions that he took ‘under color of state law.’ . . The defendants are incorrect, however, in their assertion that a person injured by an unconstitutional policy is limited to an official-capacity claim against the official who created or enforced that policy. [collecting cases] For the aforementioned reasons, we are satisfied that genuine issues of material fact exist as to Gordon’s deliberate indifference claim against Amonette.”); *United Pet Supply, Inc. v. City of Chattanooga, Tenn.*, 768 F.3d 464, 484 & n.3 (6th Cir. 2014) (“We have always understood qualified immunity to be a defense available only to individual government officials sued in their personal capacity. ‘As qualified immunity protects a public official in his individual capacity from civil damages, such immunity is unavailable to the public entity itself.’ . . That McKamey is a private entity acting in a governmental capacity does not change the unavailability of qualified immunity as a defense in an official-capacity suit. Just as the City of Chattanooga cannot assert qualified immunity as a defense against an official-capacity suit, neither can Walsh, Nicholson, Hurn, or McKamey. . . . We note that in *Bartell* we permitted a non-profit entity to assert qualified immunity in a case where it was not specified whether the defendants were sued in their official or individual capacity. . . Because we previously permitted a corporate defendant to assert qualified immunity as a defense to an individual-capacity suit, . . . and because permitting an assertion of qualified immunity as a defense to an official-capacity suit would conflict with clear Supreme Court precedent, we presume that *Bartell* involved an assertion of qualified immunity only in the defendants’ individual capacity. A handful of other circuits have permitted private corporations to assert qualified immunity, but all of the cases were similarly unclear as to whether the suit was in the corporation’s personal capacity or official capacity. [collecting cases]”); *Benison v. Ross*, 765 F.3d 649, 665

(6th Cir. 2014) (“[P]ersonal immunity defenses, such as absolute immunity or qualified immunity, are not available to government officials defending against suit in their official capacities. *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985). The Benisons’ surviving claims are based solely on actions taken by CMU as an entity. Although President Ross, Provost Shapiro, and Dean Davison discussed the decision to file a lawsuit against Kathleen to seek recovery of her sabbatical pay, it was CMU, not its individual administrators, that had a legally enforceable contract right. Thus, CMU as an entity filed the lawsuit against Kathleen in state court. Moreover, there is no evidence that any of the individual defendants participated in the decision to place a hold on Christopher’s transcript. As with the filing of the lawsuit, it was CMU as an entity that held Christopher’s transcript because of his outstanding tuition balance. Accordingly, President Ross, in his official capacity as a representative of CMU, is the only defendant against which the Benisons may proceed. Because public officials may not assert qualified immunity as a shield in their official capacities, no defendant has the capacity to claim qualified immunity as a defense. Therefore, the Benisons’ claims based on CMU’s decision to file a lawsuit against Kathleen and to place a hold on Christopher’s transcript were not properly dismissed on summary judgment as against President Ross in his official capacity.”); *Essex v. County of Livingston*, No. 11–2246, 2013 WL 1196894, \*2–\*4 (6th Cir. Mar. 25, 2013) (unpublished) (“As an initial matter, it seems that this area of the law has confused the parties involved in this case. In the instant case, the § 1983 claim against Bezotte is asserted against him in his individual capacity. An individual-capacity claim is distinct from a claim against a defendant in his official capacity. . . . The former claim may attach personal liability to the government official, whereas the latter may attach liability only to the governmental entity. . . . In other words, an official-capacity claim is merely another name for a claim against the municipality. . . . Claims asserted against the municipality are not entitled to the qualified-immunity defense and, thus, such claims cannot be resolved on interlocutory appeal unless they are necessarily resolved by our qualified-immunity determination on the individual-capacity claims. . . . In a case such as this, where the supervisor is also the policymaker, an individual-capacity claim may appear indistinguishable from an official-capacity or municipal claim, but these failure-to-train claims turn on two different legal principles.”) [*see post-Iqbal* cases on supervisory liability, *infra*] *See also Phillips v. City of Cincinnati*, No. 1:18-CV-541, 2019 WL 2289277, at \*6 (S.D. Ohio May 29, 2019) (“The Court agrees with the City that Mayor Cranley and City Solicitor Muething are not proper defendants for this claim because the *raison d’être* of *Monell* is to impose liability on a *municipality* under certain circumstances—not individuals. Even if Mayor Cranley or City Solicitor Muething were found to have instituted an unconstitutional policy, liability under *Monell* would fall to the City. Here, Plaintiffs’ *Monell* claims will continue against the City, but *Monell* claims against Mayor Cranley or City Solicitor Muething in their individual capacities are improper. . . . Moreover, to the extent that Plaintiffs bring *Monell* claims against Mayor Cranley and City Solicitor Muething in their official capacities, the claims are properly construed as against the City. . . . Accordingly, Plaintiffs’ motion to amend is denied to the extent that the Third Amended Complaint seeks to add *Monell* claims against Mayor Cranley and City Solicitor Muething.”)

Failure to expressly state that the official is being sued in his individual capacity may be construed as an intent to sue the defendant only in his official capacity. *See, e.g., Kelly v. City of Omaha, Neb.*, 813 F.3d 1070, 1075-76 (8th Cir. 2016) (“Because Kelly’s complaint does not include an ‘express statement’ that she is suing the individual defendants in their individual capacities, we consider her suit to be ‘against the defendants in their official capacity.’ . . . A plaintiff who sues public employees in their official, rather than individual, capacities sues only the public employer and therefore must establish the municipality’s liability for the alleged conduct. . . . Kelly failed to plead facts that establish municipal liability for Petersen’s actions. Kelly nowhere alleges that Petersen’s alleged sexual advances resulted from any official municipal policy authorizing his behavior. Kelly also failed to allege any facts relating to other perpetrators or victims of such conduct, which might have indicated that sexual harassment was sufficiently widespread among City officials to constitute a ‘custom or usage with the force of law.’”); *Remington v. Hoopes*, 611 F. App’x 883, 884-85 (8th Cir. 2015) (“The district court assumed the existence of an individual-capacity § 1983 claim when it granted summary judgment on the basis of qualified immunity. However, our review leads us to conclude that the Remingtons sued the defendants in only their official capacities, not as individuals. . . . Our case law requires more than an ambiguous pleading to state an individual-capacity § 1983 claim. . . . We require a ‘clear statement’ or a ‘specific pleading’ indicating that the plaintiffs are suing the defendants in their individual capacities. . . . Our circuit has adopted this ‘clear statement’ requirement ‘[b]ecause section 1983 liability exposes public servants to civil liability and damages, . . . [and] only an express statement that they are being sued in their individual capacity will suffice to give proper notice to the defendants.’ . . . Thus, when a plaintiff’s complaint is silent or otherwise ambiguous about the capacity in which the plaintiff is suing the defendant, our precedent requires us to presume that the plaintiff brings suit against the defendants in only their official capacities. . . . The Remingtons acknowledged at oral argument that the complaint contained no clear statement indicating an individual-capacity suit. Instead, the complaint’s caption and content included only the name of each defendant and his official title. Under our case law, such ‘cryptic’ allegations are not sufficient to state an individual-capacity claim. . . . And based on the facts alleged in the complaint, we find nothing that otherwise would provide the defendants with sufficient notice of an individual-capacity suit. We therefore construe the Remingtons’ complaint as suing the defendants in their official capacities only, and we do not reach the issue of qualified immunity.”); *Alexander v. Hedback*, 718 F.3d 762, 766 n.4 (8th Cir. 2013) (“Alexander argues that the district court should have read the amended complaint as suing the officers in their individual capacities. . . . The amended complaint did not designate that the officers were being sued in their individual capacities, and Alexander did not seek leave to amend the complaint to do so.”); *Murphy v. Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997) (“[W]e do not require that personal capacity claims be clearly-pleaded simply to ensure adequate notice to defendants. We also strictly enforce this pleading requirement because ‘[t]he Eleventh Amendment presents a jurisdictional limit on federal courts in civil rights cases against states and their employees.’ *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir.1989); *see Wells v. Brown*, 891 F.2d 591, 593 (6th Cir.1989). Although other circuits have adopted a more lenient pleading rule, *see Biggs v. Meadows*, 66 F.3d 56, 59-60 (4th Cir.1995), we believe that our rule is more consistent with the Supreme Court’s Eleventh Amendment jurisprudence.”). *See also Phillips v. City of*

*Cincinnati*, No. 1:18-CV-541, 2019 WL 2289277, at \*3 n.7 (S.D. Ohio May 29, 2019) (“The Third Amended Complaint does not clarify whether claims against Mayor Cranley and City Solicitor Muething are brought against them in their individual or official capacities. In the briefing on the pending motions, Plaintiffs try to clarify that they are suing the Mayor and City Solicitor in their individual and official capacities. However, the pleadings must provide a short and plain statement in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Here, throughout the proposed amended complaint, Mr. Cranley and Ms. Muething are referred to simply as City Mayor and City Solicitor and there is no plain, clear statement that they are being sued in their individual capacity. Therefore, the Court interprets the claims as brought against the Mayor and City Solicitor only in their official capacity.”)

*But see Davis v. Buchanan County, Missouri*, No. 5:17-CV-06058-NKL, 2019 WL 7116363, at \*5–6 (W.D. Mo. Dec. 23, 2019) (“Here, there can be no doubt that the Corizon Defendants have waived the right to assert a defense based on capacity. Not only did they sit on their hands for ten months, waiting until after they had filed voluminous dispositive motions and just a month—or less—before the trial date to finally raise their argument, but they also repeatedly demonstrated an intention to defend themselves in their individual capacities. Although the Corizon Defendants moved for summary judgment as to the punitive damages claims against them, they did not cite the legal principle that punitive damages are not available against a state entity and therefore should have been dismissed as against each Corizon Defendant—an indication that they each understood that they were being sued in their individual capacities. . . Each of the Corizon Defendants raised qualified immunity as a defense, although qualified immunity is a defense to only individual-capacity claims. . . Two of the Corizon Defendants even have their own personal attorneys in this action, having parted ways with the counsel that Corizon originally provided them. . . The Court thus cannot but conclude that the Corizon Defendants have waived the right under Rule 9(a) to assert the capacity argument. . . . Even if the Corizon Defendants had not waived the defense relating to the capacity in which they were sued, the Court still would deny their motions to dismiss on that ground. The Eighth Circuit requires that a complaint specify the capacity in which ‘a state official’ is sued. . . However, the Court is aware of no controlling case law holding that employees of a private corporation are ‘state officials’ within the meaning of this requirement. The Court is aware of two orders issued by the Eastern District of Missouri that seem to suggest that a plaintiff who sued a Corizon employee without specifying whether it was in her individual or official capacities, or both, should be deemed to have brought only an official-capacity claim against the employee. . . However, *Robinson* is distinguishable—in that case, the Court found that the plaintiff had not stated a claim against the Corizon employee in her individual capacity because ‘he did not allege that [the employee] was directly involved in the violation of his constitutional rights.’ Here, as discussed further below, the Court has found that Plaintiffs have adequately alleged Defendants’ direct involvement in the violation of their constitutional rights. . . Meanwhile, the Court in *Gassel* permitted the *pro se* plaintiff an opportunity to amend the complaint, specifying that ‘If plaintiff wishes to sue defendants in their individual capacities, plaintiff must specifically say so in the amended complaint.’ . . Neither case analyzes or explains

why employees of a private entity should be entitled to the same protections with regard to pleadings as state employees. The Court is not willing to extend the strict pleading requirement for state officials in civil rights cases to employees of a private entity that performs services for the state, as ‘private employees “do not have an ‘official capacity’ as that term is used under Eleventh Amendment.’. . Even if controlling case law hereafter concludes that private employees are deemed to have been sued in an official capacity if plaintiffs do not specify the capacity in which they are sued, Plaintiffs here did not know of any such precedent when they brought suit against the Corizon Defendants, and any such new rule should not retroactively interfere with Plaintiffs’ substantive rights. While suing the employees of private entities that contract with the state might be the more prudent approach to pleading, it poses a catch-22 for plaintiffs’ counsel here. In the absence of controlling precedent holding that employees of a private entity providing medical services at state correctional institutions who are sued for civil rights violations may assert the defense of qualified immunity, distinguishing between the individual and official capacities of such employees might be viewed as a concession by plaintiffs that the employees are entitled to assert qualified immunity. Under the circumstances, the Court finds that Plaintiff had no obligation to specify that they were suing the private-company employees in their individual capacities.”)

*Compare Wealot v. Brooks*, 865 F.3d 1119, 1123 n.4 (8th Cir. 2017) (“All parties have treated the claims against Officer Gates and Officer Colhour as having been brought against them in their individual capacities. From our review of the pleadings, we are unable to discover any clear allegation of the capacity in which the two officers were sued. We previously held that when ‘a plaintiff’s complaint is silent about the capacity in which she is suing the defendant,’ the claims should be treated as ‘only official-capacity claims.’. . The rule is different in other circuits. [collecting cases] We have continued to apply our more stringent pleading rule, and in one instance even done so when the parties and district court ignored the capacity issue in the first instance. *See Remington v. Hoopes*, 611 Fed.Appx. 883, 884-85 (8th Cir. 2015) (per curiam) (unpublished). There are several reasons we refrain from doing the same here. First, although we have referenced the Eleventh Amendment’s jurisdictional limit in support of our stringent pleading rule, see *Murphy v. State of Ark.*, 127 F.3d 750, 754-55 (8th Cir. 1997), this complaint’s failure to abide by our judicially created rule does not deprive us of subject matter jurisdiction so that we are compelled to dismiss. . . This is especially true given only municipal actors—as opposed to state—are involved. . . Second, despite the complaint’s imperfections, every party involved in this case proceeded with the understanding that the claims against Officer Gates and Officer Colhour were brought individually, thus negating any concerns about whether the defendants were on notice or prejudiced. . . This understanding appears to have begun when the defendants raised qualified immunity in their answer to the Wealot complaint, . . . and has continued through this appeal and oral argument, without either party raising the issue once, *cf. Remington*, 611 Fed.Appx. at 885 (noting the issue was at least raised at oral argument). Third, given the disputed facts we identify below, we think it unwise to decide the case based on unraised capacity grounds without first giving Wealot the opportunity to request amending her complaint and the district court to address the issue in the first instance. . . On remand, the district court may, at its discretion, allow Wealot to amend her complaint to reflect the course of these proceedings.”) *with Wealot v. Brooks*, 865

F.3d 1119, 1130 (8th Cir. 2017) (Wollman, J., concurring) (“I concur in all but footnote 4 of the opinion. Our circuit’s requirement of a clear statement that a defendant is being sued in an individual capacity may represent ‘a lonely position’ on the issue, but it is one that must be addressed to the court en banc. . . I would treat the defendants’ failure to raise the issue as constituting their *sub silentio* acquiescence in an unexpressed motion to amend the complaint and then deem the complaint to be correspondingly amended.”)

As noted in *Wealot*, the majority of circuits adhere to a different rule. See *Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1047 (11th Cir. 2008) (“The main concern of a court in determining whether a plaintiff is suing defendants in their official or individual capacity is to ensure the defendants in question receive sufficient notice with respect to the capacity in which they are being sued. . . . [W]hile it is ‘clearly preferable’ that a plaintiff state explicitly in what capacity defendants are being sued, ‘failure to do so is not fatal if the course of proceedings otherwise indicates that the defendant received sufficient notice.’ *Moore v. City of Harriman*, 272 F.3d 769, 772 (6th Cir.2001). In looking at the course of proceedings, courts consider such factors as the nature of plaintiff’s claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity which serve as an indicator that the defendant had actual knowledge of the potential for individual liability. . . . In examining the course of proceedings in this case, we are persuaded that Young Apartments raised claims against the individual defendants in their personal capacities, and that the individual defendants were aware of their potential individual liability.”); *Powell v. Alexander*, 391 F.3d 1, 22 (1st Cir. 2004) (“We now join the multitude of circuits employing the ‘course of proceedings’ test, which appropriately balances a defendant’s need for fair notice of potential personal liability against a plaintiff’s need for the flexibility to develop his or her case as the unfolding events of litigation warrant. In doing so, we decline to adopt a formalistic ‘bright-line’ test requiring a plaintiff to use specific words in his or her complaint in order to pursue a particular defendant in a particular capacity. However, we do not encourage the filing of complaints which do not clearly specify that a defendant is sued in an individual capacity. To the contrary, it is a far better practice for the allegations in the complaint to be specific. A plaintiff who leaves the issue murky in the complaint runs considerable risks under the doctrine we adopt today. Under the ‘course of proceedings’ test, courts are not limited by the presence or absence of language identifying capacity to suit on the face of the complaint alone. Rather, courts may examine ‘the substance of the pleadings and the course of proceedings in order to determine whether the suit is for individual or official liability.’”); *Moore v. City of Harriman*, 272 F.3d 769, 773, 775 (6th Cir. 2001) (en banc) (“The officers in this case urge us to read *Wells* as adopting the Eighth Circuit’s rule presuming an official capacity suit absent an express statement to the contrary. They argue that to withstand a motion to dismiss, *Wells* requires complaints seeking damages for alleged violations of § 1983 to contain the words ‘individual capacity,’ regardless of whether the defendants actually receive notice that they are being sued individually. Although we acknowledge that *Wells* contains language supporting this reading, we find the more reasonable interpretation to be that § 1983 plaintiffs must clearly notify defendants of the potential for individual liability and must clearly notify the court of its basis for jurisdiction. When a § 1983

plaintiff fails to affirmatively plead capacity in the complaint, we then look to the course of proceedings to determine whether *Wells*'s first concern about notice has been satisfied. . . . In conclusion, we reaffirm *Wells*'s requirement that § 1983 plaintiffs must clearly notify any defendants of their intent to seek individual liability, and we clarify that reviewing the course of proceedings is the most appropriate way to determine whether such notice has been given and received . . . . “); *Biggs v. Meadows*, 66 F.3d 56, 59-60 (4th Cir. 1995) (adopting the view of the majority of circuits, including the Second, Third, Fifth, Seventh, Ninth, Tenth and Eleventh, that looks to “the substance of the plaintiff’s claim, the relief sought, and the course of proceedings to determine the nature of a § 1983 suit when a plaintiff fails to allege capacity. [citing cases] . . . . Because we find the majority view to be more persuasive, we hold today that a plaintiff need not plead expressly the capacity in which he is suing a defendant in order to state a cause of action under § 1983.”).

*See also Cocroft v. Smith*, 95 F.Supp.3d 119, 128 (D. Mass. 2015) (“In this case, the complaint does not specify whether Officer Smith was being sued in his individual or official capacity. The factual allegations against Officer Smith reference actions taken by him in his capacity as a police officer and Cocroft made no demand for punitive damages. Nonetheless, Officer Smith filed a summary judgment motion asserting qualified immunity as a defense. The issue was briefed by both parties and this Court issued an Order finding that at that stage of the proceedings, he was not entitled to qualified immunity. Clearly, Officer Smith was operating under the assumption that he was being sued individually. He prepared for and proceeded to trial without suggesting otherwise. Under these circumstances, I find that the claims against Officer Smith were properly treated as claims against him in his individual capacity.”); *Gaetani v. Hadley*, No. CIV.A. 14-30057-MGM, 2015 WL 113900, at \*3 (D. Mass. Jan. 8, 2015) (“Defendants erroneously interpret Plaintiff’s frequently-used phrase, ‘under color of state law,’ to essentially mean that Plaintiff’s complaint indicates that he intended to sue Defendants only in their official capacities. In contrast to Defendants’ interpretation of this phrase, Black’s Law Dictionary defines ‘color of law’ to mean ‘[t]he appearance or semblance, *without the substance*, of a legal right.’ . . . Under the standard applied at this stage, the court interprets the complaint in accordance with this definition. . . . To the extent that the Plaintiff intended to sue Defendants in their official capacity (if he did at all), Plaintiff’s claims are dismissed pursuant to the doctrine of sovereign immunity. . . . However, since the complaint may also fairly be interpreted as bringing claims against Defendants as individuals, it will hereinafter be read to allege claims against Defendants solely in their individual capacities.”); *Whitehurst v. Harris*, No. 6:14-CV-01602-LSC, 2015 WL 71780, at \*8 n.5 (N.D. Ala. Jan. 6, 2015) (“The complaint states that Harris and Brown are being sued only in their individual capacities, but then alleges that they are ‘final policymakers.’ The term ‘final policymaker’ is applicable only when governmental officials are sued in their *official* capacities in an effort to impose liability against a government entity. . . . Again, this Court reads the complaint as alleging a supervisory liability claim, since Whitehurst does not dispute such a characterization.”); *Jimenez v. Brown*, No. 5:13-CV-877-DAE, 2014 WL 7499451, at \*7-8 (W.D. Tex. Jan. 8, 2014) (“A supervisory official can also be liable in his official capacity if he is the type of ‘final policymaker’ whose decisions represent the decisions of the county. . . . In that

instance, the case is effectively a suit against the municipality. . . Because Jimenez does not identify whether he brings claims against Brown in his individual or official capacity, the Court must look to the course of the proceedings to determine the nature of his claims. . . Factors relevant to the inquiry include the substance of the complaint, the nature of relief sought, and statements in dispositive motions and responses. . . Here, the course of proceedings demonstrates that claims alleged against Brown are official capacity claims. The claims against Brown are significantly different than those alleged against the other defendants: while Jimenez alleges conduct-based claims against the other defendants, he alleges policy-based claims against Brown. . . In their Motion for Summary Judgment, Defendants address their liability in both their individual and official capacities. In addressing the individual capacity claims, Defendants limit their discussion to conduct-based claims, rather than the policy-based claims. . . Defendants address the policy claims only to the extent that they impact municipal liability. . . While Jimenez has proceeded pro se, his Response does not suggest that Brown should be liable in his individual capacity. Given the nature of the claims and the manner in which they have been addressed by the parties, the Court construes the claim against Brown to be a claim against Brown in his official capacity.”); *Daskalea v. District of Columbia*, 227 F.3d 443, 448 (D.C. Cir. 2000) (“Neither the complaint nor any other pleading filed by plaintiff indicates whether Moore was charged in her official or her individual capacity. In some circuits, that would be the end of the matter, as they require a plaintiff who seeks personal liability to plead specifically that the suit is brought against the defendant in her individual capacity. . . Although it has not definitively resolved the issue, . . . the Supreme Court has typically looked instead to the ‘course of proceedings’ to determine the nature of an action. . . Following the Supreme Court’s lead, this circuit has joined those of its sisters that employ the ‘course of proceedings’ approach.”); *Rodriguez v. Phillips*, 66 F.3d 470, 482 (2d Cir. 1995) (“Where, as here, doubt may exist as to whether an official is sued personally, in his official capacity or in both capacities, the course of proceedings ordinarily resolves the nature of the liability sought to be imposed.”); *Hill v. Shelander*, 924 F.2d 1370, 1374 (7th Cir. 1991) (“[W]here the complaint alleges the tortious conduct of an individual acting under color of state law, an individual capacity suit plainly lies, even if the plaintiff failed to spell out the defendant’s capacity in the complaint.”). *Accord Miller v. Smith*, 220 F.3d 491, 494 (7th Cir. 2000); *Shabazz v. Coughlin*, 852 F.2d 697, 700 (2d Cir.1988) (“Notwithstanding the complaint’s ambiguous language, . . . Shabazz’s request for punitive and compensatory damages, coupled with the defendants’ summary judgment motion on qualified immunity but not Eleventh Amendment grounds, suggests that the parties believed that this action is a personal capacity suit.”); *Joyce v. Town of Dennis*, Civil Action No. 08-10277-NMG, 2010 WL 1383178, at \*5 (D. Mass. Mar. 30, 2010) (“With respect to the capacity argument, when a complaint does not specify the capacity in which an individual is sued, the First Circuit invokes a ‘course of proceedings test’ under which courts are not limited by the presence or absence of language identifying capacity to suit [sic] on the face of the complaint alone. Rather, courts may examine the substance of the pleadings and the course of proceedings in order to determine whether the suit is for individual or official liability. . . This case and Joyce’s complaint focus on a Town policy and practice invoked to deny her entry into the May, 2007 men’s tournament. . . Moreover, Joyce explicitly refers, in Counts II-V of her complaint, to the individual defendants as ‘state actors’. Thus, although some factors are counter-

indicative, Joyce’s claims are best described as targeting the defendants in their official capacities and, therefore, are merely duplicative of Count I.”); *Pollock v. City of Astoria*, No. CV 06-845, 2008 WL 2278462, at \*5, \*6 (D. Or. May 28, 2008) (“Here, the complaint does not expressly allege in which capacity Plaintiffs intend to sue Defendant Officers, but its construction gives the court no reason to depart from this circuit’s controlling presumption in favor of personal capacity § 1983 claims. First, Plaintiffs separate their claims against the City of Astoria and Defendant Officers into two discrete sections . . . Construing Plaintiffs’ claims against Defendant Officers as official capacity claims would render this intentional division superfluous. It would also render the claims themselves, as recited in the complaint, otherwise superfluous. Second, Plaintiffs name Defendant Officers personally in the complaint and seek money damages. . . . Third, the complaint does not explicitly allege that the claims against Defendant Officers are made in their official capacity. This activates the presumption that Plaintiffs’ claims against Defendant Officers are personal capacity claims . . . . Therefore, Plaintiffs’ claims against Defendant Officers are made in their personal capacity and not barred by the Eleventh Amendment prohibition against official capacity suits.”).

See also *Sanders-Burns v. City Of Plano*, 594 F.3d 366, 373, 377, 378, 380 (5th Cir. 2010) (“The question then is whether Sanders-Burns’s amended complaint, which only replaced the statement that Cabezuela was sued in his official capacity with the statement that Cabezuela was sued in his individual capacity, relates back to Sanders-Burns’s original complaint for statute of limitations purposes under Rule 15(c). . . We hold that it does. . . . After examining the cases decided by the Sixth, Seventh, Eleventh, and D.C. Circuits, we are convinced that the different outcomes result from the specific circumstances presented in each case, as one would expect where the core concern is adequacy of notice. . . . Here, Cabezuela had actual knowledge of the action at all times because he was named as a defendant in the original complaint and was personally served within a week of the filing of the original complaint. . . . Further, the facts here indicate that Cabezuela is not prejudiced in defending against the individual capacity claims. First, the answer to the complaint filed by the Defendants asserts the affirmative defense of qualified immunity – a defense against an individual capacity lawsuit. The inclusion of the affirmative defense of qualified immunity is important because it suggests that the attorney representing Plano and Cabezuela, in his official capacity, is likely to have communicated to Cabezuela that he may have been sued in his individual capacity. . . . After conducting a side-by-side comparison of the original and amended complaints, we note that the only modification between the original and amended complaint is the substitution of the word ‘individual’ for ‘official.’ As such, we determine that, except for the mistake in paragraph eight, Sanders-Burns’s original complaint alleges suit against Cabezuela in his individual capacity.”); *Garcia v. Dykstra*, 260 F. App’x 887, 895 (6th Cir. 2008) (“That Smutz and Pavlige asserted a qualified immunity defense in both the answer and the amended answer distinguishes this case from *Shepherd*, making it more factually similar to *Moore*. The qualified immunity defense shows that they were in fact on notice of the possibility of an individual capacity § 1983 claim by the time they filed both the original and the amended answer.”); *Rodgers v. Banks*, 344 F.3d 587, 594, 595(6th Cir. 2003) (“Like the plaintiff in *Moore*, Plaintiff did request compensatory and punitive damages in the original complaint, which we have

held provides some notice of her intent to hold Defendant personally liable. . . However, unlike the plaintiff in *Moore*, the caption on Plaintiff’s complaint listed Defendant’s name and her official title, and specifically stated that Defendant was being sued in her ‘official capacity as the representative of the State of Ohio department of Mental Health.’ . . The amended complaint’s caption still lists Defendant’s name and official title, and the amended complaint incorporates by reference paragraphs 2-7 of the original complaint, including the statement that Defendant was being sued in her official capacity. The amended complaint is otherwise silent as to whether Defendant is being sued in her official or individual capacity. Moreover, Defendant has not moved for summary judgment on the issue of qualified immunity, yet another indication that Defendant was not adequately notified that she was being sued in her individual capacity. . . Having applied the course of proceedings test, we hold that insufficient indicia exists in the original complaint and amended complaint suggesting that Defendant was on notice that she was being sued in her individual capacity. Therefore, the Eleventh Amendment bars Plaintiff’s suit to the extent that she seeks money damages. Plaintiff’s claim is hereafter limited to seeking other relief arising under 42 U.S.C. § 1983.”); *Shepherd v. Wellman*, 313 F.3d 963, 966-69 (6th Cir. 2002) (“Where no explicit statement appears in the pleadings, this Circuit uses a ‘course of proceedings’ test to determine whether the § 1983 defendants have received notice of the plaintiff’s intent to hold them personally liable. . . Under this test, we consider the nature of the plaintiff’s claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims for qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability. . . We also consider whether subsequent pleadings put the defendant on notice of the capacity in which he or she is being sued. . . . In the instant matter, the plaintiffs failed to specify in their complaint that they were suing Wellman as an individual, rather than in his official capacity. The plaintiffs later amended their complaint, but the amended complaint also failed to specify the capacity in which the plaintiffs were suing Wellman. The plaintiffs filed a second motion to amend, in which they specified that they were suing Wellman as an individual. The magistrate judge denied the motion to amend, and the district court affirmed. . . . We think the magistrate judge had good reason to deny leave to file a second amended complaint, and that the denial was not an abuse of discretion. . . . [T]he plaintiffs’ request for monetary damages is the only indication that they might be suing Wellman in his individual capacity. Although *Moore* recognizes that the request for monetary damages is one factor that might place an individual on notice that he is being sued in his individual capacity, we do not read that case as holding that a request for money damages is alone sufficient to place a state official on notice that he is being sued in his individual capacity. To so hold would be inappropriate, because the rest of the complaint so strongly suggests an official capacity suit. Furthermore, unlike in *Moore*, there were no subsequent pleadings in this case that put the defendant on notice that he was being sued as an individual. For these reasons, we conclude that the district court’s dismissal of the § 1983 action against Wellman was proper.”); *Brown v. Karnes*, No. 2:05-CV-555, 2005 WL 2230206, at \*3 (S.D. Ohio Sept. 13, 2005) (“Plaintiff’s Complaint does not specify whether he is suing Sheriff Karnes in his official capacity or his individual capacity. . . However, because neither the face of the Complaint nor the ‘course of proceedings’ indicates that Plaintiff is suing the Sheriff in his individual capacity, the Court finds that the Sheriff has been sued only in his

official capacity. . . As such, the § 1983 claim against Sheriff Karnes is the equivalent of a claim against Franklin County, and is governed by [*Monell*].”).

Naming a government official in his official capacity is the equivalent of naming the government entity itself as the defendant, and requires the plaintiff to make out *Monell*-type proof of an official policy or custom as the cause of the constitutional violation. *See, e.g., Potochney v. Doe*, No. 02 C 1484, 2002 WL 31628214, at \*3 (N.D. Ill. Nov. 21, 2002) (not reported) (“[A] suit against a Sheriff in his official capacity is a suit against the Sheriff’s Department itself. . . Plaintiffs are not required to show any personal involvement of Sheriff Ramsey in such an official capacity case.”). While qualified immunity is available to an official sued in his personal capacity, there is no qualified immunity available in an official capacity suit.

*See Hafer v. Melo*, 112 S. Ct. 358, 361-62 (1991) (personal and official capacity suits distinguished). *See also Petty v. County of Franklin, Ohio*, 478 F.3d 341, 349 (6th Cir. 2007) (“There simply is no evidence that Sheriff Karnes was in any way directly involved in what happened to Petty, either initially when he was beaten in the jail cell, or later when his surgery was delayed and his requests for liquid food were allegedly not met. . . . Thus, if Petty’s suit is against Karnes in his personal capacity, Petty fails to meet the causation requirements laid out in *Taylor*. To the extent that Petty’s suit is against Karnes in his official capacity, it is nothing more than a suit against Franklin County itself. . . And as Defendants point out, Petty was unable to come forward with evidence – beyond the bare allegations in his complaint – showing that a Franklin County custom or policy was the moving force behind the violation of his constitutional rights.”); *Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 417 (6th Cir. 2002) (“The district court reasoned that an individual capacity suit could not be maintained against the Mayor ‘because 1) the Mayor never acted in his individual capacity, and 2) the Fourteenth Amendment does not apply to individual actions’ because ‘[t]he Fourteenth Amendment protects property interest[s] only from a deprivation by state action.’ . . . [T]he fact that Mayor Berger acted in his official capacity as mayor does not immunize him from being sued as an individual under § 1983. The district court’s second reason for rejecting the individual capacity suit – that the Fourteenth Amendment protects only against actions of the state – also conflicts with *Hafer*. The state action requirement of the Fourteenth Amendment is satisfied by showing that a state official acted ‘under color of’ state law, as when the official exercises authority conferred by a state office. . . The state action requirement does not limit civil rights plaintiffs to suits against only government entities. The district court’s interpretation of ‘state action’ would eliminate all § 1983 suits against individual state officers.”); *Ritchie v. Wickstrom*, 938 F.2d 689 (6th Cir. 1991) (clarifying confusion between official capacity and individual capacity).

The official capacity suit is seeking to recover compensatory damages from the government body itself. *See Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Letcher v. Town of Merrillville*, No. 2:05 cv 401, 2008 WL 2074144, at \*6 (N.D. Ind. May 13, 2008) (“In the case of law enforcement defendants, meeting the under color of law requirement invariably will include similar allegations that the defendants were performing

official duties, in uniform, or driving marked cars. . . The defendants’ argument improperly conflates the requirement that a plaintiff allege that the defendants acted under color of law with the determination of their capacity in the suit. Accordingly, the court concludes that the defendants have been sued in their individual capacities.”); *Chute v. City of Cambridge*, 201 F.R.D. 27, 29 (D. Mass. 2001) (“It is well settled that filing a civil action against a city official in that person’s official capacity is simply another way of suing the city itself. When a plaintiff brings a civil action against a governmental agency, and against a person who is an official of the agency in that person’s official capacity, it is critical that the parties be properly identified to provide complete clarity as to who the parties are and in what capacity they are being sued.”).

To avoid confusion, where the intended defendant is the government body, plaintiff should name the entity itself, rather than the individual official in his official capacity. *See, e.g., Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1245 (6th Cir. 1989) (prudent course for plaintiff who seeks to hold government entity liable for damages would be to name government entity itself to ensure requisite notice and opportunity to respond), *cert. denied*, 495 U.S. 932 (1990); *Johnson v. Kegans*, 870 F.2d 992, 998 n.5 (5th Cir. 1989) (implying plaintiffs must expressly name governmental entity as defendant to pursue *Monell*-type claim), *cert. denied*, 492 U.S. 921 (1989); *Pennington v. Hobson*, 719 F. Supp. 760, 773 (S.D. Ind. 1989) (“better practice is to make the municipal liability action unmistakably clear in the caption, by expressly naming the municipality as a defendant.”).

*Compare Asociacion De Subscripcion Conjunta Del Seguro DeResponsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 26 (1st Cir. 2007), *reh’g and reh’g en banc denied* (1st Cir. 2007) (“Here, the complaint, in combination with the course of proceedings . . . establishes that Flores Galarza is being sued for damages in his personal capacity. If the JUA [Compulsory Liability Joint Underwriting Association of Puerto Rico, a Commonwealth-created entity] wishes to seek a personal judgment against Flores Galarza in a ruinous and probably uncollectible amount for actions that he took as the Commonwealth Treasurer to serve the interests of the Commonwealth, they are entitled to do that. . . . If such a judgment might induce the Commonwealth to indemnify Flores Galarza from the Commonwealth Treasury to spare him from ruin, that likelihood is irrelevant to the personal-capacity determination.”) *with Asociacion De Subscripcion Conjunta Del Seguro DeResponsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 37 (1st Cir. 2007), *reh’g and reh’g en banc denied* (1st Cir. 2007) (Howard, J., concurring) (“The lead opinion concludes that a viable takings claim may exist against state officials acting in their individual capacities, but that Flores Galarza is entitled to qualified immunity because his withholding funds was reasonable in light of the unique circumstances present. . . I am not entirely convinced that federal takings claims may ever properly lie against state officials acting in their individual capacities.”).

*See also Brooks v. Arthur*, 626 F.3d 194, 202 (4th Cir. 2010) (“Put simply, because the litigation landscape is materially different in a personal-capacity suit – as opposed to an official-capacity suit – the parties are not in privity.”); *Andrews v. Daw*, 201 F.3d 521, 523 (4th Cir. 2000)

("[A] government employee in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata.").

See also *Solida v. McKelvey*, 820 F.3d 1090, 1093-94 (9th Cir. 2016) ("This appeal begins and ends with the threshold question of whether a *Bivens* action can provide the injunctive and declaratory relief that Roca Solida seeks against McKelvey in her individual capacity. In answering no, we join our sister circuits in holding that relief under *Bivens* does not encompass injunctive and declaratory relief where, as here, the equitable relief sought requires official government action. . . . *Bivens* is both inappropriate and unnecessary for claims seeking solely equitable relief against actions by the federal government. By definition, *Bivens* suits are individual capacity suits and thus cannot enjoin official government action."); *Evans v. Bayer*, 684 F.Supp.2d 1365, 1369 (S.D. Fla. 2010) ("An issue remains, however, concerning whether injunctive relief can be sought against a defendant in his individual capacity if the act must be in his official capacity to have official consequences. The Court finds the answer to be no. Evans argues that the Court can compel Bayer to destroy the records in question and sanction those who inhibit his action. Bayer contends that the Court cannot compel him to act in violation of his employer's policies or state law. Bayer's first premise is dubious, his second may have merit. But in either event, the Court need not untangle this knot. Even if the Court could compel Bayer to act in his individual capacity, the compelled action would have no official consequences. The only decision the Court has found on point agrees. The District Court of the Eastern District of Pennsylvania wrote, '[w]e do not see how a court can order an officer in his personal capacity to take an official act.' *Barrish v. Cappy*, No. 06-837, 2006 WL 999974, at \*4 (E.D.Pa. Apr. 17, 2006). Accordingly, Evans's demand for an injunction is DISMISSED WITHOUT PREJUDICE. Evans has leave to file an amended complaint naming the proper parties.").

For an interesting case raising the question of whether there should be individual liability for a constitutional violation where the official claims that budgetary constraints prevented compliance with the Constitution, see *Peralta v. Dillard*, 744 F.3d 1076, 1082-84 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946 (2015) ("Peralta would have had the jury ignore that there was no money or staff available to treat him immediately, and hold Brooks personally liable for failing to give Peralta care that Brooks would have found impossible to provide. Peralta claims that this approach is compelled by our decisions in *Jones v. Johnson*, 781 F.2d 769 (9th Cir.1986), and *Snow v. McDaniel*, 681 F.3d 978 (9th Cir.2012). . . .As an en banc court, we're not bound by either decision. Even if we were, it wouldn't help Peralta. In *Jones* and *Snow*, plaintiffs sought both money damages and injunctions. Neither case dealt with jury instructions; the question in both was whether the case could proceed at all. Lack of resources is not a defense to a claim for prospective relief because prison officials may be compelled to expand the pool of existing resources in order to remedy continuing Eighth Amendment violations. . . . A case seeking prospective relief thus can't be dismissed simply because there is a shortage of resources. Damages are, by contrast, entirely retrospective. They provide redress for something officials could have done but did not. What resources were available is highly relevant because they define the spectrum of choices that officials had at their disposal. To the extent *Jones* and *Snow* can be read

to apply to monetary damages against an official who lacks authority over budgeting decisions, they are overruled. . . .Peralta seeks only damages. Allowing the jury to consider the constraints under which an individual doctor operates in determining whether he is liable for money damages because he was deliberately indifferent doesn't mean that prisoners have no remedy for violations of their Eighth Amendment rights. For example, although prisoners can't sue states for monetary relief, they *can* sue for injunctions to correct unconstitutional prison conditions. . . . Section 1983 also authorizes prisoners to sue municipal entities for damages if the enforcement of a municipal policy or practice, or the decision of a final municipal policymaker, caused the Eighth Amendment violation. . . . A chronic shortage of resources may well amount to a policy or practice for which monetary relief may be available under *Monell*, but *Monell* claims can't be brought against states, which are protected by the Eleventh Amendment. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 345 (1979). The prison where Peralta was held was, of course, run by the state. Our dissenting colleagues would have the jury hold Brooks liable for delay in treatment caused by shortages beyond his control, on the theory that the state will wind up paying any damages award. According to the dissenters, this will give the state an incentive to improve prison conditions. . . . But the state is protected from monetary damages by the Eleventh Amendment. We may not circumvent this protection by imputing the state's wrongdoing to an employee who himself has committed no wrong. The dissenters attempt an end run around the Eleventh Amendment by subjecting the state to precisely the kind of economic pressure against which the amendment protects it. We have no quarrel with the dissenters' view that Peralta may have suffered an Eighth Amendment violation. If the state provided insufficient resources to accord inmates adequate medical care, it could be compelled to correct those conditions. . . . But such a lawsuit could provide no redress for past constitutional violations because the state is protected by sovereign immunity, 'a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.' . . . Congress could abrogate this immunity, but it has not done so for cases brought under 42 U.S.C. § 1983. *See Quern*, 440 U.S. at 345. We decline to bring about by indirection what Congress has chosen not to do expressly.")

*See also Zingg v. Groblewski*, 907 F.3d 630, 638 (1st Cir. 2018) ("We are not aware of any authority. . .to support the proposition that there is a per se Eighth Amendment prohibition against corrections officials considering cost, even when considered only in the course of selecting treatment that is aimed at attending to an incarcerated person's serious medical needs. . . . Thus, even if there were sufficient evidence in the record to show that Groblewski took cost into account in making his July 15 denial of Humira in favor of Dovonex, that evidence would not in and of itself provide a supportable basis for a finding of deliberate indifference, given what the record shows regarding what Groblewski knew about Zingg's condition, MPCH's treatment protocol for psoriasis, and the potential risks posed by Humira that topical medications do not pose.")

*But see Peralta v. Dillard*, 744 F.3d 1076, 1089, 1092, 1093 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946 (2015) (Christen, J., with whom Rawlinson, M. Smith, and Hurwitz, JJ., join, and with whom Bybee, J, joins as to Parts I, II, and III, dissenting in part and concurring in part) (en banc) ("The decision announced today overturns more than thirty years of circuit

precedent by holding that lack of resources is a defense to providing constitutionally inadequate care for prisoners. Because it will deny any remedy for prisoners who have suffered injuries due to prison officials' deliberate indifference and eliminates an important incentive for improving prison conditions, I respectfully dissent. . . . The majority assures us that prisoners will still be able to bring § 1983 claims if they seek injunctive relief and attempts to distinguish *Jones* and *Snow* on the basis that Peralta sought only money damages. But the principle in *Jones* and *Snow* was first articulated in *Spain*, which drew no distinction between the type of relief sought by the plaintiff. . . . [U]ntil today, we have never suggested that cost may be a defense to Eighth Amendment claims for damages. . . . The rule articulated in *Spain*, *Jones*, and *Snow* recognizes that the constitutionally-required threshold for the humane treatment of prisoners is impossible to safeguard if prison officials are permitted to claim lack of resources as a defense. In the case of California prisons, there can be no doubt that chronic underfunding and overcrowding have plagued prison administrators and the prison population for decades. . . . The majority's decision will effectively prevent prisoners from bringing suits for damages against prison officials who have violated their Eighth Amendment rights by demonstrating deliberate indifference to serious medical needs: those who actually control prison budgets are immune from damage suits, *Tenney v. Brandhove*, 341 U.S. 367, 376–79 (1951) (providing absolute immunity for state legislators); and prison officials responsible for substandard care or conditions will be shielded by the newly-announced 'lack of resources' defense.”)

See also *Peralta v. Dillard*, 744 F.3d 1076, 1098-1101 (9th Cir. 2014) (en banc), cert. denied, 135 S. Ct. 946 (2015) (Hurwitz, J., with whom Rawlinson, M. Smith, and Christen, JJ., join, and with whom Bybee, J., joins as to Parts I and II, dissenting in part and concurring in part) (“Today’s opinion therefore renders damages suits by inmates who suffer grievous injuries as a result of constitutionally forbidden indifference all but impossible in practice. In every case in which state actors are sued for failing to provide minimal medical care—even those cases involving loss of life or serious permanent injury—the defense will be lack of resources, and that defense will almost surely succeed. This will encourage further constitutional violations: If states do not have to pay damages for depriving inmates of the level of care required to avoid violating the Eighth Amendment, there will be little reason to increase appropriations for prisoner care. . . . In the end, the only rational justification for today’s decision is concern for the prison medical provider. That solicitude is valid: With shoestring budgets, prison doctors must triage medical care. . . . [T]his case does not deal with the imposition of liability on a doctor who was unable to see a patient. Peralta managed to become Dr. Brooks’ patient, and the suit attacks decisions made by Dr. Brooks from that point forward. . . . More importantly, the majority’s focus on the personal liability of prison physicians ignores an important reality—the state is in every respect the real party in interest in a damages suit. California indemnifies employees for torts committed in the scope of their employment. . . . When a state funds its employee’s defense and indemnifies him against any judgment, it ought not then assert that he is faultless because the state is really to blame. The policy concern that no doctor will work for a prison if he faces the possibility of personal liability has already been addressed (and apparently effectively so) by California’s promise to hold the physician harmless. Having made the policy decision to incarcerate a large number of

wrongdoers, California should not be allowed to avoid the Eighth Amendment consequences of that decision by systematically underfunding medical care. At a minimum, when a state attempts to do so, we should create an exception to the judge-made collateral source rule and allow the plaintiff to inform jurors that the state, not the individual defendants, will pay any compensatory damages awarded. . . .Such an approach would not, as the majority suggests, Maj. Op. at 11, violate state sovereign immunity. States have no obligation to indemnify their employees for damages imposed because of constitutional violations. But, when a state chooses to do so, the state agent should not be heard to argue that the imposition of liability on him individually is unfair. Section 1983 and the Constitution do not codify a collateral source rule. . . .Today’s decision, as Judge Christen’s dissent convincingly demonstrates, is wrong on the record of this case. But even if that were not so, the decision sweeps far too broadly, effectively foreclosing any liability for permanent injuries and deaths caused by the deliberate indifference of state funding authorities. I therefore dissent from the affirmance of the judgment in favor of Dr. Brooks.”)

*See also Shorter v. Baca*, 895 F.3d 1176, 1191 (9th Cir. 2018) (“If plaintiffs in § 1983 actions demonstrate that their conditions of confinement have been restricted solely because of overcrowding or understaffing at the facility, a deference instruction ordinarily should not be given. Similarly, if plaintiffs in § 1983 actions demonstrate that they have been subjected to search procedures that are an unnecessary, unjustified, or exaggerated response to concerns about jail safety, we do not defer to jail officials. Otherwise, ‘careless invocations of “deference” run the risk of returning us to the passivity of several decades ago, when the then-prevailing barbarism and squalor of many prisons were met with a judicial blind eye and a “hands off” approach.’”).

## **F. Supervisory Liability v. Municipal Liability**

Supervisory liability can be imposed without a determination of municipal liability. Supervisory liability runs against the individual, is based on his or her personal responsibility for the constitutional violation and does not require any proof of official policy or custom as the “moving force,” *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (quoting *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)), behind the conduct.

*See also Hunt v. Davis*, 749 F. App’x 522, \_\_\_ (9th Cir. 2018) (“Cases addressing municipal liability are also inapplicable to Hunt’s claim against Sheriff Clark individually. Municipal liability requires an allegation of a constitutional injury flowing from a governmental policy or custom. . . . This can be established by a showing ‘that an official with final policymaking authority ratified a subordinate’s unconstitutional decision or action and the basis for it.’ . . . Such a ratification is ‘chargeable to the municipality’ as a policy or custom. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). But whether there is a municipal policy or custom that caused constitutional injury is a distinct inquiry from whether a particular official, ‘through the official’s own individual actions, has violated the Constitution.’ . . . As neither the Supreme Court nor our circuit has established that an official’s post-incident ratification of or acquiescence to a claimed constitutional violation is alone sufficient for individual liability under § 1983, . . . the district court

erred when it held that Hunt stated a claim against Sheriff Clark on this basis.”); *McGrath v. Scott*, 250 F. Supp. 2d 1218, 1222-23 (D. Ariz. 2003) (“In their pleadings, both parties rely on cases involving questions of municipal liability under § 1983 to establish the legal standard for supervisory liability under § 1983. . . However, municipal and supervisory liability present distinct and separate questions that are treated and analyzed as such. . . Supervisory liability represents a form of personal liability against an individual, while municipal liability is entity liability. Supervisory liability concerns whether supervisory officials’ own action or inaction subjected the Plaintiff to the deprivation of her federally protected rights. Generally, liability exists for supervisory officials if they personally participated in the wrongful conduct or breached a duty imposed by law. . . In contrast, municipal liability depends upon enforcement by individuals of a municipal policy, practice, or decision of a policymaker that causes the violation of the Plaintiffs federally protected rights. . . Typically, claims asserted against supervisory officials in both their individual and official capacities provide bases for imposing both supervisory liability (the individual claim) and municipality liability (the official capacity claim) if the supervisor constitutes a policymaker.”)

### 1. Pre-*Iqbal* Cases

“[W]hen supervisory liability is imposed, it is imposed against the supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates.” *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987). *See also Lloyd v. Van Tassell*, 2009 WL 179622, at \*5, \*6 (11th Cir. Jan. 27, 2009) (not published) (“A supervisor may be individually liable under § 1983 only when: (1) ‘the supervisor personally participates in the alleged unconstitutional conduct’; or (2) ‘there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation.’. . . A causal connection is established when: (1) the supervisor was on notice, by a history of widespread abuse, of the need to correct a practice that led to the alleged deprivation, and he failed to do so; (2) the supervisor’s policy or custom resulted in deliberate indifference; (3) the supervisor directed the subordinate to act unlawfully; or (4) the supervisor knew the subordinate would act unlawfully and failed to stop the unlawful action. . . ‘The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.’. . . In order to be held liable under § 1983 in an official capacity, the plaintiff must show that the deprivation of a constitutional right resulted from: ‘(1) an action taken or policy made by an official responsible for making final policy in that area of the [County’s] business; or (2) a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker.’. . . Only a final policymaker may be held liable in an official capacity. . . This is similar to the standard used for imposing supervisor liability, although the plaintiff must also prove that the defendant was a policymaker. Also, the qualified immunity defense does not apply to an official sued in his official capacity.”); *McGratposth v. Scott*, 250 F. Supp.2d 1218, 1222, 1223 (D.Ariz. 2003) (“[M]unicipal and supervisory liability present distinct and separate questions that are treated and analyzed as such. . . . Supervisory liability concerns whether supervisory officials’ own action or inaction subjected the Plaintiff to the deprivation of her

federally protected rights. Generally, liability exists for supervisory officials if they personally participated in the wrongful conduct or breached a duty imposed by law. . . In contrast, municipal liability depends upon enforcement by individuals of a municipal policy, practice, or decision of a policymaker that causes the violation of the Plaintiffs federally protected rights. . . Typically, claims asserted against supervisory officials in both their individual and official capacities provide bases for imposing both supervisory liability (the individual claim) and municipality liability (the official capacity claim) if the supervisor constitutes a policymaker.”).

As with a local government defendant, a supervisor cannot be held liable under § 1983 on a *respondeat superior* basis, **Monell v. Dept. of Social Services**, 436 U.S. 658, 694 n.58 (1978), although a supervisory official may be liable even where not directly involved in the constitutional violation. The misconduct of the subordinate must be “affirmatively link[ed]” to the action or inaction of the supervisor. **Rizzo v. Goode**, 423 U.S. 362, 371 (1976).

Since supervisory liability based on inaction is separate and distinct from the liability imposed on the subordinate employees for the underlying constitutional violation, the level of culpability that must be alleged to make out the supervisor’s liability may not be the same as the level of culpability mandated by the particular constitutional right involved.

While § 1983 itself contains no independent state of mind requirement, **Parratt v. Taylor**, 451 U.S. 527, 535 (1981), *overruled in part on other grounds*, **Daniels v. Williams**, 474 U.S. 327 (1986), lower federal courts consistently require plaintiffs to show something more than mere negligence yet less than actual intent in order to establish supervisory liability. *See e.g.*, **Blankenhorn v. City of Orange**, 485 F.3d 463, 486 (9th Cir. 2007) (“While Chief Romero did not personally dismiss complaints against Nguyen, as was the case in *Larez* and *Watkins*, he did approve Nguyen’s personnel evaluations despite repeated and serious complaints against him for use of excessive force. That approval, together with the expert testimony regarding the ineffectiveness of Nguyen’s discipline for those complaints, could lead a rational factfinder to conclude that Romero knowingly condoned and ratified actions by Nguyen that he reasonably should have known would cause constitutional injuries like the ones Blankenhorn may have suffered.”); **Whitfield v. Melendez-Rivera**, 431 F.3d 1, 14 (1st Cir. 2005) (“Supervisors may only be held liable under § 1983 on the basis of their own acts or omissions. . . Supervisory liability can be grounded on either the supervisor’s direct participation in the unconstitutional conduct, or through conduct that amounts to condonation or tacit authorization. . . Absent direct participation, a supervisor may only be held liable where ‘(1) the behavior of [his] subordinates results in a constitutional violation and (2) the [supervisor’s] action or inaction was affirmatively link [ed]’ to the behavior in the sense that it could be characterized as ‘supervisory encouragement, condonation or acquiescence’ or ‘gross negligence ... amounting to deliberate indifference.’” . Our holding with respect to Fajardo’s municipal liability informs our analysis of the mayor’s and the police commissioner’s supervisory liability. Because the plaintiffs failed to provide sufficient evidence establishing that Fajardo’s police officers were inadequately trained, it follows that the plaintiffs failed to prove that the mayor and the police commissioner were deliberately, recklessly

or callously indifferent to the constitutional rights of the citizens of Fajardo. The plaintiffs failed to show that there were any training deficiencies, much less that the mayor or the police commissioner should have known that there were ... training problems.' . . . Moreover, as discussed above, the evidence was insufficient to support the theory that the mayor or the police commissioner had condoned an unconstitutional custom.”); *Atteberry v. Nocona General Hospital*, 430 F.3d 245, 254, 256 (5th Cir. 2005) (“Ordinarily, supervisors may not be held vicariously liable for constitutional violations committed by subordinate employees. . . . Deliberate indifference in this context ‘describes a state of mind more blameworthy than negligence.’ [citing *Farmer* and *Estelle*] Accordingly, to prevail against either Norris or Perry, the Plaintiffs must allege, *inter alia*, that Norris or Perry, as the case may be, had subjective knowledge of a serious risk of harm to the patients. . . . In sum, the Plaintiffs alleged that Norris and Perry knew both that a dangerous drug was missing and that patients were dying at an unusually high rate. They also alleged that although Norris and Perry should and could have investigated the deaths and missing drugs or changed hospital policy, they did nothing for a considerable period of time. For Rule 12(b)(6) purposes, the requisite deliberate indifference is sufficiently alleged.”); *Doe v. City of Roseville*, 296 F.3d 431, 441 (6th Cir. 2002) (Discussing standards of supervisory liability among the Circuits and concluding that “[a]lthough Jane had a constitutional right to be free from sexual abuse at the hands of a school teacher or official, she did not have a constitutional right to be free from negligence in the supervision of the teacher who is alleged to have actually abused her. Negligence is not enough to impose section 1983 liability on a supervisor.”); *Carter v. Morris*, 164 F.3d 215, 221 (4th Cir. 1999) (“A plaintiff must show actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and ‘an affirmative causal link’ between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff.’ [citing *Shaw v. Stroud*]”); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 7 (1st Cir. 1998) (“Notice is a salient consideration in determining the existence of supervisory liability. . . . Nonetheless, supervisory liability does not require a showing that the supervisor had actual knowledge of the offending behavior; he ‘may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness.’ *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 582 (1st Cir.1994). To demonstrate deliberate indifference a plaintiff must show (1) a grave risk of harm, (2) the defendant’s actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk. . . . [T]he plaintiff must ‘affirmatively connect the supervisor’s conduct to the subordinate’s violative act or omission.’ . . . This affirmative connection need not take the form of knowing sanction, but may include tacit approval of, acquiescence in, or purposeful disregard of, rights-violating conduct.”); *Lankford v. City of Hobart*, 73 F.3d 283, 287 (10th Cir. 1996) (following Third Circuit approach and requiring personal direction or actual knowledge for supervisory liability); *Baker v. Monroe Township*, 50 F.3d 1186, 1194 & n.5 (3d Cir. 1995) (applying Third Circuit standard which requires “actual knowledge and acquiescence” and noting that other circuits have broader standards for supervisory liability); *Howard v. Adkison*, 887 F.2d 134, 137,138 (8th Cir. 1989) (supervisors liable when inaction amounts to reckless disregard, deliberate indifference to or tacit authorization of constitutional violations); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 562 (1st Cir. 1989) (supervisor’s conduct or inaction must be shown to amount to deliberate, reckless

or callous indifference to constitutional rights of others); *Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989) (“[S]upervisory liability may be imposed when an official has actual or constructive notice of unconstitutional practices and demonstrates ‘gross negligence’ or ‘deliberate indifference’ by failing to act.”); *Rascon v. Hardiman*, 803 F.2d 269, 274 (7th Cir. 1986) (supervisory liability requires showing that “official knowingly, willfully, or at least recklessly caused the alleged deprivation by his action or failure to act.”); *Salvador v. Brown*, No. Civ. 04-3908(JBS), 2005 WL 2086206, at \*4 (D.N.J. Aug. 24, 2005) (“The Third Circuit Court of Appeals has articulated a standard for establishing supervisory liability which requires ‘actual knowledge and acquiescence.’ *Baker v. Monroe Township*, 50 F.3d 1186, 1194 & n. 5 (3d Cir.1995). . . . Plaintiff has not alleged that Defendants Brown or MacFarland had any direct participation in the alleged retaliation by corrections officers. It appears that Plaintiff bases Commissioner Brown and Administrator MacFarland’s alleged liability solely on their respective job titles, rather than any specific action alleged to have been taken by them adverse to Plaintiff.”).

*But see* *Brandon v. Kinter*, 938 F.3d 21, 38-39 (2d Cir. 2019) (“The cases on which defendants rely do not hold that all claims under § 1983 require a mental state greater than negligence. . . . To the contrary, the § 1983 statute ‘contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.’ *Daniels v. Williams*, 474 U.S. 327, 330 (1986). *Daniels* does not foreclose all § 1983 claims based on negligence. The Supreme Court simply stated that, ‘depending on the right, merely negligent conduct may not be enough to state a claim’ and expressly declined to ‘rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care.’. . . Our Circuit has not stated whether a First Amendment free exercise claim requires more than negligence, and we need not do so here. Even assuming *arguendo* that it does, in the instant case, as we will outline shortly, Brandon has introduced sufficient evidence to create a genuine dispute as to whether the defendants acted with deliberate indifference in serving him pork. Under our holding in *Greenwich Citizens Committee, Inc. v. Counties of Warren and Washington Indus. Development Agency*, 77 F.3d 26 (2d Cir. 1996), deliberate indifference clearly suffices. We, therefore, decline to reach the question of whether something less than deliberate indifference—like negligence—would also be sufficient to establish an affirmative First Amendment claim. . . . We conclude that a reasonable jury could find that the defendants acted with deliberate indifference to Brandon’s free exercise rights. Accordingly, and for those reasons, we need not decide at this time whether negligence would also be sufficient to state a claim under the Free Exercise Clause.”)

In *Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990), the court found the Supreme Court’s analysis in *City of Canton v. Harris*, 489 U.S. 378 (1989), provided a helpful analogy in determining whether a supervisory official was deliberately indifferent to an inmate’s psychiatric needs. The court held that a three-prong test must be applied in determining a supervisor’s liability: “(1) whether, in failing adequately to train and supervise subordinates, he was deliberately indifferent to an inmate’s mental health care needs; (2) whether a reasonable person in the supervisor’s position would know that his failure to train and supervise reflected deliberate

indifference; and (3) whether his conduct was causally related to the constitutional infringement by his subordinate.” 891 F.2d at 836-37.

*See also Ontha v. Rutherford County, Tennessee*, 2007 WL 776898, at \*5, \*6 (6th Cir. Mar. 13, 2007) (not published) (“Sheriff Jones acknowledged in his affidavit that the Rutherford County Sheriff’s Office ‘does not have a written policy specifically prohibiting’ the use of a patrol car to strike a person who is fleeing on foot. . . Plaintiffs posit that this lack of training served as implicit authorization of or knowing acquiescence in Deputy Emslie’s allegedly inappropriate use of his patrol car to chase and strike Tommy Ontha as he attempted to flee. Yet, to establish supervisory liability, it is not enough to point after the fact to a particular sort of training which, if provided, might have prevented the harm suffered in a given case. Rather, such liability attaches only if a constitutional violation is ‘part of a pattern’ of misconduct, or ‘where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable or would properly be characterized as substantially certain to occur.’ . . . In this case, Plaintiffs do not contend that Deputy Emslie’s purported misuse of his patrol car was part of a pattern of comparable violations, as opposed to an isolated occurrence. Neither have Plaintiffs suggested any basis for us to conclude that the tragic events of this case were an ‘almost inevitable’ or ‘substantially certain’ byproduct of a lack of training as to the proper operation of a patrol car when pursuing an individual traveling on foot. . . . Under this record, we find as a matter of law that Plaintiffs cannot sustain their § 1983 claims against Sheriff Jones in his individual capacity.”); *Vaughn v. Greene County, Arkansas*, 438 F.3d 845, 851 (8th Cir. 2006) (“Vaughn further contends Sheriff Langston’s failure to train Jail personnel on providing care for ill inmates and his policy or custom of deliberately avoiding information regarding the medical conditions and needs of inmates evidences Sheriff Langston’s deliberate indifference to Blount’s serious medical needs. Again, we disagree. A supervisor ‘may be held individually liable ... if a failure to properly supervise and train the offending employee caused a deprivation of constitutional rights.’ . . . Under this theory of liability, Vaughn must demonstrate Sheriff Langston ‘was deliberately indifferent to or tacitly authorized the offending acts.’. . . Vaughn fails to do so. We cannot say Sheriff Langston’s practice of delegating to others such duties as reading mail and responding to communications regarding Jail inmates amounts to deliberate indifference. Moreover, there is no indication from the record Sheriff Langston had notice his policies, training procedures, or supervision ‘were inadequate and likely to result in a constitutional violation.’”); *Sargent v. City of Toledo Police Department*, No. 04-4143, 2005 WL 2470830, at \*3 (6th Cir. Oct. 6, 2005) (not published) (“We disagree with Sargent’s argument that Taylor is vicariously liable for all of Whatmore’s allegedly illegal actions. Certainly, supervisory officers who order a subordinate officer to violate a person’s constitutional rights and non-supervisory officers present during a violation of person’s civil rights who fail to stop the violation can be liable under § 1983. . . Additionally, the supervising officer can neither encourage the specific act of misconduct nor otherwise directly participate in it. . . Whether Whatmore committed a Fourth Amendment violation when he entered Sargent’s home, Taylor is not vicariously liable for any alleged violation because there is no indication either that Taylor ordered Whatmore to enter the house illegally or that Taylor knew that Whatmore entered the home without

consent. Thus, Taylor never ordered nor participated in a violation of Sargent’s rights.”); **Turner v. City of Taylor**, 412 F.3d 629, 643 (6th Cir. 2005) (“This Court has explained the standards for supervisory liability under § 1983 as follows:[T]he § 1983 liability of supervisory personnel must be based on more than the right to control employees. Section 1983 liability will not be imposed solely upon the basis of respondeat superior. There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate. *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.1984) (citing *Hays v. Jefferson County*, 668 F.2d 869, 872–74 (6th Cir.1982))[.]”); **Mercado v. City of Orlando**, 407 F.3d 1152, 1157, 1158 (11th Cir. 2005) (“All of the factors articulated in *Graham* weigh in favor of Mercado. Because he was not committing a crime, resisting arrest, or posing an immediate threat to the officers at the time he was shot in the head, if Padilla aimed for Mercado’s head, he used excessive force when apprehending Mercado. At this point, we must assume that Padilla was aiming for Mercado’s head based on the evidence that Padilla was trained to use the Sage Launcher, that the weapon accurately hit targets from distances up to five yards, and that Mercado suffered injuries to his head. Padilla was aware that the Sage Launcher was a lethal force if he shot at a subject from close range. The officers were also aware that alternative actions, such as utilizing a crisis negotiation team, were available means of resolving the situation. This is especially true in light of the fact that Mercado had not made any threatening moves toward himself or the officers. Thus, in the light most favorable to Mercado, Padilla violated his Fourth Amendment rights when he intentionally aimed at and shot Mercado in the head with the Sage Launcher. . . We further conclude, however, that Officer Rouse did not violate Mercado’s Fourth Amendment rights. Although Officer Rouse did not fire the Sage Launcher, Mercado contends that she should be held responsible under a theory of supervisory liability. . . Officer Rouse was in another room during the incident, and did not see Padilla aim or fire the gun. She did not tell Padilla to fire the Sage Launcher at Mercado’s head. Given that Padilla was trained in the proper use of the launcher, that the Department’s guidelines prohibited firing the launcher at a suspect’s head or neck except in deadly force situations, and that . . . there is no evidence that Padilla has used similarly excessive force in the past—all of which are undisputed facts in the record—Rouse could not reasonably have anticipated that Padilla was likely to shoot Mercado in the head either intentionally or unintentionally. Even under the ‘failure to stop’ standard for supervisory liability, Rouse cannot be held liable.”); **Randall v. Prince George’s County, Maryland**, 302 F.3d 188, 207 (4th Cir. 2002) (“Because supervisors ‘cannot be expected to promulgate rules and procedures covering every conceivable occurrence,’ and because they may be powerless to prevent deliberate unlawful acts by subordinates, the courts have appropriately required proof of multiple instances of misconduct before permitting supervisory liability to attach.”); **Sutton v. Utah State School for the Deaf and Blind**, 173 F.3d 1226, 1240, 1241 (10th Cir. 1999) (“Where a superior’s failure to train amounts to deliberate indifference to the rights of persons with whom his subordinates come into contact, the inadequacy of training may serve as the basis for § 1983 liability. . . . We are persuaded that plaintiff-appellant Sutton’s allegations cannot be dismissed as inadequate in light of the repeated notification to Moore, as pled, of notice that James, with all his impairments, had been subjected to repeated sexual assaults by the much

larger boy. In light of James's severe impairments, and the notification to Moore as alleged of danger to James, and the averment of Moore's failure to take action to prevent James being repeatedly molested, App. at 5, we are persuaded that a viable claim that would 'shock the conscience of federal judges' was stated."); **Barreto-Rivera v. Medina-Vargas**, 168 F.3d 42, 49 (1st Cir.1999) ("Officer Medina-Vargas's history in the police department was troubled at best. Despite failing the psychological component of the police academy entrance exam, he was admitted to the school. Over the course of his twenty- five year career, Officer Medina-Vargas was disciplined thirty times for abuse of power, unlawful use of physical force and/or physical assaults; six incidents led to recommendations that he be dismissed from the force. Toledo-Davila's first review of Officer Medina-Vargas's file came in 1992, when an investigating officer recommended his dismissal because he had an extensive record of physical assaults and there had been no apparent change in his behavior despite sanctions. Ignoring the recommendation, Toledo-Davila imposed a fifteen day suspension. Two weeks later, Toledo-Davila reviewed another disciplinary action taken against Officer Medina-Vargas for the improper use of his firearm three years earlier. Following this review, Toledo-Davila reduced Officer Medina-Vargas's sanction from a thirty day suspension imposed by the former superintendent to a two day suspension. There is clearly sufficient evidence in this record to allow a jury to reasonably conclude that Toledo-Davila displayed deliberate indifference to Officer Medina-Vargas's propensity toward violent conduct, and that there was a causal connection between this deliberate indifference and Officer Medina-Vargas's fatal confrontation with Ortega-Barreto."); **Spencer v. Doe**, 139 F.3d 107, 112 (2d Cir. 1998) ("We have long recognized that supervisors may be 'personally involved' in the constitutional torts of their supervisees if: (1) the supervisory official, after learning of the violation, failed to remedy the wrong; (2) the supervisory official created a policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; or (3) the supervisory official was grossly negligent in managing subordinates who caused the unlawful condition or event."); **Doe v. Taylor Independent School District**, 15 F.3d 443, 453 (5th Cir. 1994) (en banc) ("The most significant difference between *City of Canton* and this case is that the former dealt with a municipality's liability whereas the latter deals with an individual supervisor's liability. The legal elements of an individual's supervisory liability and a political subdivision's liability, however, are similar enough that the same standards of fault and causation should govern."), cert. denied sub nom **Lankford v. Doe**, 115 S. Ct. 70 (1994); **Shaw v. Stroud**, 13 F.3d 791, 798 (4th Cir. 1994) ("We have set forth three elements necessary to establish supervisory liability under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices,' and (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." citing **Miltier v. Beorn**, 896 F.2d 848, 854 (4th Cir. 1990)), cert. denied, 115 S. Ct. 68 (1994); **Walker v. Norris**, 917 F.2d 1449, 1455-56 (1990) (applying *City of Canton* analysis to issue of supervisory liability); **Sample v. Diecks**, 885 F.2d 1099, 1116-1117 (3d Cir. 1989) (same).

Compare *Rosenberg v. Vangelo*, No. 02-2176, 2004 WL 491864, at \*5 (3d Cir. Mar. 12, 2004) (unpublished) (“[W]e respectfully disagree with the *Ricker* Court’s decision to cite and rely on the ‘direct and active’ language from *Grabowski*. We also conclude that the deliberate indifference standard had been clearly established prior to 1999 and no reasonable official could claim a higher showing would be required to establish supervisory liability.”) with *Ricker v. Weston*, No. 00-4322, 2002 WL 99807, at \*5, \*6 (3d Cir. Jan. 14, 2002) (unpublished) (“A supervisor may be liable under 42 U.S.C. § 1983 for his or her subordinate’s unlawful conduct if he or she directed, encouraged, tolerated, or acquiesced in that conduct. . . . For liability to attach, however, there must exist a causal link between the supervisor’s action or inaction and the plaintiff’s injury. . . . [E]ven assuming, arguendo, that the K-9 officers were not disciplined as a result of Zukasky’s investigation, that investigation did not in any way cause Freeman’s injuries. . . . We reach the same conclusion as to Palmer and Goldsmith. The undisputed facts indicate that they knew about Schlegel’s prior misconduct but nonetheless promoted him to Captain of Field Services. They also knew of Remaley’s violent episodes but permitted him to be a member of the K-9 Unit. These acts are, as a matter of law, insufficient to constitute the requisite direct involvement in appellees’ injuries. . . . Importantly, neither Palmer nor Goldsmith were aware of the attacks in question until after they occurred. At that time, they ordered an investigation but ultimately chose not to discipline the officers involved, even though it appears that Zukasky had recommended that at least certain of the officers be disciplined. This decision not to discipline the officers does not amount to active involvement in appellees’ injuries given that all of the injuries occurred before the decision. There is simply no causal link between those injuries and what Palmer and Goldsmith did or did not do.”).

Compare *Lynn v. City of Detroit*, 98 F. App’x 381, 386 (6th Cir. 2004) (“According to several witnesses from within the department, police supervisors in Detroit are neither trained nor instructed to look for evidence of criminality when reviewing officers’ activities. Supervisors are expected to keep their eyes open for ‘anything amiss,’ but they focus on ensuring that reports are complete and accurate and that officers’ time has been spent efficiently and productively. Discovery of criminal activity by subordinate officers is ordinarily made through the receipt of complaints from citizens. A supervisor’s responsibility upon receiving a complaint is to report it to the Internal Affairs Division; Internal Affairs then handles the investigation. Investigation by Internal Affairs – not by supervisors – is the tool by which the Department attempts to uncover criminality on the part of its officers. Given these facts, we do not think the defendants’ failure to investigate the corrupt officers amounts to acquiescence in the officers’ misconduct or reflects indifference to violations of the plaintiffs’ rights. The defendants were entitled to rely on Internal Affairs to perform its assigned function. The defendants’ responsibility was to report specific complaints of criminality or misconduct that they themselves observed. None of the defendants personally observed any misconduct. Ferency and Tate received specific complaints and duly reported them. Ferency also reported generalized rumors of criminal activity. It was the reports to Internal Affairs that led, in time, to the officers’ prosecution.”) with *Lynn v. City of Detroit*, 98 F. App’x 381, 388 (6th Cir. 2004) (Clay, J., dissenting) (“The majority opinion suggests that Defendants, based on the record in this case, had no duty to respond to the widespread, commonly

known criminal conduct that permeated the walls of the City of Detroit's sixth police precinct's third platoon, other than to sporadically report a few citizen complaints of police misconduct to either Internal Affairs or other officers. What is not disputed is that Defendants, who directly supervised the rogue officers responsible for violations of Plaintiffs' constitutional rights, acted with deliberate indifference when confronted with daily rumors and discussion of their subordinates' criminal behavior. By looking the other way, or by failing to act when faced with apparently reliable reports of police corruption, Defendants actually contributed to the lawlessness of the third platoon by permitting its officers to continue to violate citizens' rights with impunity.'").

*See also Tardiff v. Knox County*, 397 F.Supp.2d 115, 141-43 (D.Me. 2005) (“Unlike individual officer liability, the liability of supervisory officials does not depend on their personal participation in the acts of their subordinates which immediately brought about the violation of the plaintiff’s constitutional rights. . . Liability can result from Sheriff Davey’s acquiescence to Knox County Jail’s ongoing practice of strip searching all detainees charged with misdemeanors. . . Some evidence in the record points to Sheriff Davey’s actual knowledge of this ongoing practice. . . . However, Sheriff Davey disputes that he had actual knowledge of the unlawful custom and practice of strip searching detainees charged with misdemeanors without reasonable suspicion of concealing contraband or weapons. . . Regardless of his actual knowledge, the Court concludes that based on the undisputed evidence in the record he should have known that the practice was ongoing, and that, despite the change to the written policy in 1994 and the institution of new procedures in 2001, the practice had not been eliminated. The issue then becomes whether Plaintiffs have established that Sheriff Davey’s conduct amounts to deliberate indifference or willful blindness to an unconstitutional practice of his subordinates. . . Finally, Plaintiffs must establish a causal connection between Sheriff Davey’s conduct and the corrections officers’ unconstitutional actions. . . The widespread practice was sufficient to alert Sheriff Davey that the unlawful strip search practice persisted. On the evidence presented in the summary judgment record, the Court concludes that Sheriff Davey’s failure to take any corrective action directed at eradicating this pervasive practice – even in the face of official Department of Corrections’ reports and the incontrovertible record evidence that the practice persisted – amounts to a reckless indifference of the constitutional rights of class members arrested on misdemeanor charges. Sheriff Davey’s reckless indifference allowed the practice to persist for years and caused the violation of the constitutional rights of Plaintiffs arrested on misdemeanor charges. For the foregoing reasons, the Court will grant Plaintiffs’ Motion for Partial Summary Judgment with respect to that part of Count II alleging that Sheriff Davey is responsible, in his personal capacity, for the Knox County Jail’s unconstitutional custom and practice of strip searching detainees charged with misdemeanors.”); *McAllister v. City of Memphis*, No. 01-2925 DV, 2005 WL 948762, at \*4, \*5 (W.D. Tenn. Feb. 22, 2005) (not reported) (“Young conducted the hearing. However, Young did not consider the statements of the witnesses. He did not interview the three police officers who were present at the time the incident occurred. This is true despite the fact that Charnes had determined that Polk’s statement deserved considerable weight because it is unusual for an officer to admit that he believes that another officer struck a citizen. Although the IAB is not permitted to consider previous complaints against the officer being investigated, a hearing officer is allowed to

consider them. Thus, Young knew that Hunt had six prior complaints against him. Moreover, although Young was permitted to subpoena anyone he believed would be helpful, the only person he subpoenaed was Hunt. Young never spoke with Plaintiff, and Plaintiff was not allowed to attend the hearing. Additionally, the MPD's policy states that a presumption of guilt is established when the IAB sustains a charge against an officer. In spite of this seemingly overwhelming evidence against Hunt, Young dismissed the complaint. Following the hearing, the City sent Plaintiff a letter informing him that there was sufficient evidence to sustain Plaintiff's allegations and that the appropriate action had been taken. Deputy Chief Pilot admitted in her deposition that the tone of the letter was misleading. . . . This could be evidence that Defendant's actions may have been a result of deliberate indifference to the Plaintiff's rights. Furthermore, as it is IAB's policy to send a letter to every complainant stating that appropriate action was taken, even when no action at all was taken, . . . such a practice may indicate Defendant's ratification of its officers' misconduct. . . . Therefore, the Court finds that a genuine issue of material fact exists as to whether a meaningful investigation was conducted. Additionally, based on the IAB investigation a genuine issue of material fact exists as to whether Defendant's decision not to discipline Officer Hunt indicates deliberate indifference on the part of the City, as envisioned by the Supreme Court in *City of Canton*....").

*See also Otero v. Wood*, 316 F.Supp.2d 612, 623-26 (S.D. Ohio 2004) ("The involvement of Zoretic, Wood, and Curmode . . . cannot be characterized as 'mere presence' or 'mere backup.' Zoretic was virtually looking over Brintlinger's shoulder when Brintlinger fired the gas gun. Wood was directing the firing of the knee knockers in a hands-on and immediate way. Curmode was the 'prime mover' of the entire operation, responsible for planning and initiating all action. None of these Defendants was a remote, desk-bound supervisor; rather, all three were direct participants in the firing of the knee knockers on April 29, 2001. Similarly, taking all of Plaintiff's factual allegations as true, there is a direct causal connection between the supervision provided by Zoretic, Wood, and Curmode and the failure of any officers to provide medical assistance to Plaintiff. Indeed, Zoretic, Wood, and Curmode may all be said to have directly participated in this alleged constitutional violation since they were present in Plaintiff's immediate vicinity and they, too, failed to help and were arguably deliberately indifferent to her need. . . . A reasonable jury could find, based on the facts as presented by Plaintiff, that the use of wooden baton rounds here was objectively unreasonable and that Defendants Zoretic, Wood, and Curmode each played a significant role in this use of force and thus should be liable to Plaintiff under § 1983. While Defendants unquestionably had a legitimate interest in dispersing the crowd that had gathered along Norwich Avenue, a reasonable jury could find that they did so more harshly than was necessary"); *McGrath v. Scott*, 250 F. Supp.2d 1218, 1226 & n.4 (D.Ariz. 2003) ("[T]he Court finds that the deliberately indifferent standard adopted in *L.W.* applies generally to all supervisory liability claims under § 1983. A supervisor can be liable in his individual capacity for (1) his own culpable action or inaction in the training, supervision, or control of his subordinates; (2) for his acquiescence in the constitutional deprivation; or (3) for conduct that shows a *deliberate indifference* to the rights of others. Deliberate indifference encompasses recklessness. . . . The Court does not decide if the recklessness standard is objective or subjective, as in either case

Plaintiffs Complaint adequately states a claim.”); *Classroom Teachers of Dallas/Texas State Teachers Ass’n/National Education Ass’n v. Dallas Independent School District*, 164 F.Supp.2d 839, 851 (N.D. Tex. 2001) (“Deliberate indifference to violations of constitutional rights is sufficient for supervisory liability under § 1983. There is no principle of superiors’ liability, either in tort law generally or in the law of constitutional torts. To be held liable for conduct of their subordinates, supervisors must have been personally involved in that conduct. That is a vague standard. We can make it more precise by noting that supervisors who are merely negligent in failing to detect and prevent subordinates’ misconduct are not liable, because negligence is no longer culpable under section 1983. Gross negligence is not enough either. The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference.”); *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1231 (D. Me. 1996) (“Supervisory liability may attach despite any direct involvement by [police chief] in the unconstitutional activity. Lawrence, however, may only be held liable under § 1983 on the basis of his own acts or omissions. Supervisory personnel are liable under § 1983, upon a showing of a constitutional violation, when: (I) the supervisor’s conduct or inaction amounts to either deliberate, reckless or callous indifference to the constitutional rights of others, and (2) an affirmative link exists between the street-level constitutional violation and the acts or omissions of the supervisory officials.” cites omitted).

Although the courts do not differ significantly as to the level of culpability required for supervisory liability, there is some split on the question of whether the requisite culpability for supervisory inaction can be established on the basis of a single incident of subordinates’ misconduct or whether a pattern or practice of constitutional violations must be shown.

See *International Action Center v. United States*, 365 F.3d 20, 26-28 (D.C. Cir. 2004) (“The MPD supervisors do not seek a ruling on whether they enjoy qualified immunity from a supervisory inaction claim based on past transgressions under *Haynesworth*. . . . What was being appealed, counsel explained, was any effort to base liability on a duty to actively supervise and to train without regard to anything, any other aspect, or any prior history. That merely because these four individuals are supervisors, they had an obligation to anticipate that constitutional torts were highly likely and to take steps to prevent them regardless of any other facts in the case. . . . Plaintiffs do wish to pursue such a theory of liability. At oral argument, they argued that the duty to supervise arose generally from the potential for constitutional violations, even absent proof that the MPD supervisors had knowledge of a pre-existing pattern of violations by either Cumba or Worrell. Plaintiffs contend that the general duty to supervise ‘arises in the ordinary course of taking responsibility where the police intervene in the context of mass demonstration activity,’ . . . because of the ‘substantial risk’ of constitutional violations. . . . Plaintiffs also contend that ‘[t]he duty to supervise does not require proof of a pre-existing pattern of violations.’ . . . Such a theory represents a significant expansion of *Haynesworth* – one we are unwilling to adopt. The broad wording of the district court opinion, and its failure to focus on what ‘circumstances’ gave rise to a duty on the part of the supervisors to act, pose the prospect that a claim of the sort described by plaintiffs’

counsel could proceed. The district court, in denying qualified immunity on the inaction claim, simply noted that ‘it is undisputed that the MPD Supervisors were overseeing the activities of many uniformed and plain-clothes MPD officers present at the Navy Memorial for crowd control purposes during the Inaugural Parade and that those officers included ... Cumba and Worrell,’ and that plaintiffs ‘allege that in this context, there could be a substantial risk of violating protestors’ free speech or Fourth Amendment rights.’. . . Without focusing on which allegations sufficed to give rise to a claim for supervisory inaction, the court concluded that immunity was not available because plaintiffs ‘have sufficiently alleged a set of circumstances at the Navy Memorial on January 20, 2001, which did indeed make it ‘highly likely’ that MPD officers would violate citizens’ constitutional rights.’. . . The district court’s analysis failed to link the likelihood of particular constitutional violations to any past transgressions, and failed to link these particular supervisors to those past practices or any familiarity with them. In the absence of any such ‘affirmative links,’ the supervisors cannot be shown to have the requisite ‘direct responsibility’ or to have given ‘their authorization or approval of such misconduct,’. . . and the effort to hold them personally liable fades into respondeat superior or vicarious liability, clearly barred under Section 1983. . . . The question thus reduces to the personal liability of these four individuals for alleged inadequate training and supervision of Cumba and Worrell – in the absence of any claim that these supervisors were responsible for the training received by Cumba and Worrell, or were aware of any demonstrated deficiencies in that training. That leaves inaction liability for supervision, apart from ‘active participation’ (defined to include failure to intervene upon allegedly becoming aware of the tortious conduct) and apart from any duty to act arising from past transgressions highly likely to continue in the absence of supervisory action. Keeping in mind that there can be no respondeat superior liability under Section 1983, what is left is plaintiffs’ theory that the supervisors’ duty to act here arose simply because of ‘the context of mass demonstration activity.’. . . We accordingly reject plaintiffs’ theory of liability for general inaction, mindful not only of the hazards of reducing the standard for pleading the deprivation of a constitutional right in the qualified immunity context, but also of the degree of fault necessary to implicate supervisory liability under Section 1983.”).

*Compare Braddy v. Florida Dep’t of Labor and Employment Security*, 133 F.3d 797, 802 (11th Cir. 1998) (“The standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate is extremely rigorous. The causal connection between Lynch’s offensive behavior and Davis’s liability as his supervisor for such behavior can only be established if the harassment was sufficiently widespread so as to put Davis on notice of the need to act and she failed to do so. A few isolated instances of harassment will not suffice, the ‘deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration.”); *Howard v. Adikson*, 887 F.2d 134, 138 (8th Cir. 1989) (“A single incident, or a series of isolated incidents, usually provides an insufficient basis upon which to assign supervisory liability.”); *Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989) (impliedly accepting defendants’ argument that more than one incident is needed to impose supervisory liability); *Garrett v. Unified Government of Athens-Clarke County*, 246 F. Supp.2d 1262, 1283 (M.D. Ga. 2003) (“[T]he standard for imposing supervisory liability differs slightly

from the standard for municipal liability. Specifically, an individual can be held liable on the basis of supervisory liability either ‘when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation.’ *Brown*, 906 F.2d at 671. Here, there are no allegations that Lumpkin personally participated in Irby’s arrest. Thus, the Court turns to the question of whether there was a causal connection between Lumpkin’s actions and the deprivation of Irby’s constitutional rights. . . . [I]n the case at bar, a causal connection can only be established if the unconstitutional use of the hog-tie restraint was sufficiently widespread so as to put Lumpkin on notice of the need to act and he failed to do so. . . . The Court finds that Plaintiff has failed to present evidence of a history of unconstitutional, widespread abuse of the hog-tie restraint sufficient to put Lumpkin on notice. As the Court noted earlier, a finding that there was widespread use of the hog-tie restraint does not automatically equate with a finding of widespread abuse. Plaintiff has not presented any evidence of previous complaints or injuries resulting from suspects being hog-tied by Athens-Clarke County police officers. Simply put, Plaintiff has failed to present sufficient evidence of flagrant, rampant, and continued abuse of the hog-tie restraint so as to impose supervisory liability.”), *reversed and remanded on other grounds*, 378 F.3d 1274 (11th Cir. 2004) and *Williams v. Garrett*, 722 F. Supp. 254, 259 (W.D. Va. 1989) (“[P]laintiff. . . may not rely on evidence of a single incident or isolated incidents to impose supervisory liability . . . must demonstrate ‘continued inaction in the face of documented widespread abuses.’”) with *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 567 (1st Cir. 1989) (“An inquiry into whether there has been a pattern of past abuses or official condonation thereof is only required when a plaintiff has sued a municipality. Where . . . plaintiff has brought suit against the defendants as individuals . . . plaintiff need only establish that the defendants’ acts or omissions were the product of reckless or callous indifference to his constitutional rights and that they, in fact, caused his constitutional deprivations.”).

*See also Murphy v. New York Racing Ass’n, Inc.*, 76 F. Supp.2d 489, 501 n.8 (S.D.N.Y. 1999) (“As Plaintiff’s reliance on *Camilo-Robles*, a First Circuit opinion, indicates, the Second Circuit has yet to adopt this ‘transitive’ theory of deliberate indifference, whereby a supervisor’s actual or constructive notice of constitutional torts against one plaintiff can serve as the basis of a finding of deliberate indifference to the rights of a subsequent plaintiff. We note, however, that this theory is consistent with the holding of one of the Second Circuit’s leading ‘deliberate indifference’ cases, *viz.*, *Meriwether v. Coughlin*, 879 F.2d 1037 (1989).”).

*See also Poe v. Leonard*, 282 F.3d 123, 144, 146 (2d Cir. 2002) (“One Circuit . . . found a supervisor ineligible for qualified immunity because he failed to conduct a background check on an applicant. *See Parker v. Williams*, 862 F.2d 1471, 1477, 1480 (11th Cir.1989) (finding that a sheriff was ineligible for qualified immunity because he failed to conduct a background check on a mentally unstable person he hired, who then kidnapped and raped a pre-trial detainee), *overruled on other grounds by Turquitt v. Jefferson County*, 137 F.3d 1285, 1291 (11th Cir.1998) (*en banc* ). *Parker* is distinguishable because it involved a supervisor’s failure to screen a job applicant with a problematic history, rather than his failure to re-screen a problematic officer who was part of a

pre-existing staff. In the case at bar, Leonard did not hire Pearl, but instead began to supervise him as part of the staff Leonard inherited from his predecessor. It is not unreasonable for a subsequent supervisor to rely on his predecessor to inform him of subordinates with problematic behaviors or histories. Supervisors cannot be expected to reinvent the wheel with every decision, for that is administratively unfeasible; rather, they are entitled to rely upon the decisions of their predecessors or subordinates so long as those decisions do not appear to be obviously invalid, illegal or otherwise inadequate. . . . Reasonable supervisors confronted with the circumstances faced by Leonard could disagree as to the legality of his inaction. Indeed, even different circuits disagree about whether it is objectively reasonable for a supervisor, upon assuming his new post, to neglect to review his subordinates' personnel histories."); *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998) (denying qualified immunity to Chief of Police where he "signed an internal affairs report dismissing [Plaintiff's] complaint despite evidence of Officer Chew's use of excessive force contained in the report and evidence of Officer Chew's involvement in other police dog bite incidents, and apparently without ascertaining whether the circumstances of those cases required some ameliorative action to avoid or reduce serious injuries to individuals from dogs biting them[,]” and where the Chief “did not establish new procedures, such as including the use of police dogs within the OPD’s policy governing the use of nonlethal force, despite evidence of numerous injuries to suspects apprehended by the use of police dogs.”); *Diaz v. Martinez*, 112 F.3d 1, 4 (1st Cir. 1997) (holding, in context of interlocutory appeal on question of qualified immunity, that “a reasonable police supervisor, charged with the duties that Vazquez bore, would have understood that he could be held constitutionally liable for failing to identify and take remedial action concerning an officer with demonstrably dangerous predilections and a checkered history of grave disciplinary problems.”); *Wilson v. City Of Norwich*, 507 F.Supp.2d 199, 209, 210 (D. Conn. 2007) (“In this case, Wilson has shown only that Fusaro was aware of one set of photographs taken years earlier by Daigle of a consenting female colleague. Even drawing all reasonable inferences in Wilson’s favor, this history was not enough to make it plainly obvious to Fusaro, or to Norwich, that Daigle might abuse his position of authority in running the liquor sting operation or in fabricating a child pornography ‘investigation’ to cause young women to pose for nude and semi-nude photographs. It thus fails the *Poe* test that the information known to the supervisor be sufficient to put a reasonable supervisor on notice that there was a high risk that the subordinate would violate another person’s constitutional rights.”); *Sanchez v. Figueroa*, 996 F. Supp. 143, 148-49 (D.P.R. 1998) (“In the Court’s estimation, where Plaintiff alleges failure to implement a satisfactory screening and/or supervision mechanism as a basis for supervisory liability, deliberate indifference encompasses three separate elements. . . . First, Plaintiff must demonstrate that the current screening/supervision mechanisms utilized by the police department are deficient. . . . That is, Plaintiff must demonstrate that candidates whose reasonably observable qualities demonstrate an abnormal likelihood that they will violate the constitutional rights of citizens are being hired and/or active officers whose reasonably observable conduct demonstrates a similar likelihood are not being screened for dismissal or (re)training. . . . Second, in order to demonstrate deliberate indifference, Plaintiff will be required to demonstrate that Toledo knew or should have known that the above-discussed deficiencies exist. . . . Proving knowledge or wilful blindness will require the proffer of evidence that was known or should have been known to Toledo

and that put him on notice or should have put him on notice that a problem existed. . . . Third, assuming Plaintiff can successfully demonstrate that a deficiency in the screening and/or supervision mechanisms used by the police existed and that Toledo knew of it, Plaintiff will then have to show that Toledo failed to reasonably address the problem. . . . Toledo can only have acted with deliberate indifference if he failed to address the known problem at all when he became aware of it (or should have become aware of it) or if he addressed it in a manner so unreasonable as to be reckless.”).

*See also Smith v. Gates*, No. CV97-1286CBMRJGX, 2002 WL 226736, at \*\*3-5 (C.D. Cal. Feb. 5, 2002) (not reported) (“Defendants argue that Police Commissioners cannot be held personally liable under § 1983 because they act by majority rule and therefore have no authority to unilaterally control LAPD policy or supervise officers. . . . The Ninth Circuit has not directly addressed whether individual members of a police commission or other supervisory body may be held liable, pursuant to the authority granted to them, when they act by majority vote. However, the Ninth Circuit implicitly recognizes that members of a council or board, which acts by majority vote, may be held individually liable for their conduct. . . . The Court therefore rejects the Commissioners’ argument that they have no individual liability as supervisors by virtue of the fact they act by majority vote.”).

*See also Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 799 (9th Cir. 2009) (“Can a final decision maker’s wholly independent, legitimate decision to terminate an employee insulate from liability a lower-level supervisor involved in the process who had a retaliatory motive to have the employee fired? We conclude that, on the record in this case, the answer must be yes, because the termination decision was not shown to be influenced by the subordinate’s retaliatory motives.”).

## **2. *Ashcroft v. Iqbal***

The Supreme Court’s recent decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), clearly changes the law of many circuits with respect to the standard of supervisory liability in both section 1983 and *Bivens* actions.

*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948, 1949 (2009) (“Because 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. . . . [T]o state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin. Respondent disagrees. He argues that, under a theory of ‘supervisory liability,’ petitioners can be liable for ‘knowledge and acquiescence in their subordinates’ use of discriminatory criteria to make classification decisions among detainees.’. . . That is to say, respondent believes a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the

supervisor's violating the Constitution. We reject this argument. Respondent's conception of 'supervisory liability' is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action-where masters do not answer for the torts of their servants-the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.”).

*Ashcroft v. Iqbal*, 129 S. 1937, 1956, 1957 (2009) (Souter, J., joined by Stevens, J., Ginsburg, J., Breyer, J., dissenting) (“Without acknowledging the parties’ agreement as to the standard of supervisory liability, the Court asserts that it must *sua sponte* decide the scope of supervisory liability here. . . I agree that, absent Ashcroft and Mueller’s concession, that determination would have to be made; without knowing the elements of a supervisory liability claim, there would be no way to determine whether a plaintiff had made factual allegations amounting to grounds for relief on that claim. . . But deciding the scope of supervisory *Bivens* liability in this case is uncalled for. There are several reasons, starting with the position Ashcroft and Mueller have taken and following from it. First, Ashcroft and Mueller have, as noted, made the critical concession that a supervisor’s knowledge of a subordinate’s unconstitutional conduct and deliberate indifference to that conduct are grounds for *Bivens* liability. Iqbal seeks to recover on a theory that Ashcroft and Mueller at least knowingly acquiesced (and maybe more than acquiesced) in the discriminatory acts of their subordinates; if he can show this, he will satisfy Ashcroft and Mueller’s own test for supervisory liability. . . . I would therefore accept Ashcroft and Mueller’s concession for purposes of this case and proceed to consider whether the complaint alleges at least knowledge and deliberate indifference. Second, because of the concession, we have received no briefing or argument on the proper scope of supervisory liability, much less the full-dress argument we normally require. . . We consequently are in no position to decide the precise contours of supervisory liability here, this issue being a complicated one that has divided the Courts of Appeals. . . . The majority says that in a *Bivens* action, ‘where masters do not answer for the torts of their servants,’ ‘the term Asupervisory liability’ is a misnomer,’ and that ‘[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.’ . . Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely. The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects. . . . The dangers of the majority’s readiness to proceed without briefing and argument are apparent in its cursory analysis, which rests on the assumption that only two outcomes are possible here: *respondeat superior* liability, in which ‘an employer is subject to liability for torts committed by employees while acting within the scope of their employment,’ . . or no supervisory liability at all. The dichotomy is false. Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct

of his subordinate. . . In fact, there is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge of a subordinate’s constitutional violation and acquiesces, see, *e.g.*, *Baker v. Monroe Twp.*, 50 F. 3d 1186, 1994 (CA3 1995); *Woodward v. Worland*, 977 F. 2d 1392, 1400 (CA10 1992); or where supervisors ‘know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see,’ ‘*International Action Center v. United States*, 365 F. 3d 20, 28 (CA DC 2004) (Roberts, J.) (quoting *Jones v. Chicago*, 856 F. 2d 985, 992 (CA7 1988) (Posner, J.)); or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate, see, *e.g.*, *Hall, supra*, at 961; or where the supervisor was grossly negligent, see, *e.g.*, *Lipsett v. University of Puerto Rico*, 864 F. 2d 881, 902 (CA1 1988). I am unsure what the general test for supervisory liability should be, and in the absence of briefing and argument I am in no position to choose or devise one.”).

### 3. Post-*Iqbal* Liability-of-Supervisors Cases

#### U.S. SUPREME COURT

*Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863-65 (2017) (“Applying its precedents, the Court of Appeals held that the substantive standard for the sufficiency of the claim is whether the warden showed ‘deliberate indifference’ to prisoner abuse. . . The parties appear to agree on this standard, and, for purposes of this case, the Court assumes it to be correct. The complaint alleges that guards routinely abused respondents; that the warden encouraged the abuse by referring to respondents as ‘terrorists’; that he prevented respondents from using normal grievance procedures; that he stayed away from the Unit to avoid seeing the abuse; that he was made aware of the abuse via ‘inmate complaints, staff complaints, hunger strikes, and suicide attempts’; that he ignored other ‘direct evidence of [the] abuse, including logs and other official [records]’; that he took no action ‘to rectify or address the situation’; and that the abuse resulted in the injuries described above[.]. . . These allegations—assumed here to be true, subject to proof at a later stage—plausibly show the warden’s deliberate indifference to the abuse. Consistent with the opinion of every judge in this case to have considered the question, including the dissenters in the Court of Appeals, the Court concludes that the prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation if a *Bivens* remedy is to be implied. . . [A] case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases. . . The constitutional right is different here, since *Carlson* was predicated on the Eighth Amendment and this claim is predicated on the Fifth. . . And the judicial guidance available to this warden, with respect to his supervisory duties, was less developed. The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner—‘deliberate indifference to serious medical needs.’ . . . The standard for a claim alleging that a warden allowed guards to abuse pre-trial detainees is less clear under the Court’s precedents.

This case also has certain features that were not considered in the Court’s previous *Bivens* cases and that might discourage a court from authorizing a *Bivens* remedy. As noted above, the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action. . . . And there might have been alternative remedies available here, for example, a writ of habeas corpus . . . ; an injunction requiring the warden to bring his prison into compliance with the regulations discussed above; or some other form of equitable relief. Furthermore, legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation. . . . Some 15 years after *Carlson* was decided, Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way prisoner abuse claims must be brought in federal court. See 42 U.S.C. § 1997e. So it seems clear that Congress had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs. This Court has said in dicta that the Act’s exhaustion provisions would apply to *Bivens* suits. See *Porter v. Nussle*, 534 U.S. 516, 524, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). But the Act itself does not provide for a standalone damages remedy against federal jailers. It could be argued that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment. The differences between this claim and the one in *Carlson* are perhaps small, at least in practical terms. Given this Court’s expressed caution about extending the *Bivens* remedy, however, the new-context inquiry is easily satisfied. Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context. But here the differences identified above are at the very least meaningful ones. Thus, before allowing this claim to proceed under *Bivens*, the Court of Appeals should have performed a special factors analysis. It should have analyzed whether there were alternative remedies available or other ‘sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy’ in a suit like this one. . . . Although the Court could perform that analysis in the first instance, the briefs have concentrated almost all of their efforts elsewhere. Given the absence of a comprehensive presentation by the parties, and the fact that the Court of Appeals did not conduct the analysis, the Court declines to perform the special factors analysis itself. The better course is to vacate the judgment below, allowing the Court of Appeals or the District Court to do so on remand.”)

## D.C. CIRCUIT

*Johnson v. Government of Dist. of Columbia*, 734 F.3d 1194, 1204, 1205 (D.C. Cir. 2013) (“Fifth Amendment Class members maintain that the strip search gender disparity violated the Fifth Amendment’s equal protection guarantee. We resolve these claims, unlike the claims of the Fourth Amendment class, at the first stage of the qualified immunity analysis by examining whether Dillard violated class members’ Fifth Amendment rights. The parties agree that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), controls this issue. . . . Acknowledging that they ‘must prove Dillard intended to discriminate against women arrestees,’ Fifth Amendment Class members argue that Dillard ‘intended a policy, formal or informal, of women-only strip searches.’ . . . For his part, Dillard insists that his policy throughout the class period required ‘every prisoner’—both male and female—to go through the strip search process upon arrival at the Superior Court cellblock. . . . Although class members point to some evidence from which we might infer that Dillard knew deputies were

implementing his gender neutral policy in a gender imbalanced manner, plenty of other evidence suggests that Dillard was largely missing in action throughout the class period. But even assuming class members could show that Dillard knew what was going on at the cellblock, they have pointed to no evidence from which we could infer that Dillard himself intended to treat women differently from men. . . . [C]lass members cite no testimony by any subordinate indicating that the gender disparity resulted from Dillard’s instruction or intention.”)

***Johnson v. Government of Dist. of Columbia***, 734 F.3d 1194, 1208 (D.C. Cir. 2013) (Rogers, J., concurring in part and concurring in the judgment) (“A reasonable jury could find that knowing acquiescence to continuing violations of a plaintiff’s Equal Protection rights by one’s deputies amounts to purposeful conduct and infer, in the absence of a legitimate non-invidious reason for treating women differently than men, a defendant’s discriminatory purpose. . . Dillard repeatedly swore, however, that he believed men and women were being strip searched in the same manner, *see* Dillard Dep. 96:10–97:8, 99:8–101:12, and the Fifth Amendment class fails to proffer evidence from which a reasonable jury could find that he had a women-only strip search policy or knew of the disparate treatment by his deputies. . . Absent evidence that Dillard either had a blanket policy for strip searching only female arrestees, or knew that his deputies were doing so indiscriminately and did nothing to stop them, a discriminatory purpose by Dillard cannot reasonably be inferred.”)

***Elkins v. District of Columbia***, 690 F.3d 554, 555, 556 (D.C. Cir. 2012) (“Even if Maloney did have a responsibility to train and supervise Williams–Cherry, which he disputes, summary judgment in his favor was still appropriate because the record shows, at best, ‘mere negligence,’ not an ‘affirmative link’ between Maloney’s conduct and the constitutional injury. . . This link must be strong enough that, from Maloney’s perspective, the possibility of a constitutional violation occurring due to poor training or supervision would have been highly likely, not simply foreseeable. . . Supervisory liability under § 1983 is triggered only when a supervisor fails to provide more stringent training in the wake of a history of past transgressions by the agency or provides training ‘so clearly deficient that some deprivation of rights will *inevitably* result absent additional instruction.’. . There was no pattern of constitutional violations to put Maloney on notice that training was required; indeed, this was the first search warrant DCRA had ever sought. And even if it was *foreseeable* that an untrained official might take a false step in these new and unfamiliar circumstances, such a result was by no means *inevitable*, especially as the search was led by officers from the MPD, who are trained in the proper execution of a warrant.”)

***Shaw v. District of Columbia***, 944 F.Supp.2d 43, 63, 64 (D.D.C. 2013) (“Kates is alleged to have failed to train, supervise or discipline subordinate USMS employees in the appropriate treatment of female transgender detainees. . . His motion to dismiss contends that the allegations of the complaint are insufficient to state a claim because neither his ‘ultimate authority’ nor the allegations that ‘focus on his training and supervision’ are sufficient to ‘render [him] personally liable for the alleged wrongful acts of individual USMS employees.’. . There is no question that Kates cannot be held liable for the actions of subordinates based solely on his position as the Superior Court Marshal (his ‘ultimate authority’), but that is not what plaintiff alleges. . . As for

his alleged failure to train, supervise or discipline, he argues that the allegations are insufficient to establish that he had an obligation to train or supervise in the manner plaintiff alleges—on not treating female transgender detainees as if they are male. . . Relying on *Elkins*, Kates asserts that the complaint (1) fails to allege ‘any history of constitutional transgressions by USMS’ and thus “‘no pattern of constitutional violations to put [the official] on notice that training was required’”. . . and (2) fails to allege ‘training that is so clearly deficient ... that some deprivation of constitutional rights will inevitably result.’. . . Plaintiff appears to concede the first point, but not the second. As she points out, the complaint alleges that Kates engaged in *no* training or supervision as to the treatment of female transgender detainees despite knowing the harm that was ‘likely to occur’ if plaintiff were treated as if she were male. . . The question is not whether plaintiff’s claim against Kates will ultimately succeed, but only whether these allegations are sufficient to adequately allege an obligation to train or supervise as to the appropriate treatment of female transgender detainees.”)

## FIRST CIRCUIT

*Justiniano v. Walker*, 986 F.3d 11, 19-24 (1st Cir. 2021) (“At the heart of the Alben motion-to-dismiss issue . . . is whether the complaint’s Count 3 plausibly alleged not only that Alben’s failure to implement training to teach troopers how to deal with mentally ill individuals caused a violation of Justiniano’s constitutional rights, but also that Alben was deliberately indifferent to the risk that *not* providing that training would result in a trooper committing that kind of constitutional violation. Justiniano, of course, says the complaint accomplished all of this, while Alben takes the opposite stance. Before we get into those arguments, let’s first canvass these legal principles (deliberate indifference, causation in failure-to-train cases) -- they’re the backdrop against which we’ll assess the complaint’s sufficiency, after all. Alben was not on the scene, of course, so Justiniano relies on supervisory liability and a failure-to-train theory to put him on the hook. We’ve cautioned that ‘[t]he liability criteria for “failure to train” claims are exceptionally stringent.’. . . Generally, a supervisor cannot be held liable under § 1983 on a respondeat superior theory -- a ‘supervisor’s liability must be premised on his [or her] own acts or omissions’ and does not attach automatically even if a subordinate is found liable. . . To connect the liability dots successfully between supervisor and subordinate in this context, a plaintiff must show ‘that one of the supervisor’s subordinates abridged the plaintiff’s constitutional rights’ *and* that the supervisor’s (in)action ‘was affirmative[ly] link[ed] to that behavior in the sense that it could be characterized as ... gross negligence amounting to deliberate indifference.’. . . And that’s a critical issue here -- deliberate indifference. Deliberate indifference requires a plaintiff to demonstrate or allege ‘(1) a grave risk of harm, (2) the defendant’s actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk.’. . . Indeed, ‘[m]ere negligence will not suffice: the supervisor’s conduct must evince “reckless or callous indifference to the constitutional rights of others.” . . . And there’s more. ‘[D]eliberate indifference alone does not equate with supervisory liability,’. . . but rather ‘[c]ausation [is also] an essential element, and the causal link between a supervisor’s conduct and the constitutional violation must be solid[.]’. . . For causation in a failure-to-train claim, a plaintiff must allege that the ‘lack of training caused [the officer] to

take actions that were objectively unreasonable and constituted excessive force.’. . . And the causation requirement ‘contemplates proof that the supervisor’s conduct led inexorably to the constitutional violation.’. . . We’ve observed this ‘is a difficult standard to meet,’ though not impossible -- for instance, a plaintiff could ‘prove causation by showing inaction in the face of a “known history of widespread abuse sufficient to alert a supervisor to ongoing violations.”’. . . Alternatively, liability might be appropriate ““in a narrow range of circumstances” where “a violation ...” is “a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.’’. . . So that’s what needed to be alleged here -- deliberate indifference and causation that fit these black-letter-law bills. True, ‘[c]ausation and deliberate indifference are separate requirements ... [, but] they are often intertwined in these cases.’. . . So it is here -- both determinations turn on whether Alben was aware of a risk that his subordinates (Walker, in particular) might violate mentally ill individuals’ constitutional rights. Justiniano says the complaint does plenty to state this claim plausibly, and thus it should have survived the Rule 12(b)(6) motion. Count 3 alleges that Alben, as Walker’s supervisor and a policymaker, failed to provide Walker with the proper training and resources that would have helped to prevent a violation of Justiniano’s constitutional rights (again, the complaint leans on the lethal force as the violation). Justiniano argues that the complaint adequately alleges that Alben was aware of and ignored national trends indicating a problematic rise in bad-outcome encounters between police and mentally ill individuals but provided no specialized training, and that failure to train constituted deliberate indifference to an obvious risk. And, according to Justiniano, the complaint plausibly lays out the requisite causal nexus by alleging that the sought-after deescalation training would have prevented this tragedy, meaning Walker’s lack of training by Alben was the cause of the violation of Justiniano’s rights. Alben disagrees, asserting that the complaint falls short of alleging facts sufficient to establish that he acted with deliberate indifference to Justiniano’s constitutional rights (or, put differently, that Alben had notice of conduct violating constitutional rights but failed to take steps to address it), and, on top of that, the complaint does not adequately allege that proper training would have prevented that violation (i.e., no causation). With the benefit of every possible doubt -- accepting all of the complaint’s factual allegations as true, . . . assuming that a constitutional violation occurred, drawing all reasonable inferences in Justiniano’s favor, and ‘isolat[ing] and ignor[ing]’ mere legal conclusions -- this claim’s ‘non-conclusory, non-speculative’ factual allegations do not ‘plausibly narrate a claim for relief,’. . . so Justiniano’s Count 3 as pled does not pass muster. In broad strokes, as to the alleged facts that arguably could support the supervisory liability theory, this is what the complaint does accomplish: that Alben, as supervisor, did not have specific policies in place ‘for dealing with mental health crises without using lethal force or “f” or troopers dealing with mental health crises on techniques to de-escalate’; that Alben was aware of national trends showing an increase in the number of mental health crises and a corresponding increase in the number of death-resulting encounters with police which have prompted some law enforcement entities to institute training regarding these issues, but Alben took no ‘affirmative action,’ which may have contributed to Justiniano’s death. It then asserts that Alben’s failure to act in the face of these national trends ‘demonstrates a deliberate indifference’ to Justiniano’s civil rights, and, ‘[a]s a direct result of’ Alben’s conduct, Justiniano died. It is not difficult to see what Justiniano was trying to do here.

But these alleged facts don't support the essential legal elements of 'reckless or callous indifference to the constitutional rights of others,' . . . and the 'solid' 'causal link between [Alben]'s conduct and the constitutional violation,' . . . that Justiniano needed to state in order to be entitled to relief as a matter of law. Starting with deliberate indifference, it's clear Justiniano's aim was to highlight the absence of training when it comes to police encounters with the mentally ill -- Alben himself acknowledged that shortcoming in the system, as the complaint alleges -- and to try to link that to wrongdoing by Alben. But there are too many pieces missing, even with the benefit of some inferential leaps, for us to conclude deliberate indifference has been plausibly pled. For instance, there are no non-speculative facts in the complaint that allege a specific 'grave risk of harm' in failing to train or that there were 'easily available measures to address the risk' that Alben could have taken but didn't. . . There is no allegation that the referenced mental health training adopted by some other jurisdictions would have been easy to implement in Massachusetts, nor that the trainings actually have been effective in reducing the frequency of constitutional violations of the mentally ill. . . And even if there were such allegations, it still would not be enough to suggest plausibly that Alben knew or should have known *his* troopers might violate the rights of a mentally ill individual, particularly when there is no known history of such constitutional trampling by Massachusetts troopers alleged. The complaint does not plead that Walker or the Massachusetts State Police more generally had a history of using excessive and constitutionally violative force against individuals who were mentally ill such that Alben should have been on notice of that conduct, nor is there any suggestion that the Massachusetts State Police are otherwise specifically at risk of violating a mentally ill individual's constitutional rights. . . Clearly, then, he could not have ignored -- with deliberate indifference or otherwise -- a non-existent history of these issues. . . Another angle would be to consider whether the complaint plausibly alleged a national trend of constitutional violations so prominent that Alben should have been (or was) on notice of a high risk that, without this training, there was a grave risk that his troopers would violate a mentally ill person's constitutional rights, and he nonetheless ignored it. . . But the complaint does not allege such a widespread, prominent trend of constitutional violations: in fact, the complaint does not actually allege that the 'trend' involves constitutional violations at all, but instead states that there are more and more 'tragic encounters with police where unarmed mentally ill citizens end up dead.' While we do not purport to foreclose the possibility that such a national trend might be enough to provide this notice, the trend as alleged here simply does not rise to that level. And the requisite causal link has not been plausibly alleged either, i.e., that Alben's failure to train his troopers 'caused [Walker] to take actions that were objectively unreasonable and constituted excessive force.' . . Justiniano pleads that '[a]s a direct result of the conduct of Defendant Alben, Wilfredo Justiniano lost his life,' but none of the pled conduct supports that legal conclusion. And while the complaint alleges that Walker acted improperly in light of Justiniano's mental condition, there is no allegation that Walker's decision to shoot Justiniano was related to any mental illness that Justiniano suffered. Yes, the complaint alleges that Walker confronted, fired his gun at, and ultimately killed Justiniano, who was unarmed and experiencing a mental health crisis, but, even if all of that was proven, there still could be no non-speculative inference from those facts that, had Alben provided the training, the shooting would not have happened. Recall, too, that we've said a plaintiff could 'prove causation [in this context] by showing inaction in the face of a "known

history of widespread abuse sufficient to alert a supervisor to ongoing violations,” . . . and it could be alleged by pleading that certain conduct ‘is “a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations[.]”’. . . This is a non-exhaustive set of examples, certainly, but nothing even approaching these scenarios happened here (as we touched on in part in our deliberate indifference discussion). Instead, the complaint conclusorily alleges that Alben’s refusal to change the relevant policies led to the ‘inevitable outcome’ of Justiniano’s death, but does nothing to allege non-speculative facts that would allow an inference that training actually would have altered that outcome. All told, we needed ‘more than a sheer possibility that [Alben] . . . acted unlawfully[,]’ but we didn’t get it. . . There’s not enough factually alleged here to support a conclusion that Alben acted with deliberate indifference when he neglected to train Walker (and other troopers) on how to interact with the mentally ill; and, regardless of that shortcoming, there’s still a dearth of factual allegations to bolster the conclusion that his failure to do so caused Walker to violate Justiniano’s rights. Therefore, we affirm the district court’s dismissal of the claim against Alben.”)

*Parker v. Landry*, 935 F.3d 9, 14-17, 19 (1st Cir. 2019) (“A supervisory liability claim under section 1983 has two elements: the plaintiff must plausibly allege that ‘one of the supervisor’s subordinates abridged the plaintiff’s constitutional rights’ and then forge an affirmative link between the abridgement and some action or inaction on the supervisor’s part. . . Such culpable action or inaction may comprise, say, a showing of behavior that constitutes ‘supervisory encouragement, condonation or acquiescence[,] or gross negligence . . . amounting to deliberate indifference.’. . . The concept of supervisory liability is separate and distinct from concepts such as vicarious liability and respondeat superior. . . Although a supervisor need not personally engage in the subordinate’s misconduct in order to be held liable, his own acts or omissions must work a constitutional violation. . . Facts showing no more than a supervisor’s mere negligence vis-à-vis his subordinate’s misconduct are not enough to make out a claim of supervisory liability. . . At a minimum, the plaintiff must allege facts showing that the supervisor’s conduct sank to the level of deliberate indifference. . . We train the lens of our inquiry there. . . Here, the proposed amended complaint does not identify any affirmative acts by any of the defendants that might arguably constitute deliberate indifference. Even in the absence of such facts, though, a plaintiff sometimes can identify a causal nexus by juxtaposing the supervisor’s omissions alongside a ‘known history of widespread abuse sufficient to alert a supervisor to ongoing violations.’. . . But such omissions, if paired only with ‘isolated instances’ of a subordinate’s constitutional violations, will not clear the causation bar. . . In addition to deliberate indifference and causation, the plaintiff must allege facts showing that the supervisor was on notice of the subordinate’s misconduct. . . Such notice may be either actual or constructive. . . The bottom line is that the scanty factual allegations limned in the proposed amended complaint do not make out a plausible showing of deliberate indifference and, thus, do not carry the plaintiff’s supervisory liability claims over the plausibility threshold. In the last analysis, the complaint contains no facts sufficient to support a plausible inference that any of the defendants had reason to believe that Dall-Leighton presented a substantial risk of serious harm to female inmates. . . Where, as here, a complaint reveals random puffs of smoke but nothing

resembling real signs of fire, the plausibility standard is not satisfied. We iron out one wrinkle. Even in the absence of a showing that officials knew of a substantial risk of serious harm at the hands of a particular subordinate, a plaintiff still may, in rare circumstances, make a plausible showing of deliberate indifference by alleging facts that indicate ‘a known history of widespread abuse sufficient to alert a supervisor to ongoing violations,’ from which officials could infer a substantial risk of serious harm. . . . We caution, though, that no one should read our opinion as insulating from liability correctional officials who fail to maintain a meaningful and clearly communicated process for detecting sexual abuse of inmates, as that would be inconsistent with our view of the deliberate indifference standard. . . . We need go no further. Moral indignation alone is not enough to permit a court either to hold prison officials liable for every abuse that occurs within a correctional facility or to authorize a plaintiff to embark on a fishing expedition. . . . The facts alleged in the plaintiff’s proposed amended complaint are simply too exiguous to make out plausible claims of either supervisory liability or civil rights conspiracy against the defendants. . . . Accordingly, we hold that the district court acted well within the encincture of its discretion in rejecting as futile the plaintiff’s motion for leave to file her amended complaint.”)

*Guadalupe-Baez v. Pesquera*, 819 F.3d 509, 514-17 (1st Cir. 2016) (“Guadalupe’s most loudly bruted claims sound in supervisory liability under 42 U.S.C. § 1983. Such a claim has two elements: first, the plaintiff must show that one of the supervisor’s subordinates abridged the plaintiff’s constitutional rights. . . . Second, the plaintiff must show that ‘the [supervisor]’s action or inaction was affirmative[ly] link[ed] to that behavior in the sense that it could be characterized as supervisory encouragement, condonation, or acquiescence or gross negligence amounting to deliberate indifference.’ . . . Supervisory liability is sui generis. Thus, a supervisor may not be held liable under section 1983 on the tort theory of respondeat superior, nor can a supervisor’s section 1983 liability rest solely on his position of authority. . . . This does not mean, however, that for section 1983 liability to attach, a supervisor must directly engage in a subordinate’s unconstitutional behavior. . . . Even so, the supervisor’s liability must be premised on his own acts or omissions. . . . Mere negligence will not suffice: the supervisor’s conduct must evince ‘reckless or callous indifference to the constitutional rights of others.’ . . . If a plaintiff relies on a theory of deliberate indifference, a three-part inquiry must be undertaken. . . . In the course of that inquiry, the plaintiff must show ‘(1) “that the officials had knowledge of facts,” from which (2) “the official[s] can draw the inference” (3) “that a substantial risk of serious harm exists.”’ . . . ‘[D]eliberate indifference alone does not equate with supervisory liability.’ . . . Causation remains an essential element, and the causal link between a supervisor’s conduct and the constitutional violation must be solid. . . . This causation requirement ‘contemplates proof that the supervisor’s conduct led inexorably to the constitutional violation.’ . . . That is a difficult standard to meet but far from an impossible one: a plaintiff may, for example, prove causation by showing inaction in the face of a ‘known history of widespread abuse sufficient to alert a supervisor to ongoing violations.’ . . . ‘[I]solated instances of unconstitutional activity’ will not suffice. . . . In addition, a supervisor must be on notice of the violation. . . . Such notice may be either actual or constructive. . . . Before us, Guadalupe argues that the district court erred in dismissing his supervisory liability claims both because it failed to give proper evidentiary weight to the Report and because it imposed

too demanding a pleading standard. We agree in part. The amended complaint alleges that each of the supervisory defendants ‘negligently confided and entrusted’ the unnamed police officers ‘with the authority to discharge their apparent duties.’ And as to each, the amended complaint also alleges that:

[He] is responsible to [Guadalupe] for his own actions and omissions, negligent entrustment and negligent supervision ... a behavior ... that ... could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence, amounting to deliberate indifference and reckless disregard of [Guadalupe’s] rights and guarantees under the law, and improperly training/supervising his subordinates.

The complaint then alleges that every one of the supervisory defendants failed to take necessary investigatory or remedial action after the shooting.

Certain other allegations, relevant only to Pesquera, Somoza, and Sánchez, likewise bear on these supervisory liability claims. As to this group of defendants, the amended complaint further alleges that each member of the group adopted policies that preserved ‘the pattern and practice of use of excessive force.’ Given this series of averments, Guadalupe’s best case is against Pesquera (who became Superintendent of the PRPD after the Report became public and held that office at the time of the shooting). The district court nonetheless dismissed the supervisory liability claim against Pesquera, concluding that Guadalupe’s allegations were insufficient to ‘connect the dots’ and demonstrate that Pesquera’s conduct was affirmatively linked to the harm that eventuated. . . We think that the court set the bar too high: viewed as part of the tableau constructed by the Report, Guadalupe has stated a supervisory liability claim against Pesquera that is plausible on its face. As Superintendent, Pesquera bore the ultimate responsibility for overseeing and directing all administrative, operational, training, and disciplinary aspects of the PRPD. An appreciable amount of time elapsed between the issuance of the Report and the shooting. Guadalupe alleges, though, that Pesquera continued—or at least failed to ameliorate—‘policies which cause the pattern and practice of use of excessive force.’ When this allegation is evaluated in conjunction with the rampant constitutional violations limned in the Report and the parade of horrors allegedly visited upon Guadalupe, a plausible inference exists that Pesquera either condoned or at least acquiesced in the offending conduct—conduct that is affirmatively linked to the harm Guadalupe suffered. Thus, Pesquera may be subject to section 1983 liability as a supervisor for that harm. Any claim by Pesquera that he was unaware of the substantial risk of the serious harm that befell Guadalupe would constitute deliberate indifference to the reality of the dysfunction that Pesquera inherited when he took over as Superintendent of the PRPD. . . The short of it is that Guadalupe’s supervisory liability claim against Pesquera crosses the plausibility threshold because the DOJ has given him a leg up. Indeed, it is through such reasoning that district courts in Puerto Rico have consistently given weight to the Report and declined to dismiss analogous claims during the pleading phase. . . We add that plausibility determinations cannot be made in the abstract. Here, all that Guadalupe could reasonably know (or be expected to ascertain) at the time he filed suit was that an unidentified police officer had shot him for no apparent reason. But when combined with the Report, that is enough to get Guadalupe across the plausibility threshold: such random and anonymous violence appears to be a predictable culmination of the systemic problems documented in the Report. In this instance, then, the Report plays a critical role in bridging the plausibility gap.

Nor is there anything unfair about this result. The existence of the Report put Pesquera on luminously clear notice that he might become liable, in his supervisory capacity, should his acts and omissions contribute to the continuation of the pathologies described in the Report. . . To be sure, Guadalupe’s claim against Pesquera, as pleaded, is not a textbook model. He could have included more particulars about Pesquera’s role and responsibilities as Superintendent of the PRPD and tied such details to the known circumstances of his shooting. But we have said before, and today reaffirm, that ‘[a] high degree of factual specificity is not required at the pleading stage.’ . In our view, there is enough here—though not by much—to permit Guadalupe to proceed to discovery.”)

*Saldivar v. Racine*, 818 F.3d 14, 18-20 (1st Cir. 2016) (“The District Court dismissed Saldivar’s claim against Racine on the ground that Saldivar had failed to plausibly allege that Racine was deliberately indifferent. The District Court explained that it reached that conclusion because the complaint failed to allege facts that would plausibly show that Racine had the requisite notice of the risk that Pridgen would assault Saldivar. . . Our precedent requires that same conclusion. In order for a police supervisor to be deemed ‘deliberately indifferent,’ the supervisor must have ‘actual or constructive knowledge’ of a ‘grave risk of harm’ posed by the subordinate and fail to take ‘easily available measures to address the risk.’ . . The complaint does allege that Pridgen had a number of disciplinary violations prior to the alleged assault and rape. Those violations do not, however, include any that would indicate that Pridgen had any propensity for violence or for any other sufficiently related conduct. This absence renders speculative any inference that one might otherwise arguably draw that any officer who would commit such an offense likely had a record that would suffice to give such an indication. . . . We recognize that we are reviewing a dismissal of a complaint and thus that the plaintiff need not prove her allegations. At this early stage in the litigation, she need only make the kind of allegations that would suffice under the standard set forth in *Iqbal* . . . . Indeed, as we have noted, seemingly all of our analogous § 1983 supervisory liability cases have been resolved at summary judgment, or at other later stages of the litigation. Nonetheless, under the *Iqbal* standard, the complaint must set forth facts that make the § 1983 claim plausible. . . And, here, we do not believe the facts that have been set forth suffice to make it plausible that the supervisor—Racine—is liable under § 1983 for the horrific conduct by Officer Pridgen that is alleged.”)

*Morales v. Chadbourne*, 793 F.3d 208, 220-22 & n.5 (1st Cir. 2015) (“Morales alleges that ICE supervisors Chadbourne and Riccio violated her Fourth Amendment rights because they knew or were deliberately indifferent to the fact that their subordinates routinely issued immigration detainers against naturalized U.S. citizens without probable cause, and formulated or condoned policies permitting the issuance of detainers without probable cause. Defendants argue that Morales has failed to allege sufficient facts to plausibly state a supervisory liability claim. . . . Morales alleges that ICE agents in Rhode Island maintained a practice of ‘routinely collaborat[ing]’ with state law enforcement authorities ‘to issue and enforce detainers against U.S. citizens, particularly naturalized U.S. citizens, ... without sufficient investigation into their citizenship or immigration status and without probable cause to believe that they are non-citizens

subject to removal and detention.’. . The complaint further alleges that when an individual is arrested at the ACI and ‘provide[s] a foreign country of birth, has a foreign-sounding last name, speaks English with an accent, and/or appears to be Hispanic,’ ICE agents ‘often fail sufficiently to investigate the arrestee’s citizenship or immigration background before issuing an immigration detainer ... without probable cause to believe that the individual is a noncitizen subject to detention and removal by ICE.’. . The complaint further alleges that Chadbourne and Riccio, as the heads of the ICE Boston Field Office and Rhode Island sub-office, ‘knew or should have known that their subordinates, including Defendant Donaghy, regularly ... issued immigration detainers against individuals such as Ms. Morales, without conducting sufficient investigation and without probable cause to believe that the subject of the immigration detainer was a non-citizen subject to removal and detention.’. . The complaint adds that Chadbourne and Riccio ‘formulated, implemented, encouraged, or willfully ignored [ICE’s] policies and customs [in Rhode Island] with deliberate indifference to the high risk of violating Ms. Morales’s constitutional rights’ and failed to ‘change[ ] these harmful policies and customs’ although they ‘had the power and the authority to change [them] by, for instance, training officers such as Defendant Donaghy to perform an adequate investigation into individuals’ citizenship and immigration status before issuing detainers.’. . Relying on the Supreme Court’s decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), Chadbourne and Riccio contend that Morales’s allegations are conclusory and fail to establish an affirmative link between Donaghy’s behavior and their action or inaction. . . .We reject Chadbourne and Riccio’s argument because, unlike the conclusory allegations in *Iqbal*, the allegations in Morales’s complaint are based on factual assertions that establish the affirmative link necessary to sufficiently plead a supervisory liability claim. [Court details allegations] Based on these detailed allegations—combined with the previously highlighted allegations discussing Chadbourne and Riccio’s specific roles—and drawing all reasonable inferences in favor of Morales (which we must do at the motion to dismiss stage), it is plausible that Chadbourne and Riccio either formulated and implemented a policy of issuing detainers against naturalized U.S. citizens without probable cause or were deliberately indifferent to the fact that their subordinates were issuing detainers against naturalized U.S. citizens without probable cause. Thus, Morales has sufficiently alleged that Chadbourne and Riccio, through their action or inaction, permitted their subordinates, including Donaghy, to issue detainers without probable cause in violation of the Fourth Amendment. . . . Although there were no specific cases in 2009 directly addressing a supervisor’s liability with regard to the issuance of immigration detainers, it is beyond debate that a supervisor who either authorized or was deliberately indifferent to his subordinate’s issuance of a detainer without probable cause could be held liable for violating the Fourth Amendment.”)

[See also *Morales v. Chadbourne*, 235 F. Supp. 3d 388, 402–03 (D.R.I. 2017) (“Ms. Morales moves for summary judgment, arguing that Director Chadbourne violated her Fourth Amendment right by failing to supervise and train his agents to issue detainers properly and failing to implement more effective immigration detainer policies. Director Chadbourne also moves for summary judgment, arguing that he was not responsible for training agents—that was done at the ICE training academy—or establishing policies for issuing detainers—that happens at ICE

Headquarters in Washington, D.C. . . . Because Director Chadbourne did not physically issue the detainer or have a hands-on role in holding Ms. Morales, the Court reviews his conduct under the premise of supervisory liability. . . . The Court begins its analysis, looking for an affirmative link between Agent Donaghy's conduct and Director Chadbourne's actions and inactions. The undisputed evidence establishes that Director Chadbourne failed to properly train and supervise his subordinates, including Agent Donaghy, concerning the issuance of detainers. Despite acknowledging his responsibility for communicating ICE policy to agents, Director Chadbourne could not recall discussing the detainer form with his agents or providing any training, guidance, or supervision to them. . . . He could not recall reviewing the Hayes Memo with the agents. . . . Director Chadbourne did not appear to know that probable cause was required to issue a detainer, testifying that 'an agent does not have to make a determination that a person is in the country illegally before issuing a detainer.' . . . The result of this failure to supervise is that Agent Donaghy issued the detainer against Ms. Morales without probable cause based on incomplete information without asking a single question before doing so or conducting a further investigation. Furthermore, Director Chadbourne did not supervise how his employees were issuing detainers through statistical analysis either. He failed to collect statistics about agent-issued detainers and did not report those statistics to ICE headquarters as was required by a 2007 national ICE policy. . . . The bottom line is that Director Chadbourne was not aware that there were any problems with the way his Rhode Island Field Office agents issued detainers because he did not pay attention to the process and explicitly failed to supervise agents. Whether Agent Donaghy's unconstitutional actions were based on Director Chadbourne's inaction in failing to communicate ICE policy, or his failure to review the field offices' detainer statistics for issues, or his failure to ensure through supervision that his agents were not issuing detainers against those asserting citizenship, the Court finds that there was an affirmative link between Agent Donaghy's conduct in issuing an illegal detainer and Director Chadbourne's actions in failing to train and supervise. . . . Therefore, Director Chadbourne is liable for the unconstitutional detainer because his supervision and training of his agents, or the lack thereof, was deliberately indifferent to the possibility that their performance, ignorant of the legal standard for issuing a detainer, could cause a deprivation of civil rights.”)]

***Ramirez-Lliveras v. Rivera-Merced***, 759 F.3d 10, 19-21 (1st Cir. 2014) (“The defendants strongly urge that this case be used as a vehicle to recast the contours of supervisory liability in the aftermath of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). We see no reason to do so or to address what is a hypothetical argument. The plaintiffs' case against the supervisors simply is insufficient to meet this circuit's standards as articulated before and reinforced after *Iqbal*. There are a number of clear rules governing supervisory liability under § 1983. First, the subordinate's behavior must have caused a constitutional violation, although that alone is not sufficient. . . . Here, there is a jury verdict establishing Pagán's and the other two officers' violation of constitutional rights. Additionally, the tort theory of respondeat superior does not allow imposition of supervisory liability under § 1983. . . . After *Iqbal*, as before, we have stressed the importance of showing a strong causal connection between the supervisor's conduct and the constitutional violation. . . . In addition, the supervisor must have notice of the unconstitutional condition said to lead to the claim. . . . Pagán's disciplinary record evidenced seven instances of alleged misconduct over a nearly fourteen-year period. That

record was not sufficient to put supervisors on notice that he presented a ‘substantial,’ ‘unusually serious,’ or ‘grave risk’ of shooting an arrestee. . . Nor did it give notice he required discipline beyond that already given to him. We do not discount the seriousness of the domestic violence allegations. We think the commission of these acts by Pagán against his girlfriend is indeed relevant to whether Pagán could be thought to pose a threat of violence to others when he was on official duty. We disagree with the proposition that private domestic abuse is not relevant to the risk of an officer abusing his public position with violence. Nonetheless, in light of all of the facts here, the causal connection the plaintiffs attempt to draw is insufficient as a matter of law to impose supervisory liability even on those supervisors who knew of the content of Pagán’s disciplinary record, much less on those who did not know. The domestic abuse events took place in 1998, nearly nine years before the shooting. The complaint about them was handled seriously by the PRPD. The PRPD investigation found that Pagán had made verbal threats and made threats using his weapon, but did not find he had acted on those threats or inflicted physical harm on others, much less used his weapon to shoot anyone. Further, Pagán was promptly sent for evaluation by the Domestic Violence unit, his firearm was taken away, and he was suspended. Once Pagán and the complainant’s relationship ended, there were no other domestic abuse complaints filed against Pagán. Importantly, while Toledo–Dávila had recommended termination based only on the pre-hearing allegations, that recommendation was not deemed suitable after Pagán was given a hearing. Indeed, Toledo–Dávila said the evidence at the hearing compelled that reduction of the discipline to a suspension for a period of time. Pagán did receive significant discipline after the hearing: a sixty-day suspension without pay. A reasonable official would think that suspension would have a deterrent effect. Indeed, the handling of the charges in a serious manner seemed to have that effect, for there were no other domestic abuse claims made against Pagán after the charges were brought. This evidence is simply insufficient to show the needed causal relationship between the 1998 domestic abuse complaint and the August 11, 2007 shooting. Even after thoroughly investigating the complaint, the PRPD Superintendent did not conclude that the events showed that Pagán was too dangerous to be in a position in which he would encounter civilians. The record does not evidence any causal link between the two events.”)

***Ramirez-Lliveras v. Rivera-Merced***, 759 F.3d 10, 23, 24, 28-30 (1st Cir. 2014) (Torruella, J., concurring in part, dissenting in part) (“Considering the evidence on record, and drawing all reasonable inferences in favor of the non-moving plaintiffs, I believe the majority judges are incorrect in affirming the grant of summary judgment as to all supervisory defendants. Though a close call, I find there are questions of material fact regarding the supervisory liability of Cruz–Sánchez and Colón–Báez that have improperly been kept from a jury. . . I am concerned by the majority’s view that Pagán’s disciplinary history was not enough to put the supervisory officials on notice that he presented a substantial risk of shooting an arrestee or civilian. Underlying this finding is the notion that, in order for liability to attach on a deliberate indifference theory, our case law requires that supervisory officials be on notice, not merely of the potential for violence on the part of the subordinate, but of the potential of a specific act of violence, in this case, shooting a civilian. To be sure, the Supreme Court has provided guidance to the effect that there must be warning of a specific kind of injury. [citing *Bryan County*] However, if a subordinate’s threats of

death by gunfire against another person are not enough to put a supervisor on notice that the subordinate is a prime prospect for engaging in such conduct in the future, is it required that his supervisors wait until the subordinate actually commits such a crime before corrective or preventive measures are taken? Such a strenuous standard cannot possibly be the law. In the case of Pagán, after one episode of executing a civilian, it seems obvious now that he is an ideal candidate for supervisory action based on his proven record. For Cáceres, it was one shot too many. . . .I concede that whether the causal connection here is sufficient, is a close question, particularly as to Cruz–Sánchez. I understand it may seem a stretch to some, at first glance, that a few violent episodes in 1998 would somehow be linked to another violent episode in 2007. However, it is in part because this is a difficult question that I believe the majority errs in not allowing the jury to fulfill its traditional function. . . . Though Pagán’s most egregious acts of violence happened years before the murder of Cáceres, the disciplinary proceedings related to those acts did not conclude until eight years later, in October 2006, when Pagán served his suspension only months before the execution. . . . A jury should have the opportunity to determine whether Cruz–Sánchez and Colón–Báez were on notice of the risk of harm Pagán posed to civilians. It should also have the occasion to determine whether either defendant should have seized any of the opportunities they had to keep Pagán from acting out and repeating his violent tendencies. I believe a reasonable jury could answer both inquiries in the affirmative. A claim of ignorance cannot shield them from liability. In fact, such a claim might be probative of deliberate indifference. Accordingly, for these reasons, I dissent.”)

***Marrero-Rodriguez v. Municipality of San Juan***, 677 F.3d 497, 501-03 (1st Cir. 2012) (“The individual defendants who held the positions of Lieutenant of the Municipal Police, Commissioner of the Municipal Police, Operational Field Chief, Operation Field Sub–Director, Commanding Officer of Specialized Units, Administrative Director of Police Training, Captain of the Municipal Police, and/or Instructors are all, on the pleadings, charged with responsibility for police training and the training that day. By contrast, the Municipality is pled to be liable merely because it employs the individual defendants and because it did not have sufficient training regulations in place, and the Mayor is said to be liable because he is Mayor. . . . From these facts a number of inferences may be drawn in favor of plaintiffs’ Fourteenth Amendment claim. The conduct of shooting in the back a participant in a training exercise was certainly likely to injure. It is plausible that no reasonable government interest in this training exercise justified a police officer taking out a firearm and placing it to the unprotected back of a prone officer, who was face down, motionless, under control, and unarmed. Further, it is plausibly shocking that Santiago, the co-supervisor of the training, did nothing to intervene when Lt. Pacheco placed the gun to Lozada’s back. Moreover, this was done by the highest-ranking supervisor present, as part of a training program. Lt. Pacheco, that supervisor, did not discharge his weapon before entering the facility and did not go through the required checkpoint, in violation of several training protocols. Moreover, Lt. Pacheco said that it was not proper training to merely subdue and control a suspect. Rather, he illustrated ‘proper’ training by using what was obviously lethal force, entirely disproportionate to any reasonable need, in conducting the lesson. The inference can be drawn that the instruction given by Lt. Pacheco as ‘proper’ in this type of situation was shockingly indifferent to the rights of the subdued ‘suspects.’

These factual allegations may not prove to be true; but at this stage, all inferences are drawn in the plaintiffs' favor. In short, as to the defendant officers directly involved, Lt. Pacheco and Santiago, the facts are sufficiently pled. As to the police defendants not present that day, but with direct responsibility for training, the question is closer. The complaint can, if read generously, be read to say they are not being sued merely because they are supervisors who engaged in no misconduct themselves, but because they each had direct responsibility for the conduct of training exercises and had some active involvement in the structuring of the lethal training exercise that day, and that at least some should have been there that day. Other inferences may also be drawn—their failure to implement policies, protocols, or correct training about use of live firearms and preventing deaths in such exercises from the police defendants was itself so lacking in justification as to be shocking to the conscience. This is slightly more than was pled in *Soto-Torres v. Fraticelli*, 654 F.3d 153 (1st Cir.2011), and *Peñalbert-Rosa v. Fortuño-Burset*, 631 F.3d 592 (1st Cir.2011), where we found the pleadings insufficient. At this early stage we are reluctant to dismiss. The role of these defendants can be made clearer in discovery and nothing precludes later efforts to end the case against them should discovery not substantiate these inferences. It takes more than this, though, to assert a § 1983 claim against those who have no personal involvement of any sort in the events, such as the Mayor, and more to assert a claim against the Municipality. The Mayor is not amenable to suit, as pled in the complaint, merely because he is Mayor. Nor may the Municipality be sued under § 1983, as pled, on a respondeat superior theory that it is liable because it employs the individual defendants. . . . In this case, although the complaint alleges that there were insufficient regulations in place to govern the training exercise, it also describes several safety procedures that were intended to prevent exactly this type of accident. In particular, it states that: (1) before entering the training area, officers were to discharge their weapons in a sandbox; (2) in the training facility, officers were only to use only 'dummy guns'; and (3) at this particular training, no firearms were to be used. As a result, no plausible claim of municipal liability based on lack of any safety procedures is stated. The facts as alleged may turn out not to be so. It may be that this shooting was a horrid accident brought about by the inexplicable actions of one man, Lt. Pacheco. But we think the Fourteenth Amendment pleadings, as inartful as they are, point to sufficiently plausible theories of violation to survive dismissal at this stage, save as to the Mayor and the Municipality.”)

***Feliciano-Hernandez v. Pereira-Castillo***, 663 F.3d 527, 533-36 (1st Cir. 2011) (“Feliciano-Hernández’s complaint fails under *Iqbal* to plead adequately that the individual defendants violated his constitutional rights and so fails the first prong of the qualified immunity analysis. As such, he necessarily fails the second prong as well: an objectively reasonable public official situated as defendants would not be on notice of violations of any constitutional rights. The named defendants are very high-level officials, each of whom, as Secretary of the Department of Corrections, had vast responsibilities. . . . The complaint sets forth a series of conclusions. It alleges that ‘[i]n keeping the plaintiff confined beyond the term of his sentence, each defendant acted with deliberate indifference and/or reckless disregard of the plaintiff’s Eighth Amendment rights and due process of law’ and that ‘[e]ach defendant [ ] unjustifiabl[y] deprived plaintiff of liberty in violation of his Eighth Amendment rights and due process of law.’ The complaint states as to each of the former-Secretary defendants that he or she ‘is being sued on the basis of his [or her]

deliberate indifference and/or reckless disregard’ of the plaintiff’s rights. It alleges among other conclusions that the defendants ‘failed in their duty to assure adequate monitoring, disciplining, evaluating, training and supervising any and all personnel under their charge, to assure that all inmates were properly classified and released upon completion of their sentence.’ It relatedly alleges that ‘[h]ad the defendants complied with their supervisory duties, they would have identified those employees that did not properly register the plaintiff’s classification and inaccurately categorized the crimes for which he had been sentenced.’ None of these conclusory allegations suffice to establish a claim. These are exactly the sort of ‘unadorned, the-defendant-unlawfully-harmed-me accusation[s]’ that both we and the Supreme Court have found insufficient. . . . There are a number of other specific deficiencies in the complaint. We start (and end) with the failure to plead that any of the named defendants, each a former Secretary of the Department of Corrections, had any individual notice that plaintiff’s incarceration beyond 1993 was a violation of his constitutional rights, much less that there was an affirmative link to them or that they were deliberately indifferent to those notices of alleged violations of his rights. Actual or constructive knowledge of a rights violation is a prerequisite for stating any claim. . . . Even beyond failing to show notice to the individual defendants, the complaint fails on other grounds. Feliciano-Hernández ‘would still have to go further, for “not every official who is aware of a problem exhibits deliberate indifference by failing to resolve it.”’ . . . The complaint contains no factual allegations to support even a minimal showing of deliberate indifference.”)

*Soto-Torres v. Fraticelli*, 654 F.3d 153, 157-60 & nn.7 & 8 (1st Cir. 2011) (“Soto-Torres does not allege that SAC [Special Agent in Charge] Fraticelli was present when these events occurred or that Fraticelli witnessed their occurrence. Rather, he makes only two relevant allegations. He alleges that Fraticelli ‘was the officer in charge during the incident’ and that he ‘participated in or directed the constitutional violations alleged ... or knew of the violation[s] and failed to act to prevent them.’ These are the only allegations that address Fraticelli’s involvement in Soto-Torres’s detention. . . . In *Maldonado* we observed that ‘recent language from the Supreme Court may call into question our prior circuit law on the standard for holding a public official liable under § 1983 [and *Bivens* ] on a theory of supervisory liability.’ . . . However, as in *Maldonado*, ‘[w]e need not resolve this issue ... because we find that [Soto-Torres has] not pled facts sufficient to make out a plausible entitlement to relief under our previous formulation of the standards for supervisory liability.’ . . . Soto-Torres essentially brings this suit on a theory of supervisory liability. The only allegations in the complaint linking Fraticelli with the detention of Soto-Torres are that Fraticelli ‘was the officer in charge during the incident’ and that he ‘participated in or directed the constitutional violations alleged herein, or knew of the violation[s] and failed to act to prevent them.’ *Iqbal* and our precedents applying it make clear that these claims necessarily fail. As our discussion of the law of supervisory liability makes clear, the allegation that Fraticelli was ‘the officer in charge’ does not come close to meeting the required standard. While the complaint states that Fraticelli ‘participated in or directed the constitutional violations alleged herein,’ it provided no facts to support either that he ‘participated in’ or ‘directed’ the plaintiff’s detention. In some sense, all high officials in charge of a government operation ‘participate in’ or ‘direct’ the operation. *Iqbal* makes clear that this is plainly insufficient to support a theory of supervisory

liability and fails as a matter of law. For the complaint to have asserted a cognizable claim, it was required to allege additional facts sufficient to make out a violation of a constitutional right. Those additional facts would then be measured against the standards for individual liability. The complaint would have had to plead facts supporting a plausible inference that Fraticelli personally directed the officers to take those steps against plaintiff which themselves violated the Constitution in some way. Such a pleading would then have been tested to see whether the standards for immunity had been met. But in this case, the complaint does not even meet the first prong of our two-part *Iqbal* inquiry. Our precedents make clear that it is not enough to state that a defendant ‘was the officer in charge during the incident’ and that he ‘participated in or directed the constitutional violations’ alleged. . . . The district court treated the reasoning of *Maldonado* as inapplicable to this case because the portions of *Maldonado* that laid out the requirements for supervisory liability concerned a Fourteenth Amendment substantive due process claim, whereas here, Soto-Torres attempts to state a supervisory liability theory for violation of his Fourth Amendment rights. However, the constitutional source of a plaintiff’s claims are [sic] irrelevant to this court’s analysis of whether a plaintiff has satisfactorily articulated a supervisory liability theory. Neither *Maldonado* nor *Iqbal* suggest [sic] that supervisory liability theories should be treated differently based on whether they are made to support a claim under the Fourth Amendment or the Fourteenth Amendment.”)

*Leavitt v. Correctional Medical Services, Inc.*, 645 F.3d 484, 502 (1st Cir. 2011) (“Nor can supervisory officials, like Tritch, be held liable for the conduct of their subordinates solely under a theory of respondeat superior. . . . It may be true that the care Leavitt received at MSP was generally inadequate. However, to make out a cognizable Eighth Amendment claim against healthcare providers in their *individual* capacity, he must demonstrate that there is sufficient evidence for a reasonable factfinder to conclude that *each* CMS defendant was ‘aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,’ and that *each* defendant did, in fact, ‘draw the inference.’ . . . We cannot conclude that Leavitt has satisfied his burden.”)

*Sanchez v. Pereira-Castillo*, 590 F.3d 31, 48, 49 (1st Cir. 2009) (“We read plaintiff’s complaint to assert a claim of supervisory liability under Section 1983 against the administrative correctional defendants, namely Pereira, Fontanez, Díaz, Negrón, and Soto, premised on the theory that those defendants failed adequately to train the correctional defendants who were implicated in the surgery itself. Although ‘Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*,’ *Iqbal*, 129 S.Ct. at 1948, supervisory officials may be liable on the basis of their own acts or omissions. *Aponte-Matos v. Toledo-Dávila*, 135 F.3d 182, 192 (1st Cir.1998). In the context of Section 1983 actions, supervisory liability typically arises in one of two ways: either the supervisor may be a ‘primary violator or direct participant in the rights-violating incident,’ or 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.’ *Camilo-Robles v. Zapata*, 175 F.3d 41, 44 (1st Cir.1999). In the latter scenario,

relevant here, the analysis focuses on ‘whether the supervisor’s actions displayed deliberate indifference toward the rights of third parties and had some causal connection to the subsequent tort.’ *Id.* In either case, the plaintiff in a Section 1983 action must show ‘an affirmative link, whether through direct participation or through conduct that amounts to condonation or tacit authorization,’ *id.*, between the actor and the underlying violation. In determining whether allegations state a plausible claim for relief, the Supreme Court has suggested that we ‘begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.’ *Iqbal*, 129 S.Ct. at 1950. Turning to plaintiff’s complaint, we find that it does little more than assert a legal conclusion about the involvement of the administrative correctional defendants in the underlying constitutional violation. Parroting our standard for supervisory liability in the context of Section 1983, the complaint alleges that the administrative defendants were ‘responsible for ensuring that the correctional officers under their command followed practices and procedures [that] would respect the rights and ensure the bodily integrity of Plaintiff’ and that ‘they failed to do [so] with deliberate indifference and/or reckless disregard of Plaintiff’s federally protected rights.’ This is precisely the type of ‘the-defendant-unlawfully-harmed-me’ allegation that the Supreme Court has determined should not be given credence when standing alone. *Id.* at 1949. The sole additional reference to the administrative correctional defendants’ role in the surgery is the complaint’s statement that ‘[t]he pushiness exerted by John Doe [upon the doctors] followed ... the regulations and directives designed by Pereira and construed and implemented by all of the other Supervisory Defendants .’ . . However, the only regulations described in the complaint are the strip search and x-ray regulations promulgated by Pereira. The deliberate indifference required to establish a supervisory liability/failure to train claim cannot plausibly be inferred from the mere existence of a poorly-implemented strip search or x-ray policy and a bald assertion that the surgery somehow resulted from those policies. We conclude, therefore, that the ‘complaint has alleged-but it has not Ashow[n]-Athat the pleader is entitled to relief’ from the administrative correctional defendants. *Iqbal*, 129 S.Ct. at 1950 (quoting Fed. Rule Civ. Proc. 8(a)(2)). Although it did so on different grounds, the district court was correct to dismiss the claims against those defendants. . . . We conclude that plaintiff’s allegations against Cabán and John Doe are sufficient to allow us ‘to draw the reasonable inference that [each] defendant is liable for the misconduct alleged.’ *Iqbal*, 129 S.Ct. at 1949. Although the claims against John Doe and Cabán also rest on a form of supervisory liability in the sense that neither one actually performed the surgery on plaintiff, those claims do not depend on a showing by plaintiff of a failure to train amounting to deliberate indifference to his constitutional rights. Instead, plaintiff succeeds in pleading that the defendants were liable as ‘primary violator[s] ... in the rights-violating incident,’ thereby stating a sufficient claim for relief. . . . We begin with the claims against Sergeant Cabán. . . Plaintiff’s complaint specifically alleges that Cabán was directly involved in all phases of the search for contraband. . . and in the ultimate decision to transport plaintiff to the hospital ‘for a rectal examination and/or a medical procedure to remove the foreign object purportedly lodged in Plaintiff’s rectum.’ The complaint goes on to allege that John Doe, acting pursuant to ‘orders imparted by Cabán,’ pressured the doctors to conduct a medical procedure to remove the illusory cell phone from plaintiff’s bowels. Given these allegations, it is a plausible inference that Cabán

caused plaintiff to be subjected to the deprivation of his Fourth Amendment rights. *See* 42 U.S.C. § 1983.”).

***Maldonado v. Fontanes***, 568 F.3d 263, 273-75 & n.7(1st Cir. 2009) (“[A]nalyzing the pleadings under *Iqbal*, we hold that the allegations of the complaint do not allege a sufficient connection between the Mayor and the alleged conscience-shocking behavior – the killing of the seized pets – to state the elements of a substantive due process violation. . . . The purported liability of the Mayor for damages for substantive due process violations does not involve a policy of the Municipality for which he is responsible, nor does it rest on his personal conduct. Instead, the allegations against the Mayor are that he promulgated a pet policy for the public housing complexes and was present at and participated in one of the raids. This level of involvement is insufficient to support a finding of liability. . . . Plaintiffs complaint identifies no policy which authorized the killing of the pets, much less one which the Mayor authorized. Second, the complaint does not allege that the Mayor was personally involved in any conscience-shocking conduct during the raids. . . .A government official who himself inflicts truly outrageous, uncivilized, and intolerable harm on a person or his property may be liable; but there is no claim in this complaint the Mayor himself inflicted such harm. . . . The allegations against the Mayor thus do not establish that his involvement was sufficiently direct to hold him liable for violations of the plaintiffs’ substantive due process rights. Nor do the allegations make out a viable case for supervisory liability, such that the Mayor could, on these pleadings, be held responsible for violations of the plaintiffs’ substantive due process rights committed by subordinate municipal employees or workers from ACS. . . . Some recent language from the Supreme Court may call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability. . . . We need not resolve this issue, however, because we find that the plaintiffs have not pled facts sufficient to make out a plausible entitlement to relief under our previous formulation of the standards for supervisory liability. . . . Here, the Mayor’s promulgation of a pet policy that was silent as to the manner in which the pets were to be collected and disposed of, coupled with his mere presence at one of the raids, is insufficient to create the affirmative link necessary for a finding of supervisory liability, even under a theory of deliberate indifference. The Mayor is entitled to qualified immunity on the pleadings on the Fourteenth Amendment substantive due process claims.”).

***Penate v. Kaczmarek***, No. CV 3:17-30119-KAR, 2019 WL 319586, at \*12–13 (D. Mass. Jan. 24, 2019) (“As to whether a supervisor of a forensic laboratory should have been on notice of potential liability at the relevant time, judges in two other sessions of this court have considered, in connection with Dookhan’s conduct at the Hinton lab, whether, at the time Dookhan’s misconduct occurred, ‘a reasonable supervisor would understand that [he] “would be liable for constitutional violations perpetrated by [his] subordinates in [that] context.”’. . . Those judges held that a supervisor in a forensic laboratory would have reasonably understood his potential liability if he allowed a forensic chemist to persist in conduct that ‘jeopardized the constitutional rights of criminal defendants subject to the laboratory testing procedures.’. . . These opinions are persuasive. While Farak’s misconduct differed from Dookhan’s, the impact on the fundamental due process

rights of criminal defendants was similar. . . In either case, given the central roles the drug labs and their chemists played in criminal prosecutions, a reasonable supervisor would have understood that willfully turning a blind eye to indications of evidence tampering by a lab chemist could be a basis for liability to a defendant whose due process rights were violated. . . In sum, the allegations in the complaint paint a picture of a supervisor whose oversight of the Amherst Lab was deliberately indifferent to the rights of Plaintiff as a defendant in a criminal case. The evidence in his criminal trial was stored and tested in a lab where a drug-addicted chemist tampered with, stole, and consumed evidence at will. Hanchett’s conduct – or inaction – can be said to have ‘led inexorably to the constitutional violation.’ . . . At this stage, Plaintiff has stated a plausible § 1983 claim against Hanchett.”)

***Horan v. Cabral***, No. CV 16-10359-GAO, 2017 WL 4364174, at \*3 (D. Mass. Sept. 29, 2017) (“Discovery on *Monell* liability has been stayed, and there has been no discovery on the question of the existence of a policy or practice that caused the plaintiff to be deprived of a constitutional right. Thus, the defendant cannot move for summary judgment on this issue. *See* Fed. R. Civ. P. 56(d). Even assuming an underlying constitutional violation by medical personnel in the respect alleged, the complaint fails to support a plausible inference that Cabral had personally been involved with the subordinate personnel who provided the care such that she could be liable as a supervisor. Drawing a reasonable inference in the plaintiff’s favor, that the January 22 letter from the plaintiff’s counsel was received and read by Cabral, the letter neither establishes an ‘affirmative link’ nor plausibly supports the inference that Cabral’s conduct ‘led inexorably’ to the purported constitutional violation. . . Cabral’s inaction after receiving a letter that notified her of a disagreement regarding the plaintiff’s medical treatment plan is, without more, not enough to establish deliberate indifference on her part. Additionally, an isolated incident of constitutionally deficient medical care does not plausibly allege a policy or practice of deliberate indifference to constitutional violations on the part of Cabral. . . Because the complaint does not state a plausible basis for relief, the § 1983 Eighth Amendment claim against defendant Cabral is dismissed.”)

***Thomas v. Town of Chelmsford***, 267 F.Supp.3d 279, \_\_\_ (D. Mass. 2017) (“The Court concludes that a school’s failure to take action to stop bullying and sexual harassment in response to a student’s complaints of rape is sufficiently adverse to state a retaliation claim. . . The parties spar over whether the individual defendants were deliberately indifferent to students’ behavior toward Matthew. Both parties miss the antecedent issue, which is that supervisory liability cannot be predicated on actions by students. First, it is plain that a student does not have a supervisor-subordinate relationship with a teacher or school administrator. Second, a student’s actions cannot create the underlying constitutional infringement to support supervisory liability because of the lack of state action. Supervisory liability may nonetheless exist as to individual defendants who encouraged or were deliberately indifferent to the actions of school district employees who infringed the plaintiffs’ constitutional rights. The complaint alleges that Superintendent Tiano supervised A.D. Moreau and Principal Caliri. . . The complaint also alleges that Principal Caliri directly supervised Dean Doherty and all teachers at CHS. . . Superintendent Tiano and Principal Caliri are the only two individual defendants alleged to have had supervisory roles. . . But for any

supervisory liability to attach to either defendant, the complaint must allege acts or omissions by that supervisor rather than relying on a general theory of vicarious liability. Plaintiffs have already adequately pleaded primary liability for First Amendment retaliation against Superintendent Tiano and Principal Caliri with respect to deliberate indifference to the sexual harassment of Matthew by fellow students. The question is whether the complaint also adequately alleges that Superintendent Tiano and Principal Caliri have supervisory liability for First Amendment retaliation. The plaintiffs argue that Superintendent Tiano and Principal Caliri knew that multiple teachers were making retaliatory comments about Matthew, but that Superintendent Tiano and Principal Caliri themselves retaliated against Matthew by being deliberately indifferent to the constitutional violations in a way that could be considered supervisory encouragement or condonation. But the complaint suggests that the administration did respond to reports of teachers' retaliatory comments. . . . While the plaintiffs argue that the administrators' response was inadequate, the Court's role is not to second-guess supervisory approaches. Rather, the question is whether the plaintiffs plead such deliberate indifference on the part of the supervisors that the supervisors themselves could be said to have engaged in constitutional misconduct. The plaintiffs fail to state a supervisory liability claim against Superintendent Tiano and Principal Caliri.”)

*Langlois v. Pacheco*, No. CV 16-12109-FDS, 2017 WL 2636043, at \*7 (D. Mass. June 19, 2017) (“Failure-to-train claims are typically brought against municipal defendants or other entities, not individuals. Nonetheless, ‘a supervisor may be held individually liable under § 1983 if ... [a failure to] train the offending employee caused a deprivation of constitutional rights.’ *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996); *see also Shirback v. Lantz*, 2008 WL 878939, at \*4 n.5 (D. Conn. March 28, 2008) (“It appears to the court that the standard for ‘deliberate indifference’ as an element of a claim for municipal liability [for failure to train or supervise] is the same as the standard for ‘deliberate indifference or gross negligence’ as an element of a claim of personal liability.”).”)

*Morales v. Chadbourne*, 235 F. Supp. 3d 388, 403 (D.R.I. 2017) (“Director Chadbourne also asserts a defense of qualified immunity. The Court has previously outlined the law, *see supra* Section III.A.2, so will turn directly to Director Chadbourne’s factual assertions in support of this defense. In order to qualify for immunity, Mr. Chadbourne would have to prove that the constitutional right was not clearly established and that, as a reasonable officer, he did not understand that his conduct violated that right. Where Director Chadbourne’s qualified immunity defense fails is in proving the ‘clearly established’ prong. The evidence shows that it was clearly established in 2009 that Ms. Morales had a constitutional right as a United States citizen not to have her liberty infringed based on a detainer that lacked probable cause, . . . and Director Chadbourne should have understood that his actions violated the Fourth Amendment. He should have known that agents needed probable cause to issue the detainer, but was deliberately indifferent to the standard under which ICE should issue detainers. The mandatory directives from the Hayes Memo, which he was responsible for knowing, understanding, and communicating to his agents, said as much. Moreover, he had the power and authority to supervise these individuals. ICE policy required him to keep statistics on enforcement of immigration detainers, presumably

so that any aberration of policy could be detected, but he failed to do so, permitting violations of the constitutional rights of United States citizens like Ms. Morales. Director Chadbourne’s conduct was not objectively reasonable in 2009 and the Court finds that qualified immunity does not shield his deficiencies.”)

*Diaz v. Devlin*, 229 F.Supp.3d 101, 109-10 (D. Mass. 2017) (“For purposes of this motion, Det. Carlson does not argue that the Plaintiffs’ constitutional rights were not violated, rather he argues that Plaintiffs have not alleged any facts which establish that any action or inaction on his part caused any such violations, either by him directly, or in his supervisory capacity. Plaintiffs have made general allegations that Det. Carlson was a member of the WPD vice squad involved in the Jackson investigation, had Jackson under surveillance at another address, helped plan the raid, and ‘assisted’ in carrying out the raid. Plaintiffs have not pled any specific facts which link Det. Carlson, directly or indirectly, to any [of] the alleged unlawful conduct. Such bare-bones allegations are insufficient to establish a plausible Section 1983 claim against Det. Carlson for illegal search and/or use of excessive force. Plaintiffs suggest that Det. Carlson may be liable for the violations of their rights as a supervisor of those officers who were involved in the raid. However, even assuming that Det. Carlson was the supervisor of the officers who executed the raid, as to the excessive force claim, courts have extended section 1983 liability only to those police supervisors who were physically present and either directed their subordinates to violate others’ rights or failed to intervene to prevent their subordinates from violating others’ rights. As discussed above, Plaintiffs have not pled any facts which establish that Det. Carlson was present at the Apartment, and, even if they had, they have not alleged that he directed his subordinates to use force against them, or that he was in a position to intervene. Det. Carlson’s mere presence, his planning and/or execution of the raid is insufficient ‘to create the affirmative link necessary for a finding of supervisory liability.’ *Maldonado v. Fontanes*, 568 F.3d 263, 275 (1st Cir. 2009). As to Plaintiffs’ Section 1983 supervisory claim against Det. Carlson for illegal search and seizure, as stated above, Plaintiffs’ barebones allegations fail to state a plausible claim against Det. Carlson for a direct violation. As to the claim asserted against him in his supervisory capacity, Plaintiffs have failed to link any action or inaction of Det. Carlson the behavior of a subordinate which led to a constitutional deprivation. Instead, Plaintiffs rely on conclusory allegations and unsupported speculation, which is insufficient to establish the affirmative link necessary to establish the deliberate indifference on the part of Det. Carlson in his supervisory capacity. For the reasons set forth above, I find that Plaintiffs have not alleged plausible Section 1983 claims against Det. Carlson for excessive force or illegal search and seizure. Therefore, those claims are dismissed.”)

*Doan v. Bergeron*, No. 15-CV-11725-IT, 2016 WL 5346935, at \*5 (D. Mass. Sept. 23, 2016) (“Hodgson’s reliance on *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49-50 (1st Cir. 2009), is misplaced. In that case, the First Circuit affirmed the dismissal of a deliberate indifference claim against a prison superintendent and other high-level prison officials because the plaintiff brought forth only bald legal conclusions against those defendants. There, the plaintiff alleged only that those defendants were deliberately indifferent just because they had responsibility ‘for ensuring that the correctional officers under their command followed practices and procedures [that] would

respect the rights and ensure the bodily integrity of Plaintiff and failed to do so. . . Here, however, Doan alleges not just Hodgson’s responsibility for assuring Doan’s adequate medical care, but also that he *knew* about Doan’s condition and the absence of adequate care and did nothing to remedy that.”)

***Doan v. Bergeron***, No. 15-CV-11725-IT, 2016 WL 5346935, at \*8-9 (D. Mass. Sept. 23, 2016) (“When a plaintiff seeks to hold liable a defendant based on his supervisory role over others who allegedly violated the plaintiff’s constitutional rights, the ‘clearly established’ prong of the qualified immunity inquiry is satisfied when (1) the subordinate’s actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context. In other words, for a supervisor to be liable there must be a bifurcated ‘clearly established’ inquiry—one branch probing the underlying violation, and the other probing the supervisor’s potential liability. . . As to the first step of the ‘clearly established’ inquiry, the violations of Gallagher’s subordinates—CPS and the Bristol County Sheriff’s Office defendants—were violations of clearly established constitutional rights. Doan’s right to be free from involuntary medication—implicated by the allegations that CPS defendants gave Doan Haldol even though she was incapable of giving informed consent and they did not have a court order to do so, . . . was clearly established, as the Supreme Court has stated that prisoners ‘possess[ ] a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs.’ . . Doan’s right to be free from harm—implicated by Gallagher’s failure to protect Doan from the involuntary medication of Haldol—was also clearly established in Supreme Court case law. . . As to the second step of the analysis, it was clearly established that a supervisor would be liable for the violations of his subordinates in this context, where Gallagher was alleged to have known about the constitutional violations. A supervisor can be liable for the actions of his subordinates if he or she ‘is on notice’ to ‘ongoing violations’ and ‘fails to take corrective action.’ . . Here, Doan has alleged that Gallagher was aware of the ongoing constitutional violations that she was suffering, had the power to alleviate those violations by relocating Doan, but failed to take corrective action. Gallagher relies on cases from other circuits holding that non-medical jail or prison officials such as Gallagher are entitled to rely on the expertise of medical personnel. *See Arnett v. Webster*, 658 F.3d 742, 755 (7th Cir. 2011) (stating that “if a prisoner is under the care of medical experts, a non-medical prison official will generally be justified in believing that the prisoner is in capable hands”); *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004) (same). However, ‘non-medical officials can be chargeable with ... deliberate indifference where they have a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner.’ *Arnett*, 658 F.3d at 755. This is what Doan alleges; that Gallagher knew that CPS was involuntarily medicating Doan and failed to take any corrective action. Accordingly, Gallagher is not entitled to qualified immunity at this stage of the litigation.”)

***Doan v. Bergeron***, No. 15-CV-11725-IT, 2016 WL 5346935, at \*9 (D. Mass. Sept. 23, 2016) (“Gallagher also argues that Doan has failed to make a cognizable claim against him under *Bivens*. Specifically, he states that Doan is making out a vicarious liability argument, which is not

permissible under *Bivens*. . . Doan, however, is not making such a claim. Instead, her claim is one of supervisory liability. A supervisory claim is viable as a *Bivens* claim, but only if liability is premised on the supervisor's 'own acts or omissions.' . . . With such a claim, a plaintiff must show that the supervisor's 'action or inaction was "affirmatively linked" to the constitutional violation caused by the subordinate.' . . . In other words, the supervisor's behavior must be able to be characterized as 'supervisory encouragement, condonation, or acquiescence or gross negligence ... amounting to deliberate indifference.' . . . Here, as Doan alleges, Gallagher knew of the unconstitutional conditions to which Doan was subjected, and though he had power to relocate Doan from the institution that was responsible for these conditions, he failed to do so, allowing the unconstitutional conditions to continue. Such facts as stated plausibly make out claim that Gallagher was deliberately indifferent to the constitutional violations against Doan by CPS. Accordingly, at this stage, Doan has pled enough so as to survive a motion to dismiss Count V against Gallagher in his individual capacity.")

***Rodriguez v. Sancha***, No. CV 12-1243(PAD), 2016 WL 1247208, at \*8-10 (D.P.R. Feb. 24, 2016) ("Regarding co-Defendants Figueroa-Sancha and Vázquez, Plaintiffs have presented evidence that points to the existence of an atmosphere of possible supervisory encouragement, condonation or acquiescence amounting to deliberate indifference and lack of supervision at the PRPD. It is uncontested that there was no hands-on training in the use (or prevention) of excessive force and of civil rights by the PRPD. All the officers had was the 'local Academy' which consisted of an informal meeting roughly every month where communications from Police Headquarters were discussed and discussions about the use of force and civil rights were held with the participants. This was not hands-on training. Furthermore, at the time the events that gave rise to this complaint took place in 2010, the PRPD was not required to provide regular training on use of force and civil rights to its officers. That is directly in contrast to today, where the PRPD is under an obligation to provide better training and disciplinary process to officers as a result of a stipulation between the local Department of Justice, the United States Department of Justice and the PPRD. The findings by the USDOJ further undermines Defendants' defense. The USDOJ found, among others, that the 'PRPD appears to lack basic contemporary practices that have been adopted by many law enforcement agencies to safeguard the fundamental constitutional rights of the citizens they serve', as well as insufficient guidelines on the application of force, lack of formal requirements for reporting and reviewing use of force, an ineffective disciplinary system, lack of basis processes and resources for internal investigations, inadequate guidance on conducting searches and seizures, inadequate supervision and fragmented community engagement. . . . These findings were all bolstered by the formal report issued by the USDOJ in September, 2011 and by the report of Police Department Monitor Efraín Rivera Pérez. . . . Co-Defendant Vázquez, in charge of ensuring that the officers of the force were duly trained in civil rights and use of force, further admitted under oath that: training is of the utmost importance in order to prevent police officers from abusing civil rights and using excessive use of force; that an officer not trained in use of force and civil rights is more likely to engage in civil rights violations because of that lack of training; that a duly, regularly trained officer is less likely to use excessive force; that one of the ways of preventing violations of civil rights and use of force is assuring that the police officers have regular

training and correct supervision, among others. It is evident that the above elements did not exist in the PRPD while both Figueroa–Sancha and Vázquez were at the agency’s helm, and they were both well aware of this situation. The letters from the USDOJ directed to Figueroa–Sancha dated March and April, 2009 clearly spell this out. Thus, the fact that co-defendants Vázquez and Figueroa–Sancha were not at the scene of the incident in question is of little use to them if Plaintiffs can establish that they, as high ranking officers of the PRPD, had knowledge about the constitutional violation atmosphere that permeated the PRPD and did nothing about it. . . .As the supervisor responsible for a mobilization of some fifteen officers which included an arrest, the impounding of a vehicle and a massive home search, in certainly gives the Court pause that such a vast operation did not render any accusations and instead only produced the arrest of a man for alleged drunk driving who was in fact, completely sober. Furthermore, the fact that no search or arrest warrants were issued on the night in question, when they are the norm and not the exception, casts doubt on Defendants’ actions and on whatever instructions were given by Colón, the supervisor of the police operation. It is also telling that Colón was also unaware of the many shortcomings of the officers he commanded, as he was also unaware of the multiplicity of administrative complaints against Fernández and Morales. As the Humacao Regional Director, Colón had a duty to ensure that officers under his command were adequately trained and that their actions comported with police standards. As Plaintiffs correctly point out, when a supervisor fails to monitor the actions of the officers under his charge, an inference can be made that he is acquiescing to their unconstitutional behavior, particularly under the specific facts of this case and given the multiplicity of prior administrative violations by the officers involved. At this Plaintiff-friendly stage, such an inference can be drawn on the facts presented before the Court.”)

**Johnson v. Han**, No. CV 14-CV-13274-IT, 2015 WL 4397360, at \*3-6 (D. Mass. July 17, 2015) (“Johnson brings Counts I through IV of his complaint against O’Brien. . . Each count is predicated on a theory of supervisory liability. Johnson claims that O’Brien condoned the withholding of *Brady* material (Count I), the withholding of negative test results (Count II), and the knowing presentation of falsified inculpatory evidence (Count III). Johnson further alleges that O’Brien failed to train, supervise, or discipline Dookhan and Renczkowski (Count IV). O’Brien brings four arguments in support of her motion to dismiss: (1) the obligation to disclose exculpatory and impeachment evidence under *Brady* does not apply to state-employed chemists, (2) the complaint fails to plausibly allege that O’Brien was a supervisor at the time Dookhan and Renczkowski tested the substance, (3) the complaint fails to plausibly plead the requisite elements of supervisory liability, and (4) qualified immunity bars liability. . . . Under *Brady*, it is ‘[t]he prosecution’s affirmative duty to disclose evidence favorable to defendant.’ However, the suppression of evidence unknown to a prosecutor and held only by members of the investigative team is still a *Brady* violation. . . In the context of § 1983 liability, the First Circuit has held that investigatory officials such as police officers may be liable for their failure to disclose *Brady* materials. . . . Although the First Circuit has not expressly held that *Brady* obligations similarly extend to state-employed lab chemists, O’Brien provides no persuasive reason to distinguish between different members of the state investigatory team in this regard. . . .O’Brien argues that the complaint does not include facts plausibly suggesting that O’Brien: (1) had actual or constructive knowledge of

the direct constitutional violations alleged, amounting to deliberate indifference; or (2) undertook acts or omissions causally related to those violations. O'Brien emphasizes that the complaint concedes that in 2010 she raised concerns regarding Dookhan's work with her supervisors. Accordingly, O'Brien argues she could not have been deliberately indifferent to the alleged violations of Johnson's constitutional rights. . . . Here, the complaint alleges that, during or before 2009, O'Brien: (1) knew Dookhan's resume lied about her educational credentials, (2) saw Dookhan's testing rate and understood this rate to be implausibly high if proper testing procedures were used, (3) observed Dookhan's lab protocols, and (4) had received and dismissed a report of concerns about Dookhan's high testing rate. The complaint also alleges that, after her promotion to 'Laboratory Supervisory I,' O'Brien became aware that Dookhan removed samples from the evidence room without proper chain-of-custody procedures. Counts I through IV allege claims of supervisory liability based on O'Brien's alleged role in allowing her subordinates to withhold exculpatory evidence and falsify evidence of guilt and in failing to train, supervise, or discipline these subordinates for their actions. As alleged in the complaint, the substance was tested in February 2009, Dookhan prepared and turned over the discovery packet in April 2009, and Dookhan and Renczkowski testified in November 2009. Based on O'Brien's own claim of a promotion date of March 8, 2009, the preparation of the discovery packet and the trial testimony occurred while O'Brien was Dookhan and Renczkowski's supervisor. At least by April 2009, O'Brien knew that Dookhan had lied about her educational credentials, knew that Dookhan claimed to test a high rate of samples and understood these claims to be implausible, observed Dookhan fail to follow lab protocols, and had received prior complaints about Dookhan's testing rates. At the motion-to-dismiss stage, these factual allegations suffice to state a claim that O'Brien was aware, or should have been aware, of a pattern of behavior by her subordinates that was highly likely to lead to the violation of constitutional rights (either through withholding negative test results or falsifying positive test results). The complaint further plausibly pleads that O'Brien acted with deliberate indifference towards that behavior, effectively condoning its continuation throughout 2009 despite her supervisory role. Accordingly, the court will not dismiss Counts I through IV on this ground.")

*Williams v. Bisceglia*, 115 F.Supp.3d 184, 189 (D. Mass. 2015) ("The First Circuit has upheld conclusory language similar to that alleged by the Plaintiff where the supporting facts asserted elsewhere in the complaint establish 'the affirmative link necessary to sufficiently plead a supervisory liability claim,' and/or a policy or custom of the City which led to the alleged constitutional violation. See *Morales v. Chadbourne*, — F.3d —, No. 14-1425, 2015 WL 4385945, \*11 (Jul. 17, 2015). In this case, Plaintiff has not pled any supporting facts which would support his bare, conclusory allegations against the City and Chief Gemme. On the contrary, these are the same type of conclusory allegations that the Supreme Court found deficient in *Iqbal*. Therefore, these Defendants motion to dismiss the Section 1983 claims against them is allowed.")

*Henriquez v. City of Lawrence*, No. 14-CV-14710-IT, 2015 WL 3913449, at \*4 (D. Mass. June 25, 2015) ("For reasons similar to those stated above in relation to municipal liability, the court finds that Henriquez states a plausible claim for supervisory liability. Henriquez pleads more than

conclusory allegations of deliberate indifference. . . Rather, Henriquez alleges that officers in the Department engaged in prior instances of excessive force and denial of medical care constituting a ‘history or pattern’ of such conduct; Police Chief Romero was aware of prior complaints against officers in the Department for such conduct; and despite this awareness, Police Chief Romero failed to take any steps to supervise, investigate, train, or discipline the officers. Because Henriquez’s factual allegations state a plausible claim, Police Chief Romero’s motion to dismiss Count II is denied.”)

*Nascarella v. Cousins*, No. 13-CV-10878-IT, 2015 WL 1431054, at \*11-13 (D. Mass. Mar. 27, 2015) (“Nascarella has failed to identify evidence giving rise to a reasonable inference that the substance of the training provided to correctional officers was constitutionally deficient. Neither Superintendent Marks’ failure to review the Advisory Training Council reports or the difficulty correctional officers exhibited in describing use-of-force techniques appears ‘so likely to result in the violation of constitutional rights’ as to show that supervisors were deliberately indifferent. . . Accordingly, Nascarella’s failure-to-train claim fails as a matter of law. . . .According to Nascarella, Officer Mustone and Officer Marks’ combined uses of force on forty-seven occasions in the two years preceding the incident would have put any attentive supervisor on notice that they were likely to use unnecessary force against a prisoner in the future. . . Moreover, Nascarella claims that the Facility was put on notice of Officer Mustone and Officer Marks’ tendency to use excessive force by way of Morris’ complaint, but failed to adequately investigate this allegation or take corrective action, instead summarily dismissing the complaint after a review of Morris’ disciplinary record. . . A single incident of misconduct, even if egregious, is generally insufficient to find supervisors liable for their failure to supervise or discipline subordinates. . . This would admittedly be a simpler case if the evidence showed forty-seven complaints of excessive force, rather than forty-seven use-of-force reports. However, the court must view the evidence in context. In cases involving claims of excessive force against police officers by civilians, the court would expect a greater rate of complaints-civilians may have better access to complaint procedures and may, in filing their complaints, operate beyond the control and oversight of the officers they allege used excessive force against them. That is not always the case within a correctional facility, where prisoners may be dissuaded from reporting such events by the knowledge that they remain under the care of the correctional officers about whom they would seek to complain. . . In this context, and in the face of the use-of-force reports, the court cannot find that the absence of a pattern of excessive-force complaints is dispositive. In addition to evidence that forty-seven combined uses of force over two years would cause ‘great alarm’ on the part of an attentive supervisor, . . . Nascarella offers evidence that Superintendent Marks was cited for non-compliance by Department of Correction auditors for failing to ensure the completeness and accuracy of use-of-force packages. . . Finally, Nascarella has offered evidence that, despite being cited for non-compliance, and despite the high number of combined uses of force by Officer Marks and Officer Mustone, Superintendent Marks did not investigate the discrepancies in reporting by these officers when another prisoner alleged that they had kicked and punched him in the face. . . The strength of this evidence may appropriately be weighed by a jury. The evidence suffices, however, to place in dispute the material fact of whether Superintendent Marks exhibited deliberate indifference to

a recognizable pattern of the inappropriate uses of force that required investigation and correction through his failure to properly review use-of-force packages. The First Circuit has previously found that the inference that a failure to discipline officers in the past would lead to the belief that they could escape discipline for future acts ‘simply too tenuous’ to form the basis of a supervisory liability claim. . . In both *Febus–Rodriguez* and *Ramírez–Lliveras*, however, the past, undisciplined acts were unrelated to the type of conduct at issue in those cases. . . In contrast, a jury could reasonably infer that Superintendent Marks’ failure to ensure the accuracy of past use-of-force packages, and failure to identify the allegedly alarming rate of force used by Officer Mustone and Officer Marks, gave rise to a belief in Officer Mustone and Officer Marks that they could continue to use, and under-report, force against prisoners with impunity. The court finds that this conclusion requires less of an inferential leap than in *Febus–Rodriguez* and *Ramírez–Lliveras*. . . Accordingly, the court finds sufficient record evidence to create a triable issue as to whether Superintendent Marks was deliberately indifferent in his failure to supervise or discipline correctional officers, predictably leading to Officer Mustone and Officer Marks’ use of force. . . As to Sheriff Cousins, however, Nascarella has failed to present evidence that he ‘would have known[,] ... but for his deliberate indifference or willful blindness,’ that Officer Mustone and Officer Marks posed a significant risk of harm and required supervision or discipline. . . . The record does not establish that Sheriff Cousins has responsibility for reviewing use-of-force reports at the Facility. Accordingly, in the absence of a pattern of excessive-force complaints or other evidence reasonably available to Sheriff Cousins that could have shown a pattern of abuse or tendency towards unconstitutional behavior, no affirmative link can be drawn between his actions and Officer Mustone and Officer Marks’ use of force.”)

***Saldivar v. Pridgen***, 91 F.Supp.3d 134, 137-38 (D. Mass. 2015) (“Pridgen’s disciplinary record in the Fall River Police Department consists of 11 violations between September, 2003 and June, 2011 that are entirely unrelated to any form of sexual misconduct. The suspensions that Pridgen received were due to 1) failure to abide by departmental policy in handling a domestic violence call, such as improperly informing the victim of her rights and inadequately conducting a search for weapons, 2) abuse of sick leave policy, 3) failure to appear for roll call and 4) failing to maintain a valid license to carry a firearm. Pridgen also received seven reprimands for violations such as failing to abide by proper procedure for the submission of reports, arriving late to work and causing a cruiser accident. Plaintiff has failed to demonstrate that Racine had actual or constructive knowledge of the likelihood or even the possibility that Pridgen would sexually assault a woman while on duty. In other words, Racine lacked the prerequisite notice.”)

***Stile v. Somerset Cnty.***, No. 1:13-CV-00248-JAW, 2015 WL 667814, at \*5-6 (D. Me. Feb. 17, 2015) (J. Woodcock’s opinion adopting R & R) (“A review of the recommended decision and Mr. Allen’s objection reveals essential congruity on the legal standard for supervisory liability. The Magistrate Judge observed that under *Iqbal*, courts must often turn to ‘judicial experience and common sense’. . . and must often make ‘a contextual judgment about the sufficiency of the pleadings.’. . . Selecting a different case, Mr. Allen quoted similar language from the First Circuit for the imposition of supervisory liability as appears in the recommended decision: that a plaintiff

must demonstrate that his constitutional injury ‘resulted from direct acts or omissions of the official, or from indirect conduct that amounts to condonation or tacit authorization.’ . . Mr. Stile alleges in his Amended Complaint Final that he got in an altercation with one of the correction officer’s relatives, a fellow inmate, and that from then on, the correction officers at the Somerset County Jail waged an ongoing, long and deliberate campaign to physically and mentally abuse him, to unnecessarily and repeatedly strip search him and subject him to visual body cavity searches, to leave him naked for extended periods in his cell, to turn off the hot water when he showered and to refuse to give him a towel, to improperly assign him to administrative segregation, to refuse to properly process his grievances, to assault him, leaving him black and blue, to deny him clergy, counsel, proper hydration, and visitors, to remove his legal papers, to deprive him of his eyeglasses, and to subject him to daily taunts and abuses. Contrary to Mr. Allen’s position, it is a common sense and logical contextual inference that if a Jail Administrator were doing his job, he would have some knowledge of an inmate being treated in this fashion over the course of many months. Under this rubric, it is proper for purposes of a motion to dismiss, to infer that Mr. Allen either condoned or tacitly authorized what occurred. This conclusion obtains regardless of the size of the jail and even assuming that the Magistrate Judge had no right to observe that the Somerset County Jail is not a major metropolitan prison, a proposition that seems dubious, the First Amended Complaint still survives dismissal.”)

*Stile v. Somerset Cnty.*, No. 1:13-CV-00248-JAW, 2015 WL 667814, at \*9 n.4 (D. Me. Feb. 17, 2015) (Magistrate Judge Nivison’s opinion) (“In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court considered whether a Pakistani prisoner stated a claim of intentional discrimination, based on race, religion or national origin, against the Secretary of Defense and the Director of the FBI. The Court rejected a conclusory allegation of a purpose to discriminate where implementation of the policy in question served a neutral investigative purpose, *id.* at 680–81, i.e., a ‘nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts,’ *id.* at 682. The Court noted that intent in the context of an equal protection claim required more than a showing of volition or awareness of a disparate impact. . . Here, in comparison, the Court must evaluate the plausibility of an inference that the administrator of a relatively small county jail in central Maine was consulted or was aware of the treatment of a pretrial detainee who, allegedly, engaged in a hunger strike and who also either could not or would not walk during daily transports to medical over the course of a 39–day period and, as an alleged result, was subjected to a daily regimen of forced extractions involving electric prods and other force. The supervisory connection for which Plaintiff argues is much more intuitive than the one argued in *Soto–Torres*. Additionally, the condonation or tacit authorization needed to support the connection between Defendant Allen and his subordinates is different from the purposeful discrimination inference required to support the constitutional theory presented in *Iqbal*.”)

*Facey v. Dickhaut*, No. CA 11-10680-MLW, 2014 WL 8105164, at \*19 (D. Mass. Sept. 30, 2014) (“Neither defendant is entitled to summary judgment. Mendonsa had a largely supervisory role and *respondeat superior* does not apply to constitutional violations. *See Sanchez*, 590 F.3d at 49.

However, the record includes sufficient evidence for a reasonable jury to find that Mendonsa is liable based on his own conduct. As described earlier, Mendonsa ‘more than likely’ participated in the decision to place Facey in H-1. . . Moreover, as part of the team that decided whether to release inmates from SMU, Mendonsa spoke with SMU inmates three times a week and had access to inmate conflict sheets. . . Finally, in his deposition, Mendonsa admitted that he had heard about Facey’s August 2009 attack on Inmate L. . . A reasonable jury could infer from this evidence that Mendonsa was aware of Facey’s status as a Blood and his particular conflict with a Gangster Disciple leader. Therefore, a reasonable jury could find that Mendonsa was aware that Facey faced a significant risk of reprisal from the Gangster Disciples and nevertheless approved his placement H-1, rather than in a safer unit.”)

*Diaz-Morales v. Rubio-Paredes*, 50 F.Supp.3d 98, 114 (D.P.R. 2014) (“In his second cause of action, the Plaintiff holds liable all identified and unidentified defendants who were supervisors during the course of his investigation and prosecution for their deliberate indifference towards their subordinates’ violations of his constitutional rights and for failing to monitor, supervise, train and discipline their subordinates. . . The only named defendant in the Plaintiff’s complaint who is held liable for his actions in the exercise of his supervisory duties is co-defendant Arill-Garcia as ‘the highest and immediate supervising prosecutor of RUBIO PAREDES in the Humacao District Attorney’s Office....’. . . The allegations against Arill-Garcia specify that he was present during some of the interviews that both Cruz-Velez and Rubio-Paredes took, and was thus aware of the malicious prosecution against Plaintiff. . . In light of these allegations, the court finds that Diaz-Morales has pleaded a plausible claim of deliberate indifference on the part of Arill-Garcia as supervisor of Rubio-Paredes. Taking the facts alleged as true, the court can reasonably infer that by failing to take any measures to rectify Rubio-Paredes’ conduct, Arill-Garcia knowingly allowed the latter to wrongly prosecute the Plaintiff by suborning false testimony. Thus, at this stage of the proceedings, the court **DENIES WITHOUT PREJUDICE** co-defendant Arill-Garcia’s motion to dismiss on grounds of lack of supervisory liability.”)

*Podgurski v. Dep’t of Correction*, CIV.A. 13-11751-DJC, 2014 WL 4772218, \*5, \*6 (D. Mass. Sept. 23, 2014) (“Here, taking the complaint as a whole and looking at the facts in the light most favorable to Podgurski, one could reasonably infer that Saba was deliberately indifferent to Podgurski’s serious medical needs under either a primary or supervisory liability theory. As to primary violator liability, Podgurski pleaded that his daughter informed Saba, with a letter from Podgurski’s podiatrist, that Podgurski required regular podiatric treatment, which Saba ‘rebuffed.’ . . This allegation, considered together with the allegations that Podgurski showed signs of deterioration that could be apparent to a lay person, including visible infection, walking with a cane, crutch or walker and constant complaints of pain to the Defendants and to nurses, . . . support the plausible inference that Saba knew of the ‘facts from which the inference could be drawn’ that Podgurski had a serious medical need and then disregarded it. . . Since Podgurski’s counsel indicated at the hearing that he contends that Saba was a primary violator and the Court concludes that the pleaded facts are sufficient as to this theory of liability, the Court need not address whether there are sufficient allegations of supervisory liability.”)

*Guadalupe-Baez v. Police Officers A-Z*, CIV. 13-1529 GAG, 2014 WL 4656663, \*5-\*7 (D.P.R. Sept. 17, 2014) (“In most cases, like the one we review today, the ‘causation’ element constitutes the biggest challenge for plaintiff. Often, plaintiffs fail to show a plausible connection between the supervisor and plaintiff’s constitutional violation, properly supported by facts. The First Circuit recently embarked on this issue and stated: ‘After *Iqbal*, as before, we have stressed the importance of showing a strong causal connection between the supervisor’s conduct and the constitutional violation.’ See *Ramírez-Lliveras v. Rivera Merced*, Nos. 11–2339 & 13–1169, 2014 WL 3398427 at \* 8 (1st Cir.2014) . . . This affirmative link, i.e., the causation, must be strong enough to show that it ‘contemplates proof that the supervisor’s conduct led inexorably to the constitutional violation.’ *Ramírez-Lliveras*, 2014 WL 3398427 at \*8. In other words, to meet this burden, a plaintiff must plead sufficient facts that, if taken as true, connect the dots between the supervisor’s conduct and plaintiff’s constitutional violation. . . . Here, Plaintiffs’ allegations are insufficient to ‘connect the dots,’ i.e., show causation, because their allegations are nothing more than legal conclusions, completely devoid of supporting facts. . . . Plaintiffs attempt to hold the Supervisor Defendants liable for their own actions, insofar that by their negligent behavior while supervising Police Officers A–Z, they encouraged, condoned or acquiesced the violation of Guadalupe’s rights. However, Plaintiffs do not identify the actual underpinnings of the Supervisor Defendants’ alleged failure to train. . . .Plaintiffs’ Amended Complaint is a repetition of legal jargon *ad nauseam*, that merely lists the elements of a Section 1983 cause of action without any supporting factual allegations. It is evident that these allegations do not suffice. The court previously had warned Plaintiffs that ‘mere labels do not reach the plausibility standard.’ . . Today, it is clear that Plaintiffs ignored the court’s warning. Plaintiffs justify their deficient pleading arguing that due to Defendants’ failure to disclose information about the investigation, they are precluded from pleading factual allegations sufficient to meet the *Iqbal/Twombly* standard. . . For that reason, in support of their ‘pattern and practice’ allegations, Plaintiffs rely on the Investigation Report of the *Investigation of the Puerto Rico Police Department* by the Civil Rights Division of the United States Department Justice of September 5, 2011 (“U.S. DOJ Report”) . . . Nevertheless, as this court previously warned Plaintiffs, ‘simply citing the agreement between the government of the United States and the Commonwealth of Puerto Rico for the Reform of the Puerto Rico Police Department does not per se generate any plausibility.’ . . Under the *Iqbal/Twombly* standard, the U.S. DOJ Report, by itself, is not enough to establish plausible causation. Moreover, the US. DOJ Report may be used as a stepping stone to pave the way to plausibility, however, it must be supplemented with factual allegations relating to the specific facts of the case, tracing the story between the supervisor’s conduct and plaintiff’s alleged constitutional violation, in accordance with the supervisory liability standard. Thus, Plaintiffs’ supervisor liability claims are **DISMISSED.**”)

*Carr v. Metro. Law Enforcement Council, Inc.*, CIV.A. 13-13273-JGD, 2014 WL 4185482, \*14 (D. Mass. Aug. 20, 2014) (“Similarly, the claim against the unnamed MetroLEC supervisor who allegedly failed to supervise those who engaged in the destructive search should be allowed to proceed. ‘Although a superior officer cannot be held vicariously liable under 42 U.S.C. § 1983 on

a *respondeat superior* theory ..., he may be found liable under section 1983 on the basis of his own acts or omissions[.]'. . In the instant case, the allegations of the complaint can be fairly read as asserting a claim against the MetroLEC supervisor who was on site during the search, and therefore is seeking to hold him liable for his own conduct. . . Again, this claim requires further development of the record. Carr is basing her claim against Police Chief Cunningham 'for his own acts or omissions in permitting a culture that condoned the unrestrained use of excessive force by MetroLEC officers' and for his actions in hiring, training and/or supervising officers 'with a deliberate indifference toward the possibility that deficient performance of a task may contribute to a civil rights [deprivation]'. . It is well established that a supervisor may be liable under § 1983 for 'formulating a policy, or engaging in a custom, that leads to the challenged occurrence.'. . Moreover, in a § 1983 action against a supervisor who was not a direct participant in the incident at issue, 'liability attaches 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.... Under such a theory, a supervisor may be brought to book even though his actions have not directly abridged someone's rights; it is enough that he has created or overlooked a clear risk of future unlawful action by a lower-echelon actor over whom he had some degree of control.' *Camilo-Robles v. Zapata*, 175 F.3d 41, 44 (1st Cir.1999) (internal citations omitted). '[T]he extent of a superior's knowledge of his subordinate's proclivities is a central datum in determining whether the former ought to be liable (or immune from suit) for the latter's unconstitutional acts.' *Id.* at 46. This is a factdependent inquiry and the issue should be addressed again after further development of the record. For these reasons, the motion to dismiss Counts IV, V and VIII is denied.")

***Cabrera-Berrios v. Pedrogo***, 21 F.Supp.3d 147, 153 (D.P.R. 2014) ("The Court recognizes that, at this stage of litigation, the plaintiffs do not possess exact knowledge of either Pesquera's or Diaz-Colon's activities, and, therefore, are unable to substantiate their claim of supervisory liability with more specific and detailed facts. Accordingly, the Court exercises its common sense and judicial experience to deny defendants Pesquera's and Diaz-Colon's motion to dismiss in order to permit plaintiffs the opportunity to gather more information concerning those two defendants' possible acts or omissions leading to the constitutional violations. Granted, plaintiffs have 'a long way to go' in order to substantiate their supervisory liability claims against Pesquera and Diaz-Colon. . . Nevertheless, the Court abstains from estimating the probability that plaintiffs will prevail on those claims. . . In essence, '[t]he role of these defendants can be made clearer in discovery and nothing precludes later efforts to end the case against them should discovery not substantiate these inferences.' . . Accordingly, defendants' motion to dismiss plaintiffs' section 1983 claims is **DENIED.**")

***Gary v. McDonald***, No. 13-12847-JLT, 2014 WL 1933084, \*2, \*3 (D. Mass. May 13, 2014) ("Gary sets forth sufficient factual allegations to state a plausible claim for relief. He has alleged that Moniz was responsible for training and supervising subordinates in a way that ensured prisoner safety, as well as being responsible for implementing prison policies to protect inmates from suffering violence at the hands of other inmates. . . These responsibilities include the

implementation of an inmate classification plan. . . Gary has also alleged that, despite Moniz having those responsibilities, he was placed into a cell with an inmate who had a history of assaulting other inmates to receive preferable cell assignments. . . Construing the facts in the light most favorable to Gary, it is reasonable to infer that Moniz failed properly to train or supervise PCCF employees on the appropriate screening and placement of violent inmates or failed to implement an adequate placement procedure. . . With respect to the second step of the qualified-immunity analysis, the issue is whether a reasonable person in Moniz’s position would have understood that his conduct violated Gary’s constitutional rights. . . As explained, Gary does not argue that Moniz had personal knowledge that Gary had been placed in the same cell as a violent inmate. . . He does allege, however, that Moniz was responsible for implementing appropriate policies and training measures to ensure prisoner safety. . . Nonetheless, Gary was placed in the same cell as a violent inmate who had a history of assaulting other inmates in order to be placed in a private cell. On the basis of these facts, this Court concludes that a reasonable person in Moniz’s position reasonably would have understood that his failure properly to train his subordinates violated Gary’s constitutional rights. At the time of the alleged violations, prison officials had a clearly established duty to protect inmates from violence at the hands of other inmates. . . This duty includes the duty to use of some form of classification system to ensure that inmates with a propensity for violence do not pose a danger to others. . . Here, it is reasonable to infer that Moniz did not establish an adequate classification system or failed properly to train his subordinates on the placement of violent and non-violent inmates. Because Gary has adequately claimed that his clearly established constitutional rights were violated, qualified immunity does not bar his claim.”)

***Jones v. Han***, 993 F.Supp.2d 57, \*68, \*69 (D. Mass. 2014) (“Defendant Han. . . contends that plaintiff must prove she had a ‘subjective belief’ that there was a risk [of] unconstitutional harm to have been deliberately indifferent, citing *Snell v. Demello*, 44 F.Supp.2d 386 (D.Mass.1999). *Snell* is easily distinguishable. In *Snell*, the plaintiff sued prison officials for violations of the Eighth and Fourteenth Amendments. . . The ‘subjective belief’ standard from *Snell* originated in the Supreme Court’s Eighth Amendment analysis in *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). . . Outside the Eighth Amendment context, however, an official can be deliberately indifferent to constitutional violations by her subordinates without holding a subjective belief that their actions would result in constitutional harms. . . Here, the allegations of the complaint are sufficient to state a claim for acquiescence or ‘gross negligence amounting to deliberate indifference’ to those violations by defendant. . . It therefore properly states a supervisor liability claim under § 1983.”)

***Solomon v. Dookhan***, No. 13–10208–GAO, 2014 WL 317202, \*14-\*18 (D. Mass. Jan. 27, 2014) ( O’Toole, J. (adopting Magistrate Judge Sorokin’s R & R) (“There is no dispute as to the governing law with respect to Nassif’s motion (law which also largely governs the motions of Han, Auerbach and Bigby, *infra* ). Pursuant to § 1983, a supervisor can only be liable for a subordinate’s behavior if ‘(1) the behavior of [his] subordinates results in a constitutional violation, and (2) the [supervisor’s] action or inaction was affirmative[ly] link[ed] to the behavior in the sense that it

could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference.’ *Pineda v. Toomey*, 533 F.3d 50, 54 (1st Cir.2008) (citations omitted). In addition, to establish supervisory liability, Solomon must allege facts sufficient to support a finding that Nassif either had actual notice of the offending conduct of Dookhan, or that she would have known of Dookhan’s conduct ‘but for [her] deliberate indifference.’ .A number of factual allegations (many allegedly drawn from the state police investigation) bear mention: (1) Dookhan tested drugs at a rate at least fifty percent higher than other lab technicians (Docket # 14 at ¶ 40); (2) Dookhan’s level of production of test results concerned supervisors; ( *id.* at ¶ 48C); (3) Dookhan left many samples out on her benchtop and maintained a work space ‘filled with numerous vials open to cross contamination,’ ( *id.* at ¶ 48C, 48D); (4) Dookhan ‘ignored lab procedures’ ( *id.* at ¶ 48A); (5) the ‘Laboratory had a culture of lax oversight’ ( *id.* at ¶ 48J); (6) Dookhan bore ‘responsibil[ity] for training and for some QA/QC procedures’ ( *id.*); (7) ‘Numerous lab personnel expressed concerns with Dookhan’s workload, documentation errors, blatant forgeries, and questionable test results’ ( *id.* at ¶ 48K); (8) the procedures ‘to restrict access to the evidence room were ignored and circumvented’ ( *id.* at ¶ 48O); and (9) the ‘safe was found open and unattended, was left propped open when [the Lab] was “busy,” and was accessible by codes and keys that had not been changed in over a decade’ ( *id.* at ¶ 48R). The foregoing allegations, combined with the reasonable inferences to be drawn therefrom (and particularly when viewed in light of Nassif’s role at the lab both as Director of Analytic Chemistry and within Dookhan’s direct chain of supervision), suffice to state a claim of Nassif’s supervisory encouragement of, condonation of, or acquiescence in Dookhan’s misconduct, or of gross negligence amounting to deliberate indifference toward Solomon’s constitutional rights. . . . Particularly salient is Dookhan’s disturbingly high rate of production, coupled with the other warning signs both specific to Dookhan and visible to those running the lab. Although a fully-developed factual record indeed may not ultimately support the claim, the Court is obliged at this stage to accept all well-pleaded facts alleged in the Amended Complaint as true and to draw all reasonable inferences in Solomon’s favor. . . . Accordingly, I RECOMMEND that the Court DENY Nassif’s motion. . . . Although Han held a higher position within the lab’s hierarchy and thus was arguably more removed from events than was Nassif, she nevertheless was the Director of the Hinton Lab. The allegations noted above, combined with the supplemental allegation which supported the claim against Nassif, support the reasonable inference that Han—like Nassif—was aware of the problems with Dookhan as well the problems at the lab noted, *supra*. Accordingly, I RECOMMEND that the Court DENY Han’s motion for the same reasons for which I have previously recommended that the Court deny Nassif’s Motion (and repeating the same caveat that a fuller factual record may produce a different result at a later stage of the case). . . . Auerbach stands in a materially different position from Han and Nassif. Auerbach had substantially larger responsibilities and did not personally work at or directly supervise the lab itself. Accordingly, absent specific factual allegations, it is not a reasonable inference that Auerbach would have known of Dookhan’s misconduct or of the problems at the lab absent his deliberate indifference to Dookhan’s violation of Solomon’s constitutional rights. Solomon does advance a few allegations specific to Auerbach, noted above. These allegations, and the reasonable inferences to be drawn therefrom, fail to plausibly state a claim that Auerbach knew of, or condoned, Dookhan’s violation

of Solomon's constitutional rights, or, that he would have known of it but for his deliberate indifference. Simply put, even taking Solomon's allegations as true, Auerbach is too far removed and lacking in knowledge of, or participation in, Dookhan's misconduct to state a claim of supervisory liability under the governing Section 1983 caselaw discussed *supra*. Moreover, the allegations of a 'cover-up' regarding his instructions to Han and Nassif are too generalized and vague to plausibly state a claim of violation of Solomon's constitutional rights. . . . Defendant Bigby moves to dismiss the Amended Complaint as directed against her, as failing to state a claim for supervisory liability. Docket # 96. Solomon alleges in the Amended Complaint that Bigby was at all relevant times the duly appointed Secretary of the Executive Office of Health and Human Services of the Commonwealth of Massachusetts, responsible for oversight of the Department of Public Health. . . . He alleges that Bigby was aware in June 2011, that Dookhan was testing and certifying substances at a rate that was fifty percent higher than any other chemist, and that Bigby described Dookhan's productivity as, 'a red flag that wasn't appropriately investigated.' . . . The remainder of the factual allegations concerning Bigby assert generally that she 'failed to properly supervise, train, investigate, and monitor the Department of Public Health and the Hinton Laboratory which employed Dookhan' and that she (along with other lab supervisors) maintained outdated operating procedures for the Hinton lab, failed to seek accreditation, and failed to train lab employees concerning *Brady* obligations and contact with prosecutors. . . . The claim against Bigby fails for two reasons. First, even taking the factual allegations as true, Bigby is even more removed and uninvolved than Auerbach, and thus the allegations regarding Dookhan's misconduct and the operation of the lab do not state a deliberate indifference claim as to Bigby. Second, the only specific factual allegation regarding Bigby is that Bigby was aware in June 2011 that Dookhan was testing and certifying substances at a rate that was fifty percent higher than any other chemist. Much later, Bigby described Dookhan's productivity as, 'a red flag that wasn't appropriately investigated.' . . . The fifty percent number is, in and of itself, insufficient to plausibly allege that a person in Bigby's remote position would be on notice of its significance, amounting to deliberate indifference to Dookhan's violation of Solomon's constitutional rights. The remainder of the factual allegations concerning Bigby assert generally that she 'failed to properly supervise, train, investigate, and monitor the Department of Public Health and the Hinton Laboratory which employed Dookhan' and that she (along with other lab supervisors) maintained outdated operating procedures for the Hinton lab, failed to seek accreditation, and failed to train lab employees concerning *Brady* obligations and contact with prosecutors. . . . These allegations all sound in negligence only. Accordingly, I RECOMMEND that the Court ALLOW Bigby's motion to dismiss.")

*Canales v. Gatnuzis*, 979 F.Supp.2d 164, 172 (D. Mass. 2013) ("Deliberate indifference is akin to willful blindness. . . . Even where a supervisor does not know of the specific actions of a subordinate that violate a person's constitutional rights, a supervisor may be held liable if he is aware of a general 'pattern or practice' that threatens persons' constitutional rights and is deliberately indifferent to the danger. . . . '[I]solated instances of unconstitutional activity ordinarily are insufficient to establish a supervisor's policy or custom, or otherwise to show deliberate indifference.' . . . Plaintiff has failed to plead sufficient facts to make out a plausible claim for

supervisory liability against Defendant Horgan. First, the Complaint is devoid of any suggestion that Horgan personally knew Plaintiff was being administered HIV medications or was aware of Plaintiff's protests. Second, Plaintiff fails to plead any facts to suggest that Horgan was aware of similar medication errors or other practices by the medical staff that posed a risk to inmates' constitutional rights. Plaintiff merely states that 'Defendants have a disorganized medical program and failed to maintain a quality assurance program.' Plaintiff also states that SCHOC failed 'to maintain adequate and accurate medical records.' Even taking these allegations as true, Plaintiff does not allege that Horgan himself was aware of a threat to inmates' constitutional rights. This is due in part to Plaintiff's failure to allege anything more specific than general factual allegations purportedly applicable to all Defendants. Such pleading fails to inform Horgan or this court of the factual basis for Plaintiff's supervisory liability claim. Nonetheless, as discussed below, Plaintiff has requested that this court allow him to file an amended complaint to give him an opportunity to add sufficient factual allegations, should this court find them lacking. Because this court will allow Plaintiff to file an amended complaint in this matter, Defendants' Motion to Dismiss Count V as to Horgan in his individual capacity is denied without prejudice to Defendants renewing the motion once Plaintiff has filed his amended complaint.")

***Bridges v. Ouellette***, No. 2:13-cv-00082-NT, 2013 WL 5755588, \*6-\*8 (D. Me. Oct. 23, 2013) (order affirming R&R) ("Lancaster's summary judgment motion is based on the idea that the mere review and denial of a grievance will not support an action under 42 U.S.C. § 1983. . . This is true. An after-the-fact assessment of a bygone deprivation, made in the context of reviewing an administrative grievance, does not rise to the level of a constitutional deprivation, because the grievance process is not, in itself, constitutionally mandated, . . . and because the grievance process ordinarily concerns completed acts of alleged misconduct rather than ongoing acts. . . . What Bridges says in response is that he would like the opportunity to discover whether Lancaster had the authority and opportunity to do something to assist him. . . He would like to serve interrogatories, requests for admission, and requests for production of documents . . . to better understand, among other things, 'whether or not defendant Lancaster could have ordered that I be allowed to be treated by a psychiatrist, and could have ordered that I be released from restraints'. . . . Based on my review, I conclude that Lancaster's summary judgment motion actually fails to demonstrate that there is no genuine dispute as to any material fact. State officials with supervisory oversight can be liable on constitutional claims based on tacit acquiescence and their own deliberate indifference. . . Lancaster's affidavit suggests that he had supervisory authority to countermand a prison order involving restraint of Bridges. Bridges, meanwhile, is asserting that Lancaster's review may have taken place while Bridges was still being restrained around the clock rather than medicated. Bridges believes that Lancaster may have had the opportunity to aid him and elected not to do anything. That is one plausible inference that could be drawn and it is an inference that is not dispelled by Lancaster's summary judgment showing. . . Lancaster's affidavit does not establish that Bridges was removed from full restraints prior to or simultaneous with Lancaster's investigation. Because it is unclear when Lancaster became aware of Bridges's situation, what exactly that situation was at the time, how long that situation persisted during and following Lancaster's investigation, and what authority or opportunity Lancaster had to intervene,

it cannot fairly be said that Lancaster’s summary judgment motion shows that there is no genuine issue of material fact. Lancaster’s motion for summary judgment needs additional factual development and legal analysis and is insufficient in its present form.”)

***Llanos-Morales v. Municipality of Carolina***, No. 12–1847(ADC), 967 F.Supp.2d 507, 515, 516 (D.P.R. 2013) (“Unlike the complaint in *Soto–Torres*, which merely stated that supervisory police officers were ‘in charge’ during the constitutional violations and participated in them, the complaint here alleges that the supervisory defendants were responsible for implementing training programs to curb constitutional abuses and the use of excessive force. . . More than merely alleging that the supervisory defendants failed to prevent constitutional violations generally, which was a threadbare conclusion in *Soto–Torres*, the complaint here goes further by alleging that the supervisory defendants were put on notice of Agosto’s potential for civil rights violations because they knew of the complaints lodged against him for excessive use of force and knew of his mental or emotion condition. . . Although the supervisory defendants reassigned Agosto to a desk job, they did not disarm him or take any remedial measures that would help prevent him from violating constitutional rights in the future. . . These specific facts alleging knowledge of Agosto’s medical and disciplinary problems, coupled with allegations as to the supervisory defendants’ oversight of training and discipline, together are sufficient to plausibly aver supervisory liability for Agosto’s violation of the plaintiffs’ constitutional rights.”)

***Molina v. Vidal-Olivo***, 961 F.Supp.2d 382, 383–86 (D.P.R. 2013) (“Supervisory liability doctrine, particularly when coupled with the affirmative defense of qualified immunity, imposes a strenuous burden on those harmed by top government agents. . . For good cause. The high standard is necessary; no government could function if its leaders operated under a Damoclean threat of being haled into court. However, an equally meritorious argument favors individual plaintiffs who lack the necessary resources, knowledge, and time to engage in Freedom of Information Act requests or their own independent research to augment factual allegations against top supervisors. . . .But that is not so in the complaint we consider today—one alleging instances of both *malem prohibitum* and *malem in se*. Plaintiffs’ complaint surpasses Rule 8’s requirements because the United States has done the legwork. The Civil Rights Division of the Department of Justice compiled a study of the Puerto Rico Police Department (‘PRPD’) in a 42 U.S.C. § 14141 action brought by the Attorney General of the United States. . . The study, amassed over several years, alleges the PRPD’s extraordinary and deliberate indifference to use-of-force policies, deliberate misrepresentations contrary to PRPD statistics, and deliberate indifference to safety. These allegations generally reference the PRPD’s leadership, and specifically reference Defendant Figueroa–Sancha. The court has reviewed the Department of Justice’s findings on myriad occasions. Years of investigations and questions yielded the following: [detailing findings] . . . . These findings allege gross insufficiency, deliberate indifference, and blatant disregard for safety, which plausibly entitle Plaintiffs to relief against Defendant Figueroa–Sancha. Furthermore, the Defendant–Officers in this case could plausibly fall under the umbrella of officers who received allegedly defective training under Defendant Figueroa–Sancha’s ostensibly wanton leadership. . . . Notwithstanding the preceding, the court emphasizes that this ruling is not a ruling on the merits.

This opinion reflects only the plausibility of Plaintiffs' claims. The court understands that this ruling opens the door to a plethora of similar lawsuits against the PRPD's top officials, including those serving before and after Defendant Figueroa-Sancha's tenure. It is paramount to reiterate that, at this stage, the court makes no credibility determinations or findings of fact. The allegations against Defendant Figueroa-Sancha may be entirely unwarranted, entirely meritorious, or somewhere in between. The standard to overcome a motion to dismiss is simply pleading facts that could plausibly entitle Plaintiffs to relief. Furthermore, the court stresses that it is hereby not recognizing any distinct rights pursuant to the recently approved agreement between the United States and the PRPD. . . Plaintiffs' action herein is rooted in 42 U.S.C. § 1983, not 42 U.S.C. § 14141. The court considers the report only to determine the plausibility of Plaintiffs' allegations, not to create any enforceable rights between the parties. Notwithstanding, this opinion does not prospectively provide plaintiffs' attorneys *carte blanche* to file unfounded claims against top supervisors without due diligence and proper investigation. Federal Rule of Civil Procedure 11 and the Model Rules of Professional Conduct adopted by this court impose the highest standards of professional conduct on all attorneys.")

***Facey v. Dickhaut***, 892 F.Supp. 347, 357 (D. Mass. 2012) ("The complaint here identifies Dickhaut as the Superintendent of SBCC and states that Dickhaut and Mendonsa instituted a policy requiring the separation of known enemies. It contains some general allegations, described earlier, that '[t]he Defendants' were aware of the feud between the Bloods and the Gangster Disciples and placed the plaintiff on the South Side of the facility, where he was attacked. However, to the extent that these general statements are intended as allegations of knowledge and direct participation on the part of Dickhaut, they are too 'threadbare' and 'speculative' to be accorded the presumption of truth, particularly given the absence of any other allegation specifically linking Dickhaut to the events of the case. . . These allegations are insufficient to state a claim that Dickhaut was directly involved in the incident in which the plaintiff's rights were allegedly violated. . . The complaint is also insufficient to state a claim of supervisory liability because it does not contain any allegations showing that Dickhaut was deliberately indifferent in supervising or training the officials who are directly alleged to have placed the plaintiff in danger. . . Accordingly, the complaint is being dismissed in its entirety as to Dickhaut.")

***Pena-Pena v. Figueroa-Sancha***, 866 F.Supp.2d 81, 91, 92 & n.8 (D.P.R. 2012) ("[T]he Supervisors insist that Plaintiffs allegations point to omissions rather than actions as allegedly required under the applicable standard. . . As recent as a month ago, however, the First Circuit Court of Appeals ruled out such contentions in *Marrero-Rodriguez v. Municipality of San Juan* . . . . [T]he Court . . . stated that omissions such as 'failure to implement policies, protocols, or correct training about use of live firearms' were also bases for the imposition of supervisory liability under § 1983. . . A similar conclusion is warranted in this case, where the complaint plausibly alleges that Plaintiffs' injuries were caused in part by the Supervisors' failure 'to train, supervise and control police officers, procedures and operations'. . . as well as their failure to establish protocols on the use of force, on the use of chemical agents, and on riot police and crowd control policies . . . The Supervisors spend a significant portion of their submissions arguing that

*Iqbal* ruled out § 1983 supervisory liability based on inaction or omission. . . . As just stated, Plaintiffs’ claims against the Supervisors are premised on both actions (the authorization to use force against Plaintiffs and other demonstrators) as well as on omissions (the failure to control the attacking officers and to institute proper policies and procedures). Accordingly, the Court need not address the Supervisors’ argument on this issue. Nevertheless, upon a cursory analysis of the applicable case law, the Court is unpersuaded by the Supervisors’ exposition.”)

***Inman v. Siciliano***, No. 10–10202–FDS, 2012 WL 1980408, at \*13 & n.14 (D. Mass. May 31, 2012) (“Insofar as Ciccolini was responsible for employee training, the analysis is very similar to that which is required in the municipal liability context. . . . See, e.g., *Jones v. Wellham*, 104 F.3d 620, 628 (4th Cir.1997) (“While a municipal liability claim based upon a particular official’s attributed conduct and a supervisory liability claim against that official based upon the same conduct are not perfectly congruent, each requires proof both of the official’s deliberate indifference and of a close affirmative link between his conduct and a resulting constitutional violation by a subordinate.”) (citation omitted); *Haynesworth v. Miller*, 820 F.2d 1245, 1262 n. 133 (6th Cir.1987) (“[S]ome courts have equated municipal and supervisory liability.”). Indeed, the First Circuit has sometimes bundled the analyses together. See, e.g., *Bordanaro v. McLeod*, 871 F.2d 1151, 1154–55 (1st Cir.1989).”)

***Thath Sin v. Massachusetts Dept. of Correction***, No. 10–40226–FDS, 2012 WL 1570810, at \*4, \*5 (D. Mass. May 2, 2012) (“[B]ecause plaintiff has alleged actual involvement by defendant Saba (through the grievance appeal process), he has stated a claim for supervisory liability. . . . At this stage, because the Court cannot say that ‘it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,’ . . . plaintiff may assert his claims against defendants Saba. Defendants also contend that the equal protection claim must be dismissed as against defendants Saba and Richard because the complaint does not allege sufficient involvement by them in the discriminatory conduct. However, as noted with respect to Saba, plaintiff does allege involvement through the prisoner grievance process. . . . That is sufficient at this stage of the litigation.”)

***Stewart v. Fleming***, 838 F.Supp.2d 1, 3, 4 (D. Me. 2012) (“Here, Stewart makes no allegations that Chief Fleming was a direct participant in the conduct that she alleges violated her constitutional rights. Instead, her allegations against the Chief are simply that, as a supervisor, he ‘had knowledge or, . . . , should have had knowledge’ of the wrongful conduct of Bureau and Mills and ‘approved or ratified the conduct of Bureau and Mills.’ . . . Although that assertion constitutes a factual claim about the Chief’s state of mind, the Supreme Court has concluded that a bare allegation of intent is inadequate to state a claim without more specific factual assertions. . . . Thus, because Stewart offers no factual allegations to show that Chief Fleming’s action or inaction was affirmatively linked to the allegedly constitutionally improper behavior of those he supervised, I will dismiss all the federal claims.”)

***Moulton v. Carroll County Dept. of Corrections***, No. 11–cv–391–PB, 2011 WL 7080656, at \*14 (D. N.H. Dec. 14, 2011) (“The County Commissioners in this case were unaware of any problem concerning Moulton’s dental care until June 2011, when Moulton alleges he filed a grievance with the Commissioners. Moulton does not allege that the Commissioners had a direct hand in denying him dental care. The Commissioners cannot be held liable, under a supervisory liability theory, therefore, for acts of which they were unaware and were not otherwise alleged to have caused. Accordingly, no supervisory liability lies against the Commissioners for any actions taken by Fowler and Johnson prior to Moulton’s June 2011 grievance to the Commissioners. Moulton received no response to his June 2011 grievance to the Commissioners. Moulton did not provide a copy of the grievance he filed with the Commissioners but alleges in his complaint that his grievance to the Commissioners concerned the ‘extraction-only’ policy and stated that he ‘wanted [his] teeth repaired.’ The record is not sufficient to draw a reasonable inference that the Commissioners had subjective knowledge of the CCDC’s refusal to provide fillings, as opposed to root canals and crowns, or that the individual Commissioners were deliberately indifferent to his need for fillings. In this Circuit, ‘supervisory liability under a theory of deliberate indifference will be found only if it would be manifest to any reasonable official that his conduct was very likely to violate an individual’s constitutional rights.’ . . . Thus, to the extent Moulton intends to state claims against the County Commissioners in their individual supervisory capacities for the CCDC’s failure to provide his fillings, those claims should be dismissed.”)

***Pacheco-Pacheco v. Toledo***, Civil No. 09-2121 (JAG), 2011 WL 5977337, at \*2, \*3 (D.P.R. Nov. 29, 2011) (“[S]upervisory liability is not circumscribed to situations in which the supervisor is a primary, or direct, participant in the illegal incident. A plaintiff may also rest his claim on the fact that a state official ‘[supervised, trained, or hired] a subordinate with deliberate indifference toward the possibility that deficient performance of the task’ could result in a civil rights violation. . . . A supervisory official acts with deliberate indifference when 1) there exists a grave risk of harm; 2) the official has actual or constructive knowledge of that risk; and 3) the official fails to take easily available measures to address that risk. *Camilo-Robles v. Hoyos*, 151 F.3d 1, 7 (1st Cir.1998). Put differently, it is sufficient that the supervisor ‘has created or overlooked a clear risk of future unlawful action by a lower-echelon actor over whom he had some degree of control.’ *Camilo-Robles v. Zapata*, 175 F.3d at 44. Finally, the claimant must also ‘affirmatively link’ the supervisor’s conduct to the subordinate’s illegal act or omission. . . . This causality requirement ‘need not take the form of knowing sanction, but may include tacit approval of, acquiescence in, or purposeful disregard of, rights-violating conduct.’ . . . After pruning the complaint at hand of boilerplate language and legal conclusions, a plausible claim of supervisory liability emerges. In general terms, it is alleged that Defendant Toledo failed to properly train and discipline the police officers under his command. This, according to Plaintiffs, made possible the situation that led to Mr. Irizarry’s death. To start with, the complaint establishes that Toledo and other supervisors are ‘vested with the authority to train, supervise, discipline and otherwise control’ their subordinates. . . . Additionally, the complaint states that they were ‘were the policymakers for their respective police corps.’ . . . Certainly, it is reasonable to infer that Toledo and the other supervisors were in a position to address and correct behavioral issues with their subordinates. The complaint contains

several allegations that, when taken as true and together, allow for an inference that Toledo ‘created or overlooked a clear risk of future unlawful action’ by his subordinates. . . First, that the supervisors were aware of the persistent and widespread use of excessive force by officers under their command. . . The supervisors also knew that police officers hid behind a ‘code of silence’. . . when questioned about any of these incidents. . . The Internal Affairs Division, upon a policy set by the supervisors, continually failed to investigate and act upon complaints made by citizens in a suitable manner. . . Finally, the complaint contends that nothing was done by the supervisors to correct these problems. . . These failures ‘are and have been ratified by the police department, and the supervisors.’. . It is unclear whether any of the officers involved in the homicide of Mr. Irizarry-Perez actually had a history of misconduct. . . However, this Court is mindful that ‘[s]pecific facts are not necessary; the statements need only “give the defendants fair notice of what the claim ... is and the grounds upon which it rests.”’. . The complaint does set forth that the supervisors failed to act ‘in the face of numerous transgressions of which they knew or should have known.’. . A reasonable inference from the facts alleged in the complaint is that Defendant simply ignored prior incidents of misbehavior by his subordinates. In sum, the dire picture painted by the complaint—that of rampant misconduct by police officers, and of a systemic failure by Defendant and the police corps to address the use of excessive force—provides enough foothold for the Court to deny Defendant’s motion. . . . The Court finds, however, that Plaintiffs’ complaint goes beyond merely ‘parroting’ the standard of supervisory liability under § 1983. *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir.2009). As such, Defendant’s motion must be denied.”)

***Irving v. Town of Camden***, No. 2:10-cv-000367-MJK, 2011 WL 2133836, at \*16 (D. Me. May 27, 2011) (“Assuming supervisory liability still is a tenable liability standard in the wake of *Iqbal*, see *Santana-Castro v. Toledo-Davila*, 579 F.3d 109, 116 n.5 (1st Cir.2009); *Maldonado*, 568 F.3d at 275; see also *Morris v. Ley*, No. 08- 2459, 2009 WL 1784081, 3 (7th Cir. June 24, 2009), clearly mere knowledge, after the fact, of a subordinate’s supposed wrongful conduct does not establish 42 U.S.C. § 1983 liability for a supervisor . Rather, there must be an affirmative link between the conduct of the supervisor and the supposed constitutional deprivation experienced by Irving.”)

***Alicea v. Wilcox***, No. 09-CV-12231-RGS, 2011 WL 1625032, 2 (D. Mass. Apr. 28, 2011) (“A perusal of the Complaint with respect to Chief Romero discloses factual allegations sufficient to survive the motion to dismiss. According to the Complaint: (1) Officer Wilcox had been convicted of the criminal assault and battery of two other detainees three weeks prior to the alleged assault on plaintiff Alicea; (2) Chief Romero was aware of the fact that Wilcox was the subject of numerous civilian complaints and lawsuits alleging the excessive use of force, including four of recent vintage filed in the United States District Court; (3) the Department’s Use of Force Policy vested responsibility in Chief Romero to oversee its implementation and enforcement; and (4) despite that responsibility Chief Romero neither enforced the Policy nor investigated allegations of violations by the officers under his command, including Wilcox. This is enough for pleading purposes to satisfy Fed.R.Civ.P. 8. With respect to former Mayor Sullivan, however, the only substantive allegation is that as chief executive officer under the City Charter, Mayor Sullivan was ‘responsible for the general supervision and control of [the City’s] various agencies and

departments' and therefore should have known of and corrected abuses of civilians by City police officers. . . This is an allegation of vicarious liability and nothing more. It is plainly insufficient to survive scrutiny under the *Twombly-Iqbal* standard.”)

***Valle Colon v. Municipality of Maricao***, Civ. No. 09-02217(PG), 2011 WL 1238437, at \*10 & n.2 (D. P.R. Mar. 23, 2011) (“The First Circuit, in an opinion penned by Chief Judge Lynch, noted that the Supreme Court’s language in *Iqbal* ‘may call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability.’ . . . However, the First Circuit did not render a final verdict or furnish any guidance to the district courts on this question because the appellate court found that the plaintiffs had not pled facts sufficient to make out a plausible entitlement to relief under the First Circuit’s previous formulation of supervisory liability. Notwithstanding the Chief Judge’s foreboding, the First Circuit has continued to employ and develop its previously articulated standard of supervisory liability under Section 1983. . . . The First Circuit has sided with those circuit courts’ supervisory liability standards that, as one noted commentator observed, ‘only survive *Iqbal* to the extent they authorize § 1983 liability against a supervisory official on the basis of the supervisor’s own unconstitutional conduct or, at least, conduct that sets the unconstitutional wheels in motion.’ Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses, § 7.19[D] (4th ed.2010). ‘The issue, then is one of causation, i.e., whether the supervisor’s conduct was a proximate cause of the violation of the plaintiff’s constitutional rights.’ *Id.*; see generally *Dodds v. Richardson*, No. 09-6157, 2010 WL 3064002 (10th Cir. Aug. 6, 2010) (describing in detail how the circuit courts have tackled supervisory liability post-*Iqbal*).”)

***Thayer v. Dion***, No. 2: 09-cv-00435-DBH, 2010 WL 4961739, at \*20 (D. Me. Nov. 30, 2010) (“Assuming supervisory liability still is a tenable liability standard in the wake of *Iqbal*, see *Santana-Castro v. Toledo-Davila*, 579 F.3d 109, 116 n. 5 (1st Cir.2009); *Maldonado v. Fontanes*, 568 F.3d 263, 275 (1st Cir.2009); see also *Morris v. Ley*, No. 08-2459, 2009 WL 1784081, 3 (7th Cir. June 24, 2009), clearly mere knowledge of a subordinate’s wrongful conduct does not establish 42 U.S.C. § 1983 liability for a supervisor. Rather, there must be an affirmative link between the conduct of the supervisor and the constitutional deprivation experienced by Thayer.”)

***Brown v. Englander***, No. 10-cv-257-SM, 2010 WL 4968174, at \*9 (D.N.H. Nov. 24, 2010) (“Here, plaintiff alleges that each named defendant participated in the unconstitutional deprivations alleged, by condoning their subordinates’ failure to insure that Brown received the surgery he needed and attempting to lessen his pain while denying or delaying the treatment of his physical back problems. Defendants refused to remedy, and to have continued to support, the practices brought to their attention through the inmate request and grievance processes. Accordingly, these defendants can be sued in their supervisory capacities under section 1983.”)

***Hernandez v. Castillo***, Civ. No. 09-1569(PG), 2010 WL 3372527, at \*6, \*9, \*10, \*12 (D.P.R. Aug. 24, 2010) (“Notwithstanding the Chief Judge’s foreboding [in *Maldonado*], the First Circuit has continued to employ and develop its previously articulated standard of supervisory liability

under Section 1983. . . In this case, much like in *Pereira-Castillo*, Plaintiff parroted the circuit's supervisory liability standard without much if any factual enhancement tying defendant Laboy, or any of the other named defendants, to his constitutional injury. Plaintiff lumps together all five of the DOC Secretaries who were at the helm of the Department during Plaintiff's fifteen or more years of allegedly excessive incarceration as defendants sharing equal responsibility for broadly-worded and generalized conduct that fails to rise above legal conclusion or, as the Supreme Court has articulated, the 'sheer possibility that a defendant has acted unlawfully.' . . . Plaintiff does not allege that Defendant promulgated any policy that led to the bungling of his sentence, nor does he specify which practices and procedures Defendant failed to implement to protect Plaintiff's constitutional rights. Plaintiff fails to allege any facts specifically linking Defendant's training or supervision of subordinate personnel to the erroneous classification of his sentence, which the Court surmises is normally the responsibility of DOC record-keepers. Indeed, Plaintiff would have fared better in lodging a complaint against those lower-echelon DOC employees directly handling his case, such as the prison's record-keepers or the Parole Board members who repeatedly denied his requests for release. Plaintiff shoots himself in the foot when he states that the Parole Board knew but never gave notice to the DOC Secretaries of the nature of Plaintiff's sentence or of his right to be released upon rehabilitation. This statement undermines any role that the defendants may have played in acting deliberately indifferent toward Plaintiff's plight. As previously explained, notice is an important factor in making a determination of liability because one cannot act with deliberate indifference toward a person's constitutional rights if one does not know that his rights are being violated in the first place. . . . Assuming the complaint's facts are true, the Court laments the sad saga that Plaintiff was forced to endure as a prisoner whose Kafkaesque plight appeared to be repeatedly ignored by the DOC. However, the Court cannot replace its constitutional directive to judge facts indifferently through the eyes of the law with its sympathy for Plaintiff having suffered a terrible injustice. Plaintiff simply failed to state a plausible claim for relief by painting too broad a brush and not digging deeper beyond the surface of a generalized grievance against the heads of a department. By not doing the extra legal work required to make those specific causal connections between his alleged harm and those responsible for it, he missed his opportunity to obtain any relief.")

*Lopez-Jimenez v. Pereira*, No. 09-1156CCC, 2010 WL 500407, at \*4, \*5 (D. P.R. Feb. 3, 2010) (“[P]laintiffs have also included allegations in which they aver that defendants were ‘aware of serious lapses in security and of the unreasonable risk of death existing at Bayamón 292 Institution through information available to them through regular channels of communication at the Administration of Correction ... [but] failed to enforce acceptable correctional practices at that institution or otherwise provide adequate security to Gilberto J. López-Jiménez...’. . . This, however, is akin to the ‘knowledge and acquiescence’ supervisory theory of liability rejected in *Iqbal*, where the Court held that it is not enough to just allege that a supervisor at least had knowledge of and was deliberately indifferent to the constitutional violation. *Iqbal*, at 1949. See also *Maldonado v. Fontanés*, 568 F.3d at 274, n. 7 (recognizing that “[s]ome recent language from the Supreme Court may call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability” and quoting

*Iqbal*.) While we cannot say that plaintiffs' complaint does not show 'a possibility that someone acted unlawfully,' this is not enough under the revised pleading standards. *Id.* Instead, there must be factual allegations sufficient to rise above the 'speculative level' or the 'merely possible or conceivable.' . . . As plaintiffs' complaint does not plead enough facts to state a claim to relief that is plausible on its face, it must be dismissed.").

***Brenes-Laroche v. Toledo Davila***, 682 F.Supp.2d 179, 186, 187 & n.3 (D.P.R. 2010) ("We . . . find that Plaintiff pleads sufficient facts to pin section 1983 liability upon all of the supervisory officers. As the Complaint's description of the parties and factual allegations show, the supervisory officers acts and omissions were affirmatively linked to their subordinates' unconstitutional behavior such that they could be characterized as either encouragement, condonation, acquiescence, or gross negligence amounting to deliberate indifference. We do not yet know which of these categories of misconduct would most appropriately describe Defendants' acts or omissions given our undeveloped factual record. However, we must credit Plaintiff for setting forth a factual scenario in which each individual defendant personally participated in the deprivation of rights, or at the very least, formulated a policy or engaged in a custom that led to a deprivation that was foreseeable and that each had power and authority to alleviate. . . . This is a case of a purported policy of the SJTOU's using excessive force, authorized by the unit's supervisors all the way up the chain of command, and directly ordered or permitted by them on the day of the alleged beatings. As stated in the factual background of this opinion and as reiterated in Plaintiff's Opposition to the Motion to Dismiss, each Defendant is implicated with having participated in the SJTOU's constitutional violations, either by consulting, ordering, or deliberately neglecting the unit's foreseeable use of excessive force. . . . Thus, here we are not presented with a case of wholly conjectural or hypothetical factual allegations that merely repeat the formulaic or conclusory language of supervisory liability, requiring dismissal under the standards set forth by the Supreme Court in *Iqbal*. We find that Plaintiff has pled sufficient facts to make out a plausible entitlement to relief under the First Circuit's formulation of supervisory liability, even if such has been called into question by the Supreme Court's new pleading standards. [noting that *Maldonado* casts doubt on the standard for holding a public official liable for damages under section 1983 on a theory of supervisory liability] We are cognizant of the difficulty described by Plaintiff in identifying who is responsible for what, especially when the SJTOU allegedly removed their badges and attacked Plaintiff in a coordinated group effort. We understand the difficulty faced by many civil rights litigants in Plaintiff's position who are not armed with sufficient facts, more likely to be found in Defendants' possession, to survive *Iqbal's* pleading standard at this pre-discovery stage of litigation. We hope the Circuit will clarify the supervisory liability standard to guide us in this task. For now, we heed the Supreme Court's suggestion to 'draw on [our] judicial experience and common sense.' *Iqbal*, 129 S.Ct. at 1950. We deny Defendants request to dismiss the claims against the supervisory officers to allow discovery on these important factual issues that need to be resolved in order to determine more precisely each individual defendant's role, and thus liability, in violating Plaintiff's constitutional rights." ) .

**Whitten v. Blaisdell**, No. 09-cv-450-SM, 2010 WL 376903, at \*4, \*5 (D.N.H. Jan. 22, 2010) (“Mere knowledge of the constitutional misdeeds of a subordinate does not, without more, give rise to a supervisor’s liability for that conduct in a § 1983 action, where the underlying constitutional violation requires proof of the subordinate’s purposeful action. *See Iqbal*, 129 S.Ct. at 1949 (discussing contours of liability for officials charged with Equal Protection violations arising from superintendent responsibilities). . . . Whitten alleges that, by utilizing the DOC grievance process, he alerted defendants MacLeod, Blaisdell, and Wrenn to the inadequacies in his medical care. Whitten alleges that these defendants, as supervisors for the medical staff directly responsible for providing his inadequate medical care, were more than merely aware of the inadequacies in his medical treatment. These supervisors, by virtue of being the decision makers in the grievance process, are charged with the obligation, and given the concomitant opportunity, to remedy the medical staff’s failure to provide adequate medical care. This is particular true where, as here, the supervisors’ failure to remedy or correct the denial of adequate medical care could be reasonably understood by the medical providers to amount to condonation of their failure to provide treatment. Where, as here, the issue is denial of medical care for a medical condition, and pain and other serious problems that are ongoing, supervisory approval of the medical staff’s actions can be understood to lead inexorably to a continuing or future violation of an inmate’s right to adequate medical care. . . . Whitten states that he grieved the inadequacy of his medical treatment to MacLeod, to Blaisdell, and then on to Wrenn. These supervisory officials, by doing nothing, led Whitten to continue to receive inadequate medical care. Accordingly I find that, for purposes of preliminary review, Whitten has stated claims against the supervisory defendants for their deliberate indifference to, and denial of adequate medical care for, his serious medical needs.”).

**Kilroy v. Maine**, Civil No. 9-324-B-W, 2010 WL 145294, at \*4 (D. Me. Jan. 8, 2010) (“The Supreme Court’s decision in *Iqbal* seems to have constricted the airways of supervisory liability law making it much harder for a plaintiff with such a claim to survive a motion to dismiss. *See Iqbal*, 129 S.Ct. at 1948. In the First Circuit before and after *Iqbal*, the plaintiff must plead facts sufficient to suggest that there was an affirmative link between the supervisor’s conduct and the alleged constitutional violation. *See Sanchez v. Pereira-Castillo*, \_\_\_ F.3d \_\_\_, \_\_\_, \_\_\_, 2009 WL 4936397, 12-13 (1st Cir. Dec. 23, 2009); *Maldonado v. Fontanes*, 568 F.3d 263, 274-75 & n. 7 (1st Cir.2009); *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 14 (1st Cir.2005); *Choate v. Merrill*, 08-49-B-W, 2009 WL 3487768, 2-4 (D.Me. Oct. 20, 2009) (pending recommended decision). Kilroy’s individual capacity claims against Mills and Harvey are based on a quintessentially *respondeat superior* theory of liability and the *Iqbal* majority insisted: ‘Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. . . . Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’ 129 S.Ct. at 1948.”)

**Mulero Abreu v. Ocquendo-Rivera** 729 F.Supp.2d 498, 514, 515 (D.P.R. 2010) (“In this case, the plaintiffs reference the sexual harassment claim policy that the supervisory defendants allegedly ignored that would have prevented constitutional violations, and also offer details

regarding how and why Mulero's supervisors should have or did know about the alleged violations. Supervisory liability, however, 'lies only where an affirmative link between the behavior of a subordinate and the action or inaction of his supervisor exists such that the supervisor's conduct led inexorably to the constitutional violation.' *Maldonado*, 568 F.3d at 275 (quotations and citations omitted). Given the strict standard set by *Maldonado*, the Court finds that plaintiffs' allegations are similarly deficient to establish an 'affirmative link' between Orquendo's alleged behavior and the inaction of PRPD supervisors 'such that the supervisor's conduct led inexorably to the constitutional violation.' . . . Accordingly, all claims for supervisory liability are hereby **DISMISSED.**")

*Picard v. Hillsborough County Dept. of Corrections Medical Dept.*, No. 09-cv-271-SM, 2009 WL 4063191, at \*4 (D.N.H. Nov. 20, 2009) ("Defendant O'Mara is alleged to have been made aware of Picard's need for medical attention for his weight loss by virtue of the HCDOC grievance system and failed to take action to insure the adequacy of the medical care provided to Picard. I find that a reasonable official receiving a grievance from Picard complaining of his significant weight loss and the failure of the HCDOC Medical Department to address the problem, would know that the failure to address those issues and to provide Picard with adequate medical care at the HCDOC, would likely violate Picard's constitutional rights. *See Maldonado*, 568 F.3d at 275. Picard has alleged sufficient facts to assert a claim that O'Mara was aware of and failed to remedy a deprivation of adequate medical care for Picard's weight loss, and that O'Mara is liable for the violation of Picard's Eighth Amendment right to adequate medical care.").

*Torres-Santiago v. Diaz-Casiano*, No. 08-1650 (GAG/BJM), 2009 WL 4015648, at \*8, \*9 (D.P.R. Nov. 16, 2009) ("Defendant Toledo, in his personal capacity, contends that the evidence in the record fails to make out a claim against him based on supervisory liability under Section 1983. Toledo argues that the plaintiffs have shown no facts which establish Toledo's personal involvement and have failed to otherwise show supervisory liability. . . . The plaintiffs do not contend that Toledo was personally involved with the events of September 27-28, 2006; rather, they argue that Toledo is liable under Section 1983 for the violation of plaintiffs' Fourth and Fourteenth Amendment rights on the theory of supervisory liability for his failure to adequately supervise, train, and discipline the officers under his command. . . . Under Section 1983, supervisory liability cannot be predicated on the theory of *respondeat superior*, and supervisors may only be held liable on the basis of their own acts or omissions. . . . Nevertheless, a supervisor may be liable under Section 1983 if he formulates a policy or engages in a practice that leads to a civil rights violation committed by another. . . . Absent direct participation, a supervisor may be held liable where (1) the behavior of his subordinates results in a constitutional violation, and (2) the supervisor's action or inaction was affirmatively linked to the behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence, or gross negligence amounting to deliberate indifference. . . . On a motion to dismiss, and by extension on a motion for judgment on the pleadings, the court must not credit 'bald assertions, unsupported conclusions, periphrastic circumlocutions, and the like.' . . . Merely alleging that a supervisor failed to train his subordinates is patently insufficient to establish a Section 1983 claim against the

supervisor. . . Here, the plaintiffs’ amended complaint makes only conclusory allegations that Toledo knew or should have known of the defendant officers’ violent propensities; knowingly failed to properly train, supervise, or discipline the defendant officers; knowingly failed to implement reasonable or adequate policies and procedures to avoid abuse of plaintiffs’ civil rights; and personally reviewed and/or adjudicated plaintiffs’ administrated complaint and failed to act on it – all of which, the complaint alleges, constituted gross negligence amounting to deliberate or reckless indifference to the plaintiffs’ constitutional rights. . . These ‘bald assertions’ and ‘unsupportable conclusions’ are plainly deficient to survive a motion for judgment on the pleadings. The fact that their administrative complaint (whether or not personally reviewed by Toledo, as conclusorily alleged) did not result in disciplinary action against the defendant officers does not reflect Toledo’s knowing failure to adequately train, supervise, and discipline them, amounting to callous or reckless indifference. . . Aside from the absence of disciplinary action on the administrative complaint, the plaintiffs have not offered any other evidence in support of their assertions against Toledo, and further, they have established no affirmative link between Toledo’s acts or omissions and his subordinates’ alleged violation of the plaintiffs’ constitutional rights. Rather, the plaintiffs only set forth generally that Toledo failed to train, supervise, and discipline officers under his control. Therefore, the plaintiffs have failed to allege a plausible entitlement to relief under Section 1983. Accordingly, the court **DISMISSES** with prejudice plaintiffs’ Section 1983 claim against defendant Toledo in his personal capacity for violation of the plaintiffs’ Fourth and Fourteenth Amendment rights.”).

*Merchant v. Blaisdell*, No. 09-cv-231-PB, 2009 WL 3447245, at \*4 (D.N.H. Oct. 16, 2009) (“Mere knowledge of the constitutional misdeeds of a subordinate does not, without more, give rise to a supervisor’s liability for that conduct in a § 1983 action, where the underlying constitutional violation requires proof of the subordinate’s purposeful action. . . Merchant states that he grieved the inadequacy of his medical treatment to MacLeod, to Blaisdell, and then on to Wrenn. These supervisory officials, by doing nothing, led Merchant to continue to receive inadequate medical care. Accordingly I find that, for purposes of preliminary review, Merchant has stated sufficient facts to state claims against the supervisory defendants for their deliberate indifference to, and denial of adequate medical care for, his serious medical needs.”).

*Stanley v. Landers*, No. 09-cv-52-PB, 2009 WL 2242676, at \*8 (D.N.H July 23, 2009) (“There is no supervisory liability in § 1983 actions based on a respondeat superior theory of liability. *See Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1937, 1949 (2009). The standard set forth in the First Circuit for supervisory liability under section 1983 is that a supervisor may be held personally liable ‘for the behavior of his subordinates only if “(1) the behavior of his subordinates results in a constitutional violation, and (2) the supervisor’s action or inaction was affirmatively linked to that behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference,” leading inexorably to the constitutional violation. *Pineda v. Toomey*, 533 F.3d 50, 54 (1st Cir.2008) (citation and internal brackets omitted). The First Circuit’s precedent, to be consistent with *Ashcroft*, 129 S.Ct. at 1949, must be interpreted to make officials liable only for their own actions or omissions. . . . Stanley

asserts that he has made ‘repeated multiple written and verbal complaints’ regarding Landers’ abusive conduct and false arrests to Landers’ supervisors, Goodnow and Jordanhasi, which they ignored. . . . The allegations in the complaint are sufficient to state a claim for supervisory liability as to Goodnow and Jordanhasi for failing to investigate Stanley’s complaints and supervise Landers.”)

**Chao v. Ballista**, 630 F.Supp.2d 170, 177-79 & n.2 (D. Mass. 2009) (“Plausibility, as the Supreme Court’s recent elaboration in *Ashcroft v. Iqbal* makes clear, is a highly contextual enterprise – dependent on the particular claims asserted, their elements, and the overall factual picture alleged in the complaint. . . . Allegations become ‘conclusory’ where they recite only the elements of the claim and, at the same time, the court’s commonsense credits a far more likely inference from the available facts. . . . This analysis depends on the full factual picture, the particular cause of action, and the available alternative explanations. Yet in keeping with Rule 8(a), a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible. . . . Together, [the] factual allegations [of the complaint] raise the plausible inference that, given their supervisory duties and security responsibilities, the Defendants failed to adequately train, supervise, or investigate Ballista’s year-long sexual encounters with Chao. They encompass also a failure to adopt policies and procedures within the DOC that would have prevented the sexual abuse alleged in the complaint. . . . Given the public attention devoted to sexual abuse in prisons writ large, and the repetitive, long-lasting abuse alleged in this case, it is a fair inference from the pleadings that prison officials – including Commissioner Dennehey – were deliberately indifferent to the risks and reality of this abuse. . . . Notably, the state of mind required to make out a supervisory claim under the Eighth Amendment – i.e., deliberate indifference – requires less than the discriminatory purpose or intent that *Iqbal* was required to allege in his suit against *Ashcroft* and *Mueller*. . . . Together with the other contextual factors discussed above, what qualifies as a fair or credible inference from the facts alleged in the pleadings must be calibrated accordingly. . . . While the Defendants’ personal involvement will be further tested at the summary judgment stage, Chao’s claims have met the crucial threshold of plausibility and survive the Defendants’ Motion to Dismiss.”)

## SECOND CIRCUIT

**Tangreti v. Bachmann**, 983 F.3d 609, 612-20 (2d Cir. 2020) (“Following *Ashcroft v. Iqbal*, . . . courts may not apply a special rule for supervisory liability. Rather, the plaintiff must directly plead and prove that ‘each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’. . . Applying the proper standard, we conclude that there is insufficient evidence in the pretrial record for the inference that Bachmann, through her own actions, displayed deliberate indifference to the substantial risk of sexual abuse. Even considering only Tangreti’s version of the facts, the pretrial record does not support the inference that Bachmann had subjective knowledge that Tangreti was at a substantial risk of sexual abuse. . . . It is not sufficient, as the district court maintained, that Bachmann *should have known* of the

substantial risk of sexual abuse. . . . This court articulated standards for supervisory liability in *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995), but the Supreme Court’s decision in *Iqbal* called those standards into question and this court has not clarified whether or to what extent the *Colon* standards continue to apply. . . . The district court relied on *Colon* to conclude that Bachmann was ‘conceivably personally involved’ in violating Tangreti’s rights under the Eighth Amendment either because Bachmann was grossly negligent in supervising the officers or because she failed to act on information indicating that Tangreti was at substantial risk of sexual abuse. . . . We disagree with that conclusion. *Iqbal* holds that a plaintiff may not rely on a special test for supervisory liability. Rather, ‘a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’ . . . Accordingly, for deliberate-indifference claims under the Eighth Amendment against a prison supervisor, the plaintiff must plead and prove that the supervisor had subjective knowledge of a substantial risk of serious harm to an inmate and disregarded it. . . . The pretrial record in this case does not support the inference that Bachmann had the required subjective knowledge that Tangreti was at a substantial risk of being sexually abused. . . . *Iqbal* cast doubt on the continued viability of the special standards for supervisory liability set forth in *Colon*. . . . Without clear direction from this court, . . . district courts in the circuit have sought, with inconsistent results, to determine the effect of *Iqbal* on supervisory liability. . . . Circuit courts have considered the impact of *Iqbal* as well. The Tenth Circuit has concluded that, ‘after *Iqbal*, [a p]laintiff can no longer succeed on a § 1983 claim against [a d]efendant by showing that as a supervisor he behaved knowingly or with deliberate indifference that a constitutional violation would occur at the hands of his subordinates, unless that is the same state of mind required for the constitutional deprivation he alleges.’ [citing *Dodds v. Richardson*]. . . . The focus is on what the *supervisor* did or caused to be done, ‘the resulting injury attributable to his conduct, and the *mens rea* required of him to be held liable, which can be no less than the *mens rea* required of anyone else. Simply put, there’s no special rule of liability for supervisors. The test for them is the same as the test for everyone else.’. . . Other circuits have endorsed this view. . . . We join these circuits in holding that after *Iqbal*, there is no special rule for supervisory liability. Instead, a plaintiff must plead and prove ‘that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’. . . ‘The factors necessary to establish a [§ 1983] violation will vary with the constitutional provision at issue’ because the elements of different constitutional violations vary. . . . The violation must be established against the supervisory official directly. In this case, ‘[t]o state a claim under the Eighth Amendment on the basis that a defendant has failed to prevent harm, a plaintiff must plead both (a) conditions of confinement that objectively pose an unreasonable risk of serious harm to their current or future health, and (b) that the defendant acted with “deliberate indifference[.]”’. . . . Deliberate indifference in this context ‘means the official must “know[ ] of and disregard[ ] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”’. . . Tangreti must therefore establish that Bachmann violated the Eighth Amendment by Bachmann’s own conduct, not by reason of Bachmann’s supervision of others who committed the violation. She must show that Bachmann herself ‘acted with “deliberate indifference”’—meaning that Bachmann personally knew of and disregarded an excessive risk to

Tangreti’s health or safety. . . Tangreti cannot rely on a separate test of liability specific to supervisors. . . . Given this record, at most it may be said that Bachmann could have or should have made an inference of the risk of sexual abuse. . . . But there is no evidence that she made that inference until October 31, 2014, when she discovered, and questioned Tangreti about, the ongoing sexual abuse. There is therefore insufficient evidence in the pretrial record that Bachmann acted with deliberate indifference to support Tangreti’s § 1983 claim. Contrary to the district court’s conclusion, it is not enough for Tangreti to show that Bachmann was negligent, or even grossly negligent, in her supervision of the correctional officers or in failing to act on the information she had. The deliberate-indifference standard ‘require[es] a showing that the official was subjectively aware of the risk,’ . . . and that showing has not been made. . . . In sum, we agree with Bachmann that the scope of supervisory liability under § 1983 for violations of the Eighth Amendment was not clearly established at the time of the relevant conduct. To hold a state official liable under § 1983, a plaintiff must plead and prove the elements of the underlying constitutional violation directly against the official without relying on a special test for supervisory liability. In the context of the Eighth Amendment, that requires a showing of deliberate indifference on the part of the state-official, and the pretrial record in this case cannot meet that standard. Accordingly, we **REVERSE** the judgment of the district court and remand with instructions to enter summary judgment for the defendant.”)

*Morgan v. Dzurenda*, 956 F.3d 84, 89-90 (2d Cir. 2020) (“Here, while Chapdelaine and Godding both held supervisory roles at Osborn, Morgan seeks to hold them liable only for acts that they themselves committed. . . . The crux of Morgan’s allegations against Chapdelaine and Godding is that they violated the Eighth Amendment by ignoring his pleas for help. Morgan nowhere suggests that Chapdelaine, Godding, or any other defendant improperly allowed a subordinate prison official to commit a constitutional violation. The doctrine of supervisory liability is therefore not implicated.”)

*Ganek v. Leibowitz*, 874 F.3d 73, 93 (2d Cir. 2017) (“[T]he fact that the decision to search LG’s offices was ‘carefully considered at the highest levels’ of the U.S. Attorney’s office is not enough to admit an inference that supervisors knew or should have known that a statement in the warrant affidavit, attributed to Adondakis, was false. . . . Certainly Ganek does not plead, either generally or with specific reference to this case, that FBI and U.S. Attorney supervisors, when reviewing search warrant applications, do not routinely rely on their subordinates to report accurately the statements made to them by cooperating witnesses. Nor do they—or could they—suggest that doing so is reckless. . . . In sum, because Ganek has failed to state cognizable Fourth Amendment, procedural due process, and failure-to-intercede claims, and, in any event, because Ganek has failed to plead sufficient facts as to each supervisor defendant’s personal involvement in the submission of the alleged misstatement to the magistrate judge, the supervisor defendants are entitled to dismissal of these claims.”)

*Raspardo v. Carlone*, 770 F.3d 97, 116-17 (2d Cir. 2014) (“Individual liability under § 1983 in hostile work environment claims may also involve supervisory liability. In addressing the ‘federal

analog' of § 1983 *Bivens* actions, the United States Supreme Court in *Ashcroft v. Iqbal* confirmed that liability for supervisory government officials cannot be premised on a theory of *respondeat superior* because § 1983 requires individual, personalized liability on the part of each government defendant. . . . A supervisor is protected by qualified immunity so long as reasonable officials could disagree about whether the supervisor's action was grossly negligent in light of clearly established law. . . The standard of gross negligence is satisfied where the plaintiff establishes that the defendant-supervisor was aware of a subordinate's prior substantial misconduct but failed to take appropriate action to prevent future similar misconduct before the plaintiff was eventually injured. . . . A supervisor is not grossly negligent, however, where the plaintiff fails to demonstrate that the supervisor knew or should have known of a problematic pattern of employee actions or where the supervisor took adequate remedial steps immediately upon learning of the challenged conduct. . . A plaintiff pursuing a theory of gross negligence must prove that a supervisor's neglect caused his subordinate to violate the plaintiff's rights in order to succeed on her claim. . . We have not yet determined the contours of the supervisory liability test, including the gross negligence prong, after *Iqbal*. . . We need not decide this question here because, as explained below, Gagliardi did not act with gross negligence in his supervision of Carlone, and the other tests for supervisory liability are not satisfied.”)

***Terebesi v. Torreso***, 764 F.3d 217, 234, 235 (2d Cir. 2014) (“[A] supervisor may be held liable if he or she was personally a ‘direct participant’ in the constitutional violation. . . . In this Circuit, a ‘direct participant’ includes a person who authorizes, orders, or helps others to do the unlawful acts, even if he or she does not commit the acts personally. . . . Our case law thus clearly establishes that planners may be liable under section 1983 to the extent that a plan for a search or seizure, as formulated and approved by those defendants, provides for and results in an unconstitutionally excessive use of force. . . We therefore reject the defendants’ assertions that the law in this respect is not clearly established. . . A defendant who plans or directs an unreasonable use of force is liable for the resulting constitutional violation as a ‘direct participa[nt].’”)

***Doe v. Whidden***, 557 F. App'x 71, 2014 642671, \*1, \*2 n.1 (2d Cir. Feb. 20, 2014) (“We need not decide how the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), affected the standards for establishing supervisory liability as articulated in *Colon v. Coughlin*, 58 F.3d 865, 874 (2d Cir.1995), as Doe has not adduced sufficient evidence to show personal involvement under either standard. *See Grullon v. City of New Haven*, 720 F.3d 133, 139 (2d Cir.2013) (noting possibility that *Ashcroft v. Iqbal* “heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations” but concluding that complaint failed adequately to plead supervisor's personal involvement even under *Colon v. Coughlin* standards).”)

***Hogan v. Fischer***, 738 F.3d 509, 519 n.3 (2d Cir. 2013) (“The Attorney General also argues that the claims against CO Erhardt, the one named defendant allegedly involved in the spraying incident, should be dismissed because Hogan has inadequately alleged his personal involvement. The district court did not address Erhardt's personal involvement in the spraying incident. We decline to address it in the first instance, but note that the complaint could be liberally construed

to allege that Erhardt controlled access to the cell block, allowed the John Doe guards access to Hogan's cell, and then failed to intervene when it became apparent that the guards were violating Hogan's rights. . . We express no view on the extent to which the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), 'may have heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations,' . . . or whether Hogan's current complaint plausibly alleges personal involvement.")

***Grullon v. City of New Haven***, 720 F.3d 133, 139-41 (2d Cir. 2013) ("Although the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), may have heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations, we need not reach *Iqbal's* impact on *Colon* in this case, for Grullon's initial complaint did not adequately plead the Warden's personal involvement even under *Colon*. . . Grullon's complaint, as filed, did not sufficiently allege the Warden's personal involvement in or awareness of the health, safety, and communications issues raised by Grullon. There were no such direct allegations; there were no indirect allegations sufficient to permit an inference the Warden had acted or failed to act in any of the ways that would subject him to personal liability for the deprivations alleged by Grullon. We conclude that the district court did not err in dismissing Grullon's claims against the Warden in his individual capacity for lack of sufficient allegations of the Warden's personal involvement. We reach a different conclusion with respect to the denial of Grullon's request to amend. . . Here, the district court dismissed Grullon's action with prejudice on the basis of his initial pleading, denying him leave to file an amended complaint alleging that he in fact sent his Letter to the Warden complaining of prison conditions. At the pleading stage, even if Grullon had no knowledge or information as to what became of his Letter after he sent it, he would be entitled to have the court draw the reasonable inference—if his amended complaint contained factual allegations indicating that the Letter was sent to the Warden at an appropriate address and by appropriate means—that the Warden in fact received the Letter, read it, and thereby became aware of the alleged conditions of which Grullon complained. It is of course possible that the Warden read the Letter and took appropriate action or that an administrative procedure was in place by which the Warden himself would not have received the Letter addressed to him; but those are potential factual issues as to personal involvement that likely cannot be resolved without development of a factual record. As we have previously held, 'when a *pro se* plaintiff brings a colorable claim against supervisory personnel, and those supervisory personnel respond with a dispositive motion grounded in the plaintiff's failure to identify the individuals who were personally involved, under circumstances in which the plaintiff would not be expected to have that knowledge, dismissal should not occur without an opportunity for additional discovery.'")

***Vincent v. Yelich***, 718 F.3d 157, 173 (2d Cir. 2013) ("A supervisory official may be liable in an action brought under § 1983 if he 'exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.' [citing *Colon*] As set out in Part II.A.2. above, Annucci testified in *State v. Myers* that he was 'aware of the Second Circuit's decision in *Earley v. Murray* at the time it came out in 2006,' that he was aware

that *Earley I* ruled ‘that DOCS did not have the authority to add a period of post-release supervision, if it was not included by the sentencing judge,’ and that he ‘did not agree with that decision’. . . Annucci testified that, ‘at that time in 2006’ he ‘*did not* begin a resentencing initiative.’”)

***Reynolds v. Barrett***, 685 F.3d 193, 206 n.14 (2d Cir. 2012) (“We need not here determine if the pattern-or-practice framework can *ever* be used in a § 1983 suit against a policy-making supervisory defendant, although we note our considerable skepticism on that question in light of the Supreme Court’s decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). In *Iqbal*, the Supreme Court held that ‘[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s *own individual actions*, has violated the Constitution.’. . In so holding, the Court explicitly rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’. . Thus, ‘each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.’. . *Iqbal* has, of course, engendered conflict within our Circuit about the continuing vitality of the supervisory liability test set forth in *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995). . . But the fate of *Colon* is not properly before us, and plaintiffs have not articulated any reason in their briefs to treat individual print shop supervisors and their policy-making superiors differently in the context of this suit. . . . Because plaintiffs have failed to develop any argument as to why the pattern-or-practice framework is suitable to establish the liability of individual supervisory defendants in § 1983 suits, we deem that argument waived.”)

***Shomo v. City of New York***, 579 F.3d 176, 184 (2d Cir. 2009) (“Given Shomo’s failure to allege the supervisors’ personal involvement in the alleged Eighth Amendment violations, the district court properly ruled that Shomo failed to state valid claims against the supervisors. Even so, we conclude that Shomo should be granted leave to replead against these defendants. The district court determined that Shomo’s complaint was inadequate because there were no allegations ‘that Fraser and Perry were aware of the violations,’ that grievances sent to the supervisors notified them of constitutional violations, or that the supervisors acted or failed to act in a way that caused any constitutional violations. It is possible that Shomo could remedy the inadequacies identified by the district court.”).

***Jane Stone v. Annucci***, No. 20-CV-1326 (RA), 2021 WL 4463033, at \*7–10 (S.D.N.Y. Sept. 28, 2021) (“The parties here dispute the state of the law in the wake of *Tangreti*. In particular, they disagree about whether the creation of policies by a supervisory defendant can constitute personal involvement in an underlying constitutional violation sufficient to establish Section 1983 liability. As noted above, whereas Defendants argue that the third *Colon* factor is no longer good law, . . . Plaintiffs argue that *Tangreti* ‘does not change the fundamental framework’ governing their claims[.] . . .At the outset, Plaintiffs’ maximalist position—that ‘personal involvement of supervisors can still be established by the five factors articulated in *Colon*,’ . . . is clearly not correct. Although it is true that *Tangreti* did not expressly state, ‘We are overruling *Colon*,’ it made

clear that plaintiffs seeking to hold supervisors liable ‘cannot rely on a separate test of liability specific to supervisors’—i.e., exactly what the five-factor *Colon* test was. . . . Going forward, a plaintiff must establish that each defendant’s own conduct violated the constitution, and such liability can no longer be solely premised on a defendant’s ‘supervision of others who committed the violation.’ . . . This clear direction from *Tangreti* plainly abrogates the fourth *Colon* factor, which allowed liability for a defendant who was ‘grossly negligent in supervising subordinates who committed the wrongful acts.’ . . . The *Tangreti* decision also makes clear that a plaintiff must show that each supervisor himself or herself possessed the requisite *mens rea* to be held liable for the constitutional violation, e.g., in a case like this, that he or she ‘acted with “deliberate indifference”—meaning that [the defendant] personally knew of and disregarded an excessive risk to [plaintiff’s] health or safety.’ . . . District courts applying *Tangreti* in the months since it was decided have generally stated that the five-factor *Colon* test is no longer good law. [collecting cases] It is simply not plausible, then, for Plaintiffs to argue that the old *Colon* test survived *Tangreti* in its entirety. At the same time, however, the Court disagrees with Defendants about the fate of policymaker liability under Section 1983 after *Tangreti*. Although the Second Circuit generally rejected *Colon*, *Tangreti* does not suggest that *Colon*’s third factor—whereby a defendant can be said to be personally involved in a constitutional violation if he ‘created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom,’ . . . could never form the basis of an official’s liability. . . . To be clear, *Tangreti* made clear that the requisite *mens rea* for a supervisor under Section 1983 ‘can be no less than the *mens rea* required of anyone else.’ . . . But where a plaintiff can establish that a senior official promulgated an unconstitutional policy with a culpable mental state—in this case, deliberate indifference—the Court is of the view that such official could be deemed to be personally involved in a constitutional violation. . . . Reading *Tangreti* and these other decisions together, the Court concludes that a senior prison official can still be held liable for his role in creating a policy by which violations of the Eighth Amendment occurred, but only if he can be shown to have acted with the necessary *mens rea* of deliberate indifference—that is, only if the pleadings or record evidence ‘permit the inference that [he] had subjective knowledge of the risk of the sexual abuse inflicted on [plaintiffs] and that [he] decided to disregard that risk.’ . . . In this sense, although Plaintiffs’ contention that *Colon* in its entirety survives *Tangreti* is certainly wrong, the framework applied by this Court in *Pusepa* is still largely applicable. There, this Court noted that a plaintiff adequately pleads a defendant’s involvement in an unconstitutional policy by alleging facts showing ‘that the defendant had policymaking responsibility and that, after notice of an unconstitutional practice, the defendant created the improper policy or allowed it to continue, causing the harm.’ . . . To the extent *Tangreti* bears on this framework, it is by making clear that mere ‘notice’ of an unconstitutional practice may be inadequate. After all, ‘the *mens rea* required of [a supervisor] to be held liable . . . can be no less than the *mens rea* required of anyone else.’ . . . The requisite inference of *mens rea* cannot be established merely by showing that a supervisory defendant ‘should have known of the substantial risk of sexual abuse.’ . . . This language from *Tangreti* suggests that merely being on notice of sexual abuse in prison, or having constructive knowledge thereof, is not necessarily enough—rather, the defendant-official must subjectively know of the risk of sexual abuse and consciously disregard that risk. . . . One caveat

is worth emphasizing: going forward past the pleadings stage, merely showing that defendants were on notice of previous instances of sexual abuse will not necessarily be enough to establish their liability. . . . As *Tangreti* makes clear, a prison official charged with deliberate indifference must both (1) be aware of facts from which the inference could be drawn that there was a substantial risk of serious harm to inmates; and (2) actually draw that inference. . . . At summary judgment, Plaintiffs will no longer benefit from Rule 9(b)'s recognition that knowledge and intent can be alleged generally. But for now, the allegations, viewed in the light most favorable to Plaintiffs, give rise to a reasonable inference that Annucci and Effman subjectively knew of a serious risk of sexual abuse of female inmates by staff in DOCCS facilities that was not being adequately addressed by the existing policies or the way they were being enforced.”)

***Cordero v. City of New York***, No. 15-CV-3436, 2017 WL 4685544, at \*11 (E.D.N.Y. Oct. 17, 2017) (“Viewed in a light most favorable to the plaintiff the claims of supervisory liability against Lieutenant Moran for false arrest may proceed to trial. Lieutenant Moran supervised the investigation and arrest, and approved the overtime claims. He also received overtime himself, arguably as a result of the arrest. . . . The jury may find Lieutenant Moran complicit with abuse of the city’s overtime policy.”)

***Matteo v. Perez***, No. 16-CV-1837 (NSR), 2017 WL 4217142, at \*4–5 (S.D.N.Y. Sept. 19, 2017) (“The Second Circuit has not squarely addressed how *Iqbal* affects the standards in *Colon* for establishing supervisory liability. . . . Whether the claim should proceed against Defendant here is a close question. The Complaint alleges only that Defendant received two letters from Plaintiff and failed to respond. Some courts have held that ‘mere receipt of a letter from an inmate, without more, does not constitute personal involvement for the purposes of section 1983 liability.’ . . . To the extent Plaintiff is arguing that Defendant failed to properly supervise subordinates who were violating his rights, ‘the mere fact that a defendant possesses supervisory authority is insufficient to demonstrate liability for failure to supervise under § 1983.’ . . . But courts in this circuit have also held that ‘these decisions may overstate *Iqbal*’s impact on supervisory liability’. . . . given that *Iqbal* involved alleged intentional discrimination. *Iqbal*, 556 U.S. at 676 (2009). The Supreme Court specifically held that ‘[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.’ . . . ‘Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct of deliberate indifference standards of the Fourth and Eighth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply.’ . . . Ultimately, Plaintiff has demonstrated ‘a tangible connection between the acts of the defendant and the injuries suffered.’ . . . The Court, in ruling on a motion to dismiss, must “take all facts and draw all inferences in the light most favorable” to the plaintiff, . . . and, as noted, must apply the alleged general failure to remedy the inadequate heating to Defendant, the facility’s immediate supervisor. Assuming that all five *Colon* avenues to liability remain open to Plaintiff, . . . a reasonable jury could find that the inmate was subjected for a prolonged period to bitter cold through the cumulative effects of Defendant’s acts and omissions; if true, that could indeed constitute a constitutional violation[.] . . . Thus, The Court denies Defendant’s motion to dismiss on these grounds.”)

**Case v. City of New York**, 233 F.Supp.3d 372, 396 n.16 (S.D.N.Y. 2017) (“The Supreme Court’s decision in *Ashcroft v. Iqbal*, which imposed a limitation on supervisory liability, has ‘engendered conflict within [the] Circuit about the continuing vitality of the supervisory liability test set forth in *Colon*.’ *Reynolds v. Barrett*, 685 F.3d 193, 205 n.14 (2d Cir. 2012). In the wake of *Iqbal*, district courts in the Second Circuit have disagreed on the continuing vitality of the second, fourth, and fifth *Colon* factors, with some suggesting that the viability of those factors ‘depends on the underlying constitutional claim.’. . Courts appear to agree, however, that the third factor remains viable regardless of the underlying claim. . . Because the relevant allegations with regard to the supervisory Defendants here sound only in the first and third factors, the Court need not concern itself with *Iqbal*’s ramifications on this analysis.”)

**Johnson v. McKay**, No. 9:14-CV-0803 BKS/TWD, 2015 WL 1735102, at \*9-10 (N.D.N.Y. Apr. 16, 2015) (“District courts in this circuit have routinely held that a prisoner’s allegation that a supervisory official failed to respond to a grievance is insufficient to establish that the official ‘failed to remedy that violation after learning of it through a report or appeal’ or ‘exhibited deliberate indifference ... by failing to act on information indicating that the violation was occurring’ within the meaning of *Colon*. . . Similarly, district courts have held that ‘an allegation that an official ignored a prisoner’s letter of protest and request for investigation of allegations made therein is insufficient to hold that official liable for the alleged violations.’. . However, the Second Circuit has recently cautioned courts against dismissing claims at the 12(b)(6) stage for failure to allege personal involvement where the Plaintiff alleges that an official failed to respond to a letter of complaint. [citing *Grullon v. City of New Haven*] Here, under *Grullon*, Plaintiff is entitled to the inference that Defendant Fischer received his notifications, read them, and became aware of the alleged conditions of which Plaintiff complained. Therefore, the complaint plausibly suggests Defendant Fischer’s personal involvement.”)

**Riddick v. Semple**, No. 3:15-CV-322 SRU, 2015 WL 1530808, at \*2 (D. Conn. Apr. 6, 2015) (“Riddick has named as defendants Commissioner Semple, Warden Falcone, and Deputy Wardens Hein and Dilworth. He describes these defendants as being responsible for creating and enforcing policies, training and supervising employees and the general custody and care of inmates. Riddick alleges that defendants Falcone, Hein and Dilworth were ‘aware’ that he had completed the Administrative Segregation Program and refused to remove him from Administrative Segregation status. He alleges that he repeatedly informed the defendants of his conditions of confinement in segregation. Although these allegations might be insufficient at trial or on summary judgment, the Second Circuit has held that allegations that a prisoner informed supervisory officials of his claims can be sufficient to state a claim for supervisory liability. *See Grullon v. City of New Haven*, 720 F.3d 133, 141 (2d Cir.2013). The claims against the supervisory defendants will proceed at this time.”)

**Golodner v. City of New London, Conn.**, No. 314-CV-00173-VLB, 2015 WL 1471770, at \*7 (D. Conn. Mar. 31, 2015) (“The Second Circuit has raised the possibility that the *Colon* test was

overruled in part by the Supreme Court's decision in *Iqbal*, and that the requirement for making out a claim of supervisory liability is now more demanding. *See, e.g., Grullon*, 720 F.3d at 139. However, the Second Circuit has thus far declined to resolve the question, as many other courts in this district have noted. . . This court does not need to consider the question of whether to apply the stricter standard because plaintiff has not satisfied the less exacting *Colon* standard. Further, even if plaintiff had met the *Colon* test, other courts in this district have found that where the 'constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply.'")

***Argro v. Osborne***, No. 3:12-CV-910 NAM/DEP, 2015 WL 1446427, at \*15 (N.D.N.Y. Mar. 30, 2015) ("Under *Iqbal*, the allegation in the second amended complaint that Bette Osborne 'knew that [DSS] employees are routinely entering people's homes and conducting searches' does not, without more, support a claim for supervisory liability. *Iqbal* expressly rejected as a basis for liability government officials' 'knowledge and acquiescence in' their subordinates' unconstitutional conduct, because such liability would amount to holding the officials 'accountable for the misdeeds of their agents.' . . Plaintiffs allege more than knowledge and acquiescence, however. They allege that, while knowing of the unconstitutional conduct of her subordinates, Bette Osborne failed to establish proper training policies concerning constitutional rights and established a policy or 'protocol' pursuant to which DSS employees 'were allowed to enter anybody's home without a search warrant or court order and without care for protestations of privacy and objections to searches, and do whatever they like.' If proven, such allegations would amount to a showing that, through her own individual actions in carrying out her responsibilities as DSS Commissioner, Bette Osborne caused the constitutional violations of which plaintiffs complain. Imposing liability based on such a showing would be consistent with *Iqbal*,. . . and would satisfy *Colon's* third category, *i.e.*, that Bette Osborne 'created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such policy or custom.'")

***Guillory v. Weber***, No. 9:12-CV-280 LEK/RFT, 2015 WL 1419088, at \*11 (N.D.N.Y. Mar. 27, 2015) (R&R) ("Whether a supervisory official can be liable under the second *Colon* factor—failing to remedy a wrong after learning of the violation—appears to turn on whether the complaint alleges an 'ongoing' constitutional violation. . . A supervisor will be 'personally involved' if the complaint alleges an 'ongoing' constitutional violation, the supervisor reviews the complaint, and it is a situation that he can remedy directly. . . On the other hand, if the violation has already occurred and is not ongoing, then 'the official will not be found personally responsible for failing to remedy a violation.' . Here, Superintendent Doldo was unaware of an ongoing constitutional violation. Instead, it is uncontested that on October 14, 2011, Superintendent Doldo learned about the October 12th microwave incident and Plaintiff's inability to enter the Activities Building the previous day. There are no other facts suggesting that Doldo was aware of an ongoing issue with access to the Activities Building during mealtimes. And in fact, Plaintiff was able to enter the Activities Building on October 12th. Therefore, his failure to respond to or act on Plaintiff's letter of complaint, which, at the time, appeared to refer to a previous and isolated error, is insufficient

to find him personally involved in the mishaps that took place during the Festival of Sukkot. For this reason, the Court recommends dismissing Superintendent Doldo from Plaintiff’s free exercise and RLUIPA claims.”) (footnotes omitted)

***Rothenberg v. Daus***, No. 08-CV-567 SHS, 2015 WL 1408655, at \*4 (S.D.N.Y. Mar. 27, 2015) (“The Second Circuit ‘ha[s] not yet determined the contours of the supervisory liability test ... after *Iqbal*.’ . . . Although this Court has already expressed its position that ‘the five *Colon* categories supporting personal liability of supervisors still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated,’ see *Qasem v. Toro*, 737 F.Supp.2d 147, 151–52 (S.D.N.Y.2010) (Stein, J.), other district courts have disagreed as to which *Colon* categories survive *Iqbal*. [collecting cases]”)

***Peguero v. City of New York***, No. 12-CV-5184 JPO, 2015 WL 1208353, at \*5 (S.D.N.Y. Mar. 17, 2015) (“In opposing summary judgment on the *Monell* claims, Plaintiffs rely exclusively on the argument that the City may be held liable by virtue of Schwarz’s conduct. . . . Plaintiffs reason that because Schwarz had ‘supervisory authority’ over Labate . . . and personally participated in the violation of Peguero’s constitutional rights, his conduct may form the basis of a *Monell* claim. . . . This argument confuses municipal and supervisory liability. A supervisor’s ‘direct participation’ in a constitutional violation—even if that participation takes the form of ‘ordering or helping others to do the unlawful acts’—is a means to establish that the supervisor had ‘personal involvement’ in the violation and is therefore liable for damages under Section 1983. . . . But it is not sufficient to hold a municipality liable. To subject the City of New York to liability under Section 1983, Schwarz would have to be an official with ‘final policymaking authority.’ . . . It is clear, as a matter of law, that Schwarz—who held the position of sergeant—was not.”)

***Doe v. New York***, No. 10 CV 1792 RJD VVP, 2015 WL 1221495, at \*9-11 (E.D.N.Y. Mar. 16, 2015) (“[E]ven if Governor Pataki was not involved in the *creation* of the Hepatitis policy, plaintiff has alleged that the Defendant Policy Makers held meetings to discuss ‘methods to keep prison HCV rates under control,’ . . . and ‘discussed the price of mass treatment and preventative measures in the prison system’ in ‘various meetings and memoranda between 1993 and 1995[.]’ . . . Accepting these allegations as true, it is certainly plausible that Governor Pataki was advised of the Hepatitis policy in one of these meetings and, agreeing with its cost benefit analysis, decided to *allow the continuance* of the policy. . . . Therefore, plaintiff’s claims against Governor Pataki in his individual capacity may proceed, for the moment at least, based on his alleged role in creating (or allowing the continuance of) the Hepatitis policy. . . . The allegations in the Third Amended Complaint that Dr. Curtin and Dr. O’Connell, in their role as medical supervisors, indifferently or intentionally enforced the Hepatitis policy at their facilities, is conclusory. . . . Plaintiff K. Doe does not identify with any particularity that Dr. Curtin and Dr. O’Connell personally knew about the Hepatitis policy, or encouraged its implementation at their correctional facilities, much less that they were aware of K. Doe’s symptoms and were deliberately indifferent to his medical needs. . . . If these allegations were sufficient, it could create the possibility of Section 1983 liability for prison medical supervisors any time there was a failure to diagnose an inmate. ‘That result would

defeat the Second Circuit’s strict requirement of personal involvement as a prerequisite for [Section] 1983 liability.’ . . . Therefore, plaintiff’s claims against Dr. Curtin and Dr. O’Connell are dismissed for failure to adequately allege personal involvement under Section 1983.”)

*Ellerbe v. Jasion*, No. 3:12-CV-00580 MPS, 2015 WL 1064739, at \*6-8 (D. Conn. Mar. 11, 2015) (“At issue here is the scope of the second *Colon* category (‘[T]he defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong ....’), which is in tension with *Iqbal*. . . In cases decided before *Iqbal*, the Second Circuit held that a supervisor could be shown to be personally involved in a disciplinary hearing where the supervisor reviewed and affirmed the decision of the hearing officer. [citing cases] The Second Circuit has also noted in dicta that ‘it is questionable whether an adjudicator’s rejection of an *administrative grievance* would make him liable for the conduct complained of.’ *McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir.2004) (emphasis added). It is unclear whether this comment in *McKenna*—a case about an inmate’s grievance to prison administrators concerning the prison’s failure to provide medical treatment—is applicable to an appeal of a decision to impose segregated confinement. At least in Connecticut’s prisons, appealing a placement in Punitive Segregation or Administrative Segregation is governed by different rules than an ‘Inmate Grievance,’ which is a catch-all term for all inmate complaints *other than* appeals of specific listed decisions (a list that includes decisions to place an inmate in Punitive Segregation or Administrative Segregation). Conn. Dep’t Corr. Admin. Dir. 9.6 § 4. As a result of the tensions within Second Circuit case law and the uncertainty raised by *Iqbal*, recent decisions by the district courts in this circuit are split over whether and to what extent a supervisor’s denial of an administrative appeal constitutes personal involvement. Many decisions rely on a case-by-case approach, finding personal involvement only where a supervisor’s role is more active than a ‘rubber stamping’ of the hearing officer’s decision, and/or only where the supervisor’s review occurs while the consequences of the hearing (segregated confinement) are still ongoing and can be remedied. [collecting cases] A decision in this district found personal involvement where both factors were shown—that is, the supervisor decided the appeal after an ‘extensive review’ and was aware of the alleged due process violation ‘before the sanctions imposed by [the hearing officer] had expired.’ *Friedland v. Otero*, No. 3:11–CV–606 JBA, 2014 WL 1247992, at \*10–11 (D.Conn. Mar. 25, 2014); *see also Baldwin v. Arnone*, No. 3:12–CV–243 JCH, 2012 WL 3730010, at \*4 (D. Conn. June 20, 2012) (granting plaintiff leave to amend “to include specific allegations” with regard to the supervisor who affirmed the result of the hearing). This Court adopts such an approach. Ellerbe’s allegations against Milling are limited to a conclusory accusation that she ‘acquiesced to application of said malfeasance when she signed off and placed the plaintiff on A/S.’ . . . Under Administrative Directive 9.4, Milling’s role as Director of Offender Classification and Population Management is to review a written report and recommendation provided by the hearing officer (in this case, Griggs) and issue a final decision. . . . As to timing, the complaint is silent as to exactly when Milling became involved. But a reasonable inference drawn in Ellerbe’s favor is that Milling’s review occurred before or during Ellerbe’s time in Administrative Segregation. Milling’s actions were necessary to authorize Ellerbe’s placement in Administrative Segregation. . . . Ellerbe fails to allege that Milling’s decision was anything more than a ‘rubber stamp,’ or that she even was on notice that Ellerbe

believed that his due process rights had been violated. Although Milling's role—reviewing the hearing officer's recommendation and issuing the final decision—is slightly different from that of an official reviewing an administrative appeal, it shares the qualities that make review of an administrative appeal a questionable basis for personal involvement. The Directive does not require Milling to be present at the hearing or otherwise on notice of what occurred—much less actively involved in the process—and Ellerbe does not allege that she was. While it is conceivable that Griggs's report put Milling on notice that Ellerbe's due process rights were violated during the hearing, Ellerbe has made no such allegation. The fact that Milling approved the placement, in the absence of further allegations, does not amount to personal involvement in the alleged due process violations. As to the timing of Dzurenda's consideration of Ellerbe's appeal, a reasonable inference from Ellerbe's allegations is that Dzurenda's review occurred while Ellerbe was still in Administrative Segregation. Ellerbe alleges that the appeal was decided by October 15, 2010, and that he was in Administrative Segregation for 243 days. Ellerbe's allegations about Dzurenda's involvement are more extensive than those against Milling. Ellerbe alleges that he filed an appeal notifying Dzurenda that evidence was ignored and his due process rights were violated. . . He also alleges that Dzurenda's denial of the appeal specifically referenced and rejected the allegation that a piece of evidence, the videotape, was ignored, . . . and that Dzurenda 'intentionally fabricated information as his basis for denying the appeal,' . . . These allegations are enough to raise a reasonable expectation that discovery will reveal evidence of Dzurenda's personal involvement. Whether Ellerbe can flesh out his allegations and support them with evidence is a matter to be determined at the summary judgment phase or at trial. The motion to dismiss the due process claim against Milling due to her lack of personal involvement is granted, and the claim is dismissed without prejudice. Ellerbe may, within twenty-one days of this ruling, file an amended complaint with additional allegations *only* as to the manner in which Milling was actively involved in violating his due process rights. The motion to dismiss the due process claim against Dzurenda due to his lack of personal involvement is denied.”)

**Rossi v. Fischer**, No. 13-CV-3167 PKC DF, 2015 WL 769551, at \*16-17 (S.D.N.Y. Feb. 24, 2015) (“Plaintiff alleges that Brian Fischer, as the Commissioner of DOCCS, ‘has the statutory authority to promulgate rules, regulations, and policies governing the religious rights of prisoners within the department.’ . . . Similarly he alleges that Catherine Jacobsen as Acting Deputy Commissioner for Program Services ‘had the authority to approve policies governing the religious programs in [DOCCS],’ . . . and that Mark Leonard, as the Director of Ministerial, Family, and Volunteer Services ‘was responsible for the promulgation of policies affecting the religious rights of all Rastafarian prisoners within [DOCCS].’ . . . Plaintiff attributes DOCCS’s policies on holy days and headgear to Fischer, Jacobsen, and Leonard, along with other defendants. . . A defendant that creates a policy is considered personally involved in any unconstitutional practices that occur under the policy. . . . [P]laintiff has plausibly alleged that defendants Fischer, Jacobson, and Leonard were involved in creating policies under which his right to free exercise was substantially burdened. Thus, these defendants are not properly dismissed from this suit at this juncture. Plaintiff also alleges that defendant Fischer is personally involved in the alleged constitutional violations because he has written letters to defendant Fischer ‘complaining about the unconstitutional

impediments to plaintiff's ability to practice his faith,' but Fischer has always referred plaintiff's complaints to subordinates. . . Defendants are correct in stating that this allegation cannot demonstrate the requisite personal involvement of Fischer. . . 'If the supervisor fails to respond to [a prisoner's] letter or passes the letter on to a subordinate to handle, the general rule is that the supervisor is not personally involved.' . . Nevertheless, because plaintiff has plausibly alleged Fischer's personal involvement in creating policies under which unconstitutional practices have occurred, Fischer is not dismissed from this suit.”)

**Smith v. Wildermuth**, No. 9:11-CV-0241 TJM/TWD, 2015 WL 403108, at \*9-10 (N.D.N.Y. Jan. 29, 2015) (R & R) (“District courts in this circuit have routinely held that a prisoner’s allegation that a supervisory official failed to respond to a grievance is insufficient to establish that the official ‘failed to remedy the violation after learning of it through a report or appeal.’ . . Similarly, district courts have held that ‘an allegation that an official ignored a prisoner’s letter of protest and request for investigation of allegations made therein is insufficient to hold that official liable for the alleged violations.’ . . However, the Second Circuit has recently cautioned courts against dismissing claims at the 12(b)(6) stage for failure to allege personal involvement where the plaintiff alleges that an official failed to respond to a letter of complaint. *Grullon v. City of New Haven*, 720 F.3d 133, 141 (2d Cir.2013) . . . Here, the second amended complaint includes ten pages of ways in which Plaintiff alleges that Defendant Martuscello became aware of an environment existing at Cossackie in which correction officers had free rein to abuse prisoners. Expressing no opinion as to whether such allegations are sufficient to withstand a dispositive motion, I find that they are sufficient for the purposes of initial review and recommend that the Court direct Defendants to respond to this claim. . . . As noted above, the Second Circuit has recently cautioned courts against dismissing claims at the 12(b)(6) stage for failure to allege personal involvement where the plaintiff alleges that an official failed to respond to a letter of complaint. . . In light of *Grullon*, the second amended complaint sufficiently alleges deliberate indifference to survive initial review. Plaintiff alleges that he repeatedly wrote letters and grievances to Defendants Rock and Evans regarding Inmate Scarbrough’s erratic behavior and Plaintiff’s fears for his own safety. . . Plaintiff further alleges, and the Court has confirmed, that Defendant Evans was named as a defendant in a lawsuit by Inmate Scarbrough preceding his attack on Plaintiff. . . In that lawsuit, Scarbrough alleged that he was mentally unstable and was not being protected from himself and others. . . Assuming, as the Second Circuit has directed that the Court must, that Defendants Rock and Evans in fact received those letters and read them, Plaintiff has alleged facts sufficient to survive initial review. . . Therefore, I recommend that the Court direct Defendants to respond to this claim.”)

**Ocampo v. Fischer**, No. 11-CV-4583 CBA MDG, 2014 WL 7422763, at \*7-8 (E.D.N.Y. Dec. 31, 2014) (“At the outset, the Court acknowledges that affirming the denial of a grievance is insufficient to establish the personal involvement of a prison superintendent, . . . and that the ‘mere receipt of a letter from an inmate, without more, does not constitute personal involvement for the purposes of section 1983 liability[.]’. . . However, ‘[w]here a supervisory official reviews and responds to a prisoner’s [letter of] complaint, [he] is personally involved.’ . . The Court agrees with the R & R that, at this stage of the proceedings, Ocampo has sufficiently alleged

Superintendent Breslin's personal involvement in the failure to provide him with adequate medical treatment. Superintendent Breslin's personal involvement in the instant action is not premised solely on his August 8, 2011 determination regarding Ocampo's Hepatitis C related grievance, or the mere receipt of letters regarding Ocampo's medical treatment. Rather, the supplemental materials submitted by Ocampo suggest that Breslin not only received letters regarding Ocampo's medical treatment, but also responded to them. . . To the extent Superintendent Breslin argues in his objections that Ocampo has failed to provide Superintendent Breslin's responses that corroborate these statements, . . . the Court notes that in deciding a motion to dismiss, the Court accepts as true Ocampo's factual allegations and views them in the light most favorable to him. . . Accordingly, on the basis of factual allegations demonstrating that Superintendent Breslin personally responded to issues regarding Ocampo's medical care beyond reviewing the grievance Ocampo filed, at this stage of the proceedings Ocampo has sufficiently alleged Superintendent Breslin's personal involvement in the failure to provide Ocampo with adequate medical care.")

***Balkum v. Leonard***, 65 F.Supp.3d 367, 371 (W.D.N.Y. 2014) ("Here, Plaintiff alleges in his first claim that he was physically attacked 'while imprisoned in a DOCCS transportation bus ... parked within Lakeview Shock Incarceration Facility,' . . . and alleges in his second claim that 'while within the Lakeview Shock Incarceration Facility' he advised Defendant Richir of the attack committed by his corrections officers . . . . Both claims are listed as occurring on June 17, 2011 at 6:00 p.m. 'within Lakeview Shock Incarceration Facility.' . . As a result, Plaintiff's complaint may liberally be construed to allege that Defendant Richir was present and informed of the alleged attack, or that Defendant Richir was informed of the alleged attack shortly after it occurred but failed to remedy the wrong. Either way, Plaintiff sufficiently alleges Defendant Richir's personal involvement to survive a motion to dismiss by claiming that Defendant Richir learned of the alleged attack but 'failed to correct the wrong acts.'")

***Houston v. Schriro***, No. 11 CIV. 7374 LAP, 2014 WL 6694468, at \*14-15 (S.D.N.Y. Nov. 26, 2014) ("Whatever the status of *Colon*, '[t]he law is clear ... that a prison official's mere response to a grievance, by itself, is not sufficient to establish personal involvement for purposes of § 1983 ..., ' although a detailed response may be sufficient. . . Similarly, ignoring a prisoner's letter or complaint is insufficient to render an official personally liable. . . Even assuming Houston's account of the grievances that he filed to be accurate, there is insufficient evidence to establish the personal involvement of the supervisory-defendants. Houston initially filed a grievance with Brown, IGRAC Supervisor for MDC, who responded that the issue was non-grievable. . . This response was a form letter in which Brown had placed an 'X' to indicate that the complaint '[did] not fall under the purview of the IGRP,' . . . and is far from the substantive response required to establish personal involvement. . . Houston then claims to have filed an IGRC hearing request with Harris, Director for IGRC Hearings Program for NYC DOC, and appeal requests with Agro, the Warden for MDC, Halyard-Saunders, Assistant Commissioner for Programs Administration and Discharge Planning for NYC DOC, and Wolf, Director of the Board of Corrections for NYC DOC. . . All claim that they never received any such grievance, and none responded. . . Even resolving this factual dispute in favor of Houston, receipt of a grievance does not constitute personal

involvement. . . Otherwise, the exhaustion requirement would lead to supervisory liability becoming nearly automatic. . . Finally, Houston wrote to Commissioner Schriro. Schriro's office has a record of the letter indicating that she reviewed it and forwarded it to a subordinate to investigate. . . Such delegation is ordinary and appropriate, and is insufficient to constitute personal involvement. . . Accordingly, Defendants' motion for summary judgment on Plaintiff's claims of supervisory liability is granted.")

**Guillory v. Ellis**, 9:11-CV-600 MAD/ATB, 2014 WL 4365274, \*21 (N.D.N.Y. Aug. 29, 2014) ("A supervisory official is personally involved if that official directly participated in the infraction. . . The defendant may have been personally involved if, after learning of a violation through a report or appeal, he or she failed to remedy the wrong. . . Personal involvement may also exist if the official created a policy or custom under which unconstitutional practices occurred or allowed such a policy or custom to continue. . . Finally, a supervisory official may be personally involved if he or she were grossly negligent in managing subordinates who caused the unlawful condition or event. . . The mere receipt of a letter or similar complaint is insufficient to constitute personal involvement; otherwise, a plaintiff could create personal involvement by any supervisor simply by writing a letter. . . In order for a letter to suffice to establish personal involvement, plaintiff would have to show that the supervisor conducted a personal investigation or personally took action on the letter or grievance. . . However, personal action does *not* include referring the letter to a subordinate for investigation.")

**Phillip v. Schriro**, 12-CV-8349-RA, 2014 WL 4184816, \*4-\*6 (S.D.N.Y. Aug. 22, 2014) ("Defendants assert that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), invalidated the *Colon* factors regarding supervisory liability and that 'to adequately allege personal involvement, a plaintiff must demonstrate that the defendant, through his or her own conduct, violated the Constitution.' . . Although the Second Circuit has explicitly declined to resolve this issue, *see Hogan*, 738 F.3d at 519 n. 3; *Grullon v. City of New Haven*, 720 F.3d 133, 139 (2d Cir.2013), numerous district courts have confronted the question, and the Court is persuaded by the majority view that *Colon* remains good law. . . While it is true that *Iqbal* reinforces the well-established rule in this Circuit that *respondeat superior* does not apply to § 1983 claims, . . 'Colon's bases for liability are not founded on a theory of *respondeat superior*, but rather on a recognition that personal involvement of defendants in alleged constitutional deprivation can be shown by nonfeasance as well as misfeasance.' . . Therefore, unless or until the Second Circuit or Supreme Court rule otherwise, this Court agrees with the courts that have held that the *Colon* factors 'still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.' . . Plaintiff has pled sufficient facts to plausibly allege the personal involvement of the Wardens. He alleges that he was denied his constitutional right to attend religious services on ten different occasions and that the Wardens were contacted by a grievance representative concerning these violations. . . Plaintiff also claims that the Wardens were informed of the violations by the Commissioner. . . These 'allegations fall squarely within the second *Colon* category.' . . Under the second *Colon* factor, 'if a plaintiff alleges that a constitutional violation is ongoing, and that a defendant, after being informed of a violation through a report or appeal, failed

to remedy the wrong, the plaintiff's claim against the defendant should not [be] dismissed under Rule 12(b)(6).'. . . This is not a case where it is clear that the Wardens had no 'genuine' or 'realistic' opportunity to intervene in the alleged violations of Plaintiff's rights. . . Accordingly, because there has been no 'discovery in this case, this Court will not dismiss Plaintiff's claims ... at this time. Discovery ... will reveal whether the [Wardens] were in a position to remedy the alleged ongoing constitutional violation Plaintiff complains of.'. . . Plaintiff's allegations against Commissioner Schriro, by contrast, must be dismissed for lack of personal involvement. A supervisory official is not deemed to have been personally involved solely by virtue of having received a letter or complaint from a prisoner and having referred it to the appropriate department for investigation, which is what Plaintiff alleges here. . . Courts have so held, because 'commissioners and prison superintendents receive large numbers of letters from inmates, and they delegate subordinates to handle them. If courts found personal involvement every time a supervisor forwarded a complaint to a subordinate, the requirement would lose all meaning.'. . . For the same reason, Plaintiff's contention that the Wardens were informed of the alleged violation by Commissioner Schriro does not establish her personal involvement. . . Indeed, the letter attached to the Amended Complaint is signed by someone other than Commissioner Schriro, presumably someone working in the Office of the Commissioner. . . This makes the connection between the alleged constitutional violation and Commissioner Schriro even more attenuated. . . Plaintiff's claim against Commissioner Schriro in her individual capacity is therefore dismissed.")

***Reid v. Nassau Cnty. Sheriff's Dep't***, 13-CV-1192 SJF SIL, 2014 WL 4185195, \*12 (E.D.N.Y. Aug. 20, 2014) ("The allegations in the complaints, and particularly the amended complaint, at issue on this motion, are sufficient to state a plausible claim of supervisory liability on the part of Sheriff Sposato in his individual capacity. Specifically, the consolidated plaintiffs' allegations, *inter alia*, that Sheriff Sposato knew about the challenged conditions at the NCCC that violated their constitutional rights, but failed to act to remedy or correct those conditions, are sufficient at the pleadings stage to state a plausible Section 1983 claim against Sheriff Sposato in his individual capacity. Accordingly, the branches of the County defendants' motions seeking dismissal of the consolidated plaintiffs' Section 1983 claims against Sheriff Sposato in his individual capacity are denied. However, Reid has not alleged the direct participation of the Superintendent in any of the wrongdoing alleged in his complaint, nor any basis upon which to find the Superintendent liable in a supervisory capacity. Accordingly, the branch of the County defendants' motion seeking dismissal of Reid's Section 1983 claims against the Superintendent in his individual capacity is granted and Reid's Section 1983 claims against the Superintendent in his individual capacity are dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for relief.")

***Lloyd v. City of New York***, 43 F.Supp.3d 254, 266-68 (S.D.N.Y. 2014) ("Defendants contend that the categories in *Colon* are no longer viable after *Iqbal*. . . However, the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), did not completely eliminate the *Colon* rule. The claims in *Iqbal* involved, *inter alia*, denial of equal protection and discrimination—legal theories that require proof of discriminatory intent. In that context, the Supreme Court held that a supervisor's

‘mere knowledge of his subordinate’s discriminatory purpose’ does not render the supervisor personally involved in violating the constitution. . . Rather, ‘a plaintiff must [prove] that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’ . . As the Supreme Court explained, however, ‘the factors necessary to establish a [constitutional] violation will vary with the constitutional provision at issue.’ . . In this circuit, where discriminatory intent is not an element of a constitutional claim, *Colon* remains the standard for establishing personal involvement by supervisory officials under 42 U.S.C. § 1983. . . Here, Plaintiffs’ free exercise claims do not require a showing of discriminatory intent, so personal involvement with respect to those claims is governed by *Colon*. However, because Plaintiffs’ equal protection claims require a showing of discriminatory intent, Plaintiffs must allege that each supervisory defendant actively participated in the alleged constitutional violations, and a defendant’s failure to act will not result in liability under Section 1983. Thus, the personal involvement analysis varies by claim. . . . The fact that Defendant Schriro forwarded Plaintiff Lloyd’s letter of complaint to another official for handling means she cannot be held liable under § 1983. Courts have consistently held that, ‘if an official receives a letter from an inmate and passes it on to a subordinate for response or investigation, the official will not be deemed personally involved with respect to the subject matter of the letter.’”)

***Archie v. Fischer***, 9:12-CV-1050, 2014 WL 3670676, \*9 (N.D.N.Y. July 23, 2014) (“The fact that Plaintiff may have written a letter does not automatically render the supervisory official responsible for any constitutional violation. . . Prison supervisors cannot be deemed personally involved based simply on a response to a complaint.”)

***Tretola v. D’Amico***, 13-CV-5705 JS AKT, 2014 WL 2957523, \*8 (E.D.N.Y. July 1, 2014) (“[T]he Second Circuit in *Colon* listed five ways that a plaintiff can establish liability—not just the two listed—including failure to remedy a wrong after being informed of the violation, grossly negligent supervision of subordinates who committed the wrongful acts, and deliberate indifference to the rights of inmates. . . However, the ‘continuing vitality’ of these additional methods has ‘engendered conflict within our Circuit’ due to the Supreme Court’s decision in *Iqbal*. *Reynolds v. Barrett*, 685 F.3d 193, 205 n. 14 (2d Cir.2012). This Court has concluded that only personal involvement and a custom or practice survive as viable bases for supervisory liability. *See Butler v. Suffolk Cnty.*, 289 F.R.D. 80, 95 n. 8 (E.D.N.Y.2013). As to D’Amico and Dewar, the Complaint appears to allege two bases for supervisory liability: (1) that D’Amico and Dewar were aware of the constitutional violations but failed to take action, and (2) it was the policy, custom, and practice of D’Amico and Dewar to allow or ignore violations of the Second, Fourth, Fifth, and Fourteenth Amendments. . . Neither theory saves them from the State Defendants’ motion to dismiss. *First*, as previously stated, failure to remedy a wrong after being informed of the violation has been rejected by this Court as a viable theory after *Iqbal*. . . *Second*, Plaintiffs’ allegations of a policy or custom on the part of D’Amico and Dewar are conclusory at best. The Complaint recites boilerplate language regarding a policy or custom, but provides no factual allegations in support.”)

**Griffin v. Doyle**, 12-CV-4359 JS GRB, 2014 WL 2945676, \*6 n.5 (E.D.N.Y. June 30, 2014) (“A supervisory official can nonetheless be held liable if he ‘participated directly in the alleged constitutional violation [or] ... created a policy or custom under which [the] unconstitutional practices occurred, or allowed the continuance of such a policy or custom.’ . . . This Court has concluded that only personal involvement and a custom or practice survive as viable bases for supervisory liability. *See Butler v. Suffolk Cnty.*, 289 F.R.D. 80, 95 n. 8 (E.D.N.Y.2013). Accordingly, awareness and/or negligence are not enough.”)

**Ciaprazi v. Jacobson**, No. 13 Civ. 4813(PAC)(KNF), 2014 WL 2751023, \*12, \*13 (S.D.N.Y. June 17, 2014) (R & R) (“The Second Circuit has not yet addressed what, if anything, remains of the five ways of showing personal involvement of supervisory defendants after *Iqbal* . . . . However, absent Second Circuit authority to the contrary, the Court finds that *Iqbal* did not abrogate the five forms of evidence showing personal involvement, as articulated in *Colon*. . . . Ciaprazi alleges that Fischer and Dr. D’Silva ‘maintain and enforce a policy or custom of denying root canal or any other restorative treatment to all posterior teeth, and of providing instead as “treatment” only extraction for all posterior teeth that may otherwise be restored and saved through root canal.’ He was advised by more than one dentist that ‘the DOCCS Central Office generated this policy or custom in order to save time, effort and money because root canal and other similar restorative procedures are more time-consuming, labor-intensive and expensive than extractions,’ and ‘[t]he prison dentists are also apparently not compensated by the DOCCS for root canal or other restorative treatment performed on “posterior” teeth.’ Ciaprazi’s plausible allegations of the deliberate indifference to his dental needs, specifically his posterior teeth, illustrate and support his allegations that the defendants maintain and enforce the policy or custom of ‘refusing to provide readily available treatment to save’ posterior teeth. Moreover, Fischer and Dr. D’Silva are aware of the policy because Ciaprazi complained about it in his letters to them. However, Fischer and Dr. D’Silva failed to act and continued to maintain and enforce the policy, notwithstanding that DOCCS regulations do not prohibit restorative treatment of posterior teeth. Accordingly, Ciaprazi’s allegations, that Fischer and Dr. D’Silva maintain and enforce the policy of refusing to provide restorative treatment to posterior teeth and that by doing so they deliberately disregard his constitutional rights, are sufficiently plausible at this stage of the litigation to indicate the personal involvement of Fischer and Dr. D’Silva.”)

**Yearney v. Sidorowicz**, No. 13 Civ. 3604(CM, 2014 WL 2616801, \*8, \*9 (S.D.N.Y. June 10, 2014) (“The general rule is that ‘an allegation that an official ignored a prisoner’s letter of protest and request for an investigation of allegations made therein is insufficient to hold that official liable for the alleged violations.’ . . . Even if there had been a constitutional violation here, the mere receipt of letters from an inmate is insufficient to show the requisite personal involvement for a § 1983 claim. . . . The fact that Dr. Koenigsmann asked a subordinate to respond to Plaintiffs letters does not constitute personal involvement for purposes of § 1983 liability. . . . Moreover, the fact that Dr. Koenigsmann’s subordinate, writing on his behalf, affirmed the course of treatment offered by the doctors at Sullivan rather than intervening and appeasing Plaintiff’s demand for an MRI, is also insufficient to establish Dr. Koenigsmann’s personal involvement or ‘to shed any light on the

critical issue of supervisory liability, and more particularly, knowledge on the part of the defendant.”)

*Cruz v. New York*, 24 F.Supp.3d 299, 308-09 (W.D.N.Y. 2014) (“Plaintiff alleges that Defendant Fischer ‘was provided on a daily basis with reports of applications of force, allegations of excessive use of force and other breaches of security in the Department facilities.’ . . . He also alleges that Defendants Fischer, Griffin, and Sheahan ‘knew and/or should have known that the pattern of physical abuse described above existed in the State prisons prior to and including the time of the assault of plaintiff.’ . . . Specifically, he alleges these Defendants’ awareness through ‘DOC’s elaborate reporting system,’ as well as through ‘[c]omplaints to the Commissioner, [g]rievances and the Inspector General, and [d]epartment reports.’ . . . Plaintiff alleges that the Supervisory Defendants had knowledge of ‘the failure of the Department to place surveillance cameras on [g]alleries that house the Special Housing Unit,’ . . . and that the Special Housing Unit’s lack of cameras for security reasons resulted in serious injuries to inmates housed there. . . . Plaintiff also alleges that Defendants’ tolerance of abuse by correction officers ‘constituted a municipal policy, practice or custom;’ that Defendants’ conduct was a ‘substantial factor’ in the continuation of violence by correction officers; and that the Supervisory Defendants permitted, tolerated, and sanctioned the ‘persistent and widespread policy’ of abuse. . . . Plaintiff has alleged sufficient facts to support deliberate indifference on the part of the Supervisory Defendants. As explained above, the Supervisory Defendants ‘are alleged to have received extensive information concerning the . . . pattern of incidents involving . . . violence and the failure of DOC to prohibit staff from continuing such conduct, and have failed to take any steps to curb those unconstitutional abuses.’ . . . Additionally, Plaintiff has alleged a particular policy as having caused the alleged assault; specifically, the failure of the Supervisory Defendants to place security cameras in the Special Housing Unit in order to deter correction officers from inflicting abuse on inmates. . . . With regard to the Supervisory Defendants’ knowledge of the alleged abuse by correction officers, Plaintiff’s complaint contains an entire section (“New York State Prisons: A History of Abuse”), in which he details how the Supervisory Defendants have knowledge of specific abuses occurring within the Special Housing Unit. . . . Accordingly, Defendants’ motion to dismiss Plaintiff’s second cause of action for failure to allege deliberate indifference against Defendants Fischer, Griffin, and Sheahan, is denied. . . . Defendants further argue that Plaintiff has failed to allege the personal involvement necessary to state an Eighth Amendment violation by prison officials. . . . Specifically, Defendants argue that the Supervisory Defendants were not personally involved in the events that occurred on September 17, 2011. . . . As explained in Section IV(A) of this Decision and Order, *supra*, Plaintiff has sufficiently alleged facts demonstrating personal involvement by the supervisory Defendants under category (5) of the *Colon* categories. To the extent that Defendants argue that *Ashcroft v. Iqbal* limits the application of the *Colon* categories so that only the first and third categories under *Colon* apply, as explained in Section IV(A), *supra*, Plaintiff also has alleged sufficient facts that the Supervisory Defendants created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom. Accordingly, Defendants’ motion to dismiss Plaintiff’s Eighth Amendment claims against the Supervisory Defendants for failure to allege facts supporting personal involvement is denied.”)

**Ferrer v. Fischer**, No. 9:13–CV–0031 (NAM/ATB), 2014 WL 1763383, \*2, \*3 (N.D.N.Y. May 1, 2014) (“Courts in this circuit have frequently held that the mere receipt of letters from an inmate is insufficient to constitute personal involvement. . . . However, the Second Circuit has recently cautioned courts against dismissing claims at the 12(b)(6) stage where the complaint contains allegations that an official failed to respond to a letter of complaint. *See Grullon v. City of New Haven*, 720 F.3d 133, 141 (2d Cir.2013) (“At the pleading state, even if [plaintiff] had no knowledge or information as to what became of his Letter after he sent it, he would be entitled to have the court draw the reasonable inference-if his amended complaint contained factual allegations indicating that the Letter was sent to the Warden at an appropriate address and by appropriate means-that the [defendant] in fact received the Letter, read it, and thereby became aware of the alleged conditions of which [plaintiff] complained.”); *see also Toliver v. City of New York*, 530 F. App’x 90, 93 (2d Cir.2013) (describing *Grullon* by stating that ‘pro se allegations that a prisoner sent a letter to a warden complaining of unconstitutional conditions that were not remedied are sufficient to state a claim for deliberate indifference against the warden’). . . .Plaintiff’s allegations regarding Commissioner Fischer are limited, but he does allege that he sent multiple letters to defendant Fischer, that defendant Fischer was fully aware of his situation, and that defendant Fischer failed to respond to the letters or otherwise take appropriate action. Defendant Fischer may be able to adduce sufficient evidence through discovery to demonstrate that he was not personally involved in the violations at issue. . . . However, in light of the Second Circuit’s recent decision in *Grullon*, I find that at this stage, plaintiff’s allegations are sufficient to support defendant Fischer’s personal involvement.”)

**Bessette v. Pallito**, No. 1:13–cv–252–jgm–jmc, 2014 WL 1744265, \*8 (D. Vt. Apr. 30, 2014) (adopting R&R) (“As to Commissioner Pallito, the only potentially applicable *Colon* categories are the second and fifth. However, Commissioner Pallito’s failure to act on the July 26, 2013 appeal or to ‘remedy the wrong’ alleged in that appeal is insufficient.” “[A] supervisory official having received (and ignored) a letter from an inmate alleging unconstitutional conduct does not, without more, give rise to personal involvement on the part of that official.’ *Thompson*, 949 F.Supp.2d at 575. ‘The reason for this rule appears to be the fact that high-level DOCS officials delegate the task of reading and responding to inmate mail to subordinates, and, thus, a letter sent to such an official often does not constitute actual notice.’ *Id.* (quoting *Voorhees v. Goord*, No. 05 Civ. 1407(KMW)(HBP), 2006 WL 1888638, at \*5 (S.D.N.Y. Feb. 24, 2006)).”)

**Rucano v. Koenigsmann**, No. 9:12–cv–00035 (MAD/RFT), 2014 WL 1292281, \*11, \*12 (N.D.N.Y. Mar. 31, 2014) (adopting R & R) (“Plaintiff alleges that he wrote Defendant Koenigsmann three letters describing the inadequacies of his dental care. Defendant Koenigsmann referred two of those letters to Defendant Grinbergs, who replied to Plaintiff on behalf of Defendant Koenigsmann on May 17 and June 27, 2011. . . . Defendant Koenigsmann did not respond to Plaintiff’s third letter, dated September 9, 2011, in which Plaintiff alleged that Defendant Kullman and Oliveira refused to provide him with crowns pursuant to an unconstitutional DOCCS’ Policy. . . . It was once well accepted that neither ignoring an inmate’s letter nor referring his letters to a subordinate constituted personal involvement on behalf of a

supervisory official. [collecting cases] However, in light of the Second Circuit’s recent decision in *Grullon v. City of New Haven*, it would appear that plaintiffs within the Second Circuit are ‘entitled to have the court draw the reasonable inference ... that the [official] in fact received the Letter, read it, and became aware of the alleged conditions of which [the inmate] complained.’. .As to the first two letters, it is clear that Defendant Koenigsmann acted upon those letters by referring them to his subordinate. . . However, affording Plaintiff the benefit of this inference, it is possible that Plaintiff’s third letter to Defendant Koenigsmann put him on notice of a continuing violation of Plaintiff’s Eighth Amendment rights, and he failed to take any action to remedy the wrong. . . Therefore, we recommend that Defendants’ Motion be **DENIED** as to Defendant Koenigsmann.”)

*Young v. Choinski*, 15 F.Supp.3d 172, 188-89, 191-93 (D. Conn. 2014) (“Cases in this District have repeatedly acknowledged this split over *Iqbal* in addressing the *Colon* factors, but have abstained from determining ‘whether *Iqbal* applies in all cases or just those involving discriminatory intent.’[collecting cases] Although the Second Circuit has not addressed the issue directly, it has suggested that at least some of the *Colon* factors remain viable. . . . Although *Iqbal* does arguably cast doubt on the viability of certain categories of supervisory liability, where the Second Circuit has not revisited the criteria for supervisory liability, this Court will continue to recognize and apply the *Colon* factors. . . .The fact that a prisoner sent a letter or written request to a supervisory official does not establish the requisite personal involvement of the supervisory official. . . . The district courts within this Circuit ‘are divided regarding whether review and denial of a grievance constitutes personal involvement in the underlying alleged unconstitutional act.’. . For example, with respect to ‘personal involvement,’ a number of courts have drawn a distinction between ‘a pro forma denial of a grievance and a “detailed and specific” response to a grievance’s allegations.’. . Put simply, denial of a grievance alone may be insufficient to establish the ‘personal involvement’ of a supervisory official. . . Similarly, courts have held that a supervisory official’s act of affirming the denial of a grievance on appeal does not constitute personal involvement. . .On the other hand, when a supervisory prison official receives a particular grievance, personally reviews it, and responds and/or takes action in response, such conduct may constitute sufficient ‘personal involvement’ to establish individual liability for the alleged constitutional violation. [collecting cases] Another factor district courts in this Circuit have examined is the nature of the alleged constitutional violation to determine whether it was ‘ongoing’ or discrete in nature, and thus whether it could be remedied by the supervisor. . . Following such reasoning, if the supervisory official is confronted with an ‘ongoing’ constitutional violation and reviews a grievance or appeal regarding that violation, that official is ‘personally involved’ if he or she can remedy the violation directly. In contrast, ‘[i]f the official is confronted with a violation that has already occurred and is not ongoing, then the official will not be found personally responsible for failing to remedy a violation.’. . In the case at bar, Warden McGill directly reviewed two grievances from Young, asserting complaints about the failure of Officers Hartley and Williams to respond to and arrange for treatment of Young’s mental health needs on September 3, 2008. McGill denied those grievances after reviewing the incident and concluding that ‘all staff involved [had] handled [the incident] in an appropriate manner in accordance with [DOC] directive.’. . Pursuant to the common law of this Circuit, mere denial of a grievance may be insufficient to

establish the ‘personal involvement’ of a supervisory official. . . . Nonetheless, if McGill failed to respond adequately upon receiving notice of a violation that could be remedied, . . . such as an ‘ongoing’ violation, . . . he may be held liable. In the absence of an ongoing violation—one that is capable of mitigation—McGill cannot be held personally liable. . . . In the case in suit, the grievances Young submitted to McGill solely included complaints about misconduct that had already occurred and concluded, as opposed to ‘ongoing’ violations. Therefore, with respect to plaintiff’s allegations regarding his treatment by Williams and Hartley, that conduct could no longer be effectively remedied. Accordingly, Young has failed to allege McGill’s ‘personal involvement’ in the alleged deliberate indifference to Young’s serious mental health needs on September 3, 2008. The motion for summary judgment will be granted as to claims of deliberate indifference to mental health needs against defendant McGill in his individual capacity.”)

**Hollins v. City of New York**, No. 10 Civ. 1650(LGS), 2014 WL 836950, \*13, \*14 (S.D.N.Y. Mar. 3, 2014) (“In 2009, the Supreme Court in *Ashcroft v. Iqbal* squarely addressed supervisory liability claims, and held that “Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.” . . . It is unclear—and the Second Circuit has not explicitly ruled on—what remains of *Colon* in the wake of *Iqbal*. . . . The district courts of the Second Circuit disagree about what remains of *Colon* after *Iqbal*. [collecting cases] This Court agrees with *Bellamy v. Mount Vernon Hosp.*, which held that ‘Only the first and part of the third *Colon* categories pass *Iqbal*’s muster.’ . . . After *Iqbal*, a supervisor can be liable only ‘if that supervisor participates directly in the alleged constitutional violation or if that supervisor creates a policy or custom under which unconstitutional practices occurred.’ . . . Only the first and third prongs of *Colon* require active involvement of a supervisor.”)

**King v. McIntyer**, No. 9:11–CV–1457, 2014 WL 689028, \*8–\*10 (N.D.N.Y. Feb. 20, 2014) (adopting R&R) (“Defendants assert that Defendant Fischer lacked personal involvement in the alleged constitutional deprivations. In support of this assertion, Defendants rely on two arguments. First, Defendants submit that liability against a supervisory official for an alleged constitutional violation cannot be based on the doctrine of respondeat superior, citing *Blyden v. Mancusi*, 186 F.3d 252, 264 (2d Cir.1999). . . . Second, Defendants argue, ‘just because a prisoner writes to supervisory officials about instances of alleged mistreatment does not, alone, justify holding those supervisory officials liable under Section 1983,’ citing *Liner v. Goord*, 310 F.Supp.2d. 550, 555 (W.D.N.Y.2004). *Id.* Defendants are correct as to their first argument concerning respondeat superior. However, Defendants’ argument concerning the effect that a prisoner writing to a supervisor has on that supervisor’s personal involvement is abrogated by *Grullon v. City of New Haven*, 720 F.3d 133 (2d Cir.2013). District courts in this circuit have routinely held that a prisoner’s allegation that a supervisory official failed to respond to a grievance is insufficient to establish that the official ‘failed to remedy that violation after learning of it through a report or appeal’ or ‘exhibited deliberate indifference . . . by failing to act on information indicating that the violation was occurring.’ . . . Similarly, district courts have held that ‘an allegation that an official ignored a prisoner’s letter of protest and request for investigation of allegations made therein is insufficient to hold that official liable for the alleged violations.’ . . . However, the Second Circuit

has recently cautioned courts against dismissing claims at the 12(b)(6) stage for failure to allege personal involvement where the plaintiff alleges that an official failed to respond to a letter of complaint. . . Here, like the procedural posture in *Grullon*, Defendants challenge, *inter alia*, Plaintiff's claim of personal involvement as to Defendant Fischer in a motion to dismiss. . . Thus, based on the holding in *Grullon*, Plaintiff is entitled to have the Court draw the reasonable inference from Plaintiff's pleadings that Defendant Fischer in fact received the three letters of complaint that Plaintiff described in his operative complaint. Based on this inference, Plaintiff has alleged facts sufficient to support a finding of Defendant Fischer's personal involvement. Therefore, I recommend that the Court deny Defendants' motion to dismiss with respect to Plaintiff's individual capacity claim against Defendant Fischer. . . Defendants assert that Defendant Miller lacked personal involvement in the alleged constitutional deprivations. In support of this assertion, Defendants point out that Plaintiff's allegations against Defendant Miller are that Defendant Miller affirmed two disciplinary hearing findings of guilt. . . District courts in the Second Circuit disagree about whether simply affirming an allegedly unconstitutional disciplinary decision constitutes personal involvement. Courts declining to find personal involvement conclude that there is no 'ongoing' violation for the supervisory official to 'remedy' in such a situation. . . Other district courts in this circuit have found personal involvement where a supervisory official affirms an allegedly constitutionally infirm hearing decision. . . I agree with Magistrate Judge David E. Peebles that the cases finding personal involvement in such situations 'appear to be both better reasoned and more consistent with the Second Circuit's position regarding personal involvement.' . . Here, Plaintiff alleges that Defendant Miller affirmed two disciplinary findings of Plaintiff's guilt. . . Accordingly, under the reasoning articulated in *Bennett, supra*, Plaintiff's allegations that Defendant Miller affirmed two disciplinary findings are sufficient to support the finding that Defendant Miller was personally involved in the alleged constitutional deprivations. Therefore, I recommend that the Court deny Defendants' motion to dismiss with respect to Plaintiff's individual capacity claim against Defendant Miller.”)

*Carpenter v. City of New York*, 984 F.Supp.2d 255, 269 (S.D.N.Y. 2013) (“The analysis of the supervisory liability claims in this case turns on the underlying constitutional claims against the individual officer defendants. Because summary judgment is granted to the individual officer defendants on the false arrest claims, it is also granted to the supervisor defendants on these claims. As to the excessive force claims, however, plaintiffs have raised a genuine question of material fact as to the existence of a constitutional violation. The question then is whether plaintiffs have raised a genuine question of material fact as to the existence of supervisory liability. They have done so here, because the plaintiffs have submitted sufficient evidence to show that both Chief Esposito and Chief Hall either were present for or partook in the alleged constitutional violations. If the plaintiffs prevail in demonstrating that the arresting officers used excessive force, a jury could also conclude that Chief Esposito and Chief Hall are responsible for these constitutional violations in their supervisory capacity. Accordingly, the excessive force claims against the supervisor defendants survive summary judgment.”)

**Buffaloe v. Fein**, No. 12 Civ. 9469(GBD)(AJP), 2013 WL 5815371, \*7-\*10 (S.D.N.Y. Oct. 24, 2013) (R&R) (“Although the Second Circuit has not weighed in on what remains of *Colon* after *Iqbal*, . . . several decisions in this district have concluded that by specifically rejecting the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution,’ . . . *Iqbal* effectively nullified several of the classifications of supervisory liability enunciated by the Second Circuit in *Colon*. . . While *Colon* permitted supervisory liability in situations where the supervisor knew of and acquiesced in a constitutional violation committed by a subordinate, these post- *Iqbal* district court decisions reason that *Iqbal*’s ‘active conduct’ standard imposes liability only where that supervisor directly participated in the alleged violation or had a hand in creating a policy or custom under which the unconstitutional practices occurred. These decisions may overstate *Iqbal*’s impact on supervisory liability. *Iqbal* involved allegations of intentional discrimination. . . Where the alleged constitutional violation involved ‘invidious discrimination in contravention of the First and Fifth Amendments,’ *Iqbal* held that ‘plaintiff must plead and prove that the defendant acted with discriminatory purpose,’ whether the defendant is a subordinate or a supervisor. . . It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’ . . . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon* may still apply.” [collecting cases in footnote])

**Pinter v. City of New York**, 976 F.Supp.2d 539, 571, 572 (S.D.N.Y. 2013) (“Pinter’s opposition to summary judgment offers a conclusory paragraph stating that named defendants Sergeant Michael Madison, Deputy Chief Brian Conroy, Chief Anthony Izzo, Chief Joseph Esposito, and Police Commissioner Raymond Kelly bear supervisory liability-\*without explaining how any of these individuals violated Pinter’s rights through their own actions. . . As defendants accurately note in their reply brief, Pinter’s conclusory paragraph does not show ‘any constitutional violation on the part of the [individual supervisory] Defendants,’ including Mayor Bloomberg. . . Nor does Pinter’s Rule 56.1 Counter–Statement contain evidence that could support the liability of any of the supervisory defendants.”)

**De Ratafia v. County of Columbia**, No. 1:13–CV–174 (NAM/RFT), 2013 WL 5423871, \*8, \*9 (N.D.N.Y. Sept. 26, 2013) (“This Court agrees with the analysis in *Sash*, . . . that ‘[i]t was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’ . . . Thus, as in the present case, where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply. . . Hence, the court refers to earlier Second Circuit precedent that applies the tests of deliberate indifference or gross negligence to assess supervisory liability. That analysis demands a showing of actual or constructive notice to

the supervisory defendant of constitutional torts committed by their subordinates. . . . Nowhere in the nearly three hundred paragraphs of the complaint, do plaintiffs flush out the direct manner in which defendant Harrison allegedly violated their rights. Instead, plaintiffs assert that defendant Harrison ‘failed to properly train and supervise’ the officers involved in the incident at plaintiffs’ home. However, ‘the existence of a municipal policy or practice, such as a failure to train or supervise, cannot be grounded solely on the conclusory assertions of the plaintiff.’ . . . Nowhere do plaintiffs provide any factual allegations to support their assertions that the Deputy Sheriffs’ actions in this case were due to a failure by defendant Harrison to train properly his officers. Nor does the complaint identify in what way the Sheriff’s Department training was insufficient, nor the manner in which there was a failure to train. Plaintiffs also assert that defendant Harrison ‘knew or should have known that the Deputy Sheriffs eventually would be faced with the type of vague, indefinite report from an inebriate that Meleck gave’ on October 16, 2011, and ‘promulgated no standards for evaluation or supervisory review of the Deputy Sheriffs’ response to such unreliable reports.’ However, absent from the complaint are any facts establishing or suggesting the alleged basis for defendant Harrison’s knowledge or awareness of the likelihood that his Deputies would respond in the manner they did herein to the complaint of a drunkard. It is apparent from review of the complaint that the claims as presently stated against defendant Harrison could only be supported pursuant to respondeat superior or vicarious liability doctrines, which do not support liability under § 1983.”)

**Malik v. Skelly**, No. 09–CV–6283–FPG, 2013 WL 5372850, \*2, \*3 (W.D.N.Y. Sept. 24, 2013) (“In this case, Defendant argues that the second *Colon* factor namely that a supervisor, after being informed of the violation through a report or appeal, failed to remedy the wrong—was abrogated by *Iqbal*. Again, I disagree. In *LaMagna v. Brown*, 474 F. App’x 788, 790 (2d Cir.2012) (unpublished) the Second Circuit favorably cited *Colon* in determining that the dismissal of an amended complaint was warranted where, *inter alia*, there was ‘no allegation that [defendant] “failed to remedy the wrong” once being informed of [plaintiff’s] assault.’ The Second Circuit has yet to overrule *Colon*, and unless and until that happens, *Colon* remains good law. The Complaint in this case sufficiently alleges facts that, if proven, could subject Napoli to potential liability under *Colon*. Amongst other things, the Complaint alleges that Napoli was aware that prison officials had assaulted Plaintiff, that Napoli ‘reviewed video tapes depicting the abuses against plaintiff’ (Complaint at ¶ 48), and then failed to intervene or otherwise prevent further abuses against Plaintiff. At the pleading stage, where the Court ‘must accept as true all of the factual allegations contained in the complaint,’ *Twombly*, 550 U.S. at 572, these allegations suffice to ‘raise a reasonable expectation that discovery will reveal evidence’ of the charged conduct, *Twombly*, 550 U.S. at 556, especially in light of the Supreme Court’s admonition that ‘a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.’ . . . What discovery will or will not reveal, and what those revelations could equate to at the summary judgment stage is simply a different question for a different day.”)

*Barnes v. Ross*, 926 F.Supp.2d 499, 509 (S.D.N.Y. 2013) (“Applying these principles here, Barnes’ allegations are insufficient to state an equal protection claim against Fischer. Barnes alleges that Fischer was aware that inmates at Sullivan were not receiving adequate mental-health treatment. But Barnes does not plead any facts suggesting that Fischer was aware that minority inmates were treated differently than white inmates. And even if Fischer did have knowledge of invidious discrimination by his subordinates, ‘purpose rather than knowledge is required’ for Barnes’ equal protection claim. . . There is no allegation in the complaint that Fischer participated directly in any discriminatory conduct, nor that he purposefully created or encouraged a discriminatory policy. The only other factual allegation concerning Fischer is that he responded to letters written on Barnes’ behalf—a fact that, even if true, would not demonstrate his personal involvement. . . Indeed, the Second Circuit held in *Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir.1997), that a prisoner failed to establish the requisite personal involvement of the Commissioner at that time by writing him letters, even though the Commissioner referred the first letter to a subordinate for investigation and responded directly to the second letter. . .The Court concludes that Barnes’ allegations that Fischer was aware of Barnes’ treatment and that Fischer received and responded in some manner to letters written on Barnes’ behalf are insufficient to plausibly allege that Fischer, Commissioner of DOCCS, had any personal involvement in Barnes’ medical treatment at Sullivan that would be sufficient to state an equal protection claim.”)

*Houston v. Schriro*, No. 11 Civ. 7374(HB), 2013 WL 4457375, \*11, \*12 (S.D.N.Y. Aug. 20, 2013) (“Here, Plaintiff alleges that Brown, Harris, Agro, Halyard–Saunders, and Wolf all received grievances, requests for hearings, or appeals regarding his constitutional claims for deprivation of adequate dental and foot care as well as his deprivation of low-sodium meals in violation of the First Amendment and RLUIPA. . . Regarding the destruction of his medication, Plaintiff claims that Padmore, Harris, Johnson, Schriro, Halyard–Saunders, and Wolf received his complaints. . . Plaintiff also claims that Hall received his complaints about inadequate foot care. . . And Plaintiff claims that Schriro received his complaints about his meals. . . Thus, all of these defendants had notice of these claims, yet according to Plaintiff failed to act. And none of these claims require a showing of retaliatory or discriminatory intent. Accordingly, even in light of *Iqbal*, it is inappropriate to dismiss Plaintiff’s claims against these defendants at this stage for lack of personal involvement. *See Grullon*, 2013 WL 3023464, at \*5–\*7 (“At the pleading stage, even if [Plaintiff] had no knowledge or information as to what became of his [grievance] after he sent it, he would be entitled to have the court draw the reasonable inference . . . that the [supervisor] in fact received the [grievance], read it, and thereby became aware of the alleged conditions of which [Plaintiff] complained.”). But the defendants to whom Plaintiff complained are not liable on claims requiring discriminatory or retaliatory intent where Plaintiff’s sole allegation against them is that they failed to respond to his grievances. Thus, Plaintiff’s surviving First Amendment retaliation claim as to the flooding of his cell is dismissed as to the above defendants. . . Similarly, Plaintiff fails to allege that any defendants, outside of Webb, Hall, Colon, and Agro, caused his strip searches in violation of the Fourth Amendment. Because his claims against the remaining defendants here also involve only their purported failure to respond to his grievances, I dismiss the strip search claims against the remaining defendants on this ground.”)

**Lee v. Graziano**, No. 9:12–CV–1018 (FJS/CFH), 2013 WL 4426447, \*6, \*7 (N.D.N.Y. Aug. 15, 2013) (“In this case, viewing the facts in the light most favorable to the plaintiff, Lee has alleged a plausible claim that Graziano was responsible for creating a blanket policy that precluded inmates with disabilities from receiving shower chairs or railings. As a superintendent, it was within Graziano’s purview to direct staff, formulate policies for the effective operation of Greene Correctional, and ensure that corrections staff comply with such policies. . . .Further, liberally construing Lee’s complaint, Correctional Officer John Doe # 1’s alleged statement of, ‘you don’t get any special treatment here at Greene Correctional Facility,’ creates a question of fact with respect to Greene Correctional’s policy for providing shower accommodations to inmates with disabilities and how that policy was articulated to employees and enforced. This, along with the lack of evidence at this time showing any shower accommodations for inmates with disabilities, which bolsters Lee’s liberally construed claims of an unconstitutional policy, leads to a recommendation denying Graziano’s motion without prejudice, allowing Graziano an opportunity to raise these arguments at a point when it can be analyzed based upon a more fully developed record.”)

**Liner v. Fischer**, No. 11 Civ. 6711(PAC)(JLC), 2013 WL 4405539, \*16 (S.D.N.Y. Aug. 7, 2013) (“This Court agrees with the majority view that ‘even after the U.S. Supreme Court’s decision in *Iqbal*, these categories supporting personal liability of supervisors still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.’[collecting cases]”)

**Smith v. Conway**, No. 10–CV–00824A(F), 2013 WL 4046290, \*10 (W.D.N.Y. Aug. 7, 2013) (“Although mere receipt of a letter is insufficient to establish the requisite personal involvement for § 1983 liability, personal involvement may be found where a supervisory official receives and acts on or undertakes an investigation of the inmate's complaint or grievance.”)

**Liner v. Fischer**, No. 11 Civ. 6711(PAC)(JLC), 2013 WL 3168660, \*7, \*8 (S.D.N.Y. June 24, 2013) (“The law in this Circuit before *Iqbal* was that a plaintiff could state a claim against a supervisory defendant in a § 1983 case where the plaintiff alleged that the defendant: (1) participated directly in the alleged constitutional violation; (2) failed to remedy a wrong after learning of it; (3) created a policy or custom under which the violation occurred, or allowed such a policy or custom to continue; (4) was grossly negligent in supervising subordinates who committed the alleged violation; or (5) was deliberately indifferent to ongoing unconstitutional acts. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995). The Second Circuit has not ruled as to *Iqbal*’s impact on the factors set forth in *Colon*. . . Moreover, courts in this Circuit are divided as to how many of the *Colon* factors survive in the wake of *Iqbal*. [comparing cases] This Court agrees with the majority view that ‘even after the U.S. Supreme Court's decision in *Iqbal*, these categories supporting personal liability of supervisors still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been

violated.”)

*Paul v. Bailey*, No. 09 Civ. 5784(RO), 2013 WL 2896990, \*4, \*5 (S.D.N.Y. June 13, 2013) (“Defendant is correct that supervisory officials cannot be held liable simply by virtue of their position of authority, but Plaintiff has alleged facts showing that Defendants had firsthand knowledge of Plaintiff’s medical condition and need for alternative footwear, but ignored it. Simply because they are not physicians does not mean that Defendants are not responsible for ensuring that prisoners receive proper footwear or may ignore a doctor’s orders. Accordingly, holding the *pro se* Plaintiff to a lower pleading standard, Plaintiff has alleged facts that create a plausible inference that Defendants Bailey and Batson demonstrated deliberate indifference to Plaintiff’s medical condition. At a later stage in this litigation, it may become clear that Plaintiff cannot adequately support his claims. But at this stage, under Federal Rule of Civil Procedure 12(b)(6), Plaintiff’s factual allegations must be accepted as true unless it is clear that it would be impossible for Plaintiff to establish a legally cognizable claim.”)

*Randle v. Alexander*, 960 F.Supp.2d 457, 466, 478, 479 (S.D.N.Y. 2013) (“Defendants Tracy Alexander and Robert Ercole were, respectively, a sergeant at and the Superintendent of Green Haven while Randle was incarcerated there. . . . Randle has alleged sufficient facts to give rise to a plausible inference that Alexander, but not Ercole, was personally involved in the purported constitutional violations. With respect to Alexander, the Complaint alleges that he participated directly in the conduct by filing a false report to his supervisors in order to ‘cover up the [Guard Defendants’] actions.’. . . Defendants assert in their Reply that a false report does not rise to the level of a constitutional violation . . . but the case they cite is inapposite. In *Boddie v. Schnieder*, 105 F.3d 857 (2d Cir.1997), the Second Circuit held that ‘a prison inmate has no general constitutional right to be free from being falsely accused in a misbehavior report.’. . . Here, however, Randle does not allege simply that Alexander stated he misbehaved when he had not, or even that Alexander retaliated against him by filing a false report, . . . but rather, that Alexander played a direct role in covering up an illegal forced fight within the prison. With respect to Ercole, Randle makes a number of allegations suggesting that the Guard Defendants’ behavior was a direct result of supervisory gross negligence that harbored an environment in which this type of forced fight was condoned. . . . However, these allegations constitute nothing more than recitations of the applicable standard without supporting factual context. For example, Randle alleges that Ercole, in his role as superintendent, ‘failed to train and/or supervise Sergeant Alexander and [the Guard Defendants] in how to properly transport inmates throughout the facility, how to deal with inmate altercations within the facility, the appropriate level of interaction the officers should have with the inmate population, and failed to supervise the officer’s interactions with the Green Haven population.’. . . And while the characteristics of the alleged forced fights—namely that many guards participated, they took place in an organized manner, and occurred in a particular area of the Green Haven facility—suggest that the Guard Defendants’ alleged antics may have been well known among certain subsets of guards at Green Haven, given the alleged cover-up of the incident between Johnson and Randle, it seems implausible that someone in Superintendent Ercole’s position would have been aware of the forced-fight practice. Accordingly, on both a failure to train

theory, and the theory that Ercole was grossly negligent in permitting the purported practice to continue on his watch, Randle’s claims against Ercole fail to survive Defendants’ motion to dismiss. And while it is true that Randle does allege that Ercole ignored inmate grievances and complaints—as discussed, such behavior is non-actionable in this context.”)

**Thompson v. Pallito**, 949 F.Supp.2d 558, 574, 575 (D. Vt. May 29, 2013) (“There has been considerable debate and disagreement within this circuit as to how much of the *Colon* test remains viable after *Iqbal*. The Second Circuit has not yet definitively stepped into the breach. . . . Some district courts within the Second Circuit have disallowed any § 1983 supervisory liability after *Iqbal*, effectively abrogating *Colon*. [collecting cases] Others have reaffirmed the continued vitality of all five *Colon* categories. [collecting cases] This latter approach seems to reflect the majority position. Here, because Thompson has not asserted intent-based claims—instead relying upon the ‘deliberate indifference’ standard of the Eighth and Fourteenth Amendments—and because no decision from the Second Circuit has explicitly overruled *Colon*, I follow the majority position within the district courts of this circuit and decline the DOC Defendants’ invitation to eliminate all forms of supervisory liability under § 1983. Accordingly, I apply the categories of personal involvement as established by the Second Circuit in *Colon*.”)

**Byrne v. Trudell**, No. 1:12-cv-245-jgm-jmc, 2013 WL 2237820, \*7, \*8 (D. Vt. May 21, 2013) (“Byrne also alleges that he sent Pallito a ‘detailed letter seeking relief from the abuse’ alleged in his case, and ‘the response was that he upheld their ruling.’ . . . ‘Numerous courts have held that merely writing a letter of complaint does not provide personal involvement necessary to maintain a § 1983 claim.’ . . . Further, if a defendant refers or forwards such a letter to another staff member, personal involvement still cannot be shown. . . . ‘If, however, the official does personally look into the matters raised in the letter, or otherwise acts on the prisoner’s complaint or request, the official may be found to be personally involved.’ . . . The precise contents of the alleged letter are unspecified, and it is unclear whether Pallito responded directly to it, referred the matter down the chain of command to a subordinate, or ignored it entirely. Byrne expressly claimed in his Complaint that ‘he’ affirmatively upheld the decision of those involved, perhaps a cryptic reference to Pallito’s personal, direct response to the letter. In any event, giving Byrne the benefit of the doubt as to this ambiguity, I conclude that Byrne has sufficiently alleged Pallito’s personal involvement in the claimed constitutional violations. . . . In the language of *Colon*, Pallito was a supervisory official who, ‘after being informed of the violation through a report or appeal, failed to remedy the wrong.’”)

**Powell v. Johnson**, No. 3:11-CV-1304 (MAD/DEP, 2013 WL 2181268, \*5 n.3 (N.D.N.Y. May 20, 2013) (“The issue of supervisory liability for a civil rights violation was addressed by the Supreme Court in *Iqbal*, 556 U.S. 662. The Second Circuit has yet to address the impact of *Iqbal* upon the categories of supervisory liability under *Colon*. Lower courts have struggled with this issue, and specifically whether *Iqbal* effectively calls into question certain prongs of the *Colon* five-part test for supervisory liability. . . . While some courts have taken the position that only the first and third of the five *Colon* categories remain viable and can support a finding of supervisory

liability [collecting cases], others disagree and conclude that whether any of the five categories apply in any particular case depends upon the particular violations alleged and the supervisor's participatory role [collecting cases].")

**Wynder v. McMahon**, No. 99 Civ. 772(ILG)(CLP), 2013 WL 1759968, \*10 n.16 (E.D.N.Y. Apr. 24, 2013) ("In its prior Order, the Court cited the then-accepted standard for supervisory liability in a § 1983 action, where a plaintiff could establish liability through one of five ways under *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995). . . It then determined that the Complaint sufficiently alleged two of those five ways, direct participation in the violation and creating a policy under which the violation occurred. . . Since that Order was issued in 2008, the Supreme Court changed the standard for supervisory liability in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). After *Iqbal*, courts in this circuit have not reached a consensus on the extent to which *Iqbal* altered the five *Colon* factors and the Second Circuit has not yet addressed the issue. See *Reynolds v. Barrett*, 685 F.3d 193, 205 n. 14 (2d Cir.2012). However, courts in this circuit have generally agreed that in § 1983 intentional discrimination cases, such as Mr. Wynder's race-based discrimination action, supervisory liability still may be established through those two ways."), *aff'd*, 565 F. App'x 11 (2d Cir. 2014).

**Kucera v. Tkac**, No. 5:12-cv-264, 2013 WL 1414441, \*5 (D.Vt. Apr. 8, 2013) ("[B]ecause Plaintiff has not asserted intent-based discrimination claims, but instead relies on claims under the Fourth and Fourteenth Amendment, the court examines the Amended Complaint to determine whether Plaintiff has adequately pled supervisory liability against Officers Cutting and Roberts under any of the five *Colon* factors.")

**Zappulla v. Fischer**, No. 11 Civ. 6733(JMF), 2013 WL 1387033, \*9, \*10 (S.D.N.Y. Apr. 5, 2013) ("Unless and until the Supreme Court or Second Circuit rule otherwise, this Court agrees with those courts that have held that *Iqbal* should not be read to invalidate the *Colon* categories altogether. The *Iqbal* Court specifically noted that '[t]he factors necessary to establish a [constitutional] violation will vary with the constitutional provision at issue.' . . . 'It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected [in *Iqbal* ] the argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'" . . . Thus, where a plaintiff has alleged a claim that does not include a discriminatory intent element, such as a claim under the Eighth Amendment for denial of medical treatment, the *Colon* test should still apply to the extent that it is 'consistent with the particular constitutional provision alleged to have been violated.' . . . More specifically, if a plaintiff alleges that a constitutional violation is ongoing, and that a defendant, after being informed of a violation through a report or appeal, failed to remedy the wrong, the plaintiff's claim against that defendant should not be dismissed under Rule 12(b)(6). . . . That is the case here. The gravamen of Plaintiff's remaining claim is that Defendants violated his constitutional rights by depriving him of adequate medical care following surgery on his right elbow. Liberally construed, the Complaint further alleges that Defendant Lee, after being informed of that ongoing violation through the grievance process, failed to remedy that wrong. Those

allegations fall squarely within the second *Colon* category and, in the circumstances of this case, are adequate to state a claim against Lee.”)

**Watson v. Wright**, No. 08–CV–00960(A)(M), 2013 WL 1791079, \*7 (W.D.N.Y. Mar. 26, 2013) (I agree ‘with the apparent majority view that where, as here, the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply.’ *Shepherd v. Powers*, 2012 WL 4477241, \*10 (S.D.N.Y.2012).”)

**Butler v. Suffolk County**, No. 11–CV–2602(JS)(GRB), 2013 WL 1136547, \*10 n.8 (E.D.N.Y. Mar. 19, 2013) (“The Second Circuit in *Colon* actually listed five ways that a plaintiff can establish supervisory liability—not just the two described above—including failure to remedy a wrong after being informed of the violation, grossly negligent supervision of subordinates who committed the wrongful acts, and deliberate indifference to the rights of inmates. . . However, the ‘continuing vitality’ of these additional methods has ‘engendered conflict within our Circuit’ due to the Supreme Court’s decision in *Iqbal. Reynolds v. Barrett*, 685 F.3d 193, 206 (2d Cir.2012). In *Iqbal*, the Supreme Court rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’. . Although the Second Circuit has yet to determine the effects of *Iqbal* on the *Colon*-factors, the weight of authority among the district courts in the Eastern District of New York suggests that only two of the *Colon*-factors—direct participation and the creation of a policy or custom—survive *Iqbal*. [collecting cases] This Court agrees and, thus, will limit its discussion to only those two factors.”)

**Loccenitt v. City of New York**, No. 12 Civ. 948(LTS)(MHD), 2013 WL 1091313, \*5 & n.8 (S.D.N.Y. Mar. 15, 2013) (“While the Supreme Court in *Iqbal* may have narrowed the viability of some of the *Colon* predicates for supervisory liability, the two predicates that are relevant here have been held by courts in this district to have survived *Iqbal*. . . Plaintiff states that Defendant Hilda J. Simmons ‘is the highest ranking member of the D.O.C. [and] was informed of the religious violations and failed to remedy the issue’ and that she ‘is also responsible of [sic] the supervision, oversight and religious service management.’. . Plaintiff states that Commissioner Dora Schriro is liable because she is ‘responsible for the policy, practice, supervision, implementation, and conduct’ of all D.O.C. personnel and their compliance with the civil rights laws and ‘is also responsible for supervisor liability for failure to remedy the situation after being informed of the [ ] complaint.’. . These two allegations satisfy the requirement for pleading supervisory liability since they support the inference that, as supervisors, these two Defendants created or permitted the continuance of the policy or custom under which the wrongs occurred and, after being informed of Plaintiff’s alleged civil rights violations, failed to remedy ongoing wrongs. As for Defendants Kathleen Mulvey, Rose Argo, Deputy Warden A. Baily, Deputy Warden K. Williams, Captain L. Smith and Captain H. Medina, Plaintiff merely lists these Defendants as individuals who were ‘made aware of the violations,’ and ‘failed ... to remedy the situation.’. . Plaintiff does not suggest that they were directly involved in the alleged violations, or in the creation of a policy or custom

that permitted such alleged violations, or had any authority or ability to prevent the violations from occurring. Plaintiff's general allegations against these lower-level individual Defendants are not sufficient to demonstrate a basis for subjecting them to personal liability under Section 1983.")

***Inesti v. Hogan***, No. 11 Civ. 2596(PAC)(AJP), 2013 WL 791540, \*12 & n.23 (S.D.N.Y. Mar. 5, 2013) (R & R) (“Although the Second Circuit has not weighed in on what remains of *Colon* after *Iqbal*, several decisions in this district have concluded that by specifically rejecting the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution,’ . . . *Iqbal* effectively nullified several of the classifications of supervisory liability enunciated by the Second Circuit in *Colon*. . . While *Colon* permitted supervisory liability in situations where the supervisor knew of and acquiesced in a constitutional violation committed by a subordinate, these post-*Iqbal* district court decisions reason that *Iqbal*’s ‘active conduct’ standard imposes liability only where that supervisor directly participated in the alleged violation or had a hand in creating a policy or custom under which the unconstitutional practices occurred. These decisions may overstate *Iqbal*’s impact on supervisory liability. *Iqbal* involved allegations of intentional discrimination. . . Where the alleged constitutional violation involved ‘invidious discrimination in contravention of the First and Fifth Amendments,’ *Iqbal* held that ‘plaintiff must plead and prove that the defendant acted with discriminatory purpose,’ whether the defendant is a subordinate or a supervisor. . . It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’ . . . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon* may still apply. [citing cases & Michael Avery et al., *Police Misconduct: Law & Litigation* § 4:5 (2009) (discussing the impact of *Iqbal* on supervisor liability in § 1983 and *Bivens* actions)]”)

***Aguilar v. Connecticut***, No. 3:10-cv-1981 (VLB), 2013 WL 657648, \*5, \*6 (D. Conn. Feb. 22, 2013) (“In the present case, the Plaintiff essentially asks the Court to ignore the fact that the Plaintiff has not asserted, much less offered facts, of an underlying constitutional deprivation, He asks the court to focus on whether the Warden’s conduct satisfies any of the five *Colon* factors; however, a supervisor can only be liable where his or her subordinate engaged in unconstitutional conduct. The Plaintiff has failed to identify Whidden’s subordinate and has failed to offer facts as to the purported unconstitutional conduct in which that person engaged which resulted in the Plaintiff and his assailant being placed in the same cell. He has submitted no evidence of the identity or the conduct of the subordinate. Consequently, the Plaintiff has failed to establish that there was an underlying constitutional deprivation. This is particularly true in the context of a failure to protect claim under the Eighth Amendment, which the Supreme Court has made clear involves a subjective inquiry and analysis. . . . In order to find an underlying violation of the Eighth Amendment in the present case, the Plaintiff would have had to identify the subordinate official who made the cell placement and further provide evidence as to the actual knowledge of risk by

that subordinate official. Because the Plaintiff has failed to identify the subordinate official nevertheless demonstrate that this official was both aware of facts from which an inference of an excessive risk to inmate health or safety could be drawn and did draw that inference, the Court cannot determine whether the Plaintiff's Eighth Amendment rights were violated. As discussed above in the absence of a finding that there is an underlying constitutional violation, a supervisory official cannot be liable under § 1983. Therefore where there is no underlying constitutional deprivation by a subordinate, the claim against the supervisor should be dismissed. . . The Court then need not address whether Whidden's conduct satisfied any of the *Colon* factors as the Plaintiff has failed to demonstrate an underlying constitutional deprivation in the first instance.”)

*A'Gard v. Perez*, 919 F.Supp.2d 394, 407 (S.D.N.Y. 2013) (“The Second Circuit Court of Appeals has not addressed the question directly, but it has indicated that at least some of the *Colon* factors other than direct participation remain viable. *See Rolon v. Ward*, 345 F. Appx 608, 611 (2d Cir.2009) (“A supervisory official personally participates in challenged conduct not only by direct participation, but by (1) failing to take corrective action; (2) creation of a policy or custom fostering the conduct; (3) grossly negligent supervision, or deliberate indifference to the rights of others.”); *see also Scott v. Fischer*, 616 F.3d 100, 10809 (2d Cir.2010).”)

*Jean-Laurent v. Lane*, No. 9:11–CV–186 (NAM/TWD), 2013 WL 600213, \*15, \*16 (N.D.N.Y. Jan. 24, 2013) (“Supervisory personnel may be held liable under § 1983 for ‘fail[ure] to remedy a violation after learning of it through a report or appeal.’ *Colon*, 58 F.3d at 873. However, mere receipt of a report or complaint or request for an investigation by a prison official is insufficient to hold the official liable for the alleged constitutional violations. . . . ‘On the other hand, where a supervisory official receives and acts on a prisoner’s grievance (or substantively reviews and responds to some other form of inmate complaint), personal involvement will be found under the second *Colon* prong: the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong.’. . . Allegations of awareness on the part of a correctional facility superintendent of an ongoing failure by prison officials to provide a plaintiff with medical treatment for injuries, coupled with failure to remedy the wrong after learning of it through a grievance procedure have been found to be sufficient to survive a Rule 12(b) (6) motion. . . However, the naked assertion in Plaintiff’s Complaint that he complained to Defendants Barkley, Hulihan, and Lindquist that he was being deprived of reasonable and adequate dental care, and that his complaints were found unsubstantiated is simply too lacking in factual detail to show that Plaintiff is entitled to relief. . . Plaintiff’s Complaint contains absolutely no factual enhancement regarding the manner in which complaints were conveyed to each of the defendants, the content of the complaints, the timing of the complaints, or the responses of each of those Defendants to those complaints. Therefore, I recommend that Defendants Barkley, Hulihan, and Lindquist’s motion to dismiss Plaintiff’s Eighth Amendment medical indifference claim against them be granted and that Plaintiff be granted leave to amend.”)

*Firestone v. Berrios*, 42 F.Supp.3d 403, 416-18 (E.D.N.Y. 2013) (“[T]he Plaintiff contends that the Amended Complaint plainly alleges that Dr. Kendall’s decisions and actions (or lack thereof)

caused the violation of Firestone’s constitutional rights. . . She asserts that under the *Colon* prongs, unfortunately embracing this now abrogated standard, her allegations against Dr. Kendall easily satisfy prongs (2), (4) and (5). However, as set forth above, only the first and part of third *Colon* categories appears to pass *Iqbal*’s muster, especially in the case of intent-based constitutional claims, which is what the Court faces here. Indeed, the cases that the Plaintiff cites in support of her arguments as to Dr. Kendall’s personal involvement all pre-date *Iqbal*. Therefore, the Court looks to the factual allegations contained in the Amended Complaint to ascertain whether the Plaintiff has stated a claim for supervisory liability under Section 1983 post-*Iqbal*. The baseline inquiry is what precisely the constitutional violation is that the Plaintiff is alleging. Certainly, the sexual harassment by Berrios is alleged to constitute disparate treatment based on gender in violation of the Equal Protection Clause. . . With regard to Dr. Kendall, the Plaintiff alleges that she had actual knowledge or should have known of the repeated sexual harassment of the Plaintiff by Berrios; that she failed to take timely corrective or remedial action, thereby acquiescing in the severe and pervasive sexual harassment; and that because Dr. Kendall knew of the harassment that the Plaintiff was subjected to and knew of prior improper sexual conduct by Berrios to other female staff members, this constitutes deliberate indifference to the Plaintiff’s constitutional rights. The Plaintiff references the sexual harassment policy that her supervisor, Dr. Kendall, allegedly ignored and maintains that this would have prevented constitutional violations. In addition, she offers details regarding how and why Dr. Kendall should have or did know about the alleged violations. However, despite the Plaintiff’s attempts to tie Dr. Kendall’s actions or inactions into the sexual harassment, at its core the Plaintiff’s claim for supervisory liability is one for failure to remedy a wrong after it has been reported. This is undoubtedly insufficient in the aftermath of *Iqbal*. . . Thus, the Plaintiff has not sufficiently alleged direct personal involvement. The Supreme Court has plainly rejected the essence of the Plaintiff’s allegations against this particular defendant, which is that a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution. If the Plaintiff can allege that Dr. Kendall was directly involved in the constitutional violation or was responsible for the policy or custom under which unconstitutional practices occur, then a claim for damages under Section 1983 may lie. . . However, even when viewing the Amended Complaint in the best light for the Plaintiff, the Court cannot discern these contentions from the relevant pleading. Therefore, the Section 1983 claim against the Defendant Dr. Kendall is dismissed without prejudice.”)

***Smolen v. Fischer***, No. 12 Civ. 1856(PAC)(AJP), 2012 WL 5928282, \*5, \*6 (S.D.N.Y. Nov. 27, 2012) (“Although the Second Circuit has not weighed in on what remains of *Colon* after *Iqbal*, several decisions in this district have concluded that by specifically rejecting the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution,’ . . . *Iqbal* effectively nullified several of the classifications of supervisory liability enunciated by the Second Circuit in *Colon*. . . While *Colon* permitted supervisory liability in situations where the supervisor knew of and acquiesced in a constitutional violation committed by a subordinate, these post-*Iqbal* district court decisions reason that *Iqbal*’s ‘active conduct’ standard imposes liability only where that supervisor directly participated in the

alleged violation or had a hand in creating a policy or custom under which the unconstitutional practices occurred. These decisions may overstate *Iqbal*'s impact on supervisory liability. *Iqbal* involved allegations of intentional discrimination. . . Where the alleged constitutional violation involved 'invidious discrimination in contravention of the First and Fifth Amendments,' *Iqbal* held that 'plaintiff must plead and prove that the defendant acted with discriminatory purpose,' whether the defendant is a subordinate or a supervisor. . . It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.' . . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon* may still apply.[citing cases and Michael Avery et al., *Police Misconduct: Law & Litigation* § 4:5 (2009)]")

***Johnson v. Pallito***, No. 2:12–CV–138, 2012 WL 6093804, \*5-\*7 (D. Vt. Nov. 26, 2012) (R & R adopted by 2012 WL 6093801 (D. Vt. Dec 7, 2012) ("As noted earlier, this circuit's standard for supervisory liability in a § 1983 action is governed by the principles set forth in *Colon*. . . The Supreme Court's decision in *Iqbal v. Ashcroft* potentially altered this standard when the majority rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.' . . Many courts in this circuit post-*Iqbal* have struggled to determine how much of the *Colon* standard remains intact. . . Some courts interpret the decision in *Iqbal* to considerably limit the *Colon* standard [citing cases], while others caution against such an interpretation [citing cases]. The latter cases focus on *Iqbal*'s reliance upon the 'constitutional provision at issue' because '[i]t was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.' . . Put differently, *Iqbal* instructs the court to (1) look at the elements of the claim at issue and (2) determine whether the claim requires a showing of discriminatory intent. If the claim does *not* require a showing of discriminatory intent then the *Colon* analysis may still apply. Conversely, if the claim does require discriminatory intent as an element then an *Iqbal*-limited standard may apply. . . The Court should reach an analogous conclusion here. Construing the allegations most favorably to Plaintiff, I conclude that he has failed to allege sufficient personal involvement with respect to his equal protection and due process claims. Both these claims—similar to those brought in *Iqbal*—require discriminatory intent as an essential element. *See Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir.1995) (holding that an equal protection claim requires 'purposeful discrimination'); *see also Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir.2012) (explaining a due process claim requires 'a deliberate decision to deprive [an inmate] of his life, liberty, or property'). Consequently, Defendant, as Commissioner of the Department of Corrections, cannot be held liable for failing to remedy a wrong on the basis that he was potentially informed of the violation through Plaintiff's grievance appeals. On the other hand, Eighth Amendment violations do not require discriminatory intent as an element, . . . and,

therefore, supervisors may still be found liable for failure to act after notification of wrongdoing through a grievance appeal, *see Colon*, 58 F.3d at 87.”)

***Barksdale v. Frenya***, No. 9:10–CV–00831 (MAD/DEP), 2012 WL 4107805, \*5, \*6 (N.D.N.Y. Sept. 19, 2012) (“Within this circuit there is a severe division among the district courts as to whether mere review by a DOCCS official of an appeal from a disciplinary hearing, which an inmate claims to have been infected by due process violations, can lead to personal liability on the part of that individual. . . . However, ‘the Second Circuit has, on at least one occasion, allowed a due-process claim to proceed against an upper-level prison official based on the allegation that the official “affirmed [plaintiff’s disciplinary] conviction on administrative appeal.”’ . . . In *Rodriguez v. Selsky*, I followed those cases holding that a supervisory official’s affirmance ‘of a constitutionally defective disciplinary determination at a time when the inmate is still serving his or her disciplinary sentence, and the violation can therefore be abated, falls within the *Colon* factors articulated in the Second Circuit for informing the supervisory liability analysis.’ . . . In my view, those cases concluding that a plaintiff’s allegations that a supervisory defendant reviewed and upheld an alleged constitutionally suspect disciplinary determination are enough to show his or her personal involvement in the alleged violation appear to be both better reasoned and more consonant with the Second Circuit’s position regarding personal involvement. . . . In this case the question of which line of supervisory personal liability cases should be followed is not outcome-determinative. The record reflects that plaintiff’s appeal of his disciplinary sentence to the Commissioner’s office was reviewed by Norman Bezio. There is no evidence of defendant Fischer’s involvement in the review of that disciplinary determination. In the absence of such evidence, defendant Fischer is entitled to dismissal of plaintiff’s claims against him.”)

***Ramos v. Lajoie***, No. 3:11cv679(DJS), 2012 WL 4056727, \*1-3 (D. Conn. Sept. 13, 2012) (“For many years it was well settled in this circuit that there were five ways to demonstrate the personal involvement of a supervisory defendant: (1) the defendant directly participated in the alleged constitutional violation, (2) after he was informed of the violation through a report or appeal, the supervisory defendant failed to remedy the wrong, (3) the supervisory defendant created a policy or custom pursuant to which the constitutional violation occurred or permitted such a policy or custom to continue, (4) the defendant was grossly negligent in supervising the subordinates who committed the wrongful acts, or (5) the defendant was deliberately indifferent to the plaintiff’s rights by failing to act on information that unconstitutional acts were occurring. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995). In addition, the plaintiff must demonstrate an affirmative causal link between the supervisory official’s failure to act and his injury. . . . The decision in *Iqbal* caused many courts to question this issue. . . . Since *Iqbal*, some districts courts within this circuit have determined that not all five of *Colon*’s categories of conduct that may give rise to supervisory liability remain viable. [citing cases] Other district courts restrict application of *Iqbal* to cases involving discriminatory intent. . . . The Second Circuit has not yet addressed this issue. This Court need not determine whether *Iqbal* applies in all cases or just those involving discriminatory intent, because the allegations against the defendants Lajoie, Quiros and Butkiewicz are insufficient to survive dismissal even under the *Colon* standard. The plaintiff alleges that he did

not tell defendants Lajoie, Quiros or Butkiewicz about the incident until after it was over. Thus, they were not personally involved in and were not aware of any facts that would have enabled them to prevent the incident. . . Defendants Lajoie, Quiros and Butkiewicz were notified of the incident through the institutional administrative remedy process. The receipt of a letter of complaint or an inmate grievance is insufficient to establish personal involvement of supervisory officials. . . In addition, the plaintiff has alleged no facts suggesting that the incident was other than an unauthorized act by defendant Trifone. Thus, none of the other *Colon* categories apply.”)

***Gabriel v. County of Herkimer***, 889 F.Supp.2d 374, 402, 403 (N.D.N.Y. 2012) (“There is some debate as to whether all five *Colon* categories of supervisor liability remain available after the United States Supreme Court’s decision in *Ashcroft v. Iqbal*. . . Plaintiff’s allegations against these policymaker defendants fit squarely within the third *Colon* category permitting liability based on a supervisor’s creation of ‘a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom.’ *Colon*, 58 F.3d at 873. Plaintiff claims that Sheriff Farber, Cpt. McGrail, and Lt. Coddington promulgated and allowed unconstitutional policies and customs to occur and continue, such as the medical officer policy and the under staffing of nurses at the jail. Sheriff Farber testified that he does not supervise the jail, and his day-to-day duties as County Sheriff do not involve the policies and procedures of the jail. According to him, Cpt. McGrail develops policies and procedures for the jail. Cpt. McGrail testified that he is responsible for the policies and procedures of the jail, and that Sheriff Farber reviews and signs off on those policies. He also testified that Sheriff Farber is responsible for the contract between the County and Little Falls Hospital. Further, as part of their role through that contract, N.P. Macri and Dr. Handy advise the County regarding jail medical policies and procedures. Then, after those policies are signed off on by Dr. Handy and Sheriff Farber, Cpt. McGrail and his staff implement them at the jail. Because there is testimony regarding both Sheriff Farber and Cpt. McGrail’s involvement in promulgating and implementing the allegedly unconstitutional policies and practices at the jail, summary judgment is inappropriate and defendants’ motion to dismiss Sheriff Farber and Cpt. McGrail will be denied.”)

***Solar v. Lennox***, 2012 WL 3929936, \*13 (N.D.N.Y. July 16, 2012) (“In Solar’s deposition testimony, he contends that he personally told Rowe about various medical accommodation issues on at least six occasions, three of which related to missed meals that were not provided to Solar while he was medically restricted to eating in his cell. Viewing the facts in the light most favorable to Solar, such repeated, direct conversations regarding an alleged, repeating constitutional violation is sufficient to establish personal involvement. *See Harnett v. Barr*, 538 F.Supp.2d 511, 524 (N.D.N.Y.2008) (concluding that a distinction lies between a supervisory official that is ‘confronted with an alleged violation that has ended or ... is ... a continuing violation,’ as with the latter the supervisory official is deemed ‘personally involved if he is confronted with a situation that he can remedy directly.’) (internal quotation marks and citations omitted).”)

***Smolen v. Fischer***, No. 12 Civ. 1856(PAC)(AJP), 2012 WL 3609089, \*7-\*9 (S.D.N.Y. Aug. 23, 2012) (“Although the Second Circuit has not weighed in on what remains of *Colon* after *Iqbal*,

several decisions in this district have concluded that by specifically rejecting the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution,’ . . . *Iqbal* effectively nullified several of the classifications of supervisory liability enunciated by the Second Circuit in *Colon*. . . . These decisions may overstate *Iqbal*’s impact on supervisory liability. *Iqbal* involved allegations of intentional discrimination. . . . Where the alleged constitutional violation involved ‘invidious discrimination in contravention of the First and Fifth Amendments,’ *Iqbal* held that ‘plaintiff must plead and prove that the defendant acted with discriminatory purpose,’ whether the defendant is a subordinate or a supervisor. . . . It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’ . . . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon* may still apply. [collecting cases and citing to Michael Avery et al., *Police Misconduct: Law & Litigation* § 4:5 (2009) (discussing the impact of *Iqbal* on supervisor liability in § 1983 and *Bivens* actions) in footnote] . . . . Since Smolen’s claim does not require a showing of discriminatory intent, but instead relies on the deliberate indifference standards of the Eighth Amendment, the *Colon* factors apply in determining defendants’ personal involvement. . . . Based on Smolen’s allegations that Fischer and Perez had knowledge of ‘the hazard of [the storm] windows’ and lack of ‘cell window knobs’ from previous fires . . . , they could be found to be personally involved in the alleged violations under *Colon*’s second factor (failure to remedy the wrong after being informed of the violation through a report or appeal) and fifth factor (exhibition of deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring). . . . Accordingly, assuming the truth of Smolen’s factual allegations of personal involvement of Fischer and Perez, as the Court must in considering a motion to dismiss, Fischer and Perez’s motion to dismiss Smolen’s claims for lack of personal involvement should be **DENIED.**”)

***Malik v. City of New York***, No. 11 Civ. 6062(PAC)(FM), 2012 WL 3345317, \*15, \*16 (S.D.N.Y. Aug. 15, 2012) (“Malik alleges in conclusory terms that Superintendent Agro knew that he was provided with insufficient footwear. . . . The only factual basis for this allegation, however, is that Malik wrote Superintendent Agro a letter regarding his grievances. . . . Malik also has failed to allege that Superintendent Agro created or allowed the continuance of an unconstitutional policy or custom, or that she was grossly negligent in supervising subordinates who committed the allegedly wrongful acts. . . . For these reasons, Malik’s claims against Superintendent Agro must be dismissed.”)

***Beck v. Coats***, No. 5:11–CV–420, 2012 WL 2990017, \*4 (N.D.N.Y. July 19, 2012) (“Whether all five *Colon* bases for supervisor liability remain available in light of the United States Supreme Court’s decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77, 129 S.Ct. 1937, 1948–49 (2009), is subject to debate in this circuit. [collecting cases] Even if all five bases of supervisory liability

survived *Iqbal*, plaintiff has failed to allege sufficient personal involvement on the part of defendant Morey. There is nothing in the complaint to suggest Morey was directly involved in the conduct that allegedly violated Beck's constitutional rights, knew that Beck's rights were being violated, created the ordinance at issue, or was grossly negligent in his supervision. Plaintiff alleges that it was Coats who asked him to remove his displays, sent him letters and notices, and signed the summons accusing him of violating section 316.7. There are no allegations implicating Morey in any of this conduct. In fact, plaintiff specifically notes: "I am charging Glenn Morey for he is Gary L. Coats [sic] supervisor." Compl. at 5. This is insufficient to hold Morey liable under § 1983, and he will therefore be dismissed from this action.")

***Stresing v. Agostinoni***, No. 11-CV-967S, 2012 WL 2405240, at \*4, \*5 (W.D.N.Y. June 25, 2012) ("Following *Iqbal*, there has been some division in the district courts of this Circuit over whether all five of the Colon factors are still applicable. . . Some courts have interpreted the Supreme Court's directive as imposing individual liability under § 1983 on a supervisor for only his or her *affirmative* actions, and precluding liability based on the failure to act. . . Other courts have determined that *Iqbal* allows for flexibility, in that 'the degree of personal involvement varies depending on the constitutional provision at issue,' and therefore 'the five Colon categories for personal liability of supervisors may still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.' . . The Second Circuit has not yet explicitly recognized this split among the district courts. In a recent unpublished decision, however, the Court quoted *Iqbal*'s pleading requirement with respect to government officials, but nonetheless favorably cited *Colon* in determining that dismissal of the amended complaint was warranted where, inter alia, there was 'no allegation that the [defendant] "failed to remedy the wrong" once being informed of [the plaintiff's] assault.' *LaMagna v. Brown*, No. 11-488-pr, 2012 WL 1109696, \*1-2 (2d Cir. Apr.4, 2012), *quoting Colon*, 58 F.3d at 873. . . As such, it appears that a supervisor may still be held liable for his or her own nonfeasance as well as malfeasance.")

***Inesti v. Hicks***, No. 11 Civ. 2596(PAC)(AJP), 2012 WL 2362626, at \*11 & n. 20 (S.D.N.Y. June 22, 2012) (R&R) ("It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.' . . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon* may still apply." [citing Michael Avery et al., *Police Misconduct: Law & Litigation* § 4:5 (2009) (discussing the impact of *Iqbal* on supervisor liability in § 1983 and *Bivens* actions)], *accepted and adopted in entirety by Inesti v. Hagan*, 2012 WL 3822224 (S.D.N.Y. Sept. 4, 2012).

***White v. Schriro***, No. 11 Civ. 5285(GBD)(MHD), 2012 WL 1414450, at \*7 (S.D.N.Y. May 7, 2012) ("The Supreme Court recently held in *Iqbal*, 129 S.Ct. at 1949, that a supervisor's mere knowledge of a subordinate's discriminatory purpose was insufficient to establish that the

supervisor had a discriminatory intent. Following *Iqbal*, courts in this Circuit have generally concluded that ‘where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply.’”)

***Fountain v. City of New York***, No. 10 Civ. 7538(BSJ)(KNF), 2012 WL 1372148, at \*3, \*4 (S.D.N.Y. Apr. 18, 2012) (“The Second Circuit has yet to rule on the question of whether any or all of the *Colon* criteria survive the Supreme Court’s ruling on *Iqbal*, and in the interim, courts in this district have been divided as to what forms of supervisory conduct can give rise to § 1983 liability. [citing cases] The Court finds that, with respect to Bailey, it need not reach the question of whether the five factors elucidated in *Colon* survive *Iqbal* as the Amended Complaint fails to allege any involvement whatsoever by this Defendant. The Amended Complaint’s only reference to Bailey’s involvement is to state that Bailey, amongst others, failed ‘to take disciplinary or other action to curb the known pattern of physical abuse of inmates by defendants Dipierr, Coverington and other rogue correction officers ...’ The Amended Complaint does not provide any further facts, however, to support its claim that Bailey knew about a ‘pattern of physical abuse.’ Nor does the Amended Complaint make any allegation that Bailey was aware of the alleged incident, or that he supervised any of the defendants who were personally involved. In light of these pleading deficiencies, the Court finds that the Amended Complaint fails to sufficiently state a claim under § 1983 against Bailey for the purposes of surviving a motion to dismiss. Turning next to Schriro, the Court finds that the Amended Complaint has sufficiently plead a cause of action pursuant to § 1983 against this defendant in order to survive a motion to dismiss. The Amended Complaint contains the allegation that: ‘Plaintiff wrote a complaint to Dora Shiro (sic); Comm of Corr, explaining his version of the assault, requesting an investigation be done and disciplinary action be taken against the rogue correction employees, and I never received a response.’. The Court finds that this allegation sufficiently pleads supervisory involvement on the part of Schriro under either the second or fifth factors of the *Colon* analysis, factors which this Court regards as relevant in its consideration of the allegations in the instant action. In reaching this determination, this Court joins courts in this district which have held that ‘the five *Colon* categories for personal liability of supervisors may still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.’”)

***Bouche v. City of Mount Vernon***, No. 11 Civ. 5246(SAS), 2012 WL 987592, at \*8 (S.D.N.Y. Mar. 23, 2012) (“ ‘Accordingly only the first and third *Colon* factors have survived the Supreme Court’s decision in *Iqbal*.’” citing *Bellamy*)

***Bertuglia v. City of New York***, 839 F.Supp.2d 703, 720-23 (S.D.N.Y. 2012) (“[C]ourts in this Circuit are divided over the question of how many of the so-called *Colon* factors survive in the wake of *Iqbal*. [citing cases] Our Court of Appeals has not addressed the question directly yet, but it has indicated that at least some of the *Colon* factors other than direct participation remain viable. See *Rolon v. Ward*, 345 F. App’x 608, 611 (2d Cir.2009) (“A supervisory official personally participates in challenged conduct not only by direct participation, but by (1) failing to take corrective action; (2) creation of a policy or custom fostering the conduct; (3) grossly negligent

supervision, or deliberate indifference to the rights of others.”); *see also Scott v. Fischer*, 616 F.3d 100, 10809 (2d Cir.2010). . . The plaintiffs allege, with regard to the PA supervisory defendants, that PA defendants Schaffler, Ferrone, and D’Aleo at all times acted ‘at their direction’ ‘and/or with their express approval.’ . . This conclusory, formulaic language, standing alone, is not entitled to the assumption of truth. . . The only other allegations against the supervisory defendants are that, after Van Etten, in his capacity as Inspector General, received a complaint by Bertuglia against the Port Authority relating to the Port Authority’s bidding process, and in retaliation for that complaint, ‘Van Etten, along with ... Nestor and ... Kennedy, as well as defendants [Schaffler] and Ferrone, decided to selectively investigate and prosecute [the plaintiffs], leading to this matter being referred to the New York County District Attorney’s Office and ADA Ruzow.’ . . Neither the Amended Complaint, nor any other documents relied on by it, contain further facts regarding the specifics of this decision or the manner in which the PA supervisory defendants acted to execute it, or the nature of the supervisory defendants supervision or knowledge of the primary PA defendants. The issue is whether those allegations can support the remaining § 1983 claims against the supervisory defendants under any theory of supervisory liability. The Court will address in turn the remaining § 1983 claims with reference to both the supervisory and primary PA defendants. . . There are no specific allegations that the supervisory defendants themselves provided false information to the ADA defendants, or indeed that they knew that information provided by subordinates was false; that they created a policy or practice of providing such false information; that they were grossly negligent in supervising the primary PA defendants with regard to their providing the false information; or that they had the opportunity to stop what they knew was a false arrest and did not do so. . . Accordingly, the motion to dismiss the false arrest claim as against the supervisory PA defendants is granted.”)

*Hamilton v. Fisher*, Civ. No. 9:10–CV–1066 (MAD/RFT), 2012 WL 987374, at \*17 n.17 (N.D.N.Y. Feb. 29, 2012) (“Several lower courts have struggled with the impact *Ashcroft v. Iqbal* . . . had upon *Colon*, and specifically whether *Iqbal* calls into question certain prongs of the *Colon* five-part test for supervisory liability. *See Sash v. United States*, 674 F.Supp.2d 531, 543 (S.D.N.Y.2009) (collecting cases). Because the Second Circuit has not yet issued a decision settling this matter, *Colon* remains good law.”)

*Hodge v. Sidorowicz*, No. 10 Civ. 428(PAC)(MHD), 2012 WL 6778524, at \*15, \*16 & n. 15 (S.D.N.Y. Dec. 20, 2011) (“Recently. . . the scope of what qualifies as ‘personal involvement’ by a supervisor has come into question by virtue of a 2009 decision in which the Supreme Court held, in a pleading context, that ‘[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’ . . The Second Circuit has not yet addressed how *Iqbal* affects the five categories of conduct that give rise to supervisory liability under *Colon*. However, because *Iqbal* specifically rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution,’ . . . several decisions in this district have held that *Iqbal* has nullified most of the longstanding *Colon* factors. [citing *Bellamy* and *Newton*] These courts have concluded that ‘[o]nly the first and part of

the third *Colon* categories pass *Iqbal*'s muster,' and that '[t]he other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated,' because only the first and third categories sufficiently allege personal involvement to permit supervisory liability to be imposed after *Iqbal*. . . We disagree with this narrow interpretation of *Iqbal*, as have a number of other courts.[citing cases] We believe, as observed in *Sash v. United States*, 674 F.Supp.2d 531 (S.D.N.Y.2009), that '[i]t was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.' . . . Thus, as in the present case, where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply. . . Hence we look to earlier Second Circuit precedent that applies the tests of deliberate indifference or gross negligence to assess supervisory liability, a standard that demands a showing of actual or constructive notice by the supervisory defendant of constitutional torts committed by their subordinates. [citing *Sash* and *Connick v. Thompson*] . . . Although *Connick* dealt solely with municipal liability under section 1983, we believe that its analysis is informative as to the scope of personal liability for supervisors and supports our conclusion that *Colon* remains viable. In the context of either municipal liability or supervisory liability, the Supreme Court has clearly stated that a defendant is only responsible for his own actions. . . Hence, if failure-to-train claims or the 'deliberate indifference' test for a supervisor's personal involvement in constitutional violations under § 1983 were no longer viable after *Iqbal*, we would expect that the same type of § 1983 claims would fail if asserted against a municipality. Yet in *Connick*, the Supreme Court applied the 'deliberate indifference' test to a failure-to-train claim. . . *Connick* ultimately rejected municipal liability on the grounds that the plaintiff had not proven the 'pattern of similar violations' establishing that the supervisory defendant had received adequate notice of the specific constitutional violation allegedly resulting from his failure to adequately train his subordinates, and thus failed to show a "policy of inaction" [that] [was] the functional equivalent of a decision by the city itself to violate the Constitution.' . . The Court did not, however, suggest that municipal liability was unavailable because it was premised on a failure-to-train claim, compare *Newton*, 640 F.Supp.2d at 448, or allegations of deliberate indifference, which would seem to fall within *Colon*'s fifth category of personal involvement. Compare *Bellamy*, 2009 WL 1835939 at \*6.")

***Gilliam v. Hamula***, No. 06–CV–6351–CJS–MWP, 2011 WL 6148943, at \*14 (W.D.N.Y. Dec. 12, 2011) (In deliberate indifference/medical needs case, court notes that "[t]he *Bellamy* case was affirmed by the Second Circuit in an unpublished decision. *Bellamy v. Mount Vernon Hosp.*, No. 09–3312–pr, 387 F. App'x 55, 2010 WL 2838534 (2d Cir. Jul.21, 2010). Nothing here shows that Hamula participated in a constitutional violation, or created a policy or custom under which a constitutional violation occurred to Plaintiff.")

***Young v. McGill***, No. 3:09–cv–1205 (CSH), 2011 WL 6223042, at \*4 (D. Conn. Dec. 8, 2011) ("The Supreme Court has explained that the degree of personal involvement required varies depending on the constitutional provision alleged to have been violated. . . For example, a claim of invidious discrimination, such as the racial discrimination claim present in *Iqbal*, requires a

showing of discriminatory purpose. If, however, the claim relies on unreasonable conduct or the deliberate indifference standard, the factors set forth above may still apply. The Second Circuit has not yet addressed this issue. Until it does, this Court assumes that *Iqbal*'s stricter standard applies only to intent-based constitutional claims.”)

***Jackson v. Goord***, No. 06-CV-6172 CJS, 2011 WL 4829850, at \*9 n.21 (W.D.N.Y. Oct. 12, 2011) (“Following the Supreme Court’s decision in [*Iqbal*] there is some disagreement among district courts in this Circuit as to whether all of the foregoing ‘*Colon* factors’ still apply. *See, e.g., Dilworth v. Goldberg*, 2011 WL 3501869 at \*17 (S.D.N.Y. Jul. 28, 2011) (“*Iqbal* has caused some courts to question whether all five of the personal involvement categories survive that decision.”) (collecting cases). It is unclear whether *Iqbal* overrules or limits *Colon*, therefore, in the absence of contrary direction from the Second Circuit, the Court will continue to apply those factors. *See, Platt v. Incorporated Village of Southampton*, 391 F. App’x 62, citing *Back v. Hastings on Hudson Union Free Sch. Dist.*, which sets forth all five of the *Colon* bases for imposing supervisory liability.”)

***Rivera v. Lempke***, 810 F.Supp.2d 572, 576 (W.D.N.Y. 2011) (“The Supreme Court has also made clear that, at least as to claims involving discriminatory or retaliatory intent, a claim premised on a supervisor’s ‘knowledge and acquiescence’ in subordinates’ wrongdoing is insufficiently stated. . . Thus, following *Iqbal*, courts in this circuit ‘have held that a defendant cannot be held liable under section 1983 unless that defendant took an action that deprived the plaintiff of his or her constitutional rights.’ *Plair v. City of New York*, \_\_ F.Supp.2d \_\_, 2011 WL 2150658, at \*4 (S.D.N.Y.2011). Mere failure to correct, or acquiescence in, a lower-level employee’s violation is not enough. . . . Applying these standards here, I conclude that the claims must be dismissed. As to Lempke and Guiney, who were at all relevant times the superintendent and deputy superintendent of Five Points, the complaint simply alleges, with no supporting factual allegations, that they directed Abate to write a false, retaliatory misbehavior report against plaintiff. Plaintiff also alleges that he wrote to Lempke about these matters and that Lempke failed to remedy the constitutional violation. As explained above, such allegations are insufficient to state a § 1983 claim.”)

***Plunkett v. City of New York***, No. 10–CV–6778 (CM), 2011 WL 4000985, at \*8, \*9 (S.D.N.Y. Sept. 2, 2011) (“The Supreme Court’s decision in *Ashcroft v. Iqbal*,. . . did not completely eliminate the *Colon* rule, as the City contends. The claims in *Iqbal* involved, *inter alia*, denial of equal protection and discrimination– legal theories that require proof of discriminatory intent. In that context, the Supreme Court held that a supervisor’s ‘mere knowledge of his subordinates discriminatory purpose’ does not amount to the supervisor’s violating the constitution. . . . That holding does not change the law on supervisory liability, particularly where, as here, the underlying constitutional right of the inmate is to be free from the use of cruel and unusual punishment or excessive force. In such cases, the traditional *Colon* categories of supervisory liability still apply. . . Indeed, following *Iqbal*, numerous Second Circuit courts have routinely continued to cite all five of the *Colon* categories as the bases for establishing supervisory liability in cases alleging

violations of a plaintiff's Fourth and Eighth Amendment rights. [collecting cases] The cases of [*Bellamy* and *Newton*] which Defendants cite, are not binding on this Court and overlook the specific role that discriminatory intent played in *Iqbal*. In fact, subsequent decisions have explicitly called *Bellamy* and *Newton* into doubt, noting that those rulings 'may overstate *Iqbal*'s impact on supervisory liability' and holding that '[w]here the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth and Eighth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply.' . . . It is the opinion of this court that *Colon* remains the standard for establishing personal involvement by supervisory officials under 42 U.S.C. § 1983.")

***McGee v. Pallito***, No. 1:10-CV-11, 2011 WL 6291954, at \*11 (D. Vt. Aug. 3, 2011) ("Given the language in *Iqbal* cautioning courts to examine 'the constitutional provision at issue,' . . . this Court should follow this latter line of cases, and should not discard the *Colon* factors where the claim does not require a showing of discriminatory intent. [citing *Sash* and *Delgado*]")

***Dilworth v. Goldberg***, No. 10 Civ. 2224(RJH)(GWG), 2011 WL 3501869, at \*17 (S.D.N.Y. July 28, 2011) ("*Iqbal* has caused some courts to question whether all five of the personal involvement categories survive that decision. [collecting cases] Others have continued to apply the five *Colon* categories without limitation [collecting cases]. . . . This Court agrees with those courts that have concluded that *Iqbal* must be viewed in light of the fact that it was dealing with an intentional race discrimination claim, and that *Iqbal* was rejecting an argument that the supervisor's mere knowledge of the subordinate's intent is tantamount to proof that the supervisor himself committed a discriminatory act.")

***Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Department of Homeland Sec.***, 811 F.Supp. 803, 806, 814-16, 817 n.5, 820 (S.D.N.Y. 2011) ("The plaintiffs, twenty-five individuals whose homes were searched by agents of the Immigration and Customs Enforcement Division of the Department of Homeland Security ('ICE') during eight operations between February and September of 2007, bring this putative class action against ICE; Michael Chertoff, the former Secretary of the Department of Homeland Security ('DHS'); Julie Myers, the former Assistant Secretary of ICE; John Torres, the former Director of ICE's Office of Detention and Removal Operations (the 'DRO'); and Marcy Forman, the former Director of ICE's Office of Investigations (the 'OI') (Chertoff, Myers, Torres, and Forman, together, the 'Supervisory Defendants'). . . .[I]n order to assert a claim under the equal protection component of the Fifth Amendment, a plaintiff must assert that the defendant intended to discriminate against the plaintiff because of a prohibited classification. What is less clear is what a plaintiff must assert in order to plead a claim against a supervisory defendant for the violation of a different constitutional provision. . . . The Court of Appeals has not yet definitively decided which of the *Colon* factors remains a basis for establishing supervisory liability in the wake of *Iqbal*, and no clear consensus has emerged among the district courts within the circuit. . . .This uncertainty is echoed in the decisions of the courts of appeals for other circuits. See, e.g., *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 70 (3d Cir.2011); *Dodds v. Richardson*, 614 F.3d 1185, 1194

(10th Cir.2010); *Parrish v. Ball*, 594 F.3d 993, 1001 (8th Cir.2010). For the purpose of deciding this motion, however, it is not necessary for the Court to determine the standard for supervisory liability for violations of the Fourth Amendment after *Iqbal*. That is because there is no controversy that allegations that do not satisfy any of the *Colon* prongs are insufficient to state a claim against a defendant-supervisor. That is the case with respect to defendants Chertoff and Myers. . . . At best, [plaintiffs’ allegations] suggest that the defendants, officials at the highest level of government in charge of overseeing a bureaucracy of tens of thousands of people, had access to information indicating that a handful of field agents in disparate locations around the country had engaged in constitutionally infirm practices. Accepted as true, this allegation is insufficient to establish that defendants Chertoff and Myers knew of and failed to intervene to prevent a widespread pattern of constitutional violations. . . . This conclusion with respect to defendants Chertoff and Myers is in accordance with the recent decision of the Third Circuit Court of Appeals in *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60 (3d Cir.2011). . . . *Argueta* reached a different conclusion as to the potential liability of defendant Torres than does this Court . . . . The facts alleged in that case, however, differ in critical respects from the facts alleged in this one. Most notably, the complaint in *Argueta* did not allege that defendant Torres was directly involved in the alleged Fourth Amendment violations by virtue of having authored detailed operational plans. Rather, the plaintiffs in *Argueta* alleged principally that defendant Torres knew of and acquiesced in constitutional violations, because he was on notice that they were occurring, and that he had ‘direct responsibility for the execution of fugitive operations.’ . . . The allegations against defendant Torres that the *Argueta* court considered were thus similar in kind to those alleged against defendants Chertoff and Myers, and dissimilar from those alleged against defendant Torres, in this case. . . . [As to the Fifth Amendment equal protection claims,] the plaintiffs are required to plead that an individual defendant against whom relief is sought ‘acted with discriminatory purpose.’ . . . The plaintiffs have wholly failed to do so with respect to any of the four Supervisory Defendants.”)

***Rheaume v. Hofmann***, No. 1:10–CV–318, 2011 WL 2947040, at \*3 n.1 (D. Vt. June 6, 2011) (“In *Iqbal*, the Supreme Court ruled that ‘[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’ 129 S.Ct. at 1948. This ruling has led several courts to conclude that only some of the *Colon* factors remain viable. See, e.g., *Bellamy v. Mt. Vernon Hosp*, 2009 WL 1835939, at \*4 (S.D.N.Y. June 26, 2009). Other courts have held that the personal involvement requirements for supervisors, post- *Iqbal*, depend ‘on the constitutional provision alleged to have been violated,’ and that *Iqbal* most directly applies to intent-based constitutional claims (e.g. racial discrimination). See *Qasem v. Toro*, 737 F.Supp.2d 147, 151 (S.D.N.Y.2010); *Sash v. United States*, 674 F.Supp.2d 531, 544 (S.D.N.Y.2009). For purposes of this case, particularly because it does not allege the sort of intentional discrimination addressed in *Iqbal*, I will assume that all of the *Colon* factors still apply.”)

***D’Attore v. New York City***, No. 10 Civ. 3102(JSR)(MHD), 2011 WL 3629166, at \*9, \*10 (S.D.N.Y. June 2, 2011) (“[T]he scope of what qualifies as ‘personal involvement’ by a supervisor

has recently come into question by virtue of the *Iqbal* decision, in which the Supreme Court held that ‘[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’ . . . The Second Circuit has not yet addressed how *Iqbal* affects the five categories of conduct that give rise to supervisory liability under *Colon*. . . . We believe, as observed in *Sash v. United States*, 674 F.Supp.2d 531 (S.D.N.Y.2009), that ‘[i]t was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that “a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.”’ . . . Thus, as in the present case, where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply. . . . Plaintiff’s allegations that he wrote letters to defendants Quinones, Mirabel and Schirro evidence a possible failure by them ‘to remedy a wrong after being informed through a report or appeal,’ *Hernandez v. Keane*, 341 F.3d 137, 145 (2d Cir.2003), and thus plaintiff sufficiently pleads that defendants disregarded a risk of excessive harm of which they were aware . . . . In light of plaintiff’s allegations of his communication of the issues with these supervisory defendants, he sufficiently pleads that they were involved in the alleged violations of his rights and that they acted with a sufficiently culpable state of mind.”)

***Plair v. City of New York***, No. 10 Civ. 8177, 2011 WL 2150658, at \*\*4-6 (S.D.N.Y. May 31, 2011) (“Prior to *Iqbal*, the controlling authority on supervisory liability was *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995), which held that liability ‘may be shown by evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.’ . . . Following *Iqbal*, courts in this district have held that a defendant cannot be held liable under section 1983 unless that defendant took an action that deprived the plaintiff of his or her constitutional rights. [citing cases] In that context, with intention-based constitutional claims in mind, the Supreme Court held that a supervisor’s ‘mere knowledge of his subordinate’s discriminatory purpose’ does not amount to the supervisor’s violating the constitution. . . . However, ‘the factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.’ . . . Here, the underlying constitutional right of the inmate is to be free from the use of excessive force by his jailers. In such a case, I conclude that the traditional *Colon* categories of supervisory liability still apply. . . . Following *Iqbal*, other judges in the Second Circuit have continued to cite all five of the *Colon* categories as the bases for establishing supervisory liability in cases alleging violations of a plaintiff’s Fourth and Eighth Amendment rights. [citing cases] . . . . In this action *Colon* remains the standard for establishing personal involvement by supervisory officials under 42 U.S.C. § 1983. Here, the Complaint attempts to state a claim under the third *Colon* category; each of the supervisors is alleged to have received extensive information concerning the City’s pattern of incidents involving unnecessary and excessive force to inmates

and the failure of the DOC to prohibit its staff from using such force, and the Supervisory Defendants are alleged to have failed to take any steps to curb those unconstitutional abuses. . . They are alleged to have allowed the continuation of a policy or custom under which the unconstitutional practice of using excessive force against inmates incarcerated in the City's jails has occurred. . . However, Plaintiff's allegations of the existence of a policy or custom are conclusory and do not reach the requisite level of plausibility to survive under *Twombly* and *Iqbal*. . . In the Complaint, Plaintiff points to two cases of violence that occurred several years prior to the alleged violence against him and the existence of reports from unspecified time periods which would have reported violence at New York City detention facilities. . . He conclusorily alleges that these prior incidents established a policy or custom of violence against prisoners, and that the Supervisory Defendants were aware of and allowed this policy to continue. . . Given the passage of time and the installation of a new DOC Commissioner and other supervisory staff between the prior violent incidents and the alleged abuse of Plaintiff, as well as the general failure of Plaintiff to plausibly allege that a policy or custom underlay these acts of violence, Plaintiff has not sufficiently alleged that the violence which harmed him was part of a larger policy or custom at the DOC. . . Plaintiff has therefore failed to state a claim under *Colon* against the Supervisory Defendants.”)

*Delgado v. Bezio*, No. 09 Civ. 6899(LTS), 2011 WL 1842294, at \*9 (S.D.N.Y. May 9, 2011) (“The Second Circuit has not yet addressed the impact, if any, of *Iqbal* on the *Colon* standard. Courts in this district have reached contrary conclusions, holding in some cases that only the first and third *Colon* categories remain viable bases for liability, *see, e.g., Bellamy v. Mt. Vernon Hosp.*, 07 civ 1801, 2009 WL 1835939, at \*4 (S.D.N.Y. June 26, 2009) and, in other cases, that ‘the personal involvement required to overcome a 12(b)(6) motion varies depending on the constitutional provision alleged to have been violated’ such that the applicability of each *Colon* category will depend on the nature of the violation alleged, *see Qasem*, 737 F.Supp.2d at 151-52; *see also D’Olimpio v. Crisafi*, 718 F.Supp.2d 340, 346-47 (S.D.N.Y.2010). This Court agrees with the latter line of reasoning. . . . Here, Plaintiff does not assert an intentional discrimination claim of the sort that was at issue in *Iqbal*, and intent is not an element of his due process claims. Plaintiff’s due process claims against Prack, Bezio and Cook fall into the second *Colon* category of personal involvement—namely, that ‘the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong.’. . The *Iqbal* decision would clearly preclude liability of a supervisor on the basis of mere knowledge that a subordinate had rendered a decision that was intentionally discriminatory, and would likely preclude as well a claim based on affirmance of such a decision (at least absent a proffer that the affirmance was intentionally discriminatory). However, it cannot be said that the *Iqbal* holding precludes liability where, as is alleged here, supervisory personnel affirmed a decision that they knew to have been imposed in violation of Plaintiff’s due process rights, thus continuing a deprivation of liberty without due process of law. Plaintiff claims that he was denied due process by reason of the withholding of information on confidentiality grounds at his disciplinary hearing. He also alleges that he appealed to, or sought reconsideration from, Defendants Prack, Bezio and Cook. In his appeal and reconsideration-request papers, his attorney identified the withholding of information as grounds

for the infirmity of the decision and argued that the reliance on confidential information denied Plaintiff the ability to defend himself at the hearing. . . Defendants Prack, Bezio and Cook each denied an appeal or request for reconsideration. Read in the light most favorable to Plaintiff his Complaint and supporting documents allege sufficiently the personal involvement of Prack, Bezio and Cook, as they are alleged to have had the power, and to have refused, to vacate a penalty they knew had been imposed in violation of Plaintiff's due process rights, thus violating Plaintiff's constitutional rights by knowingly continuing a deprivation of liberty without due process of law. Accordingly, the motion will be denied to the extent it seeks dismissal of Plaintiff's due process claims against Prack, Bezio and Cook.”)

*Thomas v. Calero*, 824 F.Supp.2d 488, 505-11 (S.D.N.Y. 2011) (“The Second Circuit has not yet addressed how *Iqbal* affects the five categories of conduct that give rise to supervisory liability under *Colon*. However, because *Iqbal* specifically rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution,’ 129 S.Ct. at 1949, several decisions in this district have held that *Iqbal* has nullified most of the longstanding *Colon* factors. [collecting cases] We disagree with these narrow interpretations of *Iqbal*, as have a number of other courts. [collecting cases] Thus, as in the present case, where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply ‘as long as [it is] consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.’ . . . Here, plaintiff alleges violations of his right to procedural due process within the context of a prison disciplinary hearing. As stated above, this does not require the plaintiff to show that the defendants intended to deprive him of his procedural rights, but only that defendants deprived him of a liberty interest as a result of insufficient process. . . This standard contains no reference to intent, or, indeed, even to the lesser ‘deliberate indifference’ standard applied to Eighth Amendment claims for denial of medical care, under which a plaintiff must show that the defendant ‘knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.’ . . . Looking, therefore, to *Colon*, we view the second category—that ‘(2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong,’ *Colon*, 58 F.3d at 873 – as the most applicable for evaluating plaintiff’s claim. . . . [A] number of courts in this Circuit have concluded that merely affirming the hearing officer’s determination is not a sufficient basis to impose liability under the second *Colon* factor. [noting cases] On the other hand, other courts have found that affirming a hearing officer’s determination on appeal is sufficient to establish personal involvement under the second *Colon* factor. [noting cases] We believe that, as a matter of pleading, Director Bezio’s actions, by affirming CHO Calero’s determination with only a modification of the penalty, . . . are sufficient to demonstrate personal involvement and could lead a trier of fact to impose liability under the second *Colon* factor. . . . Director Bezio’s actions fall squarely within the second *Colon* factor—after he learned, via an appeal, of an alleged violation of plaintiff’s rights, he not only failed to remedy the wrong, but allowed it to continue. . . . We therefore hold that the facts alleged in plaintiff’s complaint against Director Bezio’s may be sufficient to prove personal involvement

under the second *Colon* factor. In applying *Colon* in this manner, there is one final issue that we must address. Some courts have held that, in applying the second *Colon* category, the plaintiff must plead that there was an ‘ongoing’ violation, which the defendant had the opportunity to ‘remedy.’ . . . At the time of plaintiff’s appeal to Director Bezio, he was confined in SHU and, following his appeal, his confinement in SHU continued, resulting in a total of 291 days of confinement. . . . Thus, under the second *Colon* factor, we conclude that, when viewed in the light most favorable to the plaintiff, the facts pled are sufficient to withstand defendants’ 12(b)(6) motion. Finally, our initial determination was that, despite *Iqbal*, all five *Colon* factors still apply to this case. However, should the Second Circuit adopt a more stringent interpretation and limit the *Colon* categories to include only the first and part of the third categories, we still believe plaintiff’s claim survives. Plaintiff claims that by affirming CHO Calero’s determination, with only a modification of the sentence, Director Bezio is responsible for the CHO’s alleged constitutional violation. Looking to the first *Colon* category, ‘that the defendant participated directly in the alleged constitutional violation’, we believe plaintiff has pled sufficient facts to overcome defendants’ 12(b)(6) motion.”)

***Germano v. Dzurenda***, No. 3:09cv1316 (SRU), 2011 WL 1214435, at \*13 n.3 (D. Conn. Mar. 28, 2011) (“The defendants argue that the Second Circuit’s traditional factors governing supervisory liability are no longer valid in the wake of *Iqbal*. It is not clear that the Second Circuit’s personal involvement theory was limited by *Iqbal*. . . Even if *Iqbal* has limited the personal liability theory, however, ‘the Second Circuit has emphasized the importance in providing *pro se* incarcerated plaintiffs with an opportunity to conduct discovery to identify the officials “who have personal liability.”’ *Sosa v. Lantz*, 3:09cv869, 2010 WL 3925268, at \*5 (D.Conn. Sept. 30, 2010) (quoting *Davis v. Kelly*, 160 F.3d 917, 921 (2d Cir.1998)).”)

***Warrender v. U.S.***, No. 09-CV-2697 (KAM)(LB), 2011 WL 703927, at \*5 n.1 (E.D.N.Y. Feb. 17, 2011) (“Although the Second Circuit has not ruled on the precise issue of whether any of the *Colon* categories remain viable after *Iqbal*, see *Sash v. United States*, 674 F.Supp.2d 531, 543 (S.D.N.Y.2009), the court agrees with other courts in this district which have found that most of the *Colon* categories have been superseded by *Iqbal*. . . Accordingly, the proper standard under which to view plaintiff’s allegations is prescribed by the Supreme Court in *Iqbal* rather than the Second Circuit’s earlier decision in *Colon*.”)

***Livermore v. City of New York***, No. 08 CV 4442(NRB), 2011 WL 182052, at \*8 (S.D.N.Y. Jan. 13, 2011) (“Although the Supreme Court’s decision in *Iqbal* eliminated certain categories of supervisory liability that were recognized in *Colon*, a plaintiff may still state a claim based on a supervisor creating or condoning a policy or custom under which unconstitutional practices occur. [citing *Scott v. Fischer*, 616 F.3d 100, 108-09 (2d Cir.2010)] We agree with defendants that, as an intellectual matter, it is unlikely that plaintiff will prevail against the Supervisor Defendants on the basis of an unconstitutional policy or custom for two related reasons. First, plaintiff has already concluded that she cannot successfully pursue an analogous *Monell* claim against the City. Second, plaintiff’s argument against the Medical Defendants turns on the existence of the DOHMH alcohol

withdrawal policy. Thus, arguing that there was an unconstitutional policy or custom appears to be inconsistent with plaintiff's theory that there was a proper policy that the Medical Defendants failed to observe. . . . However, the motion to dismiss turns on the sufficiency of the allegations alone. And here, the allegations that relate to policies and customs are sufficiently plausible and provide fair notice to the Supervisor Defendants. Thus, this claim against the Supervisor Defendants survives a motion to dismiss.”)

**Diaz-Bernal v. Myers**, No. 3:09cv1734 (SRU), 2010 WL 5211494, at \*18, \*20, \*21 (D. Conn. Dec. 16, 2010) (“The individual defendants argue that the *Colon* factors were diminished by *Iqbal*. . . . In *Iqbal*, the Supreme Court rejected the idea that a supervisor could be liable for an employee’s equal protection violations based on their ‘knowledge and acquiescence in their subordinates’ use of discriminatory criteria to make classification decisions among detainees.’ . . . In rejecting the supervisors’ liability, the Supreme Court insisted that supervisors ‘may not be held accountable for the misdeeds of their agents.... [E]ach government official ... is only liable for his or her own misconduct.... [P]urpose rather than knowledge is required to impose *Bivens* liability ... for unconstitutional discrimination.’ . . . The Second Circuit has recently suggested that at least some of the *Colon* factors survive *Iqbal*. *Scott v. Fischer*, 616 F.3d 100, 110 (2d Cir.2010) (“To be sure, [t]he personal involvement of a supervisory defendant may be shown by evidence that: ... the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom.’”) (citing *Colon*, 58 F.3d at 837). . . . Here, the plaintiffs have put forth a plausible claim that Myers and Torres are subject to supervisory liability because their actions imposing intense pressure to make arrests, allowing bystander arrests, and providing inadequate training created a policy under which constitutional violations occurred. . . . Chadbourne and Martin are not liable under the same theory as Myers and Torres, because they did not create the FOTS [Fugitive Operative Teams] arrest quota, and the litigation plaintiffs point to as providing notice to the defendants did not allege unconstitutional conduct in Connecticut or Massachusetts, where Chadbourne and Martin were supervisors. Instead, Chadbourne and Martin are potentially liable for creating a policy of conducting large-scale raids without adequately training raid officers. Courts split over whether a failure to train claim can be the basis for supervisory liability post-*Iqbal*. Compare *Newton v. City of New York*, 640 F.Supp.2d 426, 448 (S.D.N.Y.2009) (“[P]assive failure to train claims pursuant to section 1983 have not survived the Supreme Court’s recent decision in *Ashcroft v. Iqbal*. “), with *D’Olimpio v. Crisafi*, 718 F.Supp.2d 340, 347 (S.D.N.Y.2010) (*Colon*’s bases for liability survive because they ‘are not founded on a theory of *respondeat superior*, but rather on a recognition that personal involvement of defendants in alleged constitutional deprivations’ can be shown by nonfeasance as well as misfeasance.”) (quoting *Colon*, 58 F.3d at 873). I agree with the latter line of cases. A supervisor who has been deliberately indifferent in failing to train is not liable for a passive constitutional violation based on the theory of *respondeat superior*. Instead, a failure to train can be an active violation on the part of a supervisor who has willfully chosen to allow the harm resulting from a lack of training. In these cases, a failure to train is more akin to those situations in which a defendant ‘create [s] a policy or custom under which unconstitutional practices occurred, or allow[s] the continuance of such a policy or custom,’ which the Second Circuit post-*Iqbal* has recognized as a basis for

liability. Scott, 616 F.3d at 110 (quoting Colon, 58 F.3d at 873). There is some evidence here that Chadbourne and Martin should have been on notice about unconstitutional conduct on the part of raid officers, so that their failure to train might be found to constitute deliberate indifference.”)

**Rivera v. Metropolitan Transit Authority**, 750 F.Supp.2d 456, 462, 463 (S.D.N.Y. 2010) (“Precisely what remains of the Second Circuit’s personal involvement rule in light of *Iqbal* is not entirely clear. While the Circuit has not yet addressed the question, one of my colleagues has concluded that: ‘[o]nly the first and part of the third *Colon* categories pass *Iqbal*’s muster – a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation or if that supervisor creates a policy or custom under which unconstitutional practices occurred. The other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated—situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate.’ . . . That view is persuasive. There is no suggestion that any of these defendants directly participated in any of the alleged constitutional violations—false arrest, malicious prosecution, excessive use of force or anything else. Nor is there any admissible evidence that any of them ‘create[d] or allow[ed] the continuation of a policy or custom under which [the alleged] unconstitutional practices occurred.’ . . . It is doubtful that the evidence would permit a finding that any of them thought that violations occurred but looked the other way, and even that would not be sufficient. Accordingly, they are entitled to dismissal.”)

**McNair v. Kirby Forensic Psychiatric Center**, No. 09 Civ. 6660(SAS), 2010 WL 4446772, at \*6 (S.D.N.Y. Nov. 5, 2010) (“The *Iqbal* decision abrogates several of the categories of supervisory liability enumerated in *Colon v. Coughlin*. . . *Iqbal*’s ‘active conduct’ standard only imposes liability on a supervisor through section 1983 if that supervisor had an active hand in the alleged constitutional violation. Only two *Colon* categories survive after *Iqbal* - (1) a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation, and part of (3) if that supervisor creates a policy or custom under which unconstitutional practices occurred. The other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated – situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate.”).

**Edwards v. City of Kingston**, No. 1:08-CV-803 (LEK/RFT), 2010 WL 3761892, at \*10 (N.D.N.Y. Sept. 20, 2010) (“The personal involvement of a supervisory defendant may be shown by evidence of, *inter alia*: participation directly in the alleged constitutional violation; failure to remedy the violation after being informed through a report or appeal; creation or allowance of the continuation of a policy or custom under which unconstitutional practices occur; or gross negligence in supervising subordinates who commit the wrongful acts. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995). The Supreme Court ruling in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), cast doubt on the viability of some of these factors in discrimination suits. The Court ruled that mere knowledge and acquiescence does not suffice to create liability under that type of claim. . . . However, the Court’s ruling certainly does not prevent finding supervisors liable when their direct participation is alleged or where they have purposefully violated their ‘superintendent responsibilities.’ As such,

Defendants' argument that Gorsline did not directly participate in inappropriate or wrongful sexual conduct against Plaintiffs in unavailing. . . While Plaintiffs directly implicate Gorsline in some measure, particularly in terms of gender discrimination, their claims against him rest on his supervisory role and his full knowledge, at least passive acceptance, and failure to act an ongoing hostile work environment, despite directly witnessing multiple incidents and becoming aware of Plaintiffs' distress. Accordingly, as Gorsline exhibits a sufficient level of personal involvement to be held liable, summary judgment as to the § 1983 claims against him is denied.”)

*Qasem v. Toro*, No. 09 Civ. 8361(SHS), 2010 WL 3156031, at \*\*3-5 (S.D.N.Y. Aug. 10, 2010) (“The Second Circuit has not yet addressed how *Iqbal* affects the five categories of conduct that give rise to supervisory liability under *Colon*. As explained in detail in *D’Olimpio v. Crisafi*, No. 09 Civ. 7283, 2010 U.S. Dist. LEXIS 59563, at \*14-18 (S.D.N.Y. June 15, 2010), in the wake of *Iqbal*, certain courts in this district have found that ‘[o]nly the first and part of the third *Colon* categories pass *Iqbal*’s muster,’ and that ‘[t]he other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated,’ because only the first and third categories allege personal involvement sufficiently to permit supervisory liability to be imposed after *Iqbal*. *Bellamy v. Mount Vernon Hosp.*, No. 07 Civ. 1801, 2009 U.S. Dist. LEXIS 54141, at \*6 (S.D.N.Y. June 26, 2009); see also *Newton v. City of N.Y.*, 640 F.Supp.2d 426, 448 (S.D.N.Y.2009) (“[P]assive failure to train claims pursuant to section 1983 have not survived the Supreme Court’s recent decision in *Ashcroft v. Iqbal*.”); *Joseph v. Fischer*, No. 08 Civ. 2824, 2009 U.S. Dist. LEXIS 96952, at \*42-43 (S.D.N.Y. Oct. 8, 2009) (“Plaintiff’s claim, based on [defendant’s] “failure to take corrective measures,” is precisely the type of claim *Iqbal* eliminated.”). This Court, as did the Court in *D’Olimpio*, disagrees with this narrow interpretation of *Iqbal*. As *Iqbal* noted, the degree of personal involvement required to overcome a Rule 12(b)(6) motion varies depending on the constitutional provision alleged to have been violated. Invidious discrimination claims require a showing of discriminatory purpose, but there is no analogous requirement applicable to Qasem’s allegations of repeated sexual assaults. See *Sash v. United States*, 674 F.Supp.2d 531, 544 (S.D.N.Y.2009) (citing *Chao v. Ballista*, 630 F.Supp.2d 170, 178 n. 2 (D.Mass. July 1, 2009)); see also *D’Olimpio*, 2010 U.S. Dist. LEXIS 59563, at \*16. *Colon*’s bases for liability are not founded on a theory of respondeat superior, but rather on a recognition that ‘personal involvement of defendants in alleged constitutional deprivations’ can be shown by nonfeasance as well as misfeasance. *Id.* at \* 17 (quoting *Colon*, 58 F.3d at 873). Thus, the five *Colon* categories supporting personal liability of supervisors still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated. . . . Plaintiff’s allegations and inferences, if proven, would entitle her to relief under the Fourteenth Amendment and Eighth Amendments. . . . The Court finds that plaintiff has alleged sufficient facts that Thornton – the Superintendent of the DOCS facility where plaintiff resided—and Rogers—the Deputy Superintendent for Security at that same facility – were deliberately indifferent to her health and safety and that they were responsible for creating or maintaining policies and practices that failed to prevent plaintiff from being raped and assaulted. The Eighth Amendment requires prison officials to take reasonable measures to guarantee the safety of inmates in their custody. . . . Although discovery may ultimately reveal that defendants Thornton and Rogers made every

reasonable effort to prevent the alleged sexual abuse, Qasem has alleged sufficient facts to allow the Court ‘to draw the reasonable inference’ that the defendants ‘are liable for the misconduct alleged.’”)

***D’Olimpio v. Crisafi***, 718 F.Supp.2d 340, 347 (S.D.N.Y. 2010) (“The defendants here note that certain courts in this District have read these passages of *Iqbal* to mean that ‘[o]nly the first and part of the third *Colon* categories pass *Iqbal*’s muster ... [t]he other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated.’ [collecting decisions] This Court respectfully disagrees. As *Iqbal* noted, the degree of personal involvement varies depending on the constitutional provision at issue; whereas invidious discrimination claims require a showing of discriminatory purpose, there is no analogous requirement applicable to D’Olimpio’s allegations regarding his search, arrest, and prosecution. . . *Colon*’s bases for liability are not founded on a theory of *respondeat superior*, but rather on a recognition that ‘personal involvement of defendants in alleged constitutional deprivations’ can be shown by nonfeasance as well as misfeasance. . . Thus, the five *Colon* categories for personal liability of supervisors may still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.”)

***Morpurgo v. Incorporated Village of Sag Harbor***, No. 07-CV-1149 (JS)(“KT), 2010 WL 889778, at \*14 (E.D.N.Y. Mar. 5, 2010) (“Assuming Plaintiff’s allegations against Defendants . . . to be true, Plaintiff has, at most, alleged that these Defendants knew of and possibly acquiesced in the constitutional violations committed by their subordinates . . . . However, Plaintiff has not stated that any of these Defendants participated directly in the alleged illegal conduct (*i.e.*, the inspections of the Property and the posting of the sign indicating Plaintiff’s home was unfit for human occupancy). Based upon the lack of particularized allegations against these four individuals, and in light of the Supreme Court’s holding in *Iqbal* eliminating supervisory liability in situations where supervisors knew of and acquiesced in a constitutional violation committed by a subordinate, Plaintiff’s 1983 claims against [supervisory Defendants] cannot survive the motion to dismiss.”).

***Klemonski v. Department of Correction***, No. 3:09-CV-787 (VLB), 2010 WL 729002, at \*2, \*3 (D. Conn. Feb. 25, 2010) (“*Iqbal* has arguably nullified the criteria imposing supervisory liability where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate, such that a supervisor can only be held liable if he or she participated directly in the alleged constitutional violation or created a policy or custom under which unconstitutional practices occurred. *See Sash v. United States*, No, 08 Civ. 8332(“JP), 2009 WL 4824669, at \*10-\*11 (S.D.N.Y. Dec. 15, 2009) (discussing and disagreeing with several district court decisions concluding that *Iqbal* has nullified several criteria for imposing supervisory liability because it established an ‘active conduct’ standard). The Second Circuit has not yet addressed the effect of *Iqbal* on the standard for supervisory liability. This Court, however, need not resolve the issue. The plaintiff has not alleged any facts in his complaint relating to defendants Murphy and Lantz.

He merely identifies them as defendants. Thus, the plaintiff has not satisfied any criteria for imposing supervisory liability and appears to assert only a claim of respondeat superior.”).

**Mateo v. Fischer**, 682 F.Supp.2d 423, 430, 431 (S.D.N.Y. 2010) (“Courts in the Second Circuit are divided on whether a supervisor’s review and denial of a grievance constitutes personal involvement in the underlying alleged unconstitutional act.’ *Burton v. Lynch*, No. 08-8791, 2009 WL 3286020, at \*6 (S.D.N.Y. Oct. 13, 2009). As Judge Sand noted in *Burton*, some courts distinguish between the *degree* of response to an inmate’s grievance – for example, between summarily denying a grievance and denying it in a detailed response that specifically addresses the plaintiff’s allegations. . . The Court finds that distinction persuasive. A supervisor’s detailed, specific response to a plaintiff’s complaint suggests that the supervisor has considered the plaintiff’s allegations and evaluated possible responses. . . A pro forma response suggests nothing like that. Here, Mateo’s complaint claims only that Fischer received his letters, forwarded at least two of them to subordinates for investigation, and sent Mateo a response to the effect that Mateo had provided insufficient information to support his allegations. Without more, these allegations prove only the scantest awareness of Mateo’s claims. Indeed, Mateo’s complaint openly admits that Fischer lacked full knowledge of his claims: it suggests that ‘facility officials’ never reported his allegations in full to Fischer. On these pleadings, the Court must conclude that Fischer lacked personal involvement; all claims against him are dismissed.).

**Sash v. U.S.**, 674 F.Supp.2d 531, 543-45 & n.16 (S.D.N.Y. 2009) (“Although the Second Circuit has not weighed in on what remains of *Colon* after *Iqbal*, several decisions in this district have concluded that by specifically rejecting the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution,’ *Ashcroft v. Iqbal*, 129 S.Ct. at 1949, *Iqbal* effectively nullified several of the classifications of supervisory liability enunciated by the Second Circuit in *Colon v. Coughlin*. [citing *Bellamy*, *Fischer*, and] *Newton v. City of N.Y.*, 640 F.Supp.2d 426, 448 (S.D.N.Y.2009) (“[P]assive failure to train claims pursuant to section 1983 have not survived the Supreme Court’s recent decision in *Ashcroft v. Iqbal*.”). While *Colon* permitted supervisory liability in situations where the supervisor knew of and acquiesced in a constitutional violation committed by a subordinate, these post-*Iqbal* district court decisions reason that *Iqbal*’s ‘active conduct’ standard imposes liability only where that supervisor directly participated in the alleged violation or had a hand in creating a policy or custom under which the unconstitutional practices occurred. These decisions may overstate *Iqbal*’s impact on supervisory liability. *Iqbal* involved alleged intentional discrimination. *Ashcroft v. Iqbal*, 129 S.Ct. at 1942. The Supreme Court specifically held that ‘[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.’ *Ashcroft v. Iqbal*, 129 S.Ct. at 1948. Where the alleged constitutional violation involved ‘invidious discrimination in contravention of the First and Fifth Amendments,’ *Iqbal* held that ‘plaintiff must plead and prove that the defendant acted with discriminatory purpose,’ whether the defendant is a subordinate or a supervisor. *Ashcroft v. Iqbal*, 129 S.Ct. at 1948-49. It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the

supervisor's violating the Constitution.' *Ashcroft v. Iqbal*, 129 S.Ct. at 1949. Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth and Eighth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply. . . See, e.g., *Chao v. Ballista*, 630 F.Supp.2d 170, 178 n.2 (D.Mass. July 1, 2009) (noting that the 'state of mind required to make out a supervisory claim under the Eighth Amendment – i.e., deliberate indifference – requires less than the discriminatory purpose or intent that *Iqbal* was required to allege in his suit....); Michael Avery et al., *Police Misconduct: Law & Litigation* ' 4:5 (2009) (discussing the impact of *Ashcroft v. Iqbal* on issue of supervisor liability in section 1983 and *Bivens* actions). . . Regardless of whether *Colon* or an *Iqbal*-limited standard applies, supervisory defendants Blackford and Merrigan are entitled to summary judgment. It is undisputed that defendant Blackford was not present at Sash's arrest, nor is there any evidence that he directed the use of excessive physical force against Sash. . . Similarly, although defendant Merrigan was present at the scene of the arrest, Sash does not contend that Merrigan ever laid a hand on him, nor does he contend that Merrigan ordered the Mulcahys to use excessive physical force. . . To the extent Sash argues that Blackford and Merrigan are liable on a theory of bystander liability, . . . he offers no supporting evidence. . . Although Sash contends that Blackford and Merrigan should be liable based on their failure to provide necessary and proper training to the Mulcahys, or alternatively, on their failure to implement a policy that would have prevented the use of excessive force, there is no evidence to support these claims.”).

***Woodward v. Mullah***, No. 08-CV-463A, 2009 WL 4730309, at \*2, \*3 (W.D.N.Y. Dec. 7, 2009) (“Some courts have found that affirming a hearing officer's determination on appeal alone is sufficient to establish personal involvement under the second *Colon* factor. [collecting cases] However, other courts have concluded that merely affirming the hearing determination is not a sufficient basis to impose liability. [collecting cases] The distinction between these cases appears to be that ‘while personal involvement cannot be founded solely on supervision, liability can be found if the official proactively participated in reviewing the administrative appeals as opposed merely to rubber-stamping the results.’ *Hamilton v. Smith*, 2009 WL 3199531, \*22 (N.D.N.Y.2009), *report and recommendation adopted as modified*, 2009 WL 3199520. . . . Based upon the limited allegations of the complaint, I find that plaintiff has failed to sufficiently allege defendant Bezio's personal involvement in the underlying alleged due process violation.”).

***Alston v. Bendheim***, No. 08 Civ. 1517, 2009 WL 4035574, at \*8 (S.D.N.Y. Nov. 23, 2009) (“A medical supervisor can be liable under § 1983 if he is grossly negligent in his supervision of a subordinate who has committed a constitutional violation. See *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995).”)

***Stevens v. New York***, No. 09 Civ. 5237(CM), 2009 WL 4277234, at \*8 (S.D.N.Y. Nov. 23, 2009) (“The Second Circuit has stated that one of the ways in which a supervisory official can be personally involved in a constitutional deprivation is when ‘after being informed of the violation through a report or appeal, [the official] failed to remedy the wrong.’ *Colon v. Coughlin*, 58 F.3d

865, 873 (2d Cir.1995) (citing *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994)). Stevens has alleged that he contacted King via certified mail, that he spoke with King on the telephone, and that he complied with King's request for supporting documentation and contact information for Stevens' counsel, and that nonetheless, King did nothing. Assuming that all allegations in the Complaint are true, this is sufficient to state a cause of action. Therefore, Stevens' § 1981 and § 1983, NYSHR, and NYCHR claims against defendant King are not dismissed at this time.")

*Alli v. City of New York*, No. 11 Civ. 7665(BSJ)(MHD), 2012 WL 4887745, \*5, \*6 & n.1 (S.D.N.Y. Oct. 12, 2012) ("Recently, . . . the scope of what qualifies as 'personal involvement' by a supervisor has come into question by virtue of a 2009 decision in which the Supreme Court held, in a pleading context, that '[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.' *Iqbal*, 129 S.Ct. at 1948. The Second Circuit has not yet addressed how *Iqbal* affects the five categories of conduct that give rise to supervisory liability under *Colon*. However, because *Iqbal* specifically rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution,' several decisions in this district have held that *Iqbal* has nullified most of the longstanding *Colon* factors. . . These courts have concluded that '[o]nly the first and part of the third *Colon* categories pass *Iqbal*'s muster,' and that '[t]he other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated,' because only the first and third categories sufficiently allege personal involvement to permit supervisory liability to be imposed after *Iqbal*. . . We disagree with this narrow interpretation of *Iqbal*, as have a number of other courts. . . We believe, as observed in *Sash v. United States*, 674 F.Supp.2d 531 (S.D.N.Y.2009), that '[i]t was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.' . . Thus, as in the present case, where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply. . . Hence we look to earlier Second Circuit precedent that applies the tests of deliberate indifference or gross negligence to assess supervisory liability. That analysis demands a showing of actual or constructive notice to the supervisory defendant of constitutional torts committed by their subordinates. . . . Although *Connick* dealt solely with municipal liability under section 1983, we believe that its analysis is informative as to the scope of personal liability for supervisors, and supports our conclusion that *Colon* remains largely intact. In the context of either municipal liability or supervisory liability, the Supreme Court has clearly stated that a defendant is only responsible for his own actions. . . Hence, if failure-to-train claims or the 'deliberate indifference' test for a supervisor's personal involvement in constitutional violations under § 1983 were both no longer viable after *Iqbal*, we would expect that the same type of section 1983 claims would fail if asserted against a municipality. Yet in *Connick*, which post-dates *Iqbal*, the Supreme Court applied the 'deliberate indifference' test to a failure-to-train claim. . . In addressing *Connick*'s failure-to-train claim against the supervisory defendant, the Supreme Court ultimately rejected municipal liability on the grounds that the plaintiff had not satisfied the substantive requirements of the legal standard. The Court thus found that *Connick* failed to show

a “policy of inaction” that [was] the functional equivalent of a decision by the city itself to violate the Constitution.’ . . . Notably, however, the Court did *not* suggest that municipal liability was completely unavailable in the context of a failure-to-train claim. . . . Nor did the Court suggest that municipal liability was unavailable with respect to a claim of deliberate indifference. . . . We therefore infer that the Court preserved *Colon*’s fifth factor of analysis-concerning deliberate indifference-for claims of personal involvement in section 1983 cases. . . . That said, the complaint is devoid of any specified factual basis for inferring that the Warden or the John Doe Deputy Warden were aware of, or promoted, due-process violations by prison hearing officers, or that they had somehow acquiesced to such conduct by Capt. Caputo or others. Indeed, the proposed complaint offers only a conclusory allegation that Warden Agro was somehow responsible for such a policy or practice. . . . Absent any allegation of a factual basis to conclude that this was the case, the proposed claims against Warden Agro and the Deputy Warden are not plausible in light of *Iqbal* and therefore would have to be dismissed.”)

[*See also D’Attore v. New York City Dept. of Correction*, No. 10 Civ. 815(JSR)(MHD), 2012 WL 4493977, \*6-\*8 (S.D.N.Y. Sept. 27, 2012) (R&R adopted by 2012 WL 5951317 (S.D.N.Y. Nov 28, 2012)) (same)].

***Joseph v. Fischer***, No. 08 Civ. 2824(PKC)(“JP), 2009 WL 3321011, at \*15 (S.D.N.Y. Oct. 8, 2009) (“Plaintiff’s claim, based on Lee’s ‘failure to take corrective measures,’ is precisely the type of claim *Iqbal* eliminated. . . . And Lee’s independent conduct of reviewing a grievance determination does not make him liable for the alleged improper conduct that underlies that grievance.”).

***Joseph v. Fischer***, No. 08 Civ. 2824(PKC)(“JP), 2009 WL 3321011, at \*18 (S.D.N.Y. Oct. 8, 2009) (“Under *Iqbal*, a government official’s act of affirming the denial of a grievance that alleges the deprivation of a constitutional right, without more, is insufficient to establish that the defendant was personally involved in depriving plaintiff of that right. Although *Iqbal* addressed *Bivens* claims (and, by analogy, section 1983 claims as well), there is no reason why its reasoning should not apply with equal force to RLUIPA claims. Based on the foregoing, I conclude that personal involvement of a defendant in the alleged substantial burden of plaintiff’s exercise of religion is a prerequisite to stating a claim under RLUIPA. I also conclude that an official’s denial of a grievance alleging a constitutional deprivation, without more, does not amount to personal involvement in the deprivation of that right.”).

***Doe v. New York***, No. 10 CV 1792(RJD)(VVP), 2012 WL 4503409, \*8, \*9 (E.D.N.Y. Sept. 28, 2012) (“A supervisory official may nevertheless be held liable under Section 1983 if ‘the defendant participated directly in the alleged constitutional violation [or] ... created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom ....’ *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995). . . . *Colon v. Coughlin* actually provided for three other avenues through which a supervisory official may be held liable under Section 1983, including ‘fail[ing] to remedy the wrong’ ‘after being informed of the violation’ and being ‘grossly negligent in supervising subordinates who committed the wrongful acts’ or ‘deliberate[ly]

indifferen[t] to the rights of inmates.’ . . The ‘continuing vitality’ of *Colon*, however, has ‘engendered conflict within [the Second] Circuit,’ *Reynolds v. Barrett*, 685 F.3d 193, 205 n. 14 (2d Cir.2012), after the Supreme Court in *Iqbal* rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’ . . Although the Second Circuit has yet to rule on the ‘fate of *Colon*’ . . . it seems clear to the Court that only the First and Third of the *Colon* avenues of supervisory liability. . .survive *Iqbal*. . . .”)

***Dorlette v. Quiros***, No. 3:10cv615 (AWT), 2012 WL 4481455, \*3-\*5 (D. Conn. Sept. 26, 2012) (“In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution,’ concluding that ‘each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.’ . . Since *Iqbal*, some district courts in this circuit have concluded that not all five of *Colon*’s categories of conduct that may give rise to supervisory liability remain viable. . . Other district courts restrict application of *Iqbal* to cases involving discriminatory intent. . . The Second Circuit has not yet addressed this issue. This court need not determine whether *Iqbal* applies in all cases or just those involving discriminatory intent because the allegations against defendants Lajoie and Quiros are insufficient to survive summary judgment even under the *Colon* standard. The defendants argue that the plaintiff has not alleged that either defendant personally engaged in wrongful conduct, and merely alleges formulaic statements of the elements of a claim for supervisory liability. Thus, they contend that the plaintiff has not presented any facts to support a plausible claim of supervisory liability. The plaintiff states that defendants Lajoie and Quiros were on notice of the violent tendencies of certain staff members through requests and grievances submitted by other inmates prior to October 23, 2009. The plaintiff also specifically reported the October 23, 2009 incident. Rather than take action, defendants Lajoie and Quiros denied the plaintiff’s grievances. The plaintiff alleges no facts and presents no evidence suggesting that defendants Lajoie and Quiros were notified prior to October 23, 2009, that any correctional officers had violent tendencies. Although the plaintiff notified them about the incident after it occurred, this is insufficient to establish their personal involvement. The plaintiff has not presented evidence that either defendant had sufficient knowledge to have prevented the incident. . . Further, the fact that defendants Quiros and Lajoie denied his grievance appeal does not state a cognizable claim. . . The defendants’ motion for summary judgment is granted as to the claims against defendants Quiros and Lajoie.”)

***Lewis v. City of West Haven***, No. 3:11cv1451(VLB), 2012 WL 4445077, \*4, \*5 & n.1 (D. Conn. Sept. 25, 2012) (“The Court notes that ‘[s]upervisory liability is a concept distinct from municipal liability, and is “imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates.”’ . . The Court notes that the recent Supreme Court decision in *Ashcroft v. Iqbal* 129 S.Ct. 1937 (2009) has called into question whether all of the *Colon* factors remain a basis for establishing supervisory liability and that ‘no clear consensus has emerged among the district courts within this circuit.’ . . Here, the Defendants have only moved to dismiss the claims against Karajanis on the basis that

Lewis has failed to state a claim for municipal liability and therefore they appear to be seeking only dismissal of the official capacity claims against Karajanis. As noted above, Lewis does not specify whether the claims asserted against Karajanis in Count VIII are official or individual capacity claims or both. Construing the claims in Count VIII, it appears they allege both official and individual capacity claims. Accordingly, since the Defendants have not moved to dismiss the claims on the basis that Lewis has failed to state a claim for supervisory liability under the *Colon* factors, these claims remain extant for summary judgment and trial.”)

***Jones v. Superintendent of Attica Correctional Facility***, No. 10–CV–0823(Sr), 2012 WL 4464685, \*3 (W.D.N.Y. Feb. 3, 2012) (“With respect to Superintendent Conway, however, plaintiff’s allegations do not suggest that Superintendent Conway was personally involved in the decision to move plaintiff to the housing unit or aware that plaintiff had problems with other inmates on that housing unit prior to the assault. Even interpreting plaintiff’s allegations to suggest that he wrote Superintendent Conway about his safety concerns upon his transfer, given plaintiff’s allegation that the assault occurred on the same day as his move into the housing block, it is not plausible that Superintendent Conway would have received plaintiff’s letter prior to the assault. In any event, such a letter is insufficient to demonstrate personal involvement by a supervisory official.”)

***Young v. State of New York Office of Mental Retardation and Development Disabilities***, 649 F.Supp.2d 282, 293, 294 (S.D.N.Y. 2009) (“Until recently, the Second Circuit rule was that a supervisory official was ‘personally involved’ only when that official: ‘(1) participate[d] directly in the alleged constitutional violation; (2) fail[ed] to remedy the violation after being informed of the violation through a report or appeal; (3) create[d] or allow[ed] the continuation of a policy or custom under which unconstitutional practices occurred; (4) act[ed] with gross negligence in supervising subordinates who commit the wrongful acts; or (5) exhibit[ed] deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.’[citing *Colon*] This Term, however, the Supreme Court in *Ashcroft v. Iqbal* held that ‘[b]ecause vicarious liability is inapplicable to ... [section] 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution,’. . . and it explicitly rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’”. . . Accordingly, ‘[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.’. . . Precisely what remains of the Second Circuit rule in light of *Iqbal* is not entirely clear. While the Circuit has not yet addressed the question, one of my colleagues has concluded that: ‘[o]nly the first and part of the third *Colon* categories pass *Iqbal*’s muster – a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation or if that supervisor creates a policy or custom under which unconstitutional practices occurred. The other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated – situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate.’[citing *Bellamy*] Plaintiffs do not contend that Uschakow and Williamson were directly involved in any of the treatment or care

at issue. Rather, they assert that they are liable because they failed to failed, either before or after Ms. Young's death, to adopt a policy to prevent DVT [deep vein thrombosis]. . . . As an initial matter, it is difficult to see how either Uschakow or Williamson could be held liable on the theory that he failed, after Ms. Young's demise, to adopt a policy to prevent DVT. Any such failure would bear no causal connection to the harm allegedly caused by their alleged constitutional violation. Plaintiffs' allegations with respect to the inaction of Messrs. Uschakow and Williamson during the period before Ms. Young's death are exceptionally vague, amounting essentially to a claim that they ultimately were responsible for the proper running of the facility and, in consequence, for any failure to adopt a policy to prevent DVT therefore would suffice to establish supervisory liability even after *Iqbal*. The Court has considerable doubt that supervisory liability properly could be imposed on such a basis, as it appears that the duty would be far too general. But it would be inappropriate to resolve that issue until the facts concerning the actual responsibilities of Messrs. Uschakow and Williamson, what they did and did not do, and the relationship, if any, of their actions and omissions to Ms. Young's situation are clear. As these defendants have failed to demonstrate the absence of a genuine issue of material fact on an issue as to which they would have the burden of proof at trial, summary judgment on qualified immunity grounds would be inappropriate at this juncture.”).

**Jackson v. Goord**, 664 F.Supp.2d 307, 324 n.7 (S.D.N.Y. 2009) (“A question has arisen as to whether the traditional supervisory-liability test has been eviscerated by the recent Supreme Court decision in *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937 (2009). See, e.g., Martin A. Schwartz, *Supreme Court Sets Standards For Civil Rights Complaints*, N.Y.L.J., Aug. 3, 2009, at 3, 7 (stating that the Court ‘jettisoned the very concept of supervisory liability ‘). We do not believe that it has done so in the circumstance of this case. The claims by Iqbal involved, *inter alia*, denial of equal protection or discrimination – legal theories that require proof of discriminatory intent. *Iqbal*, 129 S.Ct. at 1948 (citing *Church of Lukumi Babalu Awe, Inc. v. Hialeah*, 508 U.S. 520, 540-541 (1993) and *Washington v. Davis*, 426 U.S. 229, 240 (1976)). The Supreme Court held in *Iqbal* that even supervisors must be alleged and proven to have violated the plaintiff's underlying constitutional right to be held liable. See *id.* at 1949, 1952. Since the claims at issue in *Iqbal* involved discriminatory intent, the Court held that the plaintiff could not prevail by way of the traditional supervisory-liability test of deliberate indifference. *Id.* at 1949. In contrast, in this and many other prison-condition cases, the underlying constitutional right of the inmate is to be free of injurious deliberate indifference by their jailers. See, e.g., *Erickson v. Pardus*, 551 U.S. 89, 89 (2007); *Sledge v. Kooi*, 564 F.3d 105, 106 (2d Cir.2009). In these cases, then, deliberate indifference by supervisors to known injury-causing conditions should still trigger liability.”)

**Bellamy v. Mount Vernon Hosp.**, No. 07 Civ. 1801(SAS), 2009 WL 1835939, at \*4, \*6 (S.D.N.Y. June 26, 2009), *aff'd* by *Bellamy v. Mount Vernon Hosp.*, No. 09–3312–pr, 387 F. App'x 55, 2010 WL 2838534 (2d Cir. Jul.21, 2010) (“In 1995, the Second Circuit held that a supervisory official is personally involved only when that official: (1) participates directly in the alleged constitutional violation; (2) fails to remedy the violation after being informed of the violation through a report or appeal; (3) creates or allows the continuation of a policy or custom under which unconstitutional

practices occurred; (4) acts with gross negligence in supervising subordinates who commit the wrongful acts; or (5) exhibits deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. [citing *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995)] The Supreme Court’s decision in *Iqbal v. Ashcroft* abrogates several of the categories of supervisory liability enumerated in *Colon v. Coughlin*. *Iqbal*’s ‘active conduct’ standard only imposes liability on a supervisor through section 1983 if that supervisor actively had a hand in the alleged constitutional violation. Only the first and part of the third *Colon* categories pass *Iqbal*’s muster - a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation or if that supervisor creates a policy or custom under which unconstitutional practices occurred. The other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated - situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate. Bellamy’s remaining claim alleges that Wright, in his individual capacity, was deliberately indifferent to Bellamy’s medical needs. However, Bellamy offers no evidence that any of Wright’s actions fall into any of the remaining exceptions that would permit supervisory liability. *First*, Bellamy admits that Wright was not personally involved in the letter responses. Both parties agree that they have never had any form of contact. *Second*, Bellamy offers no evidence that Wright created or contributed to a policy or custom of unconstitutional practices. Bellamy also admitted that he can provide no evidence that Wright was responsible for making any decisions regarding his testosterone medications. . . . Bellamy’s conclusory allegations that Wright must have known about Bellamy’s plight is not enough to impute section 1983 liability.”)

### **THIRD CIRCUIT**

*Williams v. Papi*, 714 F. App’x 128, 133-34 (3d Cir. 2017) (“This Court has noted that there exists ‘uncertainty as to the viability and scope of supervisory liability’ after the Supreme Court’s decision in *Ashcroft v. Iqbal* . . . arguably narrowed or abrogated the ability to find a supervisor liable for conduct of which he was merely aware but did not direct. . . . Although we have not yet squarely addressed the extent of *Iqbal*’s impact on the theory of supervisory liability, we have repeatedly held that ‘[i]t is uncontested that a government official is liable only for his or her own conduct and accordingly must have had some sort of personal involvement in the alleged unconstitutional conduct.’ . . . Such personal involvement may be established by alleging that the supervisor ‘participated in violating the plaintiff’s rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates’ violations.’ . . . The District Court concluded that Chiefs Fisher, Ely, Kreig, and Olszewski, and Corporal Miller (as the ranking officer on site) could be held liable as supervisors ‘who were either present at the scene of the incident or directly participated in the events,’ and that disputes of fact precluded granting them qualified immunity. . . . In reaching this determination, the District Court did not separately consider each supervisor’s circumstances or the extent of each’s personal involvement in the alleged conduct. This lapse is particularly notable concerning Chiefs Kreig and Fisher. Although Kreig was personally involved in various alleged violations, he was the only Meshoppen Borough officer on the scene, meaning he had no subordinates for whose conduct he could be held liable.

Thus, to the extent that he was found liable as a supervisor for his own participation in the alleged violations, that is redundant of his individual liability, and he is entitled to summary judgment on this claim. Regarding Fisher, it is undisputed that he was off duty, did not come to scene, and did not direct, condone, or have awareness of the conduct that occurred. Fisher’s generalized knowledge that the situation was unfolding is too slender a reed upon which to hold him liable for the conduct of his on-site subordinates. . . We reject Mrs. Williams’ theory that Fisher can be held liable based solely on his failure to come to the scene, thereby leaving Miller in charge even though he was allegedly unprepared to handle the situation. To the extent that such a basis for liability exists and survived *Iqbal*, it is certainly not clearly established that the mere failure to show up at a scene when off duty could render a supervisor liable for his subordinates’ unconstitutional conduct, and Mrs. Williams has failed to cite any case law in support of the proposition. Fisher is thus entitled to qualified immunity.”)

***Wharton v. Danberg***, 854 F.3d 234, 243, 247 (3d Cir. 2017) (“Suits against high-level government officials must satisfy the general requirements for supervisory liability. In particular, supervisors are liable only for their own acts; in this case, they are liable only if they, ‘with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm.’ *A.M. ex rel. J.M.K. v. Luzerne Cty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir. 2004) (quoting *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989)) (alteration in original). This standard for supervisory liability largely overlaps with the over-detention standard—both require a showing of deliberate indifference and causation—but centers the inquiry around a policy or practice. . . . Our precedent is clear that while the detention of sentenced inmates is governed by the Eighth Amendment, the treatment of pretrial detainees is governed by the Due Process Clause. . . For pretrial detainees, therefore, there is no applicable provision more specific than the Due Process Clause and the more-specific-provision rule does not apply. A separate due process analysis is required. The protections of the Eighth Amendment and Due Process Clauses are sometimes, but not always, the same. . . We need not delve into the differences between those two analyses in this context, however. This is a suit against supervisory officials, for the creation of policies and practices. Supervisory policy-and-practice liability requires deliberate indifference. *A.M. ex rel. J.M.K.*, 372 F.3d at 586. Thus, for the same reasons as in our Eighth Amendment analysis, we conclude that there is no genuine dispute of material fact as to deliberate indifference under the Fourteenth Amendment.”)

***Palakovic v. Wetzel***, 854 F.3d 209, 225 n.17, 233 (3d Cir. 2017) (“A supervisor may be directly liable under the deliberate indifference test set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994), if the supervisor ‘knew or w[as] aware of and disregarded an excessive risk to the plaintiff[’s] health or safety[.]’ . . . A plaintiff ‘can show this by establishing that the risk was obvious.’ . . There is some question as to whether a supervisor may be held indirectly liable for deficient policies under *Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989)), as the Supreme Court may have called the so-called *Sample* test into question in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Because the Palakovics have plausibly alleged a claim based on direct supervisory liability, we need not consider the unresolved nature of the *Sample* test today. . . . The Palakovics claimed that the

supervisory defendants established a policy whereby mentally ill and suicidal prisoners like Brandon were repeatedly placed in solitary confinement rather than provided with adequate mental health treatment. . . . According to the Palakovics, despite the risk and the obviousness of the need to correct it, the supervisors failed to train officials on how to recognize and properly manage seriously mentally ill and suicidal prisoners, failed to provide suicide prevention training, failed to provide training on the adverse impact of solitary confinement on those with mental illness, and failed to train non-medical staff on the importance of consulting with mental health care providers concerning discipline and management of mentally ill prisoners. The supervisors were alleged to have provided essentially no training on suicide, mental health, or the impact of solitary confinement, and simply acquiesced in the repeated placement of mentally ill prisoners like Brandon in solitary confinement. According to the Palakovics, the supervisors were responsible for the policies concerning the treatment of mentally ill prisoners that gave rise to an unreasonable risk of Brandon’s suicide, as well as the failure to provide specific types of training that could reasonably have prevented it. We must take the factual allegations of the amended complaint as true, and those facts are sufficient to support claims against the supervisory defendants.”)

*Jankowski v. Lellock*, 649 F. App’x 184, 187-88 (3d Cir. 2016) (“Once this supervisory relationship is established, we have articulated two ways in which a supervisor may be liable for unconstitutional actions undertaken by a subordinate. First, liability may attach if the supervisor, “with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm.”. . . This standard encompasses Jankowski’s failure to train claim, and specifically requires (1) deliberate indifference and (2) direct causation. . . . Second, at least prior to *Iqbal*, ‘a supervisor may be personally liable under § 1983 if he or she participated in violating the plaintiff’s rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced’ in the subordinate’s unconstitutional conduct. . . . ‘[W]e have refrained from answering the question of whether *Iqbal* eliminated—or at least narrowed the scope of—supervisory liability because it was ultimately unnecessary to do so in order to dispose of the appeal then before us.’. . . As in *Argueta*, we ‘make the same choice here because we determine that [Jankowski] failed to allege a plausible claim to relief on the basis of the supervisors’ “knowledge and acquiescence” or any other similar theory of liability.’. . . Applying this legal framework to the facts in Jankowski’s second amended complaint convinces us that the District Court correctly dismissed the claims against both Meyers–Jeffrey and Zangaro. First, Jankowski never alleges that either Meyers–Jeffrey, who was merely an aide in the detention classroom, or Zangaro had any supervisory or actual authority. . . . over Lellock, thus immediately casting serious doubt on both claims. Second, Jankowski’s second amended complaint, stripped of its conclusory allegations, pleads very few facts, none of which transform his claims into anything more than pure speculation. This is so because Jankowski relies primarily on the strength of an inference that we believe is unreasonable. He argues that because Lellock (1) pulled approximately twenty-two male students out of detention over the course of the school year to talk to them individually and (2) did so in apparent violation of a district policy forbidding the removal of students from a classroom, it was ‘obvious’ that Lellock was intending to have ‘private one-on-one encounters with those male students.’ Thus, he concludes that Meyers–Jeffrey and Zangaro

knew or should have known that Lellock was sexually abusing these students. We cannot agree with Jankowski that this final inference is reasonable in light of the facts alleged. Assuming that either or both individuals did have actual authority over Lellock, supervisory liability still requires a plaintiff to show that the supervisor knew about and acquiesced in the subordinate's unconstitutional conduct. . . . Jankowski has not met this standard for either Meyers–Jeffrey or Zangaro. Mere knowledge that students are being pulled from class to speak with a school police officer in violation of a district policy does not lead one to reasonably conclude that those students are then being sexually assaulted by that officer. The facts alleged, therefore, do not support the claim that either Meyers–Jeffrey or Zangaro actually knew about Lellock's conduct during the 1998–1999 school year. . . . Thus, we hold that both claims of supervisory liability were properly dismissed by the District Court.”)

*Chavarriga v. New Jersey Dep't of Corr.*, 806 F.3d 210, 227, 229-30, 232-33 (3d Cir. 2015) (“[T]he inmate must identify the supervisor’s specific acts or omissions demonstrating the supervisor’s deliberate indifference to the inmate’s risk of injury and must establish a link between the supervisor, the act, and the injury. . . . We are satisfied that appellant’s allegations that Brown intentionally denied her potable water for three days or was deliberately indifferent to the denial were insufficient to impose liability on Brown because appellant did not adequately allege facts attributing the denial to Brown. Although the complaint pleaded that Brown was one of an unspecified number of supervisors of the correctional officers who interacted with appellant, appellant did not make specific allegations concerning Brown’s duties as a supervisor, or her interactions or communications with correctional officers in general, let alone with the officers directly involved with appellant’s custody. The complaint did allege that Brown forced appellant to drink water ‘from a dirty toilet bowl,’ but this allegation was conclusory because appellant did not plead that Brown gave a direction for appellant to drink in this way. It is clear that appellant based her complaint against Brown for the denial of water on the actions of subordinate personnel, and thus appellant was seeking to place liability on Brown on a *respondeat superior* theory or was alleging that Brown was liable on some other theory merely because of her position as a supervisor. But Brown’s position as a supervisor without more did not make her responsible for her subordinates’ conduct. Accordingly, we cannot infer from the factual allegations in the complaint that Brown should have been alerted to a history of mistreatment of inmates in general or of appellant in particular. . . . We also are satisfied that appellant did not adequately plead that Brown was instrumental in requiring her to go to the shower or otherwise be naked while in the presence of male prison personnel and inmates and in not supplying her with sanitary napkins and medications. Rather, though she did plead that Brown directed that her clothing be taken from her, her allegations with respect to the walk to the shower or otherwise be naked in the presence of male prison personnel and inmates and the denial of sanitary napkins and medications are generalized with respect to the individuals responsible for these actions. Although appellant did not adequately plead that Brown should have known that she was deprived of water for three days, we reiterate our rejection of the District Court’s conclusion that the deprivations of potable water in this case could not be cruel and unusual punishment under the Eighth Amendment. . . . Thus, while we uphold the grant of summary judgment on the denial of potable water as well as on the

naked shower walk and other naked exposures and the denial of sanitary napkin and medications claims in Brown’s favor, we will reverse the District Court’s dismissal of the Eighth Amendment claims against the unknown defendants that appellant alleged were responsible for these deprivations and will remand the case for further proceedings on these claims. . . . Notwithstanding our foregoing discussion, we hold that the District Court correctly granted Brown summary judgment on appellant’s Eighth Amendment body cavity search claim. In her brief, appellant attempts to implicate Brown in her manual body cavity search by claiming that ‘Jane Doe’s simultaneous digital penetration of plaintiff’s vagina and rectum was committed in the presence of her direct supervisor, Sgt. Brown.’ . . . Yet this statement, though quite specific, was in appellant’s brief and not her complaint, and is of questionable significance as she goes on in her brief to indicate that Brown ‘*evidently* authorized and supervised’ the search, a comment that suggests that she only is surmising that Brown was involved in the search. . . . In any event, appellant by making these allegations in her brief cannot overcome the lack of an adequate pleading in her complaint alleging with specificity that Brown was involved in the search. In fact, although appellant did allege in her complaint that Brown ‘supervised various DOC personnel,’ she did not allege that Brown supervised Jane Doe. . . . Although a court on a motion to dismiss ordinarily ‘must accept the allegations in the complaint as true,’ it is not compelled to accept assertions in a brief without support in the pleadings. . . . After all, a brief is not a pleading. We therefore will affirm the District Court’s grant of summary judgment on the body cavity claim in favor of Brown.”)

***Parkell v. Markell***, 622 F. App’x 136, 140 (3d Cir. 2015) (“To establish that a supervisor was deliberately indifferent, Parkell must identify a specific policy or practice that the supervising official failed to employ and show that the existing policy or procedure created an unreasonable risk of a constitutional violation, that the official was aware of but indifferent to the risk, and that the policy or procedure caused constitutional injury. . . . We have held that these elements are met where the supervisor ‘failed to respond appropriately in the face of an awareness of a pattern of such injuries’ or where ‘the risk of constitutionally cognizable harm is so great and so obvious that the risk and the failure of supervisory officials to respond will alone support’ a finding of deliberate indifference. . . . We cannot infer from Parkell’s allegations, even construed liberally, that Markell or Biden—even if they allegedly failed to build more prison space or pursue institutional reform—either played a role in determining the prison conditions creating the risk of his injury, or were aware of that risk. . . . While the case against Morgan and Coupe is closer, Parkell’s allegations are too conclusory to support an inference of deliberate indifference. . . . Parkell does not indicate, for example, how frequently fights over provisions occurred prior to his, how many had resulted in serious injury, and what prison guards’ actual response—outside of sounding an emergency alert—to such fighting consisted of. His complaint therefore does not plausibly suggest that the type of violent dispute causing his injury was so pervasive, injurious, and predictable, and guards’ typical responses so ineffectual, that Morgan and Coupe *must have been aware* of a problem merely by virtue of their institutional roles. . . . However, Parkell’s allegations as to Morgan and Coupe are not so implausible as to be factually or legally frivolous. . . . He conceivably could address their deficiencies so as to nudge his failure-to-protect claim over the line into plausibility. . . . The District

Court erred in denying Parkell an opportunity to amend his complaint and flesh out his claim against Morgan and Coupe.”)

**Hammond v. City of Wilkes-Barre**, 600 F. App’x 833, 838 n.8 (3d Cir. 2015) (“As we noted in *Santiago*, courts ‘have expressed uncertainty as to the viability and scope of supervisory liability after [*Ashcroft v. Iqbal*, 556 U.S. 662 (2009) ].’ . . . We need not address whether the scope of supervisory liability has narrowed, as Defendants are entitled to summary judgment ‘even under our existing supervisory liability test.’”)

**Barkes v. First Corr. Med., Inc.**, 766 F.3d 307, 316-25 (3d Cir. 2014), *rev’d on other grounds sub nom. Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (“Before discussing the District Court’s qualified immunity analysis, it is necessary first to consider whether and to what extent our precedent on supervisory liability in the Eighth Amendment context was altered by the Supreme Court’s decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Though we have in the past declined ‘to wade into the muddled waters of post-*Iqbal* “supervisory liability,” *Bistran v. Levi*, 696 F.3d 352, 366 n. 5 (3d Cir.2012); *see also Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 69–70 (3d Cir.2011), we find it appropriate to do so now. . . . ‘Failure to’ claims—failure to train, failure to discipline, or, as is the case here, failure to supervise—are generally considered a subcategory of policy or practice liability. . . . We developed a four-part test for determining whether an official may be held liable on a claim for a failure to supervise. The plaintiff must identify a supervisory policy or practice that the supervisor failed to employ, and then prove that: (1) the policy or procedures in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) the defendant-official was aware that the policy created an unreasonable risk; (3) the defendant was indifferent to that risk; and (4) the constitutional injury was caused by the failure to implement the supervisory practice or procedure. . . . In this Circuit, when a plaintiff seeks to hold a defendant liable under the Eighth Amendment in his or her role as a supervisor, ‘*Sample’s* four-part test provides the analytical structure . . . , it being simply the deliberate indifference test applied to the specific situation of a policymaker.’ . . . Which brings us to *Iqbal*. . . . [T]he Court expressly tied the level of intent necessary for superintendent liability to the underlying constitutional tort. . . . This aspect of *Iqbal* has bedeviled the Courts of Appeals to have considered it, producing varied interpretations of its effect on supervisory liability. . . . Most courts have gravitated to the center, recognizing that because the state of mind necessary to establish a § 1983 or *Bivens* claim varies with the constitutional provision at issue, so too does the state of mind necessary to trigger liability in a supervisory capacity. The Tenth Circuit, for example, held that, after *Iqbal*, § 1983 liability may attach to ‘a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor *or her subordinates* ) of which “subjects, or causes to be subjected,” the plaintiff to a constitutional deprivation, if the supervisor ‘acted with the state of mind required to establish the alleged constitutional deprivation.’ *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir.2010) (emphasis added). . . . The Ninth Circuit agreed with this view in *Starr v. Baca*, seeing ‘nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of

confinement cases.’ . . . We do not read *Iqbal* to have abolished supervisory liability in its entirety. Rather, we agree with those courts that have held that, under *Iqbal*, the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged. In this case, the underlying tort is the denial of adequate medical care in violation of the Eighth Amendment’s prohibition on cruel and unusual punishment, and the accompanying mental state is subjective deliberate indifference. . . . Accordingly, we hold that the standard we announced in *Sample* for imposing supervisory liability based on an Eighth Amendment violation is consistent with *Iqbal*. We leave for another day the question whether and under what circumstances a claim for supervisory liability derived from a violation of a different constitutional provision remains valid. . . . Our dissenting colleague disagrees with our conclusion that *Sample* has survived *Iqbal*. In his view, a supervisor can be held liable under the Eighth Amendment only if he committed an affirmative ‘action[ ],’ was ‘personal [ly] involve[d] in his subordinates’ misfeasance,’ and acted with ‘intentional ... deliberate indifference.’ . . . Our colleague claims that his position recognizes that ‘there’s no special rule of liability for supervisors’ and that ‘the test for them is the same as the test for everyone else.’ . . . But in fact the opposite is true: his test would immunize from liability prison officials who were deliberately indifferent to a substantial risk that inmates’ serious medical conditions were being mistreated or not treated at all. . . . Simply because an official may have a senior position in the DOC does not make him free to ignore substantial dangers to inmate health and safety. . . . Treating supervisors and subordinates equally under the Eighth Amendment does not mean ignoring the different ways in which each type of officer can, with deliberate indifference, expose inmates to constitutional injury. We think our dissenting colleague fails to recognize this fact, and in doing so makes three significant analytical errors. We address each below. . . . [E]xcessive force claims are different than conditions of confinement claims: instead of deliberate indifference, they require a plaintiff to show that ‘officials applied force “maliciously and sadistically for the very purpose of causing harm,” or ... with “a knowing willingness that [harm] occur.”’ . . . The Dissent’s position neglects the black-letter principle that the type of Eighth Amendment claim alleged here can be shown by an act *or an omission*. . . . Under the Eighth Amendment, prison officials, from the bottom up, may be liable if by act or omission they display a deliberate indifference to a known risk of substantial harm to an inmate’s health or safety. . . . The omission alleged here is the deliberately indifferent failure to enforce FCM’s compliance with proper suicide-prevention protocols, as required under FCM’s contract with the DOC. As we will discuss, there is a material factual dispute on this point. . . . The Dissent would require both that the supervisor ‘personally display [ed] deliberate indifference,’ . . . and that the supervisor was ‘personal[ly] involve[d] in his subordinates’ misfeasance[.]’ . . . With respect to the former observation, we agree, which is why our decision requires subjective deliberate indifference on the part of the offending officer. . . . With respect to the latter, the Dissent misinterprets the rules for Eighth Amendment liability under *Farmer*. The Dissent asserts that, by affirming *Sample*’s vitality post-*Iqbal*, our decision wrongly applies an *objective*, rather than a *subjective*, test for evaluating deliberate indifference, in contravention of *Farmer*. This criticism is unpersuasive for two reasons. . . . Far from being patently objective, *Sample*’s test is explicitly concerned with the officer’s subjective knowledge. . . . To be sure, *Sample* stated that it derived its test ‘[b]ased on *City of Canton*,’ . . . but the *actual* test that it articulated clearly sounds in subjectivity. . . . [T]his brings

us to the second reason that the Dissent’s objection fails: the test that *we* derive from *Sample* and apply in this case cannot be described as anything but subjective, and is thus entirely consistent with *Farmer*. . . . To the extent that *Sample* approved, in some circumstances, an objective test for determining a prison official’s Eighth Amendment deliberate indifference, that portion of *Sample* has been abrogated by *Farmer* and it is not the test we apply today. Recognizing that our test does, in fact, require an official’s subjective deliberate indifference, the Dissent pivots and claims that the plaintiff must nonetheless plead that the supervisor was ‘personal[ly] involve[d] in his subordinates’ misfeasance.’. . . The Dissent’s rule would have the practical effect of requiring that a supervisor have personal knowledge of an individual inmate, that inmate’s particular serious medical need, and of the prison staff’s failure to treat that need, before the supervisor could ever be held liable for deliberate indifference. But *Farmer* itself recognized that a prison official cannot avoid liability under the Eighth Amendment simply ‘by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to’ suffer a constitutional injury. . . . What the Dissent fundamentally fails to recognize is that there are different ways that prison officials can be responsible for causing an inmate harm. . . . [W]here there is evidence of serious inadequacies in the provision of adequate medical care for inmates, and there is evidence that prison officials were aware of the problem and yet indifferent to the risk that an inmate would suffer a constitutional injury, they can be held liable under § 1983 for violating the Eighth Amendment.”)

***Barkes v. First Corr. Med., Inc.***, 766 F.3d 307, 332, 336-44 (3d Cir. 2014) (Hardiman, J., dissenting), *rev’d on other grounds sub nom. Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (“Today the Court holds that two of the most senior executives in the Delaware prison system must stand trial for the suicide of Christopher Barkes. In my view, this decision is a classic case of holding supervisors vicariously liable, a practice the Supreme Court proscribed in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The majority accomplishes this feat by attempting to salvage the supervisory liability doctrine we created twenty years before *Iqbal* in *Sample v. Diecks*, 885 F.2d 1099 (3d Cir.1989). As I shall explain, *Sample* has been abrogated by *Iqbal*. And even assuming I am wrong about *Sample*’s abrogation, Defendants Taylor and Williams are still entitled to summary judgment because Barkes has not complied with *Sample*’s requirement that she identify a specific supervisory practice or procedure that they failed to employ. I respectfully dissent. . . . Since *Iqbal*, supervisory liability claims must spring from ‘actions’ or ‘misconduct,’. . . . [T]he mere fact that the supervisor occupied a position of authority is insufficient. Accordingly, the overwhelming weight of authority requires plaintiffs to establish the supervisor’s personal involvement in his subordinates’ misfeasance. . . . The courts of appeals requiring the supervisor’s personal involvement—i.e., the Fifth, Seventh, Eighth, and Tenth Circuits—have upheld supervisory liability claims when the challenged policy originates with the supervisor or he contributes to its unlawfulness. . . . None of those courts of appeals has upheld a so-called ‘failure-to’ claim, in which subordinates violate the law while the supervisor fails to take remedial action. Decisions of both the Seventh and Tenth Circuits illustrate the fundamental dichotomy between cases involving the supervisors’ personal involvement on the one hand and those relying on the supervisor’s position of authority. [Discussing cases] Like the Seventh and Tenth Circuits, the Fifth and Eighth Circuits

have rejected similar ‘failure-to’ claims after *Iqbal*. [Discussing cases] When the Ninth Circuit faced a ‘failure-to’ claim in *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011), it departed from the approaches taken by the Fifth, Seventh, Eighth, and Tenth Circuits. Contrary to the other four courts of appeals, the Ninth Circuit upheld an Eighth Amendment supervisory liability claim against a sheriff ‘because he knew or should have known about the dangers in the [jail], and ... was deliberately indifferent to those dangers.’. . . The plaintiff’s complaint contained detailed allegations concerning the sheriff’s knowledge of his subordinates’ unlawfulness. . . In determining the sheriff’s culpability for his inaction, however, the Court permitted the claim to go forward because a state statute held the sheriff ‘answerable for the prisoner’s safekeeping.’. . . In a vigorous dissent, Judge Trott claimed that the ‘complaint has all the hallmarks of an attempted end run around the prohibition against using the vicarious liability doctrine of respondeat superior to get at the boss.’. . . In light of *Iqbal*, we must also overrule the framework we adopted for supervisory liability claims in *Sample v. Diecks*, 885 F.2d 1099 (3d Cir.1989). . . . [A]fter denuding *Sample* of its objective quality, the majority upholds a test that does not require the plaintiff to plead personal involvement by the supervisor. Under *Sample*, the plaintiff need only establish a ‘supervisory practice or procedure that [the supervisor] failed to employ.’ *Sample*, 885 F.2d at 1118. That is a far cry from the ‘personally displayed deliberate indifference,’ *Nelson*, 585 F.3d at 535, or ‘deliberate, intentional act,’ *Porro*, 624 F.3d at 1327–28; *Dodds*, 614 F.3d at 1195, that our sister circuits have required after *Iqbal*. ‘Simply put, there’s no special rule of liability for supervisors. The test for them is the same as the test for everyone else.’. . . None of the cases discussed—not even the Ninth Circuit’s decision in *Starr*—has upheld a special test that applies only to supervisors. The majority disagrees, saying *Sample*’s ‘essence’ is deliberate indifference, . . . so we should continue to treat supervisors differently. Only by doing so, can the majority circumvent the District Court’s prior holdings that the record does not show deliberate indifference. . . *Sample*’s unique combination of elements applies only to the supervisory form of deliberate indifference and permits Barks to take her claim to trial without alleging Taylor and Williams’s personal involvement. With due respect to my colleagues’ concern that *Iqbal* has ‘bedeviled’ the courts of appeals, . . . I perceive near unanimous agreement among our sister circuits. Barks’s claim plainly seeks to hold Taylor and Williams vicariously liable for, in Barks’s words, ‘presid[ing] over a system,’. . . that she deems unlawful. Today’s decision invites plaintiffs to sue senior government officials whenever prison guards use force against an inmate or police officers mistreat a suspect. Regrettably, it exposes Commissioner Taylor and Delaware’s prison wardens to lawsuits from any Delaware inmate with a complaint about FCM’s services. . . . None of the courts that have considered *Iqbal* have applied a standard like *Sample*’s, as the majority does today. The District Court’s prior decision that Barks cannot prove Taylor and Williams’s deliberate indifference combined with the absence of any allegation of personal involvement on their part, entitles them to qualified immunity. . . . Even had *Iqbal* not substantially changed the law of supervisory liability and had *Sample* remained good law, I would still hold that Taylor and Williams are entitled to summary judgment. . . . Judge Farnan granted them summary judgment on the first supervisory liability claim because Barks failed to meet *Sample*’s threshold requirement. Barks did not allege in her third amended complaint a specific supervisory practice that Taylor and Williams should have performed, and any allegations that Taylor and Williams should have ‘enforced’ the contract would do nothing to

cure that omission. The District Court should have granted Taylor’s and Williams’s motion for summary judgment on the supervisory liability claim for the same reasons Judge Farnan did on the earlier supervisory liability claim.”)

*Valdez v. Danberg*, 576 F. App’x 97, 100 (3d Cir. 2014) (“We have recognized two theories of supervisory responsibility: (1) where a supervisor establishes and maintains a policy, practice or custom which directly causes a constitutional harm; and (2) where the supervisor participates in violating a plaintiff’s rights, directs others to violate them, or has knowledge of and acquiesces in the violations. *Santiago*, 629 F.3d at 129 n. 5. *See also Sample*, 885 F.2d at 1116–17 (supervisory liability may be imposed only where the supervisor was the ‘moving force’ behind the constitutional tort).”)

*Lawal v. McDonald*, 546 F. App’x 107, 113, 114 (3d Cir. 2014) (“As the District Court observed, the repeated and collective use of the word ‘Defendants’ ‘fail[ed] to name which specific Defendant engaged in the specific conduct alleged.’. . . As a result, the Amended Complaint is ambiguous about each Defendant’s role in the operation and whether he committed the act himself or supervised other agents in doing so. In using the collective ‘Defendants,’ Plaintiffs alleged that *each* of the Defendants: (a) directed the PPA to send the letters to Plaintiffs advising them that they were entitled to a refund, to be picked up at the PPA facility; (b) attacked each driver, throwing him against a wall and handcuffing him; (c) was told by Plaintiffs that Plaintiffs were citizens; (d) interrogated each Plaintiff for more than one hour; (e) acknowledged to each Plaintiff that he ‘had been mistakenly detained,’ but (f) told them they were not permitted to leave; (g) held the Plaintiffs for several additional hours; and (h) prohibited them from speaking or standing. There is a serious question as to whether it is plausible that each of the three defendants committed all of the acts ascribed to them, particularly given the number of other individuals brought to the facility during the operation and the affidavits submitted with Defendants’ motion to dismiss. . . . In light of these ambiguities, the Amended Complaint may fail to meet *Iqbal*’s directive that ‘a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’. . . Moreover, given the very narrow potential claim upon which relief may be granted, it is difficult for Defendants to determine which of them are alleged to have held or directed others to hold Plaintiffs after their U.S. citizenship was verified and they were no longer suspected of violating the immigration laws. To the extent Plaintiffs seek to proceed on a theory of supervisory liability, the pleading likely requires further factual assertions linking the direction or act of an individual defendant to the alleged unconstitutional conduct. . . . Thus, to resolve the ambiguity regarding the precise actions each individual Defendant allegedly took, we will provide Plaintiffs a final opportunity to file a pleading that provides the factual enhancements that specify the acts each individual Defendant . . . allegedly took, explains whether each Defendant personally engaged in the acts or if the actions were taken at the specific Defendant’s direction, and includes facts concerning the reasonableness of Plaintiffs’ detention. Of course, such a pleading must comply with Fed.R.Civ.P. 11. If Plaintiffs choose to file a Second Amended Complaint, the District Court will be free to entertain another motion to dismiss before permitting any discovery and determine whether Plaintiffs have alleged facts that demonstrate a specific Defendant

plausibly engaged in an unreasonable seizure after they verified Plaintiffs' citizenship status, and, even if sufficiently alleged, whether the specific Defendant is entitled to qualified immunity.")

**Zion v. Nassan**, 556 F. App'x 103, 2014 WL 323373, \*5 (3d Cir. Jan. 30, 2014) ("The amended complaint includes numerous allegations of Nassan's violent propensities before and during his employment as a Pennsylvania state trooper. The amended complaint specifically alleges that the supervisory defendants were aware of a 2008 jury finding that Nassan was liable for the shooting death of a twelve-year-old boy. . . . The supervisors allegedly did not order additional training for Nassan, and one of them allegedly ordered a subordinate to alter Nassan's employment records. . . . These allegations establish that the supervisory defendants were aware of a pattern of violent behavior by Nassan and did nothing to remedy the situation. At the time of the shooting, binding precedent held that a supervisor may be liable for his subordinate's constitutional violations if the supervisor 'had knowledge of and acquiesced in' the violations. *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Detention Ctr.*, 372 F.3d 572, 586 (3d Cir.2004). Because the legal norms allegedly violated by the supervisory defendants were clearly established at the time of the challenged actions, we will affirm the District Court's judgment as to the supervisory defendants as well.")

**Bistran v. Levi**, 696 F.3d 352, 366 n.5 (3d Cir. 2012) ("This case gives us no occasion to wade into the muddied waters of *post-Iqbal* 'supervisory liability.' 'Numerous courts, including this one, have expressed uncertainty as to the viability and scope of supervisory liability after *Iqbal*.' *Santiago*, 629 F.3d at 130 n. 8 (collecting cases); *see also Argueta*, 643 F.3d at 70. Neither the parties nor the District Court mention 'supervisory liability' as a possible basis for recovery here. As we understand his claims, Bistran alleges that the named defendants directly and personally participated in the alleged unconstitutional conduct. That is the only theory of recovery we consider.")

**Argueta v. U.S. Immigration and Customs Enforcement**, 643 F.3d 60, 70 (3d Cir. 2011) ("In this case, Plaintiffs never alleged in their Second Amended Complaint that Appellants actually adopted a facially unconstitutional policy. For instance, they did not claim that Appellants, as part of Operation Return to Sender, ever ordered ICE agents to storm into homes without obtaining the requisite consent. Plaintiffs instead claimed that these four individuals should be held accountable because, among other things, they knew of – and nevertheless acquiesced in - the unconstitutional conduct of their subordinates. The District Court determined that Plaintiffs could pursue a claim under the Fourth Amendment based on a 'knowledge and acquiescence' theory because the Fourth Amendment does not require proof of a discriminatory or unlawful purpose (and it further concluded that Appellants adequately alleged such a claim in their pleading). In response, Appellants have argued that: (1) at least after *Iqbal*, 'knowledge and acquiescence,' 'failure to train,' and similar theories of supervisory liability are not viable in the *Bivens* context and, on the contrary, a supervisor may be held liable only for his or her direct participation in the unconstitutional conduct; and (2) even under such now defunct theories of liability, Plaintiffs failed to allege a facially plausible *Bivens* claim against Appellants. We recently observed that '[n]umerous courts, including this one, have expressed uncertainty as to the viability and scope of

supervisory liability after *Iqbal*.’ . . To date, we have refrained from answering the question of whether *Iqbal* eliminated – or at least narrowed the scope of – supervisory liability because it was ultimately unnecessary to do so in order to dispose of the appeal then before us. . . We likewise make the same choice here because we determine that Plaintiffs failed to allege a plausible claim to relief on the basis of the supervisors’ ‘knowledge and acquiescence’ or any other similar theory of liability. Accordingly, we need not (and do not) decide whether Appellants are correct that a supervisor may be held liable in the *Bivens* context only if he or she directly participates in unconstitutional conduct.”)

***Argueta v. U.S. Immigration and Customs Enforcement***, 643 F.3d 60, 72, 74-77 (3d Cir. 2011) (“[W]e assume for purposes of this appeal that a federal supervisory official may be liable in certain circumstances even though he or she did not directly participate in the underlying unconstitutional conduct. The District Court specifically concluded that a Fourth Amendment claim does not require a showing of a discriminatory purpose and that Plaintiffs could therefore proceed under a ‘knowledge and acquiescence’ theory. Plaintiffs acknowledge that the ‘terminology’ used to describe ‘supervisory liability’ is ‘often mixed.’ . . They contend that a supervisor may be held liable in certain circumstances for a failure to train, supervise, and discipline subordinates. . . . We accordingly stated in a § 1983 action that ‘[p]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence.’ *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988). . . We further indicated that a supervisor may be liable under § 1983 if he or she implements a policy or practice that creates an unreasonable risk of a constitutional violation on the part of the subordinate and the supervisor’s failure to change the policy or employ corrective practices is a cause of this unconstitutional conduct. . . . Having addressed the legal elements that a plaintiff must plead to state a legally cognizable claim, we turn to the remaining steps identified by *Iqbal*: (1) identifying those allegations that, because they are no more than conclusions, are not entitled to any assumption of truth; and (2) then determining whether the well-pleaded factual allegations plausibly give rise to an entitlement to relief. . . We acknowledge that Plaintiffs filed an extensive and carefully drafted pleading, which certainly contained a number of troubling allegations especially with respect to alleged unconstitutional behavior on the part of lower-ranking ICE agents. Plaintiffs are also correct that, even after *Iqbal*, we must continue to accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and then determine whether a reasonable inference may be drawn that the defendant is liable for the alleged misconduct. . . .[W]e ultimately conclude that, like *Iqbal*, Plaintiffs failed to allege a plausible *Bivens* claim against the four Appellants. Initially, certain allegations in the Second Amended Complaint were conclusory in nature and merely provided, at best, a ‘framework’ for the otherwise appropriate factual allegations. . . For instance, the broad allegations regarding the existence of a ‘culture of lawlessness’ are accorded little if any weight in our analysis. . . We further note that the relevant counts in the pleading contained boilerplate allegations mimicking the purported legal standards for liability, which we do not assume to be true. We also must reject certain broad characterizations made by the District Court, which were not supported by either the actual factual allegations in the Second Amended Complaint or reasonable inferences from such allegations. Most significantly, the District Court

went too far by stating that Myers and Torres ‘worked on these issues everyday.’ . . . Turning to the non-conclusory factual allegations in the Second Amended Complaint, we begin with the critical issue of notice. Plaintiffs did reference an impressive amount of documentation that allegedly provided notice to Appellants of their subordinates’ unconstitutional conduct. However, these alleged sources of notice were fatally flawed in one way or another. Broadly speaking, we must point out the typical ‘notice’ case seems to involve a prior incident or incidents of misconduct by a specific employee or group of employees, specific notice of such misconduct to their superiors, and then continued instances of misconduct by the same employee or employees. The typical case accordingly does not involve a ‘knowledge and acquiescence’ claim premised, for instance, on reports of subordinate misconduct in one state followed by misconduct by totally different subordinates in a completely different state. . . . Second, we observe that allegations specifically directed against Appellants themselves (unlike the allegations directed at the agents who actually carried out the raids) described conduct consistent with otherwise lawful behavior. . . . In other words, a federal official specifically charged with enforcing federal immigration law appears to be acting lawfully when he or she increases arrest goals, praises a particular enforcement operation as a success, or characterizes a home entry and search as an attempt to locate someone (i.e., a fugitive alien). In fact, the qualified immunity doctrine exists to encourage vigorous and unflinching enforcement of the law. . . . We also agree with Appellants’ assertion that Plaintiffs themselves did not really identify in their pleading what exactly Appellants should have done differently, whether with respect to specific training programs or other matters, that would have prevented the unconstitutional conduct. . . . We also cannot overlook the fact that Appellants themselves occupied relatively high-ranking positions in the federal hierarchy. . . . [T]he context here involved, at the very least, two very high-ranking federal officials based in Washington D.C. who were charged with supervising the enforcement of federal immigration law throughout the country (as well as two other officials responsible for supervising such enforcement throughout an entire state). . . . [W]e wish to emphasize that our ruling here does not leave Plaintiffs without any legal remedy for the alleged violation of the United States Constitution. Chavez, Galindo, and W.C. are still free to pursue their official capacity claims for injunctive relief against any further intimidation or unlawful entry into their home. Also, we do not address Plaintiffs’ individual capacity claims for damages against the lower-ranking ICE agents named in the Second Amended Complaint.”)

*Santiago v. Warminster Tp.*, 629 F.3d 121, 128-34 & n.8, n.10 (3d Cir. 2010) (“While we conclude that the Third Amended Complaint can be read as alleging liability based on the Supervising Officers’ own acts, we will nevertheless affirm the District Court’s ruling because those allegations fail to meet the pleading requirements set forth by the Supreme Court in *Twombly* and *Iqbal*. . . . [A]ny claim that supervisors directed others to violate constitutional rights necessarily includes as an element an actual violation at the hands of subordinates. In addition, a plaintiff must allege a causal connection between the supervisor’s direction and that violation, or, in other words, proximate causation. . . . Therefore, to state her claim against Chief Murphy and Lt. Donnelly, Santiago needs to have pled facts plausibly demonstrating that they directed Alpha Team to conduct the operation in a manner that they ‘knew or should reasonably have known

would cause [Alpha Team] to deprive [Santiago] of her constitutional rights.’ . . .As to her claim against Lt. Springfield, Santiago must allege facts making it plausible that ‘he had knowledge of [Alpha Team’s use of excessive force during the raid]’ and ‘acquiesced in [Alpha Team’s] violations.’ . . . Numerous courts, including this one, have expressed uncertainty as to the viability and scope of supervisory liability after *Iqbal*. . . . Because we hold that Santiago’s pleadings fail even under our existing supervisory liability test, we need not decide whether *Iqbal* requires us to narrow the scope of that test. . . . Santiago alleges that the plan developed and authorized by Chief Murphy and Lt. Donnelly ‘specifically sought to have all occupants exit the Plaintiff’s home, one at a time, with hands raised under threat of fire, patted down for weapons, and then handcuffed until the home had been cleared and searched.’ Because this is nothing more than a recitation of what Santiago says the Alpha Team members did to her, it amounts to a conclusory assertion that what happened at the scene was ordered by the supervisors. While the allegations regarding Alpha Team’s conduct are factual and more than merely the recitation of the elements of a cause of action, the allegation of supervisory liability is, in essence, that ‘Murphy and Donnelly told Alpha team to do what they did’ and is thus a ‘formulaic recitation of the elements of a [supervisory liability] claim,’ *Iqbal*, 129 S.Ct. at 1951 (internal quotation marks omitted) – namely that Chief Murphy and Lt. Donnelly directed others in the violation of Santiago’s rights. Saying that Chief Murphy and Lt. Donnelly ‘specifically sought’ to have happen what allegedly happened does not alter the fundamentally conclusory character of the allegation. . . . Our conclusion in this regard is dictated by the Supreme Court’s decision in *Iqbal*. . . . In short, Santiago’s allegations are ‘naked assertion[s]’ that Chief Murphy and Lt. Donnelly directed Alpha Team to conduct the operation in the allegedly excessive manner that they did and that Lt. Springfield acquiesced in Alpha Team’s acts. As mere restatements of the elements of her supervisory liability claims, they are not entitled to the assumption of truth. However, it is crucial to recognize that our determination that these particular allegations do not deserve an assumption of truth does not end the analysis. It may still be that Santiago’s supervisory liability claims are plausible in light of the non-conclusory factual allegations in the complaint. We therefore turn to those allegations to determine whether the claims are plausible. . . . In summary, the allegations against Alpha Team are that the officers ordered everyone to exit the house one at a time; that Santiago exited first under threat of fire; that Santiago was patted down in a demeaning fashion, found to be unarmed, and subsequently handcuffed; that the remaining occupants of the home then exited, some of whom were handcuffed while others were not; that Santiago’s daughter was coerced into consenting to a search of the home; and that Santiago was left restrained for thirty minutes while her home was searched, during which time she had a heart attack. The question then becomes whether those allegations make it plausible that Chief Murphy and Lt. Donnelly directed Alpha Team to conduct the operation in a manner that they ‘knew or should reasonably have known would cause [Alpha Team] to deprive [Santiago] of her constitutional rights,’ . . . or that Lt. Springfield ‘had knowledge [that Alpha Team was using excessive force during the raid]’ and ‘acquiesced in [Alpha Team’s] violations.’ . . . [T]here is no basis in the complaint to conclude that excessive force was used on anyone except Santiago. Even if someone else had been subjected to excessive force, it is clear that the occupants were not being treated uniformly. Thus, Santiago’s allegations undercut the notion of a plan for all occupants to be threatened with fire and handcuffed. While it is possible that there was such a plan, and that

Alpha Team simply chose not to follow it, ‘possibility’ is no longer the touchstone for pleading sufficiency after *Twombly* and *Iqbal*. Plausibility is what matters. Allegations that are ‘merely consistent with a defendant’s liability’ or show the ‘mere possibility of misconduct’ are not enough. . . Here, given the disparate treatment of the occupants of the home, one plausible explanation is that the officers simply used their own discretion in determining how to treat each occupant. In contrast with that ‘obvious alternative explanation’ for the allegedly excessive use of force, the inference that the force was planned is not plausible. Where, as here, an operation results in the use of allegedly excessive force against only one of several people, that use of force does not, by itself, give rise to a plausible claim for supervisory liability against those who planned the operation. To hold otherwise would allow a plaintiff to pursue a supervisory liability claim anytime a planned operation resulted in excessive force, merely by describing the force used and appending the phrase ‘and the Chief told them to do it.’ *Iqbal* requires more. . . . We next ask whether the allegation that Lt. Springfield was placed in charge of the operation, coupled with what happened during the operation, makes it plausible that Lt. Springfield knew of and acquiesced in the use of excessive force against Santiago. Again, we conclude that it does not. The complaint implies but does not allege that Lt. Springfield was present during the operation. Assuming he was present, however, the complaint still does not aver that he knew of the allegedly excessive force, nor does it give rise to the reasonable inference that he was aware of the level of force used against one individual. . . . In sum, while Santiago’s complaint contains sufficient allegations to show that the Supervising Officers planned and supervised the operation and that, during the operation, Alpha Team used arguably excessive force, her allegations do nothing more than assert the element of liability that the Supervising Officers specifically called for or acquiesced in that use of force. . . . The Third Amended Complaint was filed after the close of discovery. Consequently, there is no reason to believe that Santiago’s conclusory allegations were simply the result of the relevant evidence being in the hands of the defendants. Under *Iqbal*, however, the result would be the same even had no discovery been completed. We recognize that plaintiffs may face challenges in drafting claims despite an information asymmetry between plaintiffs and defendants. Given that reality, reasonable minds may take issue with *Iqbal* and urge a different balance between ensuring, on the one hand, access to the courts so that victims are able to obtain recompense and, on the other, ensuring that municipalities and police officers are not unnecessarily subjected to the burdens of litigation. . . The Supreme Court has struck the balance, however, and we abide by it.”)

*Laffey v. Plouisis*, 364 F. App’x 791, 2010 WL 489473, at \*3, \*4 (3d Cir. Feb. 12, 2010) (“Laffey observes that several circuits recognize that in the § 1983 context, one can be held liable for a constitutional violation by ‘setting in motion’ certain events which he knows or should know will result in a constitutional violation. . . Laffey asks us to adopt and apply a similar standard in this *Bivens* action and to find that Rackley, Plouisis, and Elcik are liable because ‘they pressured MVM into disciplining Laffey....’ We have yet to apply such a standard in cases arising under § 1983, much less in the context of a *Bivens* action. Furthermore, we are hesitant to adopt this standard following *Iqbal*, a *Bivens* action in which the Supreme Court emphasized ‘a plaintiff must plead that each Government-official defendant, *through the official’s own individual actions*, has violated the Constitution.’ *Iqbal*, 129 S.Ct. at 1948 (emphasis added). And finally, although Laffey

argues that Plousis, Rackley, and Elcik ‘pressured’ MVM into disciplining him, his complaint alleges insufficient facts to support such an inference. In sum, the District Court did not err because Laffey failed to allege facts sufficient to demonstrate that any individual Marshals Service defendant was responsible for his demotion or suspension.”).

*Bayer v. Monroe County Children and Youth Services*, 577 F.3d 186, 191 n.5 (3d Cir. 2009) (“With respect to Bahl, the District Court recognized that he cannot be liable for this violation under § 1983 on a respondeat superior theory, and that plaintiffs ‘instead must show that [he] played a personal role in violating their rights.’ . . . The court concluded that plaintiffs had created a triable issue ‘as to whether Defendant Bahl had personal knowledge regarding the Fourteenth Amendment procedural due process violation.’ In light of the Supreme Court’s recent decision in *Ashcroft v. Iqbal*, No. 07-1015 (May 18, 2009), it is uncertain whether proof of such personal knowledge, with nothing more, would provide a sufficient basis for holding Bahl liable with respect to plaintiffs’ Fourteenth Amendment claims under § 1983. . . . We need not resolve this matter here, however. As discussed *infra*, we believe qualified immunity shields both Dry and Bahl from liability for their conduct in this case; thus, Bahl would be entitled to such immunity whether his alleged liability under § 1983 were to derive from his own conduct or from his knowledge of Dry’s conduct.”).

*Castellani v. City of Atl. City*, No. CV 13-5848 (JBS/AMD), 2017 WL 3112820, at \*16-17 (D.N.J. July 21, 2017) (“The availability of a supervisory liability theory for excessive force claims is unclear since the Supreme Court’s decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See *Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 70 (3d Cir. 2011) (“To date, we have refrained from the answering the question of whether *Iqbal* eliminated—or at least narrowed the scope of—supervisory liability ... [w]e likewise make the same choice here...”)). Plaintiff argues that the Court should employ the Eighth Amendment supervisory liability analysis from *Barkes v. First Correctional Medical, Inv.*, 766 F.3d 307, 316 (3d Cir. 2014), *rev’d on other grounds sub nom, Taylor v. Barkes*, 124 S. Ct. 2042 (2015), which permits supervisory liability where the supervisor acted with deliberate indifference in maintaining a custom or policy that directly caused the violation of the plaintiff’s constitutional rights. . . . Defendant Hall, on the other hand, relies on *Ricker v. Weston*, 27 Fed.Appx. 113 (3d Cir. 2002), which, while concededly an unpublished decision, addresses supervisor liability in the context of an allegation of excessive force. The *Ricker* court held that a supervisor may be liable under § 1983 for his subordinate’s lawful conduct ‘if he or she directed, encouraged, tolerated, or acquiesced in that conduct,’ but for liability to attach, ‘there must exist a causal link between the supervisor’s action or inaction and the plaintiff’s injury.’ . . . In other words, the supervisor ‘must be directly and actively involved in the subordinate’s unconstitutional conduct.’ . . . In *Ricker*, the court granted the supervisors’ motion for summary judgment because there was ‘simply no causal link’ between Plaintiff’s injuries and what the supervisors did or did not do. . . . Defendant Hall further argues that even if some form of supervisor liability in the context of an excessive force claim still exists post *Iqbal*, Plaintiff’s claim still fails because for liability to be established under a deliberate indifference standard, the plaintiff must preliminarily establish that the supervisor is a policymaker. *A.M. ex rel. J.M.K. v.*

*Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir. 2004). Defendant argues that Plaintiff has presented no evidence that Hall was a policymaker, as he was a working police sergeant in a large police department, whose only role was to gather information on K-9 handler candidates and produce it to the hiring committee. . . . The Court finds that Plaintiff has failed to raise any genuine dispute of material fact as to Defendant Hall’s supervisory liability. Defendant Hall was not the policymaker in this situation, and there is no indication that Hall actually selected Wheaten for the position of K9 Handler, nor that he directed the officers to attack. In the alternative, Defendant Hall asserts qualified immunity, and Plaintiff does not oppose. Plaintiff has not established that Defendant Hall violated a clearly established constitutional right, as he has not identified a case where a supervisor acting under similar circumstances as Hall was held to have violated the Fourth Amendment. See *White v. Pauly*, 137 S. Ct. 548, 552 (2017)(reiterating that the clearly established law must be “particularized” to the facts of the case, and should not be defined “at a high level of generality”).”)

*Wilson v. Gilmore*, No. 14CV1654, 2015 WL 3866531, at \*6 (W.D. Pa. June 22, 2015) (“Taking as true Plaintiff’s allegations concerning Superintendent Gilmore’s failure to train and supervise, Plaintiff has stated a plausible claim for relief that Superintendent Gilmore’s practice of failing to train and supervise his employees on the DOC’s policies regarding use of force, use of restraints, and access to medical care created an unreasonable risk that a constitutional injury would occur, of which he was aware and indifferent to, and which resulted in an injury to Plaintiff. Specifically, Plaintiff has alleged that Superintendent Gilmore was responsible in his position of authority to ensure his correctional officers were trained on use of force, use of restraints, and access to medical care policies and the failure to perform this function created an unreasonable risk of injury. Whether the facts at issue here constitute a constitutional violation is inappropriate for the Court to determine at this juncture. Plaintiff also alleges that Superintendent Gilmore ‘tolerated, encouraged, and acquiesced in a practice of excessive use of force by correctional officers at Greene through his failure to appropriately discipline those he knew had violated DOC policy on use of force, application of restraints, and access to medical care.’ . . . He further alleges that Superintendent Gilmore acquiesced in the security office’s practice of ignoring prisoner complaints of abuse. . . . Taking these allegations as true, Plaintiff has stated a plausible claim that Superintendent Gilmore’s actions of ignoring inmate abuse complaints and failing to discipline correctional officers for violating the aforementioned DOC policies created an unreasonable risk that the officers, including the other defendants, would violate these policies knowing that they would not be disciplined for such conduct and that these actions indirectly caused his injuries. Accordingly, Plaintiff has sufficiently pled the requisite level of personal involvement as to Superintendent Gilmore and the Defendant’s motion should therefore be denied.”)

*Moore v. Mann*, No. 3:CV-13-2771, 2015 WL 3755045, at \*4 (M.D. Pa. June 16, 2015) (“Courts have found that an allegation that an official ignored correspondence from an inmate, and that the requesting of an investigation of his allegations, is insufficient to impose liability on the supervisory official. . . . While under some circumstances a letter alerting local prison officials, who are in a position to take steps to protect an inmate, may impose such duties to take reasonable

measures to guarantee the safety of the inmate, such is not the case here. Wetzel was not employed at SCI-Coal Township. Further, as Plaintiff admits, by the time he became aware of the allegations via the letter Plaintiff wrote to the Office of Professional Responsibility, the matter was under investigation. . . For these reasons, the claims set forth against Defendant Wetzel will be dismissed from the complaint.”)

*Doe v. New Jersey Dep’t of Corr.*, No. CIV.A. 14-5284 FLW, 2015 WL 3448233, at \*10 (D.N.J. May 29, 2015) (“Pursuant to *Barkes*, the Court analyzes whether Plaintiff has alleged sufficient facts to show that (1) a policy or procedure in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) that Defendant Lanigan was aware that the policy or procedure created an unreasonable risk; (3) that Defendant Lanigan was indifferent to that risk; and (4) that the constitutional injury was caused by the failure to implement the supervisory procedure. Plaintiff’s Complaint identifies Defendant Lanigan as a policymaker who is responsible for ‘the implementation and enforcement of policies and procedures ... to ensure the physical and emotional safety and well-being of an inmate such as the Plaintiff.’. . Plaintiff’s Complaint details a pattern of violent assaults against him by correctional officers and inmates, which were purportedly precipitated by his status as a cooperating witness in the prosecutions of high profile gang members and the mistaken belief among correctional officers that he had also cooperated in the prosecution of a former NJSP correctional officer. In count six, captioned ‘Policymaker and/or Supervisory Liability,’ Plaintiff alleges, among other allegedly deficient policies, that the NJSP policies regarding protection of cooperating witness were deficient because those policies failed to ‘protect, secure, and segregate inmates who have cooperated with law enforcement-especially in a criminal case that involves employees of the NJDOC itself and/or involves violent inmate gang members.’. . Plaintiff further contends that ‘[i]nmates who have cooperated in cases involving NJDOC employees, particularly Correction Officers, should be transferred out of State and their safety should be ensured[.]’ . . The Court also finds that Plaintiff has adequately pleaded the knowledge requirement with respect to Defendant Lanigan. Notably, after the first three assaults by correctional officers, but months before the assault by Defendant McNair on July 24, 2014, Plaintiff’s mother allegedly sent letters to upper management and policy makers in the NJDOC in an effort to notify high ranking prison officials about her son’s plight. The July 25, 2014 letter from Plaintiff’s attorney to Defendant Lanigan, attached as an exhibit to the Complaint and sent after the last violent attack, also references correspondence sent to the Office of the Attorney General during 2013–2014, allegedly to notify state officials about the assaults on and threats against Plaintiff. Plaintiff alleges that the earlier attacks by Defendants Avino and Ortiz resulted in the termination of Defendant Avino and prompted an internal investigation within NJSP. Assuming the truth of these allegations for purposes of the motion to dismiss and giving all favorable inferences to Plaintiff, it is hardly implausible to draw the inference that Defendant Lanigan was aware of Plaintiff’s particular plight prior to the attack on July 24, 2014. As explained in *Barkes*, to meet the knowledge requirement for supervisory liability, a supervisor need not have specific or knowledge of a particular inmate’s situation in order to hold the supervisor liable for deliberate indifference. . . Here, however, it is plausible under the facts pleaded in Plaintiff’s Complaint that Defendant Lanigan was aware that Plaintiff was a repeated

target of assault by correctional officers prior to the July 24, 2014 attack but did not institute any corrective policies, measures, training, or supervision to prevent further injury to Plaintiff. As such, because Plaintiff adequately states a claim for relief against Defendant Lanigan in his supervisory capacity and the State fails to offer additional arguments for dismissal, the State's motion to dismiss the Complaint as to Defendant Lanigan is denied without prejudice.”)

*Beenick v. LeFebvre*, No. 4:14-CV-01562, 2015 WL 2344966, at \*4-7 (M.D. Pa. May 14, 2015) (“As Plaintiff points out, Magistrate Judge Blewitt’s report and recommendation failed to address the ways in which *Barkes* clarified Third Circuit law in the aftermath of the United States Supreme Court decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). It is true, as Magistrate Judge Blewitt acknowledged and Defendants argue, that government officials may not be held liable for the unconstitutional actions of their subordinates on a theory of *respondeat superior*. . . It was on this principle that Magistrate Judge Blewitt founded his analysis. In doing so, Magistrate Judge Blewitt unfortunately failed to recognize the myriad of ways in which Plaintiff had alleged that Dittsworth, Weaving, and Fagan, through their own individual actions, had violated his constitutional rights. To that end, *Barkes* reiterated that there are two general ways in which a supervisor-defendant can be held liable for the unconstitutional actions and conduct of their subordinates. . . The first is a direct liability theory, including a theory of knowledge and acquiescence, and the second is policy or practice liability, including a theory based on failure to supervise. In his complaint, Plaintiff specified only a failure to supervise claim in Count IV. However, throughout the complaint he utilizes language of knowledge and acquiescence. Consequently, the Court will address both theories as they apply to Plaintiff’s allegations. . . . Although *Iqbal* arguably rejected supervisory liability predicated on a theory of knowledge and acquiescence, the Third Circuit has clarified through *Barkes* that the holding in *Iqbal* was dependent on the constitutional violation at issue. . . Because the claim presented in *Iqbal*—First and Fifth Amendment violations—required that the plaintiff prove that the perpetrator acted with a discriminatory purpose, it necessarily followed that the defendant supervisors need have possessed the same mental state. . . Therefore, the *Barkes* court concluded, ‘the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged. In this case, the underlying tort is ... [a] violation of the Eighth Amendment’s prohibition on cruel and unusual punishment, and the accompanying mental state is subjective deliberate indifference.’ . . However, following *Iqbal*, the Third Circuit has heightened its pleading bar for supervisory liability claims predicated on a theory of knowledge and acquiescence. . . [Discussing *Santiago* and *Argueta*] In the case at bar, Plaintiff alleges only that Defendants Dittsworth and Weaving knew that LeFebvre and Mandichak–McConnell routinely ordered prisoners to operate the meat slicer to slice food it was not intended to slice, without any safety precautions and without any training. He alleges more specifically that Defendant Fagan knew of this practice through her periodic inspections, observation, and through verbal and written communications from staff and prisoners. He further alleges that all of the supervisory defendants ‘tolerated, condoned, acquiesced in, and encouraged the practice.’ These allegations are insufficient to state a claim for supervisory liability under the Third Circuit’s heightened pleading standards. As relates to Defendants Dittsworth and Weaving, the open-ended statement that they had knowledge of their subordinates’ conduct is purely conclusory

without any facts to support that statement. As for Defendant Fagan, the allegations against her are very similar to those articulated in *Argueta* in terms of specificity and abundance. As those allegations in *Argueta* were found to be insufficient, so too do we find them here. Consequently, to the extent Plaintiff's claim in count IV is predicated on a theory of knowledge and acquiescence, it is dismissed without prejudice, with leave to amend in accordance with this Court's decision to more explicitly state the circumstances and specifics of the Defendants' knowledge. . . . The second way in which a supervisor-defendant may be liable for the acts of its subordinates is if, 'with deliberate indifference to the consequences, [he or she] established and maintained a policy, practice or custom which directly caused [the] constitutional harm.' . . . A subcategory of this type of policy or practice liability includes 'failure to' claims, including failure to train, failure to discipline, and most importantly for the matter before this Court, failure to supervise. . . . The *Barkes* court went on to reaffirm the continued viability of its test for supervisory liability in the context of a failure to supervise claim under the Eighth Amendment, as originally articulated in *Sample v. Diecks*, 885 F.2d 1099 (3d Cir.1989). . . . In that case, the Third Circuit developed a four-part test for establishing a claim based on the failure of a government official to supervise his or her subordinates. Specifically, '[t]he plaintiff must identify a supervisory policy or practice that the supervisor failed to employ, and then prove that: (1) the policy or procedures in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) the defendant-official was aware that the policy created an unreasonable risk; (3) the defendant was indifferent to that risk; and (4) the constitutional injury was caused by the failure to implement the supervisory practice or procedure.' . . . Moreover, the *Barkes* court explicitly rejected the notion that the defendant must have committed an affirmative act in order to be held liable under the Eighth Amendment. . . . At this point in the litigation the Court need only consider whether Plaintiff has plead a cause of action for failure to supervise, not whether he has proven his claim. I find that he has done so. Specifically, Plaintiff has alleged that all three of the supervisory Defendants were responsible in their positions of authority to make protective gear available and to ensure that the meat-slicer would not be used without its blade guard. The failure to make available protective gear with a dangerous cutting instrument and the failure to train prisoners in the use of that instrument necessarily creates an unreasonable risk of injury, especially in the context of a prison environment where prisoners have less liberty to refuse to follow the order of a superior. Whether the facts at issue here constitute a constitutional violation is inappropriate for the Court to determine at this juncture. I find only that Plaintiff has alleged enough information in his complaint to plausibly state that a constitutional violation has occurred because of Defendants' inactions. . . . Moreover, Plaintiff does aver that Defendants knew that Defendants LeFebvre and Mandichak–McConnell routinely ordered prisoners to operate the meat slicer to slice food it was not intended to slice, without any safety precautions and without any training. In the absence of a more developed factual record, the Court is unaware of the exact contours of the Defendants knowledge of their subordinates' conduct. Furthermore, Plaintiff alleges that Defendants did nothing to prevent this practice, instead tolerating, condoning, and encouraging it. . . . Finally, Plaintiff alleges that his injury, including the loss of his fingers, was directly caused by the failure of the Defendants to take the actions they were required to and their inaction in preventing Defendants LeFebvre and Mandichak–McConnell from allowing this unsafe practice to persist. These are more than 'naked

assertions’ that formulaically recite the elements of the cause of action. Consequently, Defendants’ motion to dismiss count IV will be denied to the extent Plaintiff’s complaint relies upon a theory of failure to supervise.”)

*Peet v. Beard*, No. 3:10-CV-482, 2015 WL 2250233, at \*15-17 (M.D. Pa. May 12, 2015) (“[T]he defendants’ exclusive focus on Palakovich’s asserted inability to make medical decisions and his lack of direct interaction with Peet misses the salient focus that the Third Circuit highlighted in *Barkes*, which is on whether Palakovich’s own conduct in his role as a supervisor was itself deliberately indifferent with respect to policies and procedures within the prison. . . . In particular, Peet notes that official policy dictated that emergency response times were to be within four minutes, something that Palakovich himself acknowledged was expected of staff. Nevertheless, there is evidence in the record to show that SCI–Camp Hill officers on duty on the day of the alleged incident had never been trained in effective response times, and indeed were entirely unaware of the 4–minute maximum response time expected until they learned of it during discovery in this case. . . . Likewise, DOC nurses who were also under Palakovich’s supervision and ultimate authority were also never trained regarding expected response times. . . . [T]he evidence reveals a potentially stark contrast between what defendant Palakovich describes as his understanding of the medical emergency response policy, a policy he was charged with implementing, and the general lack of awareness of that policy among those who were charged with Peet’s safety during the critical moments when he lay disabled with his face wedged against a scalding radiator. This gulf could have been bridged by essential training, understanding, awareness and communication, but the factual record is largely silent on this score, leaving the gulf between the superintendent’s expectations, and staff awareness of those expectations unbridged. Given these unresolved factual questions, we believe that summary judgment would not be appropriate on a supervisory failure-to-train claim. . . . [T]he evidence, albeit disputed, when viewed in a light most favorable to the plaintiff would permit a finding of supervisory failure-to-train liability. The nature of this policy, which deals with emergency medical responses, underscores the gravity of adequate staff knowledge and training. . . . Yet, the evidence, and particularly the staff assertions that they were totally unaware of a policy that called for a four minute response to a medical emergency in which it is alleged that an inmate was being blinded, scarred and burned by a radiator for an extended period of time, permits an inference that there was a failure-to-train in this case that rose to a matter of potentially constitutional dimensions. . . . The defendants’ suggestion that medical staff are entirely independent of Palakovich, or somehow that they and their decisions fell outside the ambit of his authority, is not legally tenable, and does not provide a basis for summary judgment in light of *Barkes*. . . . [T]he plaintiff has done an adequate job of identifying facts that could show that SCI–Camp Hill administrators, including Superintendent Palakovich, were indifferent to their role as supervisors overseeing both corrections staff and medical staff at the prison, and that this indifference—in the face of Peet’s serious and documented medical needs—arose to the level of constitutional misconduct.”)

*Harris v. Hudson Cnty. Jail*, No. CIV.A. 14-6284 JLL, 2015 WL 1607703, at \*5 (D.N.J. Apr. 8, 2015) (“To make out a supervisor liability claim based on acquiescence, Plaintiff must show that

the supervisor had authority over a subordinated, had actual knowledge of a violation of a plaintiff's rights, and then acquiesced to that violation. . . . To recover on such a claim, a plaintiff must also show that the supervisor acted with the requisite mental state, which varies based on the tort alleged. *Barkes*, 766 F.3d at 319–20. In a conditions of confinement claim, the requisite mental state is deliberate indifference.”)

*Jamison v. Wetzel*, No. 1:13-CV-2129, 2015 WL 791444, at \*7 (M.D. Pa. Feb. 25, 2015) (“[T]o the extent that these supervisory liability claims rest on the premise that officials did not after-the-fact act favorably upon his past grievances, this claim also fails. An inmate cannot sustain a constitutional tort claim against prison supervisors based solely upon assertions that officials failed to adequately investigate or respond to his past grievances. Inmates do not have a constitutional right to a prison grievance system. *Speight v. Sims*, 283 F. App'x 880 (3d Cir.2008) . . . . Consequently, dissatisfaction with a response to an inmate's grievances does not support a constitutional claim. . . . In sum, a number of the plaintiff's claims against these supervisory defendants appear to consist of little more than assertions of *respondeat superior* liability, coupled with dissatisfaction with the processing of this inmate's past grievances, assertions which as a matter of law do not suffice to state a constitutional tort claim. Therefore, these defendants are entitled to be dismissed from this case.”)

*Womack v. Moleins*, No. CIV. 10-2932, 2015 WL 420161, at \*2-3 (D.N.J. Jan. 30, 2015) (“There are two ways to establish a supervisory defendant's personal involvement in a subordinate's unconstitutional conduct. First, the supervisor may be liable if he ‘participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in the subordinate's unconstitutional conduct.’ *Barkes v. First Corr. Med., Inc.*, 766 F.3d 307, 316 (3d Cir.2014). To establish knowledge and acquiescence, a plaintiff must allege the defendant's ‘(1) contemporaneous knowledge of the offending incident or knowledge of similar incidents in the past, and (2) actions or inactions which communicated approval of the subordinate's behavior.’ . . . ‘[C]onstrutive knowledge of a subordinate's unconstitutional conduct simply because of [the defendant's] role as a supervisor’ is insufficient. Instead, the supervisory defendant must have actual knowledge of the misconduct, but knowledge may be inferred from the circumstances. . . . Allegations of participation or actual knowledge and acquiescence must be made with particularity. . . . Second, the supervisory defendant may be liable if he, ‘with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused the constitutional harm.’ . . . Claims alleging a failure to train, failure to discipline, or failure to supervise are a subset of such policy or practice liability. . . . Generally, failure to adequately train or supervise can only constitute deliberate indifference if the failure has caused a pattern of violations. . . . To hold an official liable on a claim for failure to supervise based on a policy or practice, a plaintiff ‘must identify a supervisory policy or practice that the supervisor failed to employ, and then prove that: (1) the policy or procedures in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) the defendant-official was aware that the policy created an unreasonable risk; (3) the defendant was indifferent to that risk; and (4) the constitutional injury was caused by the failure to implement the supervisory

practice or procedure.’ *Barkes*, 766 F.3d at 317. Similarly, to bring a claim of failure to train under § 1983, ‘a Plaintiff must (1) identify the deficiency in training; (2) prove that the deficiency caused the alleged constitutional violation; and (3) prove that the failure to remedy the deficiency constituted deliberate indifference....’ *Lapella v. City of Atlantic City*, No. 10–2454 JBS/JS, 2012 WL 2952411, at \*6 (D.N.J. July 18, 2012).”)

***Collinson v. City of Philadelphia***, No. CIV.A. 12-6114, 2015 WL 221070, at \*4 n.1 (E.D. Pa. Jan. 14, 2015) (“The Third Circuit has expressed uncertainty as to the viability and scope of supervisory liability after the Supreme Court’s holding in *Ashcroft v. Iqbal* . . . The Third Circuit recently addressed the concept of supervisory liability after *Iqbal* as it pertained specifically to Eighth Amendment claims. The Circuit held that ‘under *Iqbal*, the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged.’ *Barkes v. First Correctional Medical, Inc.*, 766 F.3d 307, 319 (3d Cir.2014). The Third Circuit specifically ‘left for another day’ whether supervisory liability will continue to exist for other constitutional violations. . .With this ‘uncertainty,’ district courts in this Circuit have continued to apply pre-*Iqbal* standards with caution. *See, e.g. , Pratt v. City of Philadelphia*, 2012 WL 592247, at \*3 (E.D.Pa.2012).”)

***Bornstein v. Cnty. of Monmouth***, No. CIV. 11-5336, 2014 WL 6908925, at \*3-5 (D.N.J. Dec. 9, 2014) (“Recently, the Third Circuit in *Barkes v. First Correctional Medical, Inc.* ruled that supervisory liability under § 1983 in the Eighth Amendment context survived the Supreme Court’s ruling in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). . . Specifically, the Court reaffirmed its four-part standard, established in *Sample v. Diecks*, for determining whether an official may be held liable on a § 1983 Eighth Amendment claim for failure to supervise. . . In reaching its conclusion, the Court stated that ‘under *Iqbal*, the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged.’ . . Since the parties in the present case did not have the benefit of the *Barkes* opinion when briefing Defendants’ Motion for Summary Judgment, the Court directed the parties to provide supplemental briefing on the impact, if any, of *Barkes*. After reviewing the parties’ submissions, the Court does not find that *Barkes* altered the personal involvement standard for supervisory liability applicable to this case. The *Barkes* court identified ‘two general ways in which a supervisor-defendant may be liable for unconstitutional acts undertaken by subordinates[:]’ (1) liability based on an establishment of policies, practices or customs that directly caused the constitutional violation and (2) personal liability based on the supervisor participating in the violation of Plaintiff’s rights, directing others to violate Plaintiff’s rights, or having knowledge of and acquiescing to a subordinate’s conduct. . . The violation alleged in *Barkes* fell into the first category, as it was based on a supervisory officer’s failure to supervise with respect to a deficient prison mental health screening policy, while the case at hand presents a claim within the second category, which, beyond mere identification, is not addressed further in *Barkes*. Thus, the *Barkes* ruling is not directly applicable here. Although the Third Circuit’s reasoning in *Barkes* relies on the broader notion that the standard for supervisory liability varies with the underlying constitutional tort alleged, ultimately, the *Barkes* ruling is limited to affirming its previously established *Sample* standard and does not indicate an intent to change existing

standards on supervisory liability. Indeed, *Barkes* expressly states that it would ‘leave for another day the question of whether and under what circumstances a claim for supervisory liability derived from a violation of a different constitutional provision remains valid.’ . . . Had the Third Circuit intended to overrule existing standards for supervisory liability, it would have spoken more clearly. Therefore, the Court does not find that *Barkes* alters the well-established personal involvement standard for supervisory liability. . . . In *Barkes*, the Third Circuit reasoned that since the underlying tort was the denial of adequate medical care in violation of the Eighth Amendment, which has an accompanying mental state of subjective deliberate indifference, in order to hold a supervisor liable for failure to supervise in the context of a deficient mental health screening policy, there must also be deliberate indifference on the part of the supervisor, as assessed under the four part *Sample* test. . . Here, the underlying tort is excessive force against a pretrial detainee, which is assessed under the due process ‘shocks the conscience’ standard. . . . Just as a reasonable jury could find, based on the video evidence and statements of the officers, that the force used by the subordinate officers shocked the conscience, drawing all reasonable inferences in favor of Plaintiff as the non-moving party, a reasonable jury could also find that Sgt. Noland’s conduct in permitting Bornstein’s treatment by other officers shocked the conscience, especially considering the cumulative amount of force used against him by multiple officers in multiple instances. There remains a genuine dispute of material fact whether Sgt. Noland was personally involved in the alleged constitutional violations and whether his conduct shocks the conscience. Therefore, Sgt. Noland’s Motion for Summary Judgment will be denied.”)

***Rankin v. Majikes***, No. 3:CV-14-699, 2014 WL 6893693, at \*9 (M.D. Pa. Dec. 5, 2014) (“Rankin will be permitted to proceed with his Fourth Amendment claim against Dessoie and Crane because the Amended Complaint contains sufficient factual allegations to support a supervisory liability theory. Here, Dessoie and Crane are alleged to have had responsibility over the training and supervision of the City Officers and Sergeants. . . Rankin also avers that they failed to train in methods for avoiding the use of excessive or deadly force, including the use of live action simulations and other generally accepted police training methods regarding the avoidance of the use of such force. . . Rankin further asserts that they were deliberately indifferent to that risk, which resulted in the deprivation of his Fourth Amendment rights. . . Dessoie and Crane’s motion to dismiss the excessive force claim will be denied.”)

***Thomas v. Adams***, 55 F.Supp.3d 552, 554, 567-68, 578-80, 586-88 (D.N.J. 2014) (“Moving to dismiss Plaintiffs claims, pursuant to Rule 12(b) of the Federal Rule of Civil Procedure, Defendants essentially maintain that Plaintiffs failed to state a plausible claim against them simply because Defendants are high-ranking supervising officials, and Plaintiffs’ facts lack the *particularities* of Defendants’ decision-making process and actions. This Court disagrees and will deny Defendants’ motions, in part, and grant them in part. . . . Nowhere has the *Iqbal* misreading been more evident and distortive of the letter and spirit of Rule 8 than in the matters containing claims against defendants holding supervisory positions. While, half a century ago, the *Conley* passage came to be construed as allowing a pleader to avoid asserting any facts, the *Iqbal* misreading came to be used as a shield that allowed virtually every wrongdoer holding a

supervisory position to escape litigation upon claiming ‘insufficiency of pleading,’ *i.e.*, upon uttering the hollow phrase which came to mean that a plaintiff, separated from the supervisor-wrongdoer by a few ranks of subordinates, simply had no meaningful way to learn about and plead, without discovery, the *particularities* of the wrongdoer’s *exact* conduct. Such *Iqbal* misreading is troubling. The contraction of the *Conley* holding into the *Conley* passage might or might not have done a long term damage. However, the transformation of the careful, thoughtful and well-grounded holding of *Iqbal* into the *Iqbal* misreading threatens such damage. . . *Iqbal* did not change any aspect of substantive law. Nor did *Iqbal* create a liability exception for the defendants fortunate to hold supervisory positions. And, *a fortiori*, *Iqbal* did not change a single word of Rule 8(a) (or Rule 12(b)), or the meanings of these Rules: the actual *holding* of *Iqbal* merely elaborated on the Supreme Court’s original *passim* observation in *Dura* that ‘it should not prove burdensome [for a plaintiff] to provide [his defendants with] *some indication* of the [facts] that the plaintiff has in mind,’ 544 U.S. at 347 (emphasis supplied), since the Federal Rules have *always* been asking a pleader for a ‘short and plain statement of the claim showing that the pleader is entitled to relief.’ . . . Thirty six years ago, in *Monell [v. Dep’t of Soc. Servs.]*, 436 U.S. 658 (1978) ], the [Supreme] Court ... concluded that Congress had rejected [the concept of] impos[ing] liability upon [supervisory entities] based *purely upon the acts of others* .... Section 1983’s causation language imposes liability on a ‘person who ... shall subject, or cause to be subjected, any person’ to a deprivation of federal rights. . . . Thirty six years after *Monell*, the pleading standard as to supervising officials remains the same. It is with *that* standard in mind, the Supreme Court addressed those *Iqbal* claims that were merely disguised *respondeat superior* challenges. . . . Reading *Leamer*, *Napoleon* and *Durmer* jointly with the rationale of *Plata*, this Court concludes that, if: (a) supervising officials make systemwide determinations; (b) these determinations become the moving force behind the circumstances under which the subordinate officers effectively have no choice but to deny/reduce/change an inmate’s prescribed medical/ mental treatment for non-medical reasons; and (c) such denial/reduction/change in prescribed treatment was foreseeable under the systemwide determinations the supervisors made, then the supervisors are liable to the inmate for his injuries caused by such denial/reduction/change in prescribed treatment, provided that the inmate draws the requisite ‘causal link’ between the supervisors’ decisions and his injury-by stating facts plausibly establishing the supervisors’ deliberate indifference to the risk of the inmate’s injury. . . . A recent decision by the Court of Appeals details the precise causal link the inmate must draw to plausibly plead such a claim. *See Barkes*, — F.3d —, 2014 U.S.App. LEXIS 17261. . . . Read against the holdings of *Barkes* and *Sample*, the guidance in *Plata*, *Iqbal*, *Barkes*, *Argueta*, *Leamer*, *Napoleon* and *Durmer* indicates that a plaintiff states a plausible circumstantial-evidence medical care claim against defendants-supervisors if: (a) there are facts (either pled or amenable to judicial notice) showing that the supervisors’ decisions created an operational regime laden with an unreasonable risk of denial of (or reduction/change in) the plaintiffs’ mental care for non-medical reasons, and defendants-supervisors, being aware that their systemwide decisions entailed such risk elected to proceed with an implementation of their decisions (regardless of whether the defendants-supervisors were acting maliciously *or* were prompted to act by unfortunate slew of external economic/socio-political/logistical circumstances); and (b) the causal link between these systemwide decisions and

denial of (or reduction/change in) the plaintiffs’ mental care can reasonably be inferred from the lack of facts indicating that subordinate officers had a meaningful discretion to properly perform their duties under the circumstances ensuing from the operational regime triggered by the defendants-supervisors’ systemwide decisions. . . . [S]tripped of all niceties, the DOC Defendants’ qualified immunity argument turns on their self-serving misreading of *Iqbal*, i.e., on their claim that supervisory officials are necessarily shielded from suit by a plaintiff separated from those supervisors by a few ranks of subordinates, since that the plaintiff cannot be in privity with the particularities of the supervisors’ operations and decision-making processes and, hence, cannot plead those particularities. Although, as detailed *supra*, such self-serving misreading of *Iqbal* has become common among defendants holding supervisory positions and even persuaded a few jurists, *see Barkes*, — F.3rd —, 2014 U.S.App. LEXIS 17261, at \*24 (“*Iqbal* has ... [led some jurists to] believe [that it] abolish [ed] supervisory liability in its entirety”), that misreading is *not* the law and never was the law. Thus, this misreading cannot entitle Defendants to qualified immunity. *Iqbal* did not involve a change in the Fourteenth or Eighth Amendment regime, nor did *Iqbal* eliminate the ‘practical guidance’ these bodies of law provided to the DOC Defendants, ‘fairly warning’ them that they could be liable for their decisions and acts evincing deliberate indifference to the risk of harm resulting from denial/reduction/change in Plaintiffs’ prescribed mental treatment for non-medical reasons. Not a single statement in *Iqbal* could have led the DOC Defendants to believe that they would be entitled to violate clearly established due process law because the Supreme Court offered a clarification as to the pleading requirement of Rule 8(a), or because the DOC Defendants held supervisory positions, or because Plaintiffs—not being in privity with the DOC Defendants’ exact operations—could not plead the particularities of the DOC Defendants’ decision-making processes or acts. . . . [T]he DOC Defendants are not entitled to qualified immunity.”)

***Shawn H. v. Wienk***, 2:12-CV-1783, 2014 WL 4792247, \*8 (W.D. Pa. Sept. 23, 2014) (“When viewed in connection with the above standards, it is clear that Plaintiffs have failed to sufficiently allege a supervisory liability claim. There are no facts pled in the Complaint that would indicate Berdar or Savini had any personal involvement in the incident or that they directed, or actually knew of and acquiesced in, the alleged violations of S.H.’s constitutional rights. Moreover, for the reasons previously discussed in connection with Plaintiffs’ *Monell* claim, Plaintiffs have failed to allege sufficient facts that Berdar and Savini had notice of a prior practice of unconstitutional behavior of a similar conscience-shocking nature on the part of Wienk. Finally, to the extent Plaintiffs are relying on a failure to supervise/train theory of liability, the Complaint is devoid of any factual allegations with respect to a pattern of similar constitutional violations. Accordingly, dismissal of this claim is appropriate as well, and Defendants’ Motions will therefore be granted as to Counts II and III.”)

***Marks v. Corizon Health Care Inc.***, 4:13-CV-0726, 2014 WL 4252430, \*6, \*7 (M.D. Pa. Aug. 26, 2014) (“In this case, Marks alleges that he wrote to defendants Leggore, Harris, Davis, and Law asking for help and explaining that he has epilepsy, that he has seizures, that he was placed on a top tier, that he told Hunsberger about his situation, that Hunsberger did not care, and that it

is hazardous for him to be on the top tier. He alleges that he wrote to these defendants after he was assigned to an upper tier but before he fell. At this stage of the proceedings, Marks has sufficiently alleged that he put defendants Leggore, Harris, Davis, and Law on notice of an ongoing dangerous situation and that by failing to take action to correct the situation they acquiesced in the situation. Thus, at this early stage of the proceedings, Leggore, Harris, Davis, and Law are not entitled to dismissal on the basis of lack of personal involvement. Marks has failed, however, to sufficiently allege personal involvement on the part of defendant Shoop. Marks alleges that Shoop is a health care administrator, who, according to Marks, should have made sure that his staff put his medical condition in his file and on the computer. Marks further alleges that he wrote to Shoop's staff, but Shoop neglected to properly oversee his staff. Shoop, however, cannot be liable on the basis of *respondeat superior*. And Marks has not alleged that any facts from which it can reasonably be inferred that Shoop was aware of his situation before his fall. While he attached to his amended complaint a response to a grievance, which response appears to be signed by defendant Shoop, that response indicates that Marks's grievance was dated November 27, 2012, three weeks after his fall. Mark's after-the-fact grievance is not sufficient to show personal involvement on the part of defendant Shoop. Accordingly, we will recommend that the Eighth Amendment claim against Shoop be dismissed.”)

***Powell v. Wetzel***, No. 1:12-cv-01684, 2014 WL 2864686, \*2, \*3 (M.D. Pa. June 24, 2014) (“The Court will decline to adopt the Report and Recommendation, and deny Defendant Fisher’s motion to dismiss Count One. In his amended complaint, Plaintiff alleges that Defendant Fisher was ‘personally aware of the irregular confiscation of [his] legal materials by Sgt. Workinger, because Mr. Powell repeatedly informed Superintendent Fisher both verbally and in writing and also pleaded for the return of the legal files,’ . . . and that ‘Superintendent Fisher tolerated and acquiesced in the disregard of DOC policies by Sgt. Workinger with regard to the confiscation of Mr. Powell’s legal files’ . . . . Although Magistrate Judge Schwab concluded that Defendant Fisher’s ‘after-the-fact knowledge of such alleged wrongdoing, through oral communication or written letters or grievances, is not enough to establish the requisite personal involvement,’ this legal conclusion runs counter to the principle that a supervisor may be held liable for ‘having knowledge of and acquiescing in their subordinates’ violations.’ . . . Plaintiff alleges that he contacted Defendant Fisher several times and requested that he return his legal papers, and Defendant Fisher refused. . . . Accordingly, at the pleadings stage, the Court finds that Plaintiff has stated an access to courts claim against Defendant Fisher, and will deny his motion to dismiss Count One.”)

***Holbrook v. Jellen***, No. 3:14-CV-28, 2014 WL 1944644, \*10, \*11 (M.D. Pa. May 14, 2014) (“We find that Defendants’ argument for dismissal of the supervisory Defendants (including Woodside) as well as the application of the four *Turner* factors to Plaintiffs’ First Amendment claims to be premature and to be more appropriate at the summary judgment stage of this case after sufficient time for discovery has been afforded. . . . Despite the fact that Defendants have submitted as an Exhibit with their Motion to Dismiss a copy of DC-ADM 803, it does not appear that discovery has commenced in this case. In light of *Thompson v. Smeal*, as well as *Scott v.*

*Erdogan*, we find that a proper analysis of the *Turner* factors to Plaintiffs' First Amendment claims requires complete and thorough discovery, such as specific evidence as to how the mailings which were sent to inmate Holbrook would cause security risks in the prison. Also, we agree with Plaintiffs that discovery is required as to the specific roles of the supervisory Defendants each time Holbrook's mail was censored to see if these Defendants only engaged in perfunctory reviews of Jellen's decisions or if they conducted their own analysis of the contents of the censored mail. Thus, we concur with Plaintiffs that they are entitled 'to develop evidence to aid the "fact-intensive" and "contextual, record-sensitive analysis" required by *Turner*.'"")

***Rosembert v. Borough of East Lansdowne***, 14 F.Supp.3d 631, 643 (E.D. Pa. 2014) ("In light of the facts asserted in the amended complaint, that supervisory officers were present during the alleged beating of Plaintiff and that previous African-Americans have been targeted in a similar manner by police officers from these Boroughs, Plaintiff has sufficiently stated a claim for failure to train, discipline or control. These facts demonstrate that supervisors were present and aware of the excessive force used in Plaintiff's arrest, and by either engaging in the behavior or silently acquiescing to the conduct, they communicated a message of approval.")

***McCargo v. Camden County Jail***, No. 13-0868 (RBK)(KMW), 2014 WL 116329, \*3 n.2 (D.N.J. Jan. 9, 2014) ("It is worth noting that numerous courts have explained that a plaintiff states a claim by alleging that a supervisory defendant reviewed a grievance where the plaintiff alleges an ongoing violation as she " 'is personally involved in that violation because [s]he is confronted with a situation [s]he can remedy directly.'" [collecting cases] In this case, however, while plaintiff may have alleged an ongoing condition of confinement violation, the complaint does not allege that defendants Taylor or Pizarro were involved in reviewing plaintiff's grievances to impute the required knowledge to sustain the claim.")

***Cardona v. Warden - MDC Facility***, No. 12-7161 (RBK)(AMD), 2013 WL 6446999, \*5 (D.N.J. Dec. 6, 2013) ("Numerous courts have explained that a plaintiff states a claim by alleging that a supervisory defendant reviewed a grievance where the plaintiff alleges an ongoing violation as she " 'is personally involved in that violation because [s]he is confronted with a situation [s]he can remedy directly.'" [collecting cases] In this case, as plaintiff alleged an ongoing violation that defendant Zickefoose was made aware of through his written requests per facility procedure, he has stated a deliberate indifference claim against her. The claim against Zickefoose will be permitted to proceed.")

***Dare v. Township of Hamilton***, No. 13-1636 (JBS/JS), 2013 WL 6080440, \*7, \*8 (D.N.J. Nov. 18, 2013) ("Under pre-*Iqbal* Third Circuit precedent, '[t]here are two theories of supervisory liability,' one under which supervisors can be liable if they 'established and maintained a policy, practice or custom which directly caused [the] constitutional harm,' and another under which they can be liable if they 'participated in violating plaintiff's rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates' violations.' . . . The Third Circuit has recognized the potential effect *Iqbal* might have in altering the standard for

supervisory liability in a section 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing the scope of the test. . . Therefore, it appears that, under a supervisory theory of liability, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right. . . Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a defendant expressly directed the deprivation of a plaintiff's constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation; e.g., supervisory liability may attach if the plaintiff asserts facts showing that the supervisor's actions were 'the moving force' behind the harm suffered by the plaintiff. . . Here, Plaintiff alleges no facts regarding Chief Tappeiner's personal involvement in the deprivation of Plaintiff's constitutional rights. Plaintiff's Complaint contains only one paragraph that may implicate Police Chief Tappeiner at all. This paragraph consists of the bare allegation that '[t]here was participation by upper management of the Township of Hamilton Police Department, under color of State law, in connection with the deprivation of the rights of Plaintiff, that evidences the customs, patterns, practices, and procedures of Defendants to retaliate and violate the civil rights of Plaintiff.' . . Plaintiff has alleged no facts indicating that Chief Tappeiner directed the deprivation of a plaintiff's constitutional rights or created policies to that effect. Instead, Plaintiff relies on a single paragraph of legal conclusions that only obliquely alludes to 'upper management' without even mentioning Chief Tappeiner. Accordingly, this Court will dismiss the claims against Chief Tappeiner under section 1983.")

***McCray v. Holmes***, No. 12–2356 (RBK)(JS), 2013 WL 6073852, \*4 (D.N.J. Nov. 15, 2013) (“Plaintiff alleges that he appealed his grievances complaining about the lack of his kosher meals to defendant Holmes, but that defendant Holmes failed to restore his kosher meals. Typically, a plaintiff appealing his grievances to the prison administrator is not enough to impose knowledge against the prison administrator of the wrongdoing. [collecting cases] However, in this case, plaintiff alleges an ongoing constitutional violation. Indeed, he alleges that he has not received kosher meals since February, 2012. Furthermore, he alleges that defendant Holmes was made aware of this ongoing violation through plaintiff's prison grievances and appeals. Numerous courts have stated that a plaintiff states a claim by alleging that a supervisory defendant reviewed a grievance where the plaintiff alleges an ongoing violation as he ‘ “is personally involved in that violation because he is confronted with a situation he can remedy directly.”’ [collecting cases] In this case, as plaintiff has alleged an ongoing violation that defendant Holmes was made aware of through his grievance appeals, he has stated a free exercise claim against Holmes.”)

***Jerri v. Harran***, No. 13–1328, 2013 WL 4401435, \*1, \*3 (E.D. Pa. Aug. 16, 2013) (“Although the Third Circuit has, in dictum in several cases, recognized that a theory of knowledge and acquiescence may serve as the basis of a § 1983 claim against a person in a supervisory role in relation to the alleged unconstitutional wrongdoing, the Court has never upheld such a judgment in a precedential decision. *Argueta v. United States Immigration and Customs Enforcement*, 643 F.3d 60, 71, (3d Cir.2011); *Santiago v. Warminster Twp.*, 629 F.3d 121, 129 (3d Cir.2010); *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988). The court has refrained from defining the

precise contours of what is required in order to plead or prove such a claim sufficiently. These decisions impose a high standard, and all but one of the Third Circuit's decisions have not proceeded beyond the motion to dismiss or summary judgment stage. . . . In this case, plaintiffs' allegations of 'knowledge and acquiescence,' are very general and fail to show any specific knowledge or conduct. The Court rejects plaintiffs' argument that their allegations are sufficient to establish supervisory liability.")

*Newsome v. Catone*, No. 3:12-CV-2475, 2013 WL 2897796, \*7-\*9 (M.D. Pa. June 11, 2013) ("To the extent that supervisory liability survives after *Iqbal*, the scope of that liability is clearly and narrowly defined. . . . Newsome has not alleged well-pleaded facts showing that 'the person[s] in charge, had knowledge of and acquiesced in [their] subordinates' violations.' . . . Moreover, Newsome has not alleged well-pleaded facts which would establish a claim of supervisory liability grounded upon an assertion that the defendants 'established and maintained a policy, practice or custom which directly caused [a] constitutional harm[.]'. . . Furthermore, to the extent that Newsome's supervisory liability claims rest on the premise that officials did not after-the-fact act favorably upon his past grievances, this claim also fails. An inmate cannot sustain a constitutional tort claim against prison supervisors based solely upon assertions that officials failed to adequately investigate or respond to his past grievances. Inmates do not have a constitutional right to a prison grievance system. . . . Consequently, dissatisfaction with a response to an inmate's grievances does not support a constitutional claim. . . . Indeed, in a case such as this, it is also well-established that non-medical correctional supervisors may not be 'considered deliberately indifferent simply because they failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor.' . . . [C]ourts have repeatedly held that, absent some reason to believe that prison medical staff are mistreating prisoners, non-medical corrections staff who refer inmate medical complaints to physicians may not be held personally liable for medically-based Eighth Amendment claims. . . . In sum, as presently drafted, the plaintiff's amended complaint's claims against these supervisory defendants consist of little more than assertions of *respondeat superior* liability, coupled with dissatisfaction with the processing of this inmate's past grievances, assertions which as a matter of law do not suffice to state a constitutional tort claim. Therefore, these defendants are entitled to be dismissed from this case.")

*Dinote v. Danberg*, No. 12-cv-377 (GMS), 2013 WL 2297039, \*5, \*6 (D. Del. May 23, 2013) ("Here, there is no evidence that defendants Danberg, McBride, or Johnson, in their roles as Commissioner of the Delaware Department of Corrections, Director of Central Offender Records, and Warden of SCI, respectively, had any contact or interaction with Dinote during the time in question or that they made the decision that she be strip searched. Dinote also does not allege that the strip search policy at BWCI was established and/or approved by any of the individual defendants. Specifically, Dinote's brief contains a citation to Danberg's testimony that it is the warden who would establish the strip search policy for that institution. Thus, while Dinote's account of her prison experience may, if proved, demonstrate a constitutional violation, . . . her allegations and pleadings, as well as the evidence she presents, is insufficient to legally implicate the individual defendants presently before the court as the warden of BWCI is not a party to this

action. Instead, Dinote attempts to make out a claim against these defendants by associating institutional policies, such as the requirement that all incoming inmates at BWCI go through the ‘standard booking procedure’ including a strip search and a shower, with constitutional violations. . . These claims are based solely on defendants’ various positions within the Delaware Department of Correction, rather than any alleged individual involvement in the alleged events. . . Thus, defendants are entitled to summary judgment on Dinote’s Fourth Amendment claims.”)

**Broadwater v. Fow**, 945 F.Supp. 574, 587, 588 (M.D. Pa. 2013) (“A supervisory defendant in a § 1983 action may not be liable based merely on the theory of *respondeat superior*. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988). Instead, the plaintiff must allege that the supervisory defendant was personally involved in the incident at hand. . . Unfortunately, the term ‘personal involvement’ is not universally defined in applicable case law. . . Overall, the supervisor must somehow exhibit a ‘deliberate indifference’ to the deprivation of the plaintiff’s constitutional rights. . . Policy-making supervisors may be liable if they ‘established and maintained a policy, practice or custom which directly caused [the] constitutional harm.’. . A supervisor’s failure to employ a specific supervisory practice or procedure to correct a known unreasonable risk of constitutional harm also satisfies the personal involvement requirement. . . Mere knowledge and acquiescence in a subordinate’s constitutional violations may also qualify as personal involvement. . . Allegations that a supervisor ‘tolerated past or ongoing misbehavior’ may suffice. . . To establish knowledge and acquiescence of a subordinate’s misconduct, a plaintiff must allege the defendant’s (1) contemporaneous knowledge of the offending incident or knowledge of similar incidents in the past, and (2) actions or inactions which communicated approval of the subordinate’s behavior. . . A plaintiff may not allege that a supervisory defendant had constructive knowledge of a subordinate’s unconstitutional conduct simply because of his role as a supervisor. . . A failure to train only amounts to deliberate indifference ‘where the need for more or different training is obvious’ and the lack of training can be expected to result in constitutional violations.”)

**Hartmann v. Carroll**, 929 F.Supp.2d 321, 326, 327 (D. Del. 2013) (“It is well established that supervisory liability cannot be imposed under § 1983 on a respondeat superior theory. . . Purpose rather than knowledge is required to impose liability on an official charged with violations arising from his or her superintendent responsibilities. . . ‘Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.’. . A plaintiff must show that an official’s conduct caused the deprivation of a federally protected right. . . Additionally, the filing of a grievance is not sufficient to show the actual knowledge necessary for personal involvement . . . and participation in the after-the-fact review of a grievance is not enough to establish personal involvement . . . .”)

**Smith v. Indiana County Jail**, No. 12–728, 2013 WL 425144, \*3, \*4 (W.D. Pa. Feb. 4, 2013) (“To state a claim for supervisory liability, a complaint must allege the defendant’s *actual* knowledge to support a claim of *deliberate* indifference. This distinction in pleading requirements resulted in the dismissal of a complaint in *Santiago v. Warminster Tp.*, 629 F.3d at 134, where the plaintiff implied but did not allege facts establishing actual knowledge. Instead, the complaint implied the

presence of the supervisory defendants in the vicinity of alleged unconstitutional conduct, and therefore alleged broadly that they knew of and acquiesced in the use of excessive force. The United States Court of Appeals for the Third Circuit concluded that these allegations did not support an inference of awareness of subordinates' allegedly unconstitutional activity so as to support a claim predicated upon personal involvement. The Court of Appeals affirmed the dismissal of the claims against the supervising officers, holding that the plaintiff's allegations were insufficient to establish the degree of knowledge sufficient to 'nudge [[his]] claims across the line from conceivable to plausible' so as to satisfy *Twombly*. . . Similarly, in *Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 74 (3d Cir.2011), the Court of Appeals affirmed the dismissal of an action against supervising defendants where the complaint did not plausibly allege legally sufficient notice of the underlying unconstitutional conduct of their subordinates . . . .In the case at issue, Plaintiffs' claims, which are based upon allegations of imputed and assumed knowledge, or speculative tolerance of past behavior, are insufficient. There are no allegations that Warden Hummel participated in or directed the sexual misconduct at issue. Instead, Plaintiffs rely upon allegations that the sexual activity of Defendant Gross and Dailey were 'common knowledge of the inmate population.' Plaintiffs impute this purported general knowledge within the inmate population to Warden Hummel, so as to create an inference of notice and deliberate indifference, highlighted by her failure to act to prevent additional occurrences. . . However, the Complaint does not allege that the sexual misconduct was ever reported to Warden Hummel so as to infer a plausible claim of notice or 'actual knowledge.' In the absence of some actual knowledge or notice of Gross and Dailey's misconduct, Plaintiffs' allegations do not support a plausible claim of Warden Hummel's personal involvement in the violation of Plaintiffs' constitutional rights.")

***Cress v. Ventnor City***, No. 08–1873(NLH)(AMD), 2012 WL 6652804, \*3 (D.N.J. Dec. 20, 2012) (“Egg Harbor defendant, John Woods, did not participate in the actual execution of the search warrant and he did not enter plaintiffs' home until after the completion of the operation. Instead, Woods was the team commander who devised the operation plan, assigned the ACERT members' duties, and directed practice runs. Plaintiffs claim that the operation plan was excessive from its inception based on the minor nature of the offense allegedly committed by Lombardi and because there was no real or perceived risk that Lombardi was dangerous. In order to hold Woods personally liable under § 1983, plaintiffs ‘must show that he participated in violating their rights, or that he directed others to violate them, or that he, as the person in charge of the raid, had knowledge of and acquiesced in his subordinates' violations.’ *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190–91 (3d Cir.1995). The Court finds that even though Woods did not personally use excessive force, there are sufficient disputes of material fact concerning what was known and relied upon in developing the plan so as to preclude summary judgment as to Woods at this time. However, it is likely that a separate special interrogatory question or questions regarding the planning of the operation may be necessary to insure that Woods's claim of qualified immunity is viewed through the lens of facts applicable to his conduct and not others. For example, a jury might conclude that the warrant was obtained without probable cause, that the officers did not have reason to fear Lombardi, and the use of force was unreasonable. On the other hand, they could reach the opposite

conclusion on any, or all, of those factual disputes. A proper set of interrogatories in this case should assess each stage of the operation and the relative role of each defendant to insure the proper application of the qualified immunity doctrine. *See id.* at 1193; *cf. Santiago v. Warminster Twp.*, 629 F.3d 121, 133 (3d Cir.2010) (“Where, as here, an operation results in the use of allegedly excessive force against only one of several people, that use of force does not, by itself, give rise to a plausible claim for supervisory liability against those who planned the operation. To hold otherwise would allow a plaintiff to pursue a supervisory liability claim anytime a planned operation resulted in excessive force, merely by describing the force used and appending the phrase ‘and the Chief told them to do it.’ “).”)

***Moriarty v. de LaSalle***, No. 12–3013 (RMB), 2012 WL 5199211, \*5, \*6 (D.N.J. Oct. 19, 2012) (“The Third Circuit permits § 1983 claims to proceed based on a theory of supervisory liability where a plaintiff can show defendants had knowledge of their subordinates’ violations and acquiesced in the same. *See Baker v. Monroe Twp.*, 50 F.3d 1186, 1190–91 (3d Cir.1995) (permitting plaintiff to hold a supervisor liable for a subordinate’s § 1983 violation provided plaintiff is able to show ‘the person in charge ... had knowledge of and acquiesced in his subordinates’ violations’). To impose liability on a supervisory official there must be ‘both (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents, and (2) circumstances under which the supervisor’s assertion could be found to have communicated a message of approval to the offending subordinate.’ *Colburn v. Upper Darby Twp.*, 838 F.2d 663, 673 (3d Cir.1988). Allegations of actual knowledge and acquiescence must be made with particularity. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988). In this case, the Complaint does not allege or suggest that any of the supervisory defendants had contemporaneous knowledge of the incident. Plaintiff is not entitled to relief as against the supervisory defendants here; Plaintiff alleges that they became aware of the claims via his grievance filings. Participation in the after-the-fact review of a grievance or appeal is insufficient to establish personal involvement on the part of those individuals reviewing grievances. *See Rode*, 845 F.2d at 1208 (finding the filing of a grievance insufficient to show the actual knowledge necessary for personal involvement); *Brooks v. Beard*, 167 F. App’x 923, 925 (3d Cir.2006) (per curiam) (allegations of inappropriate response to grievances does not establish personal involvement required to establish supervisory liability). Accordingly, the supervisory defendants cannot be held liable for Plaintiff’s medical claims here and claims against these defendants will be dismissed with prejudice.”)

***Pfeiffer v. Hutler***, No. 12–1335 (AET), 2012 WL 4889242, \*4–\*6 (D.N.J. Oct. 12, 2012) (“Under pre-*Iqbal* Third Circuit precedent, ‘[t]here are two theories of supervisory liability,’ one under which supervisors can be liable if they ‘established and maintained a policy, practice or custom which directly caused [the] constitutional harm,’ and another under which they can be liable if they ‘participated in violating plaintiff’s rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates’ violations.’. . . The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the test. . . Hence, it appears that, under a supervisory theory of liability,

and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right. . . Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a defendant expressly directed the deprivation of a plaintiff's constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation; *e.g.*, supervisory liability may attach if the plaintiff asserts facts showing that the supervisor's actions were 'the moving force' behind the harm suffered by the plaintiff. . . Here, Plaintiff provides no facts describing how the supervisory defendants, Warden Hutler and Chief Mueller, actively or affirmatively violated his constitutional rights, *i.e.*, he fails to allege facts to show that these defendants expressly directed the deprivation of his constitutional rights, or that they created policies which left subordinates with no discretion other than to apply them in a fashion which actually produced the alleged deprivation. In short, Plaintiff has alleged no facts to support personal involvement by the supervisory defendants, and simply relies on recitations of legal conclusions such that they failed to supervise, oversee or correct the alleged custom by some correction officers at OCJ to verbally abuse and disclose gay inmates or inmates confined on sex crime charges in violation of Plaintiff's constitutional rights. These bare allegations, 'because they are no more than conclusions, are not entitled to the assumption of truth.' *Iqbal*, 129 S.Ct. at 1950. Accordingly, this Court will dismiss without prejudice the Complaint, in its entirety, as against the defendants, Warden Hutler and Chief Mueller, because it is based on a claim of supervisor liability, which is not cognizable in this § 1983 action, pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). Nevertheless, if Plaintiff believes that he can assert facts to show more than supervisor liability, or if he can assert facts to cure the deficiencies of his claims against the other unnamed correction officers, Officer DeMarco and Lt. Martin, then he may move to file an amended complaint accordingly.”)

***Smart v. Borough of Bellmawr***, No. 11–0996 (RBK/JS), 2012 WL 4464561, \*8 (D.N.J. Sept. 24, 2012) (“Plaintiff asserts a failure-to-train claim against Defendant Walsh, alleging that Walsh knew of and acquiesced in his subordinates’ violations. . . The Third Circuit has previously held that a supervisory official may face § 1983 liability under a knowledge-and-acquiescence theory. *See Baker v. Monroe Twp.*, 50 F.3d 1186, 1190–91 (3d Cir.1995). But the Supreme Court rejected the argument that officials who know of and acquiesce in the misdeeds of their subordinates can be liable for them. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). The Third Circuit has not yet decided whether a supervisor may only be held liable if he directly participates in unconstitutional conduct. *See Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 70 (3d Cir.2011). Regardless, Plaintiff has failed to produce evidence that Walsh knew of any violations of his subordinates. Plaintiff argues that none of the Bellmawr law enforcement training materials specifically reference certain state and federal cases involving warrantless entry. But this assertion is not a basis for liability, and Plaintiff has failed to connect Defendant Walsh with any potential constitutional violation committed by Defendant Draham.”)

***Love v. South River Police Dept.***, Civ. No. 11–3765, 2012 WL 3950358, \*2, \*3 (D.N.J. Sept. 10, 2012) (“It is well established that government officials cannot ‘be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior,’ rather a Plaintiff must show that each government official has violated the constitution through their own individual actions. . . . Consequently, to survive a motion to dismiss, a plaintiff bringing a section 1983 claim against named defendants in their individual capacities must allege sufficient factual matter to support a claim for one of the two forms of supervisory liability. The first form of supervisory liability requires the plaintiff to allege that the supervisor ‘established and maintained a policy, practice, or custom which directly caused [the] constitutional harm.’. . . This form of supervisory liability does not require the plaintiff to allege a direct act by the defendant that caused the constitutional violation. Rather, a plaintiff may establish liability under this first form by alleging that the defendant’s policy, practice, or custom, when enforced by subordinates or third parties, caused the plaintiff harm under § 1983. . . . The second form of supervisory liability under § 1983 requires a plaintiff to allege that the supervisor ‘participated in violating plaintiff’s rights, directed others to violate them, or, as a person in charge, had knowledge of and acquiesced in his subordinates’ violations.’. . . To establish a claim under the second form of supervisory liability, Plaintiff would have to allege a direct and affirmative act by the Defendant, whether in the form of acquiescence or direct participation, that resulted in an infringement of his constitutional rights. Additionally, supervisory liability requires the plaintiff to show ‘a causal connection between the supervisor’s actions and the violation of plaintiff’s rights.’. . . Liberally construing the Amended Complaint and subsequent submissions, it appears that Plaintiff is alleging this second form of supervisory liability. Because the Complaint must be ‘held to less stringent standards than formal pleadings drafted by lawyers,’ *Erickson*, 551 U.S. at 94, and because many of the allegations in the Amended Complaint require a context specific inquiry and necessitate the development of the factual record before the Court can decide whether, as a matter of law, Chief Bouthillette could be liable, the Court declines to dismiss the Amended Complaint as to Chief Bouthillette at this time. Original Defendants’ arguments, which are certainly colorable, are best addressed by way of a motion for summary judgment after discovery has concluded.”)

***Neil v. Allegheny County***, No. 12–03482012, 2012 WL 3779182, \*5 n.3 (W.D. Pa. Aug. 31, 2012) (“The *Iqbal* case stated that because ‘vicarious liability is inapplicable to § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’. . . Thus, the Supreme Court noted that in section 1983 actions, where master-servant liability is extinct, ‘the term “supervisory liability” is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.’. . . Our Court of Appeals has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a section 1983 suit, but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the supervisory liability test. [citing *Santiago* and *Argueta*]”)

***Figuroa v. City of Camden***, No. 09–4343 (JBS/AMD), 2012 WL 3756974, \*9, \*11 (D.N.J. Aug. 28, 2012) (“Here, while Defendant City of Camden points to evidence in the record of the training

program that all Camden Police Officers are required to undergo, and evidence that both Defendants Gransden and Roberts did, in fact, complete the required training, *see* Jay Cert. Exs. M–R, there is also evidence in the record that the City’s policymakers were on notice that its training program and its internal discipline program were insufficient to prevent a repeated and uncorrected pattern of constitutional rights violations as of 2007 when these incidents occurred. The Court finds that, on a record such as this, Plaintiffs must survive Defendant City of Camden’s motion for summary judgment. . . . Alternatively, Defendant Venegas argues that he is entitled to supervisory qualified immunity for his actions overseeing the Camden Police Department because a reasonable supervisor in Defendant’s position would not have believed that he was being deliberately indifferent to the risk of the Defendant Officers’ use of excessive force. *See Rosenberg v. Vangelo*, 93 F. App’x 373, 378 n. 2 (3d Cir.2004). The Court disagrees. Given the scope of Venegas’s responsibilities under his supercession executive agreement with the County, and the context in which he was brought to oversee the Camden Police Department, including the Attorney General’s letter, the Court concludes that a reasonable supervisor would have known that disclaiming all responsibility for duties such as discipline and training of police officers would be deliberately indifferent to the possibility of undisciplined officers effecting arrests with excessive force. Whether Defendant Venegas took meaningful steps to improve officer training regarding reasonable force in arrests and to improve internal disciplinary investigations and measures during the year leading up to the incidents complained of herein is not in the present record. Accordingly, the Court will deny Defendant Venegas’s motion for summary judgment.”)

***Lapella v. City of Atlantic City***, No. 10–2454 (JBS/JS), 2012 WL 2952411, \*10 (D.N.J. July 18, 2012) (“ ‘A supervisor may be personally liable ... if he or she participated in violating the plaintiff’s rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates’ violations.’ *A.M. ex rel J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir.2004). The elements of the cause of action alleged are two-fold, that the supervisor have knowledge of the subordinates’ violations and that the supervisor acquiesce in the subordinates’ violations. Plaintiff alleges just that, that Police Chief Mooney had knowledge of and acquiesced in Officer Moynihan’s conduct. However, while Plaintiff alleges the elements of the cause of action, she provides no factual allegations to support a plausible basis for relief. Rather, Plaintiff recites the elements of the cause of action in legal boilerplate. This is insufficient under Rule 8 and this Court must be dismissed.”)

***Plouffe v. Cevallos***, No. 10–1502, 2012 WL 1994785, at \*4 -\*6 & n.4 (E.D. Pa. June 1, 2012) (“Plouffe asserts incorrectly that *Bell Atlantic Corp. v. Twombly* has eliminated the requirement that he plead actual knowledge and acquiescence. *Twombly* held that factual allegations must be sufficient to raise a right to relief above a speculative level. . . It did not purport to relax the substantive requirements of supervisory liability under § 1983. If anything, the Supreme Court’s later decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), may bring into question the ongoing viability of knowledge and acquiescence as a basis for supervisory liability at all. In *Iqbal*, the Supreme Court held that a plaintiff must plead that each government-official defendant, through the official’s own individual actions, has violated the Constitution. . . *Iqbal*’s implications for

supervisory liability are not yet clear. In a few post- *Iqbal* cases, the Third Circuit has questioned but not answered whether *Iqbal* narrowed the scope of supervisory liability. See, e.g., *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 70 (3d Cir.2011); *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 n. 8 (3d Cir.2010). Indeed, in one case, the Third Circuit commented that ‘[i]n light of ... [ *Iqbal* ], it is uncertain whether proof of [personal knowledge regarding a constitutional violation], with nothing more, would provide a sufficient basis for holding [defendant] liable ... under § 1983....’ *Bayer v. Monroe Cty. Children & Youth Servs.*, 577 F.3d 186, 190 n. 5 (3d Cir.2009). However, the Third Circuit has not resolved the questions of *Iqbal*'s impact on all of the pre- *Iqbal* theories of supervisory liability. . . . Because the Third Circuit has not held that a plaintiff may no longer establish § 1983 liability based on a supervisor's knowledge of and acquiescence in a subordinate's constitutional violation, this Court will continue to apply the pre- *Iqbal* supervisory liability analysis. . . . The defendants argue that the only allegations regarding Cavanaugh and Mottola's knowledge come after the fact, when Plouffe filed a post-termination grievance. Citing *Rode v. Dellarciprete*, the defendants argue that this is insufficient to establish personal involvement on the part of the supervisory officials. In *Rode*, the plaintiff alleged that the Governor had personal knowledge of the unconstitutional conduct against her because the plaintiff had filed grievances with the Governor's administrative office. The Third Circuit held that such allegations were insufficient to show actual knowledge and, hence, personal involvement. . . . However, *Rode* is distinguishable from the case at bar. In *Rode*, the grievances filed with the governor's administrative office were the only evidence of actual knowledge on the part of the supervisory official; there was no allegation that the governor had personally reviewed the grievance or otherwise had knowledge of the alleged violation. By contrast, here, Plouffe alleges that defendant Mottola handled Plouffe's particular grievance. . . . Furthermore, Plouffe claims that a representative from the Chancellor's Office was present at Plouffe's pre-termination final hearing, and that this representative responded to Plouffe's legal arguments. . . . Regarding defendant Cavanaugh, Plouffe also alleged that the president of the local faculty union ‘personally brought the matter to the attention of the Chancellor, who said he would look into it when the grievance reached his level.’ . . . These allegations, which the Court must accept as true, reasonably support a theory of contemporaneous knowledge and acquiescence by defendants Cavanaugh and Mottola.”)

***Zeigler v. PHS Correctional Health Care, Inc.***, No. 11–203Erie, 2012 WL 1971149, at \*4-\*7 (W.D. Pa. June 1, 2012) (“If a prisoner is under the care of medical experts, a nonmedical prison official will generally be justified in believing that the prisoner is in capable hands. . . . [A] non-medical supervisory official may be held liable if there was ‘knowledge of “malicious” and “sadistic” medical mistreatment.’ . . . In her capacity as the Health Services Administrator, Defendant Overton is not deliberately indifferent if she failed to respond to Plaintiff's medical complaints while he was under the care of medical professionals. . . . Defendant Overton's reliance on the opinion of medical professionals even as Plaintiff grieved his complaints about the alleged inadequacies in his medical treatment through the administrative remedy process. . . . do not indicate that Overton possessed ‘knowledge of malicious or sadistic medical mistreatment’ so as to impose liability upon her. . . . The failure to train claim must be dismissed against Defendants Overton and

Baker as such a claim is only available against entity-type defendants and not individuals. . . . Defendants Overton and Baker cannot be held liable for the failure to train their subordinates as they have no constitutional duty to do so.”)

*Peppers v. Booker*, No. 11–3207 (CCC), 2012 WL 1806170, at \*\*6, 7 (D.N.J. May 17, 2012) (“To survive a motion to dismiss, a section 1983 claim against named defendants in their individual capacities, a plaintiff must allege sufficient factual matter to support a claim for one of the two forms of supervisory liability. The first form of supervisory liability requires the plaintiff to allege that the supervisor ‘established and maintained a policy, practice, or custom which directly caused [the] constitutional harm.’ . . . This form of supervisory liability does not require the plaintiff to allege a direct act by the defendant that caused the constitutional rights violation. Rather, a plaintiff may establish liability under this first form by alleging that the defendant’s policy, practice, or custom, when enforced by subordinates or third parties, caused the plaintiffs harm under section 1983. . . . The second form of supervisory liability under section 1983 requires a plaintiff to allege that the supervisor ‘participated in violating plaintiff’s rights, directed others to violate them, or, as a person in charge, had knowledge of and acquiesced in his subordinates’ violations.’ . . . To establish a claim under the second form of supervisory liability, Plaintiffs would have to allege a direct and affirmative act by the Defendants that resulted in an infringement of Plaintiffs’ constitutional rights. Under this form of supervisory liability, a defendant is held liable for their direct acts whether in the form of acquiescence or direct participation. Additionally, supervisory liability requires the plaintiff to show ‘a causal connection between the supervisor’s actions and the violation of plaintiff’s rights.’ . . . Plaintiff’s factual assertions, taken as true, are not sufficient to sustain claims against Booker on the basis of knowledge and acquiescence. Plaintiffs assert that the Mayor insisted on or approved of their transfers and demotions. These factual assertions, without more, are not sufficient to establish a plausible claim against Mayor Booker.”)

*R.M. v. Sainato*, Civ. No. 2:11–cv–01676 (WJM), 2012 WL 1623860, at \*5–\*8 (D.N.J. May 9, 2012) (“In this case, Plaintiff adequately pled that Sheriff Rochford had actual knowledge of an excessive risk to inmate safety. The Complaint alleges that Sheriff Rochford had ‘actual . . . knowledge’ of the fact that Sainato was the subject of a criminal investigation involving allegations of sexual misconduct. . . . The Complaint also alleges that Sheriff Rochford had ‘actual . . . knowledge’ that Sainato ‘was engaged in a series of sexual encounters with inmates’ participating in the SLAP program. . . . The Complaint therefore adequately alleges facts supporting Plaintiff’s claim that Sheriff Rochford knew of a substantial risk of serious harm to the inmates. Plaintiff also adequately pled that Sheriff Rochford disregarded the risk. . . . Plaintiff adequately pled facts and allegations supporting a theory of fault in hiring. . . . In this case, Plaintiff alleged that Sheriff Rochford was responsible for hiring decisions and failed to adequately screen Defendant Sainato before hiring him. . . . Specifically, Plaintiff alleges that Sheriff Rochford hired Sainato ‘despite actual and/or constructive knowledge [that Sainato] was the subject of a criminal investigation and charge(s) involving allegations of inappropriate sexual conduct.’ . . . Plaintiff’s allegations clearly establish a direct causal link between Sainato’s background, which includes criminal charges for sexual misconduct, and the particular constitutional violation Plaintiff suffered, *i.e.*, sexual assault.

Thus, Plaintiff sufficiently alleged facts to support that Sainato ‘was highly likely to inflict the *particular* injury suffered by the plaintiff.’ . . . Plaintiff failed to plead sufficient facts and allegations to support a theory of supervisory/training liability. Based on the Supreme Court’s reasoning in *City of Canton v. Harris*, 489 U.S. 378 (1989), the Third Circuit developed a four-part test for liability under the Eighth Amendment for failure to properly supervise and train. . . . It is not clear whether this theory of supervisory liability is still available in light of the Supreme Court’s decision in *Iqbal*. . . . Like the Third Circuit in *Argueta*, this Court need not reach the question of the scope of supervising liability post- *Iqbal*, because the allegations in the Complaint are insufficient to make out a claim for supervisory liability. Consistent with Judge Sheridan’s findings in the First Action, this Court finds that Plaintiff failed to identify a policy or practice that Sheriff Rochford failed to employ. Specifically, Plaintiff failed to ‘identify in [his] pleading what exactly [the Defendant] should have done differently, whether with respect to specific training programs or other matters, that would have prevented the unconstitutional conduct.’ . . . Accordingly, this claim is dismissed without prejudice.”)

***Szemple v. UMDNJ***, No. 10–5445 (PGS), 2012 WL 1600360, at \*3 (D.N.J. May 7, 2012) (“In *Iqbal*, the Supreme Court held that ‘[b]ecause vicarious or supervisor 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.’ . . . Thus, each government official is liable only for his or her own conduct. The Court rejected the contention that supervisor liability can be imposed where the official had only ‘knowledge’ or ‘acquiesced’ in their subordinates conduct.” footnote omitted)

***Walker v. Walsh***, No. 3:11–CV–1750, 2012 WL 1569629, at \*3 (M.D. Pa. May 3, 2012) (“After *de novo* review, this Court will adopt the legal standards set forth in the R & R, which recognize that a supervisor may be held liable for the acts of his subordinates if he directed or actually knew of and acquiesced in the misconduct.”)

***Jackson v. Federal Bureau of Prisons***, No. 11–6278 (JBS), 2012 WL 1435632, at \*7 & n. 3 (D.N.J. Apr. 25, 2012) (“In light of the Supreme Court’s decision in *Iqbal*, *supra*, the Court questions the continuing validity of the Third Circuit’s supervisory liability jurisprudence. As stated by the Supreme Court . . . . However, although the Third Circuit has acknowledged *Iqbal*’s potential impact on § 1983 supervisory liability claims, it has declined to hold that a plaintiff may no longer establish liability under § 1983 based on a supervisor’s knowledge of and acquiescence in a violation. . . . Accordingly, this Court will continue to apply the Third Circuit’s traditional supervisory liability analysis as set forth above. . . . Thus, Jackson appears to allege only that Zickefoose failed to take action once notified of the occurrences, even though he also alleges that he did not file any grievances at FCI Fort Dix. Participation in the after-the-fact review of a grievance or appeal is insufficient to establish personal involvement on the part of those individuals reviewing grievances. . . . Therefore, Warden Zickefoose cannot be held liable in this instance, and the Complaint will be dismissed with prejudice for failure to state a claim, pursuant to 28 U.S.C. §§ 1915(e)(2) (B)(ii) and 1915A(b)(1).”)

**Baklayan v. Ortiz**, No. 11–03943 (CCC), 2012 WL 1150842, at \*5, \*6 (D.N.J. Apr. 5, 2012) (“A liberal reading of the Complaint could find that Plaintiffs are asserting a theory of supervisory liability. . . . The only facts offered anywhere in the Complaint in support of a supervisory theory of liability are the descriptions of Defendants’ jobs: Plaintiffs state that Defendant Ortiz was ‘charged with ultimate responsibility for the training and supervision of Essex County correctional officers, and for the administration and implementation of the Essex County Department of Corrections policies, practices, and/or customs,’ and that Defendant Pringle was ‘charged with overseeing all programs and operations applicable to custody, inmate management and release from Essex County Correctional Facility.’ . . . It would be too great a leap for the Court to infer from these cursory job descriptions that Defendants were somehow aware of and acquiescent to the alleged misconduct, or that they were responsible for the policy or procedure which resulted in the alleged misconduct and deliberately indifferent to its result, and that they are therefore liable under § 1983. . . . Count Five alleges that Defendants failed to prevent the alleged unconstitutional conduct by ‘knowingly, recklessly, or with gross negligence’ failing to ‘instruct, supervise, control, and discipline’ their subordinates from: (1) unlawfully harassing Baklayan; (2) unlawfully implementing an immigration hold on a U.S. citizen; (3) conspiring to violate Baklayan’s rights; and (4) otherwise depriving Baklayan of his rights. . . . As with Count Four, Plaintiffs fail to allege any personal involvement in the alleged wrongdoing. . . . As mentioned previously, a supervisor may be held liable under § 1983 when he or she ‘with deliberate indifference to the consequences, established and maintained a policy, practice, or custom which directly caused [the] constitutional harm,’ . . . or where the supervisor has knowledge of the incident and acquiesces to it. . . . Plaintiffs have yet to allege any facts suggesting that Defendants knew about Baklayan’s predicament or that they established a policy or custom that resulted in constitutional harms to Baklayan. Accordingly, Count Five is dismissed for failure to state a claim upon which relief can be granted.”)

**Bondurant v. Christie**, No. 10–3005 (FSH), 2012 WL 1108523, at \*7, \*8 (D.N.J. Apr. 2, 2012) (“The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the test. . . . Hence, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff’s constitutional right. . . . Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a defendant expressly directed the deprivation of a plaintiff’s constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation; *e.g.*, supervisory liability may attach if the plaintiff asserts facts showing that the supervisor’s actions were ‘the moving force’ behind the harm suffered by the plaintiff. . . . Here, plaintiff provides no facts describing how these supervisory defendants allegedly violated his constitutional rights, *i.e.*, he fails to allege facts to show that these defendants expressly directed the deprivation of his constitutional rights, or that they created policies which left subordinates with no discretion other than to apply them in a fashion which actually produced the alleged

deprivation. In short, Bondurant has alleged no facts to support personal involvement by the supervisory defendants, and simply relies on recitations of legal conclusions such that they were responsible for its agencies and employees and for developing and applying policies, practices and procedures at their respective agencies. These bare allegations, ‘because they are no more than conclusions, are not entitled to the assumption of truth.’ . . . Accordingly, this Court will dismiss with prejudice the Amended Complaint (Docket entry no. 6), in its entirety, as against the defendants, Chris Christie, Governor of New Jersey; Gary Lanigan, Commissioner of NJDOC; and Jennifer Velez, Commissioner of NJDHS, because it is based on a claim of supervisor liability, which is not cognizable in this § 1983 action, pursuant to 28 U.S.C. § 1915(e)(2)(B).”)

**Johnson v. Morgan**, No. 09–007–LPS, 2012 WL 1427774, at \*4, \*5 (D. Del. Mar. 30, 2012) (“Under pre-*Iqbal* Third Circuit precedent, ‘[t]here are two theories of supervisory liability,’ one under which supervisors can be liable if they ‘established and maintained a policy, practice or custom which directly caused [the] constitutional harm,’ and another under which supervisors can be liable if they ‘participated in violating plaintiff’s rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates’ violations.’ . . . Supervisory liability may attach if the plaintiff shows that the supervisor’s actions were ‘the moving force’ behind the harm suffered by the plaintiff. . . . The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing the scope of the test. . . . Hence, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff’s constitutional right.”)

**Gaymon v. Esposito**, No. 11–4170 (JLL), 2012 WL 1068750, at \*10 (D.N.J. Mar. 29, 2012) (“To the extent that Plaintiffs allege that the Supervisory Defendants are liable in their individual capacities for failing to supervise and/or control Defendant Esposito, the Court finds the factual allegations insufficient to support such a claim. As stated *infra*, the Complaint fails to allege any facts relaying any information about Defendants Fontoura and Ryan’s whereabouts and awareness when the alleged injury occurred, namely the fatal shooting of the Decedent by Officer Esposito. The Complaint thus does not state any facts which support their personal involvement in the alleged injury, nor are there any facts alleged supporting their actual knowledge and acquiescence in Defendant Esposito’s use of deadly force. The Court thus dismisses Plaintiffs’ § 1983 claims for failure to train, supervise and/or control as to the Supervisory Defendants”)

**Mayo v. County of York**, No. 1:10–CV–01869, 2012 WL 871198, at \*10, \*11 (M.D. Pa. Feb. 16, 2012) (R & R) (“ ‘It is well-established that inmates do not have a constitutionally protected right to a prison grievance system.’ . . . Thus, a denial of a grievance or grievance appeal does not amount to a violation of a prisoner’s constitutional rights. . . . Although the amended complaint fails to state an independent claim upon which relief can be granted based on the processing of his grievances, the fact that the plaintiff filed grievances is relevant to the plaintiff’s other claims. In some circumstances a grievance may be sufficient to put a prison official on notice of alleged continuing

abuse by other prison staff and therefore may show actual knowledge of an alleged constitutional violation and acquiescence in the events forming the basis of a prisoner's claims. . . .The plaintiff alleges that he filed grievance informing the defendants of the ongoing denial of prescribed medical care but that the defendants failed to take corrective action. We conclude that the amended complaint sufficiently alleges personal involvement on the part of the defendants involved in the grievance process.”)

***Festa v. Jordan***, 803 F.Supp.2d 319, 325 (M.D. Pa. 2011) (“There is no *respondeat superior* liability in the § 1983 context; a defendant must have personal involvement in the alleged wrongs for liability to attach. . . . This personal involvement can be shown where a defendant personally directs the wrongs, or has actual knowledge of the wrongs and acquiesces in them. . . . Actual knowledge ‘can be inferred from circumstances other than actual sight.’ . . . Acquiescence is found ‘[w]here a supervisor with authority over a subordinate knows that the subordinate is violating someone’s rights but fails to act to stop the subordinate from doing so, the factfinder may usually infer that the supervisor “acquiesced” in (i.e., tacitly assented to or accepted) the subordinate’s conduct.’ . . . The defendant claims that there is ‘a complete lack of evidence’ that Ware directed, supervised, or approved of the police searches and seizures. The Court disagrees. The plaintiff has introduced circumstantial evidence from which a rational juror could draw the conclusion that Ware either directed, or knew and acquiesced in, the searches and seizures. First, Ware notified the police that Coss might be with Festa. Second, he expressed a desire that Festa’s children not be present at the house. Third, he was actually present at the scene of the completed car search after receiving a phone call from an officer. Fourth, he was present at the search of Festa’s home, even though how close he was is in dispute. This is more than a scintilla of evidence from which a juror could disbelieve Ware’s claims that he did not direct the officers. After all, Ware admitted that he frequently advises police, at least two phone calls between him and Dunmore officers were made, he acted to ensure that no children were in the house, and he was present at the scene. His mere presence at the scenes of the searches, moreover, plausibly suggests actual knowledge and acquiescence in the events that occurred. For this reason, summary judgment on the grounds that supervisory liability cannot be imposed on Ware will be denied.” footnote omitted)

***Campbell v. Gibb***, No. 10–6584 (JBS), 2012 WL 603204, at \*10 & n.6 (D.N.J. Feb. 21, 2012) (“In light of the Supreme Court’s decision in *Iqbal*,. . . the Court questions the continuing validity of the Third Circuit’s supervisory liability jurisprudence. . . . However, although the Third Circuit has acknowledged *Iqbal*’s potential impact on § 1983 supervisory liability claims, it has declined to hold that a plaintiff may no longer establish liability under § 1983 based on a supervisor’s knowledge of and acquiescence in a violation. *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 n. 8 (3d Cir.2010); *Bayer v. Monroe*, 577 F.3d 186, 190 n. 5 (3d Cir.2009). Accordingly, this Court will continue to apply the Third Circuit’s traditional supervisory liability analysis as set forth above.”)

***Cooper v. Sharp***, No. 10–5245 (FSH), 2012 WL 274800, at \*14 (D.N.J. Jan. 31, 2012) (“Here, plaintiff provides no facts describing how the supervisory defendants, Singer and Dacosta,

allegedly violated his constitutional rights, *i.e.*, he fails to allege facts to show that these defendants expressly directed the deprivation of his constitutional rights, or that they created policies which left subordinates with no discretion other than to apply them in a fashion which actually produced the alleged deprivation. In short, Cooper has alleged no facts to support personal involvement by the supervisory defendants, and simply relies on recitations of legal conclusions such that they failed to supervise, oversee or correct the treatment of civilly committed residents at EJSP–STU as prisoners in violation of plaintiff’s constitutional rights.”)

***Richardson v. Crawford County Correctional Facility***, NO. CIV.A. 10-275 ERIE, 2011 WL 7102576, at \*9 (W.D. Pa. Nov 21, 2011), *Report and Recommendation Adopted as Modified by Richardson v. Crawford County Correctional Facility*, 2012 WL 253195 (W.D. Pa. Jan 26, 2012) (“Plaintiff alleges that sometime after his return from Meadville Medical Center and while his arm was still in a sling, Defendant Schrekengost slammed a steel door on Plaintiff’s injured arm ‘with maliciousness and purpose.’ . . . Further, Plaintiff alleges that Wardens Lewis and Saulsbery ‘have been made aware and have had actual knowledge of such physically vindictive conduct of ... Schrekengost in the past pervious to the complained events (and since), of its substantial and dangerous propensities to the safety and health of the inmates and yet have acquiesced in same, doing nothing to correct her said contacts.’ . . . Defendant Wardens move to dismiss this claim against them because it is grounded in supervisory liability which cannot support a § 1983 action. Defendants are wrong in this regard. Plaintiff has specifically alleged that the Wardens were personally involved in that they knew of Schrekengost’s past vindictive conduct and acquiesced in it. This allegation is sufficient to support a claim against Defendants Wardens at this motion to dismiss stage.”)

***Ballard v. Williams***, No. 3:10-CV-1456, 2011 WL 5089726, at \*4 (M.D. Pa. Oct. 25, 2011) (“[T]he Magistrate Judge failed to consider that ‘[i]t is also possible to establish section 1983 supervisory liability by showing a supervisor tolerated past or ongoing misbehavior.’ *Argueta v. United States Immigration & Customs Enforcement*, 643 F.3d 60, 72 (3d Cir.2011) (citing *Baker v. Monroe Township*, 50 F.3d 1186, 1191 n. 3 (3d Cir.1995)). While merely mishandling a grievance may not be a constitutional violation, ‘a supervisor may be personally liable under § 1983 if he or she participated in violating the plaintiff’s rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates’ violations.’ *A.M. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir.2004). In his response brief, Plaintiff suggests that this may well be the sort of liability he is seeking against Palakovich and Zobitne, averring that their actions were ‘tantamount to supervisory liability.’ . . . Admittedly, this claim is difficult to glean from Plaintiff’s Amended Complaint. He merely states that Defendant Zobitne, as Unit Manager, had disregarded the Plaintiff’s request and never responded back. . . . And, although the exact hierarchy at the prison is not explained, this claim could serve as the foundation for supervisor liability. As for Defendant Palakovich, the allegations are even more barren, though it is clear that Ballard is claiming that Defendant Palakovich acted intentionally in depriving Plaintiff of his property. . . . As such, both of these potential claims are insufficient to survive the

Motion to Dismiss, even under the liberal *pro se* pleading standard, . . . as additional factual recitations are required. However, as explained below, Plaintiff will be given leave to amend.”)

*Abraham v. Danberg*, 832 F.Supp.2d 368, 378 (D. Del. 2011) (“Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a defendant expressly directed the deprivation of a plaintiff’s constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation; *e.g.*, supervisory liability may attach if the plaintiff asserts facts showing that the supervisor’s actions were ‘the moving force’ behind the harm suffered by the plaintiff.”)

*Mohney v. Pennsylvania*, 809 F.Supp.2d 384, 391, 392 (W.D. Pa. 2011) (“Generally, in order to establish supervisory liability against government officials in their individual capacities under § 1983, a plaintiff must demonstrate that the officials were personally involved in the commission of the conduct alleged. . . However, the United States Supreme Court has recognized a second theory of supervisory liability in that ‘there are limited circumstances in which an allegation of “failure to train” can be the basis for liability under § 1983.’ *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (1989). In such case, a plaintiff must establish that the alleged ‘failure to train amounts to deliberate indifference to the rights of persons with whom the [untrained persons] come into contact.’ . . . Accordingly, Defendants are not correct in asserting that personal involvement is a necessary element of a viable § 1983 claim. Nonetheless, even taken in the light most favorable to Plaintiff, the facts pleaded in the Amended Complaint are not sufficient to constitute deliberate indifference. . . . In his Amended Complaint, Plaintiff states that the Supervisory Defendants ‘have encouraged, tolerated, ratified, and had been deliberately indifferent to’ a pattern of misconduct involving, among other things, the use of excessive force, the failure to establish proper procedures with respect to encounters with mentally disabled persons, the improper use of taser weapons, and the failure to discipline officers who were the subject of prior complaints. . . . However, there are no facts offered in support of those conclusory statements. The Amended Complaint does not establish the requisite pattern of constitutional violations necessary to make Plaintiff’s supervisory liability claim plausible on its face. Nor has Plaintiff provided any facts related to prior encounters between mentally disabled individuals who have doused themselves with gasoline and PSP officers, which would demonstrate the need for the sort of specialized training that Plaintiff alleges was lacking in this case. . . Therefore, the § 1983 claims against Supervisory Defendants Neal, Wilson, and Pawlowski in their individual capacities will be **DISMISSED.**”)

*Lane v. Phelps*, 800 F.Supp.2d 646, 650 (D. Del. 2011) (“The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the test. . . Hence, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff’s constitutional right. . . . Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a

defendant expressly directed the deprivation of a plaintiff's constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation[.]”)

**Major Tours, Inc. v. Colorel**, 799 F.Supp.2d 396, 398, 399 (D.N.J. 2011) (“As this Court explained in *Liberty and Prosperity 1776, Inc. v. Corzine*, 720 F.Supp.2d 622, 628-29 (D.N.J.2010), claims based on a showing that a supervisor knew of and acquiesced to the discriminatory conduct of a subordinate are not foreclosed by *Iqbal*. *Iqbal* rejected supervisory liability in that case because the Supreme Court found that a nondiscriminatory intention, and not discriminatory animus, was the more likely inference to be drawn from the allegations made in that case regarding the supervisor's conduct. . . Consequently, merely permitting the operation of the discriminatory policy did not state a claim against the policymaker because there was no factual allegation or reasonable inference regarding discriminatory purpose behind that decision. . . Conversely, if a plaintiff shows that the supervisory decisions that resulted in the discriminatory effects were taken for a discriminatory reason, then the plaintiff need not show that the supervisor himself directly executed the harmful action. . . [A] reasonable jury could find that Schulze and Calorel's own actions caused Plaintiffs' buses to be stopped on the basis of the race of the owners.”)

**Johnson v. Bradford**, No. 10-5039 (RBK), 2011 WL 1748433, at \*7, \*8 (D.N.J. May 6, 2011) (“Under pre-*Iqbal* Third Circuit precedent, ‘[t]here are two theories of supervisory liability,’ one under which supervisors can be liable if they ‘established and maintained a policy, practice or custom which directly caused [the] constitutional harm,’ and another under which they can be liable if they ‘participated in violating plaintiff's rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates' violations.’ *Santiago v. Warminster Twp.*, 629 F.3d 121, 127 n. 5 (3d Cir.2010) (internal quotation marks omitted). . . The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the test. . . Hence, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right. . . . Here, plaintiff provides no facts describing how the supervisory defendants allegedly violated his constitutional rights, *i.e.*, he fails to allege facts to show that these defendants expressly directed the deprivation of his constitutional rights, or that they created policies which left subordinates with no discretion other than to apply them in a fashion which actually produced the alleged deprivation. In short, Johnson has alleged no facts to support personal involvement by the supervisory defendants, and simply relies on recitations of legal conclusions such that they failed to supervise or failed to protect plaintiff in violation of his First, Eighth and Fourteenth Amendment rights.”)

**Nykiel v. Borough of Sharpsburg**, No. 08-0813, 2011 WL 869141, at \*12, \*13 (W.D. Pa. Mar. 9, 2011) (“In *Iqbal*, the United States Supreme Court upheld the decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), that absent *respondeat superior*, each federal government official is liable for his or her

own misconduct. . . However, purpose rather than knowledge is required to impose *Bivens* liability on the official charged with violations arising from his or her superintendent responsibilities. However, contrary to defendant's position, these cases apply to federal employees and not section 1983 supervisory liability claims. . . . The present case differs from *Iqbal* and *Bivens*. First, the officials in *Iqbal* and *Bivens* were federal officials and not state officials, like Chief Rudzki, to which the standards of section 1983 apply. Likewise, in *Iqbal*, the plaintiff was seeking supervisor liability based solely upon the officer's role and not his actions. . . . Here, there is a dispute of material facts regarding Chief Rudzki's actions and how they reflect a knowledge of and acquiescence to the detention and subsequent restraining of Nykiel by Officer Duffy and Officer Mitchell for the following reasons. First, prior to arriving to the Sharpsburg police station that day, he spoke with Officer Duffy on several occasions over the telephone and was aware of the surrounding circumstances of Nykiel's arrest. Second, upon Chief Rudzki arriving at the station, the record indicates that Nykiel was exhibiting combative behavior, the officers were restraining him, and the medics were treating him. Chief Rudzki observed the events from the hallway when he arrived at the station for approximately three to five minutes and then went back to his office. Prior to returning to his office, Officer Fusco informed him that he strongly believed Nykiel was overdosing on crack cocaine. The record does not reveal that he adequately inquired as to what was going on or the type of medical treatment or physical treatment being administered to Nykiel. This contemporaneous knowledge of possible offending acts as well as inaction on Chief Rudzki's part could be interpreted by a reasonable juror as circumstances under which Chief Rudzki was aware of and acquiesced to Officer Duffy and Officer Mitchell's actions and communicated a message of approval to the allegedly offending officers. For the foregoing reasons, summary judgment on supervisor liability will be denied.”)

*Fennell v. Rodgers*, 762 F.Supp.2d 727, 732, 733 (D. Del. 2011) (“The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the test. . . . Hence, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right. . . . Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a defendant expressly directed the deprivation of a plaintiff's constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation; *e.g.*, supervisory liability may attach if the plaintiff asserts facts showing that the supervisor's actions were ‘the moving force’ behind the harm suffered by the plaintiff. . . . Plaintiff has not refuted Scarborough's sworn statement that Scarborough does not know plaintiff, that his duties did not include implementing procedures for requesting medical treatment, and that he was not involved in grievances submitted by plaintiff. While plaintiff argues that Scarborough ‘lied,’ he provides no evidence to support his argument. . . . A reasonable jury could not find that Scarborough was personally involved in plaintiff[']s claims. Therefore, the court will grant Scarborough's motion for summary judgment.”).

***Thomas v. Board of Educ. of Brandywine School School Dist.***, 759 F.Supp.2d 477, 495-97 & n.19 (D. Del. 2010) (“The Court acknowledges some lack of clarity in the case law – and in the parties’ briefing – as to the interaction between supervisory liability and the doctrine of qualified immunity. For example, the parties identify Plaintiff’s constitutional right as the ‘right to be free from sexual abuse.’ . . . While, of course, Plaintiff has such a right, . . . there is no allegation here that Harter, a supervisor, directly violated that right. Instead, the issue here could be stated as whether Plaintiff had a clearly established constitutional right to be free of a public school superintendent’s deliberate indifference to sexual abuse being committed against the student by a teacher. Alternatively, the issue might be stated as whether Plaintiff can demonstrate supervisory liability against Harter; if Plaintiff cannot, then undertaking further qualified immunity analysis becomes unnecessary. . . . Where, as here, individual liability is predicated on a defendant’s supervisory role, the supervisor -defendant ‘must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior.... Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence ...’. In other words, a supervisor may only be held liable for a constitutional violation in which the supervisor can fairly be said to have had a personal involvement. There are two ways of demonstrating the personal involvement of supervisors sufficient to justify imposing Section 1983 liability on a supervisor in his individual capacity. First, supervisors can be liable ‘if they established and maintained a policy, practice or custom which directly caused [the] constitutional harm.’ . . . Alternatively, supervisors can be ‘liable if they participated in violating plaintiff’s rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates’ violations.’ . . . While the Third Circuit has not adopted a test for determining when supervisory liability exists based on sexual harassment in the public school context, several other courts of appeals have done so, and the Court considers those tests to be highly instructive. Thus, in order to hold Barter liable in his individual capacity, Plaintiff must show; (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student, and (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse, and (3) such failure caused a constitutional injury to the student. . . . Here, there is insufficient record evidence to permit a reasonable juror to find that Harter had actual knowledge of sexual abuse by Holt.”)

***Mincy v. McConnell***, C.A. No. 09-236 Erie, 2010 WL 3092681, at \*5 (W.D. Pa. July 15, 2010) (“If a grievance official’s only involvement is investigating and/or ruling on an inmate’s grievance after the incident giving rise to the grievance has already occurred, there is no personal involvement on the part of that official. . . . However, a supervisory official can be found liable under §1983 if it is shown that he had knowledge of and acquiesced in his subordinates’ violations. . . . Plaintiff has not alleged that Defendants Harlow, Giroux, or Brooks were, in any way, personally involved in the harassment or retaliation of which he complains. However, Plaintiff does allege that these Defendants were aware of Defendant McConnell’s ‘retaliatory tendencies’ and ‘racially motivated abusive behavior,’ yet failed to take any corrective action. This awareness

is alleged to have come from numerous ‘grievances, civil actions, and complaints’ that were allegedly filed against Defendant McConnell, presumably by Plaintiff and other inmates. Construed in the light most favorable to Plaintiff, these allegations are sufficient to show that these Defendants had knowledge of and essentially acquiesced in their subordinates’ complained-of misconduct.”)

***Liberty And Prosperity 1776, Inc. v. Corzine***, 720 F.Supp.2d 622, 628, 629 (D. N.J. 2010) (“After the Supreme Court’s decision in *Iqbal*, there is some uncertainty over the continued existence of liability for a supervisor who knows about the unconstitutional conduct of subordinates and does nothing to stop it. . . Longstanding Third Circuit Court of Appeals precedent holds that supervisory personnel can be held liable under § 1983 if they had knowledge of and acquiesced in subordinates’ constitutional violations. . . But *Iqbal* makes it clear that there is no separate test for liability under § 1983 for supervisors; rather, each claim must satisfy the requirements of individual liability for each defendant regardless of supervisory position . . . A careful reading of *Iqbal* reveals that it does not foreclose Plaintiffs’ claim based on knowledge and acquiescence, and therefore the alternative allegations in the Complaint are sufficient. While *Iqbal* did hold that elements of a § 1983 claim cannot be imputed to a supervisor by way of *respondeat superior*, it did not hold that acts or omissions regarding superintendent duties can never state a claim. This distinction is crucial. . . . The allegations in *Iqbal* were insufficient to state a claim under the Equal Protection clause, not because decisions made by a supervisor with respect to whether certain policies will be carried out cannot state a claim, but because that particular claim requires not just acts or omissions that have discriminatory effects, but also that the decisions be the consequence of purposeful discrimination. The requirement of purpose in *Iqbal* flows from the nature of an Equal Protection claim, rather than some general requirement of supervisory liability. . . Some free speech claims made against supervisors may similarly require factual allegations regarding the supervisor’s discriminatory purpose, if the restriction is facially content-neutral but the plaintiff claims that it has a viewpoint-discriminatory purpose, for example. . . . Other free speech claims do not require this kind of finding of discriminatory purpose, such as those based on policies that facially discriminate based on content, . . . but may require allegations regarding knowledge and intent when qualified immunity is raised. Even for claims that require a finding of purpose, sometimes this finding is the only reasonable inference from the nature of the restriction, meaning that no separate factual allegation to support a finding of purpose is required. Such is the case here. Even if purpose is a necessary element of Plaintiffs’ claims, the Governor’s decision to permit the speech limitations reasonably raises the inference that the decision was taken with a discriminatory purpose because a very likely motivation for the policy was to prevent the speech of people who opposed the plan since the policy permitted the speech of Save Our State. It would be as if, in *Iqbal*, the plaintiffs had alleged that Ashcroft had implemented a policy of arresting only Arab Muslims who voted for Ralph Nader. In such a case, if not the only reasonable inference, certainly an extremely strong inference sufficient to state a plausible claim would be that this decision was taken because of, and not in spite of the protected political expression of the targets. In summary, *Iqbal* does not abandon constitutional liability for supervisors’ decisions regarding policies implemented by subordinates. The Supreme Court would not have made such a sweeping change to the law by implication. The

case simply reiterates the longstanding distinction between supervisory liability based on the discrete conduct of the supervisor that meets the requirements for the claim, and liability that is imputed to the supervisor solely by virtue of the supervisory position. If a claim requires discriminatory purpose as well as discriminatory effect, then the plaintiff must allege facts sufficient to show that the supervisory decisions that resulted in the discriminatory effects were taken for a discriminatory reason. And, in such cases, where a discriminatory purpose is a plausible inference from the facts, and in the absence of a ‘more likely’ motivation to be inferred, then this obligation has been met. Thus, the question with respect to the sufficiency of the allegations against Governor Corzine is not about his personal participation, since the allegation of knowledge and acquiescence is sufficient. The question is whether the facts alleged raise a plausible claim that viewpoint discrimination motivated the restrictions, rather than some content-neutral motivation . . . .”)

***Park v. Veasie***, No. 3:CV-09-2177, 2010 WL 2367666, at \*7, \*8 (M.D. Pa. June 9, 2010) (“Various courts of appeals, including the Third Circuit, have recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a *Bivens* or a § 1983 suit. . . . However, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff’s constitutional right. Here, Plaintiffs have alleged sufficient facts suggesting that Veasie was both personally involved in the improper search and seizure. . . . and that he directed Defendants Bogart and Markochik to violate Plaintiffs’ Fourth Amendment rights. For instance, Plaintiffs allege that Veasie intentionally chose officers with little training and experience in conducting a drug raid and that he was responsible for conducting the raid. . . . Combined with the more specific allegations that Plaintiffs make concerning Veasie’s direct involvement, these allegations are sufficient to survive a motion to dismiss.”)

***Whitaker v. Springettsbury Tp.***, Civil No. 1:08-CV-627, 2010 WL 1565453, at \*14 (M.D. Pa. Apr. 19, 2010) (“Supervisory liability under § 1983 utilizes the same standard as claims for municipal liability. *Iqbal*, \_\_ U.S. \_\_, 129 S.Ct. at 1948; *Carter*, 181 F.3d at 356. A supervisor will only be liable for the acts of a subordinate if he fosters a policy or custom that amounts to deliberate indifference towards an individual’s constitutional rights. . . . To establish supervisory liability , a plaintiff ‘must (1) identify the specific supervisory practice or procedure that the supervisor failed to employ, and show that (2) the existing custom and practice without the identified, absent custom or procedure created an unreasonable risk of the ultimate injury, (3) the supervisor was aware that the unreasonable risk existed, (4) the supervisor was indifferent to the risk; and (5) the underling’s violation resulted from the supervisory practice or procedure.’ *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 216 (3d Cir.2001) (citing *Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir.1989). As we found above, Plaintiffs have pointed to no evidence in this case to show that a relevant policy or custom proximately caused the alleged use of unconstitutionally excessive force that resulted in Whitaker’s death, and Plaintiffs have not identified evidence to support any other factor that must be shown to establish a failure to supervise on the part of Chief Eshbach. Given the absence of evidence in support of this claim, and because we can perceive no basis for

permitting a claim for supervisory liability to go forward on the record developed, we will recommend that the Court enter summary judgment in Chief Eshbach's favor with respect to all claims.”).

***Bullock v. Beard***, No. 3:10-CV-401, 2010 WL 1507228, at \*4 (M.D. Pa. Apr. 14, 2010) (“In Count 2, Plaintiffs bring a § 1983 claim against Defendants Beard, Klopotosky, Walsh and Mooney. Most of the language in this claim seems to be couched in the rhetoric of municipal liability claims for failure to train employees. . . However, Plaintiffs have not named any municipal defendants, so this cannot be the appropriate standard for this claim. The only other type of claim that would have been covered under Count 1 is a claim for supervisory liability. The Plaintiffs’ Complaint makes out a claim under supervisory liability by alleging that these Defendants had actual knowledge of the Eighth Amendment violations occurring in SCID and acquiescing to these violations. For example, the Plaintiffs alleged that the defendants were deliberately indifferent to the safety of prisoners and thereby condoned the disregard for psychiatric needs of inmates, such that Decedent’s death was likely to occur. . . This claim, therefore, alleges the type of knowledge and acquiescence sufficient to make out a claim for supervisory liability pursuant to 42 U.S.C. § 1983.”).

***Williams v. Lackawanna County Prison***, No. 4:CV-07-1137, 2010 WL 1491132, at \*4, \*5 (M.D. Pa. Apr. 13, 2010) (“Accepting Williams’ allegations as true, Williams has pled facts sufficient to state a plausible claim to relief [malicious and sadistic use of force] as to defendants Blume, Craven, and Masci; therefore, we will refrain from dismissing this claim as to these defendants. *See Twombly*, 127 S.Ct. at 1960. However, in his complaints, Williams also indicates that he wishes to sue Warden Donate. Williams claims the following: I have sent numerous grievances to the Warden and nothing has been done. She knows of the violation of my rights and failed to do anything to fix the situation. She also created these policies and customs allowing and encouraging these illegal acts, and she is grossly negligent in managing the people she is suppose [sic] to supervise. . . In his first amendment to his original complaint, Williams asserts, ‘Warden Janine Donate refuses to investigate any of my complaints/grievances. I have been grieving my issues to her for 8 months now and she hasn’t responded to any of them. She approves and encourages this type of behavior of her prison and staff members.’ . . With this claim, Williams appears to be alleging a supervisory liability claim against Warden Donate under 42 U.S.C. § 1983. According to traditional Third Circuit precedent, supervisory personnel are only liable under § 1983 if they participated in or had knowledge of violations, if they directed others to commit violations, or if they had knowledge of and acquiesced in subordinates’ violations. *Baker v. Monroe Twp.*, 50 F.3d 1186, 1191 (3d Cir.1995). However, with its decision in *Ashcroft v. Iqbal*, the Supreme Court may have cast doubt on the viability of this standard for holding government officials liable based on a theory of supervisory liability under § 1983. . . . Various courts of appeals, including the Third Circuit, have recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a *Bivens* or a § 1983 suit. [citing *Bayer* and *Maldonado*] However, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a

plaintiff's constitutional right. Additionally, in the context of the Eighth Amendment claim of cruel and unusual punishment, this involvement may be demonstrated 'through allegations of personal direction or of actual knowledge and acquiescence.' *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988); *see also Womack v. Smith*, 2009 U.S. Dist. LEXIS 120728, at \*15-17 (M.D.Pa. Dec. 29, 2009) (Conner, J.) (noting that, in applying the *Rode* standard of personal involvement in a case in which the plaintiff alleged cruel and unusual punishment, the Supreme Court's holding in *Iqbal* "is expressly limited to situations involving discrimination" and that the Court in that case made clear that "the factors necessary to establish a Bivens violation will vary with the constitutional provisions at issue"). Here, Williams has not alleged any facts that would support the personal involvement of Warden Donate in either the denial of the grievance process or the alleged assault. . . Instead, Williams merely claims that the warden 'refuses to investigate' his complaints and grievances and has failed to respond 'to any of them.' . . In addition, he claims that '[s]he approves and encourages this type of behavior' within the prison, . . . that she 'created these policies and customs allowing and encouraging these illegal acts,' and that 'she is grossly negligent in managing the people she is suppose [sic] to supervise.' . These allegations simply amount to a recitation of the legal elements of a constitutional claim that are insufficient to withstand a motion to dismiss. . . Accordingly, we will dismiss, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), the above-referenced claims against Warden Donate premised upon supervisory liability.").

***Womack v. Smith***, No. 1:06-CV-2348, 2009 WL 5214966, at \*5, \*6 (M.D. Pa. Dec. 29, 2009) ("We do not subscribe to the defendants reading of *Iqbal*. The defendants insist that this recent Supreme Court decision overturns longstanding Third Circuit precedent which permits a finding of personal involvement through either allegations of 'personal direction or *actual knowledge and acquiescence*.'" *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988) (emphasis added). The court believes *Iqbal* is distinguishable from the instant case. First, as the Supreme Court makes clear in *Iqbal*, the factors necessary to establish a *Bivens* violation will vary with the constitutional provisions at issue. *Iqbal*, 129 S.Ct. at 1948. The claims at issue in *Iqbal* involved discrimination in contravention of the First and Fifth Amendments to the Constitution. *Id.* at 1944. Supreme Court decisions are clear that in order to make out a claim of discrimination under the First and Fifth Amendments a plaintiff must plead and prove that the defendants acted with 'discriminatory purpose.' *Id.* In the case *sub judice*, the plaintiff alleges cruel and unusual punishment in violation of the Eighth Amendment, not discrimination. The court's concern here is strictly limited to whether prison officials acted with 'deliberate indifference' towards a 'substantial risk of serious harm to an inmate.' *Farmer v. Brennan*, 511 U.S. 825, 828, 832-37, 114 S.Ct. 1970 (1994). Second, the Supreme Court's own holding is expressly limited to situations involving discrimination. The Court specifically stated that '[i]n the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability ... for *unconstitutional discrimination*...." *Iqbal*, 129 S.Ct. at 1949 (emphasis added). Therefore, the court will apply the knowledge and acquiescence standard in determining whether the plaintiff has sufficiently pleaded personal involvement. . . . The allegations state that on multiple occasions between December 9, 2004 and January 4, 2005 defendant Smith informed Lappin, Dodrill, Vanyur, Thomas, Kendig and Marioana, in writing,

that the plaintiff was placed in restraints while he was housed in a secure cell and that the plaintiff was compliant when placed in restraints. . . In particular, defendant Dodrill was informed at least once every eight hours, a total of 75 separate notifications, that the plaintiff was being restrained. . . None of the defendants ostensibly took action to alleviate the plaintiff's conditions or reprimanded any of the corrections officers involved. . .We conclude that the allegations are sufficient to subject Defendant Dodrill to potential liability, but are insufficient as to the other defendants. Here, the averments against Dodrill demonstrate that he was notified no less than 75 times of the prolonged restraint of Womack. Such continuous and systematic notification indicate[s] that Dodrill knew of the plaintiff's condition. Additionally, his alleged non-intervention after being notified of the plaintiff's condition indicate[s] that Dodrill acquiesced in the restraining of Womack. In sharp contrast, Womack's claims against Lappin, Vanyur, Thomas, Kendig and Marioana involve only three notices and the court concludes that the allegations against them are insufficient to show knowledge and acquiescence. Specific and detailed allegations are needed to show that these defendants had personal knowledge in order to sustain . . .civil rights claims against them. . . Womack's theory is that the defendants had personal knowledge based solely on defendant Smith's three communications indicating the plaintiff was restrained. . . The Bureau of Prisons employs thousands of employees and oversees thousands of prisoners. The smaller regional offices also are responsible for thousands of employees and prisoners. These allegations are simply insufficient to show that Lappin, Vanyur, Thomas, Kendig and Marioana had actual knowledge. A holding to the contrary would subject the Director of the Bureau of Prisons and regional administrators to potential liability merely because an inmate or a corrections officer transmits a small number of status updates to regional and national authorities. . . Without detailed and specific allegations, the plaintiff's claims against these defendants are insufficient to show they had knowledge of and acquiesced in his treatment. Nevertheless, the court will dismiss the claims against Lappin, Vanyur, Thomas, Kendig and Marioana without prejudice and grant leave to file an amended pleading if discovery reveals additional evidence of actual knowledge.”).

*Young v. Speziale*, No. 07-03129 (SDW-MCA), 2009 WL 3806296, at \*7, \*9 (D.N.J. Nov. 10, 2009) (“In *Iqbal*, the Supreme Court held that a plaintiff seeking to impose supervisory liability on a § 1983 defendant must allege more than that the particular defendant ‘knew of, condoned, and willfully and maliciously agreed to’ violate a plaintiff’s constitutional rights. . . Although such allegations were held to be insufficient in *Iqbal*, the plaintiff’s claims there are distinguishable from those of Young. Specifically, the plaintiff in *Iqbal* brought a *Bivens* action for discrimination in violation of the First and Fifteenth Amendments. Such claims require a plaintiff to plead and prove that the defendant acted with discriminatory purpose . . . As a result of this particular requirement, the Supreme Court concluded that mere knowledge on the part of the supervisor was an insufficient basis for *Bivens* liability, which it treated as equivalent to § 1983 liability. . . There is no such requirement for a § 1983 claim for inadequate medical care arising under either the Eighth or Fourteenth Amendments. . . The Supreme Court, in *Iqbal*, even prefaced its analysis of this issue by recognizing that ‘[t]he factors necessary to establish a *Bivens* [or § 1983] violation will vary with the constitutional provision at issue.’ . . *Iqbal* thus does not support the proposition that general allegations are never sufficient to support a § 1983 claim. . . The Court is aware of

the qualified immunity doctrine and the underlying policy, espoused therein, against discovery; however, at this juncture, discovery is needed to, at a minimum, determine the players involved in the denial of Plaintiff's request for surgery. Although it 'exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government, ... [l]itigation [may be] be necessary to ensure that officials comply with the law.'").

*Gioffre v. County Of Bucks*, No. 08-4232, 2009 WL 3617742, at \*5 (E.D. Pa. Nov. 2, 2009) ("These supervisory officials here argue that the allegations against them amount to nothing more than formulaic recitations of the elements of supervisory liability and must, therefore, be disregarded. . . Further, they argue that even if the allegations were deemed factual, these facts fail to establish that they were personally involved in Mr. Gioffre's alleged constitutional injuries. . . Specifically, Defendants maintain that Plaintiff has alleged only that they established or implemented policies denying inmates adequate medical care and failed to properly train, supervise, monitor or discipline the medical staff. They argue that such allegations are insufficient to establish the supervisory liability of non-medical prison officials because Plaintiff fails to allege that Defendants had any actual knowledge of Mr. Gioffre's alleged constitutional injuries. . . With respect to Defendants, the Complaint alleges (1) that upon admission, Mr. Gioffre needed a medical examination, which he was not provided because of prison customs and policies, Compl. at & 17; (2) that as of the date of Mr. Gioffre's admission, Defendants had established, tolerated or ratified a practice, custom or policy of failing to provide necessary medical care to inmates to 'avoid the costs of necessary medication, treatment and hospitalization,' *id.* at & 29 (emphasis added); and (3) that Defendants were on notice of the constitutionally insufficient practices at BCCF because of 'inmate complaints, court rulings, reports, and other information,' *id.* at & 30. To be sure, this version of the Complaint lacks much detail. Plaintiff does not identify the precise practice or policy instituted by Defendants that created a substantial risk to inmates such as Mr. Gioffre. Nor does Plaintiff provide details about the substance of the complaints, court rulings, and reports received by Defendants regarding the constitutionally insufficient practices at BCCF. Nevertheless, the Complaint alleges a problematic practice or policy, known to and ratified by Defendants, of denying medical care for cost-saving reasons. The Complaint also alleges that Defendants learned of these alleged unconstitutional conditions, but that with deliberate indifference, they failed to remedy the situation. . . These details regarding the motive for the practice or policy of denying inmates medical treatment and the means through which the Defendants learned of the unconstitutional conditions elevate the Complaint, perhaps only barely, from being merely a blanket, general assertion of entitlement to relief. . . . Thus, the Court concludes that while the allegations as to Defendants are minimal and discovery eventually may establish that no such constitutionally impermissible practices or policies existed, the allegations are sufficient at this stage to put Defendants fairly on notice of the claims against them.'").

## **FOURTH CIRCUIT**

***Kartman v. Markle***, 582 F. App'x 151, 154-55 (4th Cir. 2014) (“Kartman testified in his deposition that he repeatedly informed Markle, the Administrator of the Central Regional Jail, in grievances and letters delivered by varying methods, that he faced a substantial risk of harm from other inmates. Markle testified that he never received any of these grievances and, therefore, had no knowledge of Kartman’s situation. The district court assumed that Kartman filed the grievances and letters as he claimed. However, the court concluded that there was no evidence that Markle actually received them or had any knowledge of Kartman’s issues, based on Markle’s testimony and the fact that Markle was not responsible for making prisoner’s housing decisions and would not have been the person to respond to these grievances. We conclude that material issues of fact exist preventing summary judgment on this claim. Markle testified that requests to be moved would be placed in his mailbox so long as they were addressed to him and would not be diverted to a supervisor or guard. While Markle stated that he would likely refer the request to a supervisor or the booking department, such a referral would require Markle to initially read and screen the request or grievance. Moreover, the record showed that grievances must be filed with the Administrator of the Jail; filing grievances with officers or supervisors would be insufficient to exhaust. Finally, Kartman submitted a grievance response from the Director of Inmate Services, which could be interpreted as stating that Markle had received Kartman’s grievances filed following the October assault. Based on the foregoing, and contrary to the district court’s ruling, we find that Kartman provided sufficient evidence to raise a material issue of fact as to whether he filed the disputed grievances and letters and, if so, whether Markle either received them or was willfully blind to their existence. . . . The district court ruled that a reasonable person in Markle’s position in possession of the incident reports of the October fight, Kartman’s November grievances, and Kartman’s letter would have known of an excessive risk of harm to Kartman and would have taken action. Because it is unclear whether Markle was in possession of or was aware of these documents, we vacate the district court’s order granting summary judgment and remand for further proceedings.”)

***Danser v. Stansberry***, 772 F.3d 340, 349-50 (4th Cir. 2014) (“The court’s observation that Stansberry and Roy were ‘directly responsible’ cannot be reconciled with the court’s failure to identify any conduct of Stansberry and Roy supporting this conclusion. Moreover, the record fails to reveal any such evidence, or other evidence that FCI–Butner or the SHU ‘had a policy or practice of ignoring or failing to update the BOP classifications in Sentry and the CIM system.’ Thus, all that is present in the record before us is the mere fact that Stansberry and Roy were Boyd’s supervisors, and under *Iqbal* that is insufficient as a matter of law to conclude that Stansberry and Roy violated Danser’s Eighth Amendment rights. . . . Our conclusion is not altered by Danser’s argument that Stansberry and Roy are not entitled to qualified immunity because they ‘tacitly authorized’ Boyd’s actions by failing to discipline him after the incident. At its core, Danser’s argument reflects a misperception of the ‘tacit authorization’ theory, which focuses on information known to a supervisor *before* an incident occurs. *See Shaw v. Stroud*, 13 F.3d 791, 798–800 (4th Cir.1994). A supervisor may be held liable under a tacit authorization theory if that supervisor fails to take action in response to a known pattern of comparable conduct occurring before the incident at issue took place. . . . Here, there is no evidence in the record that either Stansberry or Roy was

aware before the date of Danser’s attack of any alleged defects in the assignment process for the recreation cages or of a pattern of officers leaving the recreation area unattended. Therefore, neither Stansberry nor Roy may be held liable under a tacit authorization theory. . . Accordingly, based on the record before us, we conclude as a matter of law that the district court erred in denying the summary judgment motion of Stansberry and Roy.”)

*Evans v. Chalmers*, 703 F.3d 636, 660, 661 (4th Cir. 2012) (Wilkinson, J., concurring) (“A second example of the complaints’ overreach lies not so much in the nature of the claims as in the identity of the defendants. The plaintiffs have sued not just the police investigators, but also a number of Durham city officials such as the City Manager, Chief of Police, and various members of the police chain of command. Plaintiffs seek monetary damages from these so-called ‘supervisory defendants’ under a theory of supervisory liability. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), however, the Supreme Court issued several cautionary holdings with respect to such liability—lessons that plaintiffs have utterly failed to heed. To begin with, the Supreme Court explained in *Iqbal* that ‘a supervisor’s mere knowledge’ that his subordinates are engaged in unconstitutional conduct is insufficient to give rise to liability; instead, a supervisor can be held liable only for ‘his or her own misconduct.’ *Id.* at 677. Yet the complaints in this case repeatedly allege that the so-called supervisory defendants violated plaintiffs’ constitutional rights on the theory that they ‘knew or should have known’ about their subordinates’ conduct. This directly contradicts *Iqbal*’s holding that such allegations, standing alone, cannot give rise to supervisory liability. Moreover, the *Iqbal* Court explained that in order to state a claim for supervisory liability, ‘a plaintiff must plead that *each* [supervisory] defendant, through the official’s *own individual actions*, has violated the Constitution.’ . . The plaintiffs here, however, have roped in a number of Durham city officials without pleading any allegedly improper *individual actions*. . . . The absence of individualized allegations is all the more remarkable in light of the otherwise exhaustive nature of the complaints: combined, the three complaints weigh in at a staggering eight hundred-plus pages. The plaintiffs argue that the absence of specific allegations with respect to each individual supervisor is of no consequence given that they have used the term ‘supervisory defendants’ as shorthand to allege the collective actions and state of mind for all of the named supervisors. Requiring repetition of the names of specific defendants within the context of each factual allegation, we are told, would be ‘pointless and inefficient.’ This contention sorely misses the mark. The purpose of requiring a plaintiff to identify how ‘*each* [supervisory] defendant, through the official’s *own individual actions*, has violated the Constitution,’ . . is not to erect some formalistic rule that a complaint must mention each defendant by name some particular number of times. The requirement is instead designed to ensure that the serious burdens of defending against this sort of lawsuit are visited upon a departmental supervisor only when the complaint ‘plausibly suggest[s]’ that the supervisor engaged in ‘his or her *own misconduct*.’ . . At bottom, then, the problem with the supervisory liability claims here is that, like those at issue in *Iqbal*, they fail to cross ‘the line from conceivable to plausible.’ . . As in *Iqbal*, the plaintiffs’ allegations here *could* be ‘consistent with’ a scenario in which the supervisory officials somehow participated in their subordinates’ allegedly unconstitutional conduct. . . But the ‘obvious alternative explanation[.]’ . . for the supervisors’ conduct in assigning the case to certain investigators and attending meetings where the case was

discussed is that they wanted to facilitate the investigation, stay abreast of recent developments, and bring the case to closure on a reasonable timeline. That, after all, is their job. In short, the complaints here are wholly indiscriminate. They seek to sweep in everyone and everything, heedless of any actual indications of individual malfeasance that would justify the personal burdens that litigation can impose. What *Iqbal* condemned, the complaints assay. What is more, the complaints' sweeping allegations mirror the sweeping nature of the wrongs of which plaintiffs complain. It is, of course, the purpose of civil litigation to rectify, but not in a manner that duplicates the very evils that prompted plaintiffs to file suit.”).

*Al-Haqq v. Stirling*, No. CA 2:14-098-TMC, 2014 WL 6749096, at \*9 (D.S.C. Dec. 1, 2014) (“Even if prior Fourth Circuit case law on supervisory liability is still good law after *Iqbal*, . . . the Plaintiff has not satisfied the requirements for imposing supervisory liability enunciated in cases such as *Carter v. Morris*, 164 F.3d 215, 221 (4th Cir.1999) (a Plaintiff must show actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and an ‘affirmative causal link’ between the supervisor’s inaction and the particular constitutional injury suffered by the Plaintiff); *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.1994); and *Slakan v. Porter*, 737 F.2d 368, 370–75 (4th Cir.1984). As a result, a Defendant in a supervisory position over others who has mere knowledge of a constitutional violation is subject to dismissal-the supervisor himself must purposefully violate a prisoner’s constitutionally protected rights to be subject to liability. Therefore, to the extent Plaintiff alleges claims premised upon supervisory liability, those claims likewise fail.”)

*Cook v. Howard*, No. 11–1601, 2012 WL 3634451, \*4, \*5 (4th Cir. Aug. 24, 2012) (not reported) (“Curiously, the Appellants make no attempt to demonstrate that it satisfied the Supreme Court’s explanations of Rule 8(a)(2)’s requirements as set forth in *Twombly* and *Iqbal*, and which were the primary grounds upon which the district court relied. Instead, they rely on pre-*Twombly* and *Iqbal* cases such as *Leatherman* and *Jordan*. While *Leatherman* held that § 1983 claims are not subject to a heightened pleading standard and *Jordan* applied that holding in this Circuit, claims brought in federal court are also subject to the generally applicable standards set forth in the Supreme Court’s entire Rule 8(a) jurisprudence, including *Twombly* and *Iqbal*. As we have previously recognized, these later ‘decisions require more specificity from complaints in federal civil cases than was heretofore the case.’ *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 288 (4th Cir.2012). . . . We agree with the district court that the amended complaint does not satisfy these requirements. The amended complaint suffers from a number of infirmities with respect to the claims against the BCPD. Most strikingly, it repeatedly sets forth legal conclusions masquerading as factual allegations. . . .With respect to Commissioner Bealefeld and Colonel Bevilaqua’s liability as supervisory officers, the amended complaint’s assertions boil down to contending that because Cook’s death occurred at a time when they were supervisors of BCPD officers, they have imputed knowledge of their subordinates’ conduct and should be held liable for it. Simply put, the amended complaint does not set forth facts that raise beyond the level of speculation any claim of entitlement to relief under § 1983 or 1985 founded on a theory of supervisory liability.”)

***O’Connell v. City of Greenville***, 4:14-CV-64-BO, 2014 WL 4537182, \*2 (E.D.N.C. Sept. 11, 2014) (“Defendant Aden argues that plaintiff’s supervisory liability claim fails because the complaint does not allege any facts regarding Aden’s individual actions or omissions. The complaint, however, asserts that Aden, the police chief, failed to adequately supervise Does One through Five. Specifically, plaintiff alleges that Aden failed to implement and enforce policies to adequately supervise and train his officials to prevent constitutional violations. These allegations are sufficient to nudge plaintiff’s supervisory liability claim across the line from conceivable to plausible. *Twombly*, 550 U.S. at 70. Thus, defendant Aden’s motion to dismiss the individual capacity claim on this ground is denied.”)

***Alexander v. Kenworthy*** No. 5:11-CT-3142-FL, 2013 WL 461338, \*3 (E.D.N.C. Feb. 6, 2013) (“Defendants each assert that plaintiff failed to allege that they had any personal involvement in the alleged failure to clean and maintain the cell containing the staph infection. Plaintiff, however, alleges that each of the defendants was aware of the situation and refused to direct that the cell be cleaned/disinfected. The court finds that these allegations are sufficient to state a supervisor liability claim.”)

***Panowicz v. Hancock***, No. DKC 11-2417, 2012 WL 4049358, \*11, \*12 (D. Md. Sept. 12, 2012) (“Where a complaint recites only a single instance of harm, courts have generally found a failure to state a claim for supervisory liability. . . . While it may be true that Plaintiff will ultimately be required to show prior instances of misconduct to prevail on his supervisory liability claim, the focus at the dismissal stage is on plausibility. Considering the well-pleaded allegations of the complaint in the light most favorable to Plaintiff, as the court must on a motion to dismiss, Plaintiff has set forth a plausible claim that he suffered a cognizable injury as a result of Defendant’s failure to implement formal safeguards against the erroneous publication of judgments of conviction on a judicial website. The question is a close one, and Plaintiff’s ultimate burden in proving deliberate indifference is heavy, but the audit report ‘nudge[s][his] claim[ ] across the line from conceivable to plausible[.]’ . . . The appendix to the audit report indicates that Defendant implemented informal procedures to ensure that judgments were accurately recorded, but the State’s recommendation that formal policies be adopted at least suggests that these informal procedures were in some respect insufficient. To the extent that Defendant may have known of a propensity for such errors and failed to respond, whether by implementing a formal policy or providing training to her subordinates, Plaintiff has set forth a sufficient § 1983 claim against Defendant in her individual capacity, albeit by a very thin margin. Ultimately, the ‘determining issue on supervisory liability is whether defendant proximately caused a violation of the plaintiff’s rights by doing something or failing to do something he should have done,’ and ‘this issue is ordinarily one of fact, not law.’ . . . Plaintiff is entitled to discovery to attempt to make the requisite showing. Accordingly, Defendant’s motion to dismiss Plaintiff’s individual capacity claim under § 1983 will be denied.”)

***Denney v. Berkeley County***, No. 3:10-1383-RMG-JRM, 2012 WL 3877732, \*6, \*7 (D.S.C. Sept. 5, 2012) (“[S]upervisors may still be held liable under § 1983. *See, e.g., Taylor v. Lang*, No. 12-6069, 2012 WL 2354460, at \*2 (D.S.C. June 21, 2012) (conducting supervisory liability

analysis under § 1983 post- *Iqbal* ); *Smith v. Ray*, 409 F. App'x 641, 650 (4th Cir.2011) (same); *see also Starr v. Baca*, 652 F.3d 1202, 1205–07 (9th Cir.2011) (explaining why *Iqbal* did not affect the existence of supervisory liability under § 1983). That is because the liability of a supervisor is not based on ordinary principles of vicarious liability, but instead on “a recognition that supervisory indifference or tacit authorization of subordinates’ misconduct may [itself] be a causative factor in the constitutional injuries [the subordinates] inflict on those committed to their care.” . . . ‘Thus, when a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action, not held vicariously liable for the culpable action or inaction of his or her subordinates.’ *Starr*, 652 F.3d at 1207. Given that background, it makes sense that the state of mind requirement for a deliberate indifference claim is modified somewhat in the supervisory context, requiring a plaintiff to demonstrate: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor’s response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) that there was an affirmative causal link between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff. *Randall v. Prince George’s Cnty., Md.*, 302 F.3d 188, 206 (4th Cir.2002) (quotation marks and citation omitted). Plaintiff Denney’s claim against Dewitt fails because he has not shown that Dewitt ‘had actual or constructive knowledge that his [subordinates were] engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff.’ . . . Denney essentially argues that Dewitt must have known of the risk, given the many alleged lapses in protocol by prison officials. But a deliberate indifference claim requires more than that. In order for the fact-finder to infer that an official knew of the risk, the plaintiff must have shown that the risk ‘was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about it.’ . . . Denney has offered no evidence that Dewitt was aware that his subordinates were placing individuals charged with crimes against minors into cells where they might be the targets of violence, or of any other violations of policy. Nor has Denney shown that Dewitt knew of the two beatings that occurred at the detention center in the weeks leading up to this incident. Thus, Denney has not raised beyond the level of mere speculation his claim that Dewitt knew his subordinates were engaged in conduct that posed a risk to the safety of individuals in Denney’s position.”)

***Knowles v. Lewis***, No. 5:11–CT–3113–FL, 2012 WL 3637241, \*5, \*6 (E.D.N.C. Aug. 22, 2012) (“The court next turns to plaintiff’s claim against Lewis and Smith arising out of their alleged deliberate indifference to his medical care. This supervisor liability claim is based solely upon the fact that plaintiff wrote letters to Lewis and Smith complaining about his medical care. However, this alone, is insufficient to meet the heavy burden in supervisor liability cases. . . . Moreover, even if supervisor liability could stem from the letters alone, plaintiff’s claims still fails because as DAC supervisory officials, Lewis and Smith are entitled to rely upon the judgment of medical staff at Johnston for the provision of medical care. . . . Based upon the foregoing, plaintiff has failed to state a supervisor liability claim based upon alleged deliberate indifference to plaintiff’s medical

care against Lewis and Smith. Finally, plaintiff alleged a supervisor liability claim against Lewis and Smith based upon the alleged deliberate indifference to the design of the Johnston facility and prison policies resulting in his sun exposure. Lewis and Smith have not proven that plaintiff failed to state a claim upon which relief may be granted for this claim. Thus, to the extent Lewis and Smith seek dismissal of these claims, their motion is DENIED.”)

**Moore v. Davis**, No. 8:11-cv-01173-DCN-JDA, 2012 WL 2890893, \*4 n.4 (D.S.C. May 22, 2012) (“[T]he Supreme Court in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), may have entirely abrogated supervisory liability in *Bivens* actions. . . A *Bivens* action ‘is the “federal analog to suits brought against state officials under ... § 1983.”’ . . Therefore, the Supreme Court’s reasoning may extend to abrogate supervisory liability in § 1983 actions as well as *Bivens* actions.”)

**Shannon v. Department of Public Safety and Correctional Services**, No. ELH-11-1830, 2012 WL 1150802, at \*7 (D. Md. Apr. 5, 2012) (“To the extent that Shannon seeks to hold Warden Wolfe culpable under a theory of supervisory liability, his claims are unavailing. Supervisory liability under § 1983 must be supported with evidence that: 1) the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; 2) the supervisor’s response to the knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and 3) there was an affirmative causal link between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff. . . Shannon does not claim Warden Wolfe had actual or constructive knowledge of the incidents in question, nor are there any grounds alleged for assigning supervisory liability. Shannon does not allege that Warden Wolfe was aware of and disregarded an excessive risk to Shannon’s health. . . Further, Warden Wolfe was entitled to rely on the opinions of medical professionals concerning Shannon’s treatment. For these reasons, Warden Wolfe is entitled to summary judgment in his favor.”)

**Pelzer v. McCall**, No. 8:10-cv-1265-MBS-JDA, 2012 WL 761935, at \*5 (D.S.C. Feb. 16, 2012) (“[T]he Supreme Court in *Ashcroft v. Iqbal*. . . may have entirely abrogated supervisory liability in *Bivens* actions. . . . A *Bivens* action ‘is the “federal analog to suits brought against state officials under ... § 1983.”’ . . Therefore, the Supreme Court’s reasoning may extend to abrogate supervisory liability in § 1983 actions as well as *Bivens* actions.”)

**Lavender v. City of Roanoke Sheriff’s Office**, 826 F.Supp.2d 928, 935, 936 (W.D. Va. 2011) (“To plead claims for relief under § 1983 against Johnson in her individual capacity, once again, Lavender must plead facts that show a more than a *respondeat superior* relationship. ‘While a municipal liability claim based upon a particular official’s attributed conduct and a supervisory liability claim against that official based upon the same conduct are not perfectly congruent, each requires proof both of the official’s deliberate indifference and of a close affirmative link between his conduct and the resulting constitutional violation by a subordinate.’ *Jones v. Wellham*, 104 F.3d 620, 628 (4th Cir.1997) (citation omitted). To establish supervisory liability , a plaintiff must show: (1) that the supervisor had actual or constructive knowledge that his subordinate was

engaged in conduct that posed ‘a pervasive and unreasonable risk’ of constitutional injury to citizens like the plaintiff; (2) that the supervisor’s response to that knowledge was so inadequate as to show ‘deliberate indifference to or tacit authorization of the alleged offensive practices;’ and (3) that there was an ‘affirmative causal link’ between the supervisor’s inaction and the particular constitutional injury suffered. . . Here, Lavender’s pleadings are essentially boilerplate, devoid of specific facts showing that Johnson either in her official or individual capacity was deliberately indifferent to or tacitly authorized a particular practice that led to the single alleged use of excessive force against Lavender on March 21, 2009 by an unidentified deputy. At the hearing on the motion to dismiss, Lavender’s counsel explained that Lavender was attempting to hold Johnson liable under § 1983 because after Johnson became aware of the March 21, 2009 incident, she allegedly failed to ‘follow through,’ that is, ‘properly investigate’ the incident and that Lavender also was seeking to hold Johnson liable based on her ‘pattern of conduct,’ though he did not have ‘specific facts.’ Counsel’s explanation underscores at least two fundamental deficiencies in Lavender’s complaint. First, though Johnson’s alleged failure to investigate the alleged excessive use of force against Lavender possibly might serve as grist should another excessive force claim arise in the future, it could not have resulted in the constitutional deprivation Lavender alleges—the antecedent excessive use of force—and consequently is not actionable under § 1983. . . Second, the acknowledgment that Lavender does not yet have ‘specific facts’ to establish a pattern of conduct and is seeking to engage in discovery to support his allegations ignores *Iqbal*’s admonition that Rule 8 of the Federal Rules of Civil Procedure ‘does not unlock the doors and discovery for a plaintiff armed with nothing more than conclusions.’ . . In short, Lavender’s complaint falls far short of showing that Lavender is entitled to relief under § 1983 against Johnson in her individual or official capacity, and the court will dismiss those claims against her.”)

***Harbeck v. Smith***, 814 F.Supp.2d 608, 627 (E.D. Va. 2011) (“Although Plaintiff has not conclusively shown that Smith had knowledge of Plaintiff’s continued unlawful incarceration, she need not meet that burden at this point. Plaintiff has plausibly alleged that Smith personally received notice of the unlawful incarceration on several occasions and failed to act. Such a showing of personal knowledge is sufficient to survive a motion to dismiss. . . . Therefore, despite the fact that liability for Smith cannot rest on a theory of respondeat *superior*, Plaintiff has alleged sufficient personal involvement on the part of Smith to survive a motion to dismiss under Rule 12(b)(6).”)

***Humbert v. O’Malley***, Civil No. WDQ-11-0440, 2011 WL 6019689, at \*7 (D. Md. Nov. 29, 2011) (“The Court will deny Bealefeld and Dixon’s motions to dismiss the § 1983 claims. Humbert has properly alleged that Bealefeld had actual or constructive knowledge of officers’ misconduct, such as ordering crime lab technicians not to follow up on DNA found at crime scenes. That the police allegedly did so in at least nine cases makes it plausible that Bealefeld had a ‘policy of inaction’ with respect to his subordinates’ DNA collection and processing. . . . Because Humbert’s constitutional harm involved continued detention despite exculpatory DNA evidence, he has sufficiently pled an affirmative causal link between Bealefeld’s inaction and his injury. . . . The allegations of police misconduct are so significant that even the mayor should have known about

it. . . Accordingly, the Court will deny the motions to dismiss the § 1983 claims against Bealefeld and Dixon.”)

***Newbrough v. Piedmont Regional Jail Authority***, 822 F.Supp.2d 558, 586 & n.14 (E.D. Va. 2011) (“In the Fourth Circuit, a plaintiff seeking to establish supervisory liability under § 1983 must show: (1) that ‘the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed “a pervasive and unreasonable risk” of constitutional injury to citizens like the plaintiff’; (2) that the supervisor’s response was so inadequate as to show ‘deliberate indifference to or tacit authorization of the alleged offensive practices’; and (3) that there existed ‘an “affirmative causal link” between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff.’ *Shaw*, 13 F.3d at 799 (internal citations omitted). In short, a plaintiff must demonstrate that the supervisor’s constitutionally offensive inaction was itself a ‘direct cause’ of the injury alleged, *Miltier*, 896 F.2d at 854 – a heavy burden. . . . Arguably, *Iqbal* may have abrogated supervisory liability altogether. . . . Because a *Bivens* action ‘is the federal analog to suits brought against state officials under . . . § 1983,’ *id* at 1948, the Court’s reasoning may effectively nullify supervisory liability in both § 1983 actions and *Bivens* actions.”)

***McFadyen v. Duke University***, No. 1:07CV9532011, 2011 WL 1260207, at \*57 (M.D.N.C. Mar. 31, 2011) (“[I]n applying [the *Iqbal*] standard, circuit courts have concluded that supervisory liability may still be imposed based on ‘deliberate indifference’ where the underlying constitutional violation itself may be established based on deliberate indifference. *See Starr v. Baca*, No. 09-55233, 2011 WL 477094, at \*4 (9th Cir.2011); *see also, e.g., Smith v. Ray*, No. 09-1518, 2011 WL 317166, at \*8 (4th Cir. Feb. 2, 2011) (continuing to apply the *Shaw v. Stroud* “deliberate indifference” standard).”).

***Hunt v. Robeson County***, No. 5:10-CT-3112-FL, 2011 WL 761483, at \*6 (E.D.N.C. Feb. 24, 2011) (“Plaintiff alleges that the named supervisors created an official policy and/or an environment that implicitly authorized detention officers and the medical staff to systemically deny inmates proper and adequate medical services. In particular, plaintiff alleges that the supervisory defendants created an environment in which inmates’ medical complaints were treated as frivolous or untruthful and that denied inmates’ medical services in a timely manner. This is sufficient to state a constitutional claim against the supervisory defendants. *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694-95 (1978). Thus, the motion to dismiss Begay and Harris is DENIED.”)

***Miller v. Hamm***, Civil No. CCB-10-243, 2011 WL 9185, at \*12 (D. Md. Jan. 3, 2011) (“Miller claims Stakem-Hornig and City Solicitor Nilson are liable for his constitutional injuries in their capacities as supervisors. In *Shaw v. Stroud*, 13 F.3d 791 (4th Cir.1994), the Fourth Circuit set forth three elements required to establish supervisory liability under 42 U.S.C § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed ‘a pervasive and unreasonable risk’ of constitutional injury to citizens like the plaintiff; (2) that the supervisor’s response to that knowledge was so inadequate as to show ‘deliberate

indifference to or tacit authorization of the alleged offensive practices,’; and (3) that there was an ‘affirmative causal link’ between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff. . . . To satisfy the first element, a plaintiff must show the supervisor had knowledge of a subordinate’s conduct that ‘pose[d] a pervasive and unreasonable risk of constitutional injury to the plaintiff.’. . . This requires that the plaintiff allege conduct that ‘is widespread, or at least has been used on several different occasions,’ and ‘poses an unreasonable risk of harm of constitutional injury.’. . . Although Miller brings this claim against both Stakem-Hornig and City Solicitor Nilson, the relevant pleadings focus only on Nilson’s knowledge of his subordinate’s conduct. . . . To the extent that the pleadings support Stakem-Hornig’s liability, it is not as a supervisor, but as an active participant in the decision to deny Miller a name-clearing hearing. As a result, the motion to dismiss the claim of supervisory liability will be granted as to Stakem-Hornig. With respect to Nilson, the pleadings do not give rise to a plausible inference that he had actual or constructive knowledge that his subordinate, Stakem-Hornig, was engaging in conduct that posed a pervasive and unreasonable risk of constitutional injury to the plaintiff. The complaint alleges only that Nilson had reason to believe Stakem-Hornig was violating the constitutional rights of BPD officers and that he had knowledge she was acting as a final decisionmaker rather than referring decisions to the BPD. . . . The former allegation is too broad and vague to give rise to supervisory liability. The latter allegation, while suggesting potentially improper conduct, does not make it plausible that Nilson was aware Stakem-Hornig was engaging in conduct posing an unreasonable risk to Miller’s rights. Miller does not specify the types of decisions Stakem-Hornig was failing to refer to BPD, and he does not assert these decisions repeatedly implicated officers’ constitutional rights. Miller has not established the first element of supervisory liability as to either Stakem-Hornig or City Solicitor Nilson. Accordingly, this claim will be dismissed.”)

*Massenburg v. Adams*, No. 3:08CV106, 2010 WL 1279087, at \*3 (E.D. Va. Mar. 31, 2010) (“Defendants Adams and Sharpe argue that the complaint does not adequately allege that they were personally involved in any deprivation of Plaintiff’s rights. Read in the light most favorable to Plaintiff, both Adams and Sharpe knew Plaintiff’s religion prohibited him from working on the Sabbath. Both Sharpe and Adams also knew that the Plaintiff’s work assignment required that he work on the Sabbath or face punishment. [FN6. Sharpe knew the foregoing facts because Plaintiff raised the complaint in her presence. Adams knew these facts because Plaintiff wrote a grievance in which he requested that she intervene.] The complaint further suggests that in their respective positions as Camp Administrator and Warden, Sharpe and Adams had the authority and responsibility to intervene and remedy the alleged violation of Plaintiff’s free exercise rights, yet they stood indifferent. Such allegations are sufficient, at this juncture, to establish a personal involvement by Adams and Sharpe.”).

## **FIFTH CIRCUIT**

*Hicks v. LeBlanc*, 832 F. App’x 836, \_\_\_ (5th Cir. 2020) (“A supervisory official may be held liable only if (1) he affirmatively participates in the acts that cause the constitutional deprivation,

or (2) he implements unconstitutional policies that causally result in the constitutional injury. . . ‘In order to establish supervisor liability for constitutional violations committed by subordinate employees, plaintiffs must show that the supervisor act[ed], or fail[ed] to act, with deliberate indifference to violations of others’ constitutional rights committed by their subordinates.’ . . ‘A failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights.’ . . ‘A supervisor may also be liable for failure to supervise or train if: “(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff’s rights; and (3) the failure to train or supervise amounts to deliberate indifference.”’ . . Deliberate indifference requires ‘proof that a municipal actor disregarded a known or obvious consequence of his action.’ . . To establish a state actor’s disregard, there must be ‘actual or constructive notice’ ‘that a particular omission in their training program causes . . . employees to violate citizens’ constitutional rights’ and the actor nevertheless ‘choose[s] to retain that program.’ . . ‘A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference.’ . The complaint contained no allegations that LeBlanc affirmatively participated in the acts that caused Hicks’ constitutional deprivation. Instead, Hicks’ claim against LeBlanc was predicated on his conduct in (1) failing to promulgate adequate policies, and (2) failing to train and supervise DPSC employees. We must therefore consider whether LeBlanc’s alleged actions, or inaction, were objectively unreasonable in light of the clearly established law that a prison official must ensure an inmate’s timely release and that such an official may be liable for failure to promulgate policy or failure to train and supervise if he acted with deliberate indifference to constitutional rights. . . Whether LeBlanc acted with deliberate indifference is a close call. Hicks alleged that LeBlanc knew of the DPSC’s long history of overdetecting inmates; that DPSC employees used different methods to calculate release dates; and that the DPSC had not disciplined employees who miscalculated sentences. However, the alleged facts—which included processing delays, data errors, inconsistent calculation methodologies, and unspecified deficiencies—speak to the incompetence of DPSC employees and the lack of adequate training and supervision. Based on these allegations, LeBlanc could be held liable for *incompetent* over-detention, such as the failure to process a prisoner’s release or immediately compute an inmate’s sentence after being sentenced to time served. . . But it cannot be said that LeBlanc had notice that his employees were purposely disregarding sentencing orders out of retaliatory intent. The complaint was devoid of allegations supporting the reasonable inference that a pattern of *intentional* over-detention existed in the DPSC; that is, the alleged facts suggest a pattern of over-detention caused by quality control deficiencies and the lack of training and supervision, not a pattern of over-detention stemming from the blatant refusal to credit offenders with time served contrary to sentencing orders. In the absence of such a pattern, LeBlanc could not have acted with deliberate indifference to Lawson’s intentional sentencing miscalculation and over-detention of Hicks. Accordingly, the district court erred in denying LeBlanc’s defense of qualified immunity.”)

***Johnson v. Halstead***, 916 F.3d 410, 416-19 (5th Cir. 2019) (*denying reh’g and reh’g en banc*) (“The district court denied Halstead qualified immunity on Johnson’s hostile work environment

claim but limited the claim to a theory of supervisory liability. A supervisor can be liable for the hostile work environment created by his subordinates ‘if that official, by action or inaction, demonstrates a deliberate indifference to a plaintiff’s constitutional rights.’ . . . We first address Halstead’s contention that there is a clear legal obstacle to this section 1983 claim. He argues that although a hostile work environment based on sex violates the Equal Protection Clause, it is not clearly established that one based on race does. This ignores multiple cases in which we have considered race-based hostile work environment claims asserted under section 1983. . . . But for Halstead to be liable, it is not enough that Johnson was subject to a hostile work environment. Halstead must have been deliberately indifferent to this racially hostile work environment. . . . This is a ‘stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.’ . . . Johnson thus must allege that ‘repeated complaints of civil rights violations’ were followed by ‘no meaningful attempt on the part of the municipality to investigate or to forestall further incidents.’ . . . He has done so. There is no dispute that Halstead knew about the alleged harassment. Johnson says he met with Halstead soon after he filed the complaint with HR. The subsequent transfer of Johnson and Halstead’s later apology corroborate this. So does the Coleman Report, as it found that a ‘high ranking officer’ confirmed Johnson’s account of his interactions with the Police Chief. The investigators also concluded that there was ‘widespread knowledge’ of Johnson’s situation, and that the ‘Chain of Command’ knew about the ‘hostile, intimidating, and bullying’ behavior. Johnson’s allegations that Halstead did nothing to try and stop the harassment even though he knew about it—again corroborated by the outside investigation—also satisfy the second requirement for deliberate indifference.”)

*Perniciaro v. Lea*, 901 F.3d 241, 259-60 (5th Cir. 2018) (“Perniciaro contends that Dr. Thompson—the chief of staff at ELMHS responsible for overseeing the provision of care—was deliberately indifferent by failing to adequately supervise Dr. Nicholl in light of Perniciaro’s myriad injuries and Dr. Nicholl’s failure to create a holistic treatment plan. But without an underlying constitutional violation—of which we have found none—there can be no supervisory liability. . . . Perniciaro has failed to establish that Dr. Thompson violated his clearly established rights, and Dr. Thompson is therefore entitled to qualified immunity. As to Lea, the CEO of ELMHS, Perniciaro contends that he was deliberately indifferent by failing to adequately supervise Dr. Nicholl, failing to adequately supervise and train the guards on the proper implementation of ALO, and failing to ensure that all incidences of injuries or violence were reported. Regarding Lea’s supervision of Dr. Nicholl, once again the absence of an underlying constitutional violation precludes supervisory liability. Regarding the supervision and training of guards and reporting of injuries, Perniciaro’s claims fare no better. Perniciaro has failed to identify any deficiency in the guards’ training . . . and there is neither evidence that Lea knew that guards were not properly implementing ALO nor evidence that the need for additional supervision or training should have been obvious. In an environment like ELMHS, where guards are tasked with the difficult job of keeping mentally ill and potentially violent individuals safe from themselves and from one another, the fact that Perniciaro was injured while on ALO is not itself sufficient to make the need for further supervision or training obvious. . . . Finally, although Perniciaro points to evidence that he twice sustained injuries that were either unreported or untimely reported, he presented no evidence,

nor even argument, that those failures were causally connected to any constitutional violation. Nor is there evidence that those two failures made the inadequacy of existing training and supervision ‘obvious and obviously likely to result in a constitutional violation.’ Accordingly, Lea, too, is entitled to qualified immunity.”)

*Pena v. City of Rio Grande City*, 879 F.3d 613, 621 (5th Cir. 2018) (“A superior officer issuing a direct order to a subordinate to use excessive force demonstrates both the necessary action and causality for a supervisor-liability claim. Peña’s proposed amended complaint thus stated a claim against Solis under this theory. . . . A superior officer issuing a direct order to a subordinate to use excessive force demonstrates both the necessary action and causality for a supervisor-liability claim. Peña’s proposed amended complaint thus stated a claim against Solis under this theory.”)

*Davidson v. City of Stafford, Texas*, 848 F.3d 384, 397-98 (5th Cir. 2017) (“As a threshold matter, the proper inquiry for supervisory liability here would be Chief Krahn’s alleged failure to train or supervise, not his interpretation of § 38.02. But even if Chief Krahn’s interpretation of § 38.02 was the equivalent of a failure to train or supervise, Davidson has failed to demonstrate a material dispute of fact concerning the deliberate indifference of Chief Krahn. Davidson’s evidence is insufficient to demonstrate either a pattern, as discussed in section III.A.2, *supra*, or that his injury was a highly predictable consequence of Chief Krahn’s understanding of § 38.02. That is, Chief Krahn’s understanding of § 38.02 does not lead to the highly predictable consequence of officers arresting individuals (including Davidson) without probable cause. On this point, our prior decision in *Brown v. Bryan County*, 219 F.3d 450 (5th Cir. 2000) is instructive. There, we found deliberate indifference where the municipality in question had not trained or supervised the officer who committed the allegedly unconstitutional conduct. . . We further emphasized the fact that the policymaker, a sheriff, had recently investigated the officer and was aware of the officer’s ‘youth, inexperience, personal background, and ongoing [improper] arrest activities.’. . None of the facts in Davidson’s case provide the same cause for concern we recognized in *Bryan County*. Defendants provided evidence demonstrating the extensive training completed by Officers Flagg and Jones, and Davidson points to no evidence concerning the officers’ backgrounds or activities with the Stafford PD that demonstrate the high probability of Davidson’s arrest. Davidson’s evidence therefore fails to create a material dispute of fact as to deliberate indifference, and the district court correctly granted summary judgment on his claim for the liability of Chief Krahn in his individual capacity.”)

*Terry v. Kinney*, No. 15-20548, 2016 WL 5335030 (5th Cir. Sept. 22, 2016) (not reported) (“As the parties recognize, Terry had a clearly established liberty interest in her bodily integrity guaranteed by the Fourteenth Amendment that was violated by McCutchen’s misconduct . . . The defendants, as McCutchen’s supervisors during the relevant period, may be held liable under 42 U.S.C. § 1983 if they ‘learned of facts or a pattern of inappropriate sexual behavior by [McCutchen] pointing plainly toward the conclusion that the subordinate was sexually abusing [Terry]’ and ‘demonstrated deliberate indifference toward the constitutional rights’ of Terry, if that failure to take action caused Terry a constitutional injury.”)

**Hinojosa v. Livingston**, 807 F.3d 657, 668-69 (5th Cir. 2015) (“Defendants contend that the complaint does not properly allege *their responsibility* for the asserted constitutional violation because § 1983 does not contemplate supervisory liability. They argue that they cannot be held liable for the alleged failures of medical personnel and subordinate corrections officers because they did not personally participate in those failures. . . . But Defendants misread the complaint. The complaint does not seek to hold Defendants vicariously liable for the actions of their subordinates. Rather, it seeks to hold them liable for their own actions in promulgating—and failing to correct—intake and housing policies that exposed Hinojosa and other inmates like him to extreme temperatures without adequate remedial measures. ‘A supervisory official may be held liable ... if ... he implements unconstitutional policies that causally result in the constitutional injury.’ . . . To the extent that Defendants appear to argue they had no hand in the formation of the intake and housing policies described in the complaint, they raise a factual dispute inappropriate for resolution on a motion to dismiss. The complaint specifically alleges that Defendants promulgated and had the power to change the policies that allegedly caused Hinojosa’s death. Moreover, while it is true that the complaint contains allegations regarding the conduct of Defendants’ subordinates, these allegations seek only to establish direct liability against those subordinates who were also named as defendants in the complaint, not vicarious liability against Livingston, Thaler, and Stephens.”)

**Hinojosa v. Livingston**, 807 F.3d 657, 689 (5th Cir. 2015) (Jones, J., dissenting) (“Especially after *Iqbal*, the plaintiff has not provided the careful factual allegations to meet the burden of pleading, with plausibility, that three of the highest-ranking officials in the Texas prison system were deliberately indifferent to Hinojosa’s vulnerability to heat in the conditions he faced at Garza West”)

**Brauner v. Coody**, 793 F.3d 493, 500-01 (5th Cir. 2015) (“A supervisor can . . . be held liable when he was himself deliberately indifferent. In order to hold a defendant supervisor liable on such a theory, ‘the plaintiff must show that: (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff’s rights; and (3) the failure to train or supervise amounts to deliberate indifference.’ . . . Thus, Brauner would have to create a genuine issue of material fact that the doctors and wardens failed to supervise or train the subordinate officials. He would then have to create a genuine fact issue that the doctors knew the nurses were disregarding their orders, and the doctors neglected to correct this behavior knowing it posed an actual serious risk to Brauner’s health. His evidence is lacking on these points.”)

**Pena v. Givens**, 637 F. App’x 775, 785 n.6, 786 (5th Cir. 2015) (“Although the particular facts of this case do not require us to address the Supervisory Appellants’ *Iqbal* argument, we note the many cases in the years since *Iqbal* in which we have continued to apply our rigorous pre-*Iqbal* standards for supervisory liability. *See, e.g., Brauner v. Coody*, 793 F.3d 493, 500–01 (5th Cir.2015); *Pierce v. Hearne Indep. Sch. Dist.*, 600 Fed. App’x 194, 199 (5th Cir.2015); *Whitley v.*

*Hanna*, 726 F.3d 631, 639–41 (5th Cir.2014); *Walker v. Upshaw*, 515 F. App’x 334, 339 (5th Cir.2013). . . . We resolved the psych techs’ qualified immunity challenge based on a different part of the qualified immunity standard: the lack of clarity on whether physical restraint in the context of mental-health treatment is a seizure. Of course, this does not answer whether a constitutional violation did or did not occur. It simply answers whether the psych techs can be made to account for it. But the unsettled nature of the law in this area likewise entitles the Supervisory Appellants to qualified immunity. . . . Put simply, if the law did not put the psych techs on notice that their actions would be judged under the Fourth Amendment, then it cannot have put the Supervisory Appellants on notice that they had a duty to ensure their subordinates were respecting patients’ Fourth Amendment rights.”)

***Lott v. Edenfield***, 542 F. App’x 311, 315, 316 (5th Cir. 2013) (not published) (“The complaint fails to adequately allege that either Lappin or Holder had knowledge of the alleged unconstitutional conditions at FCI Big Spring. The complaint does not recite a single fact that would establish that either Lappin or Holder actually received notice of the conditions. Instead, the complaint suggests that Lappin and Holder were aware of the conditions because they are ‘the governmental authorities charged with oversight of the United States Bureau of Prisons and FCI Big Spring.’ This is essentially a theory of respondeat superior, which is not applicable in *Bivens* suits. . . . In the absence of any facts showing that Lappin and Holder received notice, knowledge may not be imputed to them based on their supervisory positions. Although it is a close question, we conclude that the complaint adequately alleges knowledge on the part of Edenfield. The complaint states that many of the plaintiffs filed administrative grievances concerning the alleged unconstitutional conditions. These grievances, along with Edenfield’s presence at the prison and immediate responsibility for the prison, support a plausible inference that Edenfield actually received notice of the conditions. However, even if Edenfield was aware of the conditions, the complaint does not include sufficient facts to allow this court to draw the inference that she was deliberately indifferent to the plaintiffs’ clearly established rights. The plaintiffs do not suggest that Edenfield personally caused the overcrowding at FCI Big Spring or the alleged conditions related to it. Rather, they argue that she is liable because she was aware of the conditions but failed to address them. Relying on *Farmer v. Brennan*, 511 U.S. at 832, the plaintiffs argue that the Eighth Amendment imposes a duty on prison officials to provide humane conditions of confinement. Although this is true, *Farmer* requires only that prison officials act reasonably in dealing with prison conditions that they know to be dangerous or inhumane. Applying the doctrine of qualified immunity in the context of deliberate indifference, we conclude that the plaintiffs must plead facts from which we can infer that Edenfield responded to the conditions in a way that any reasonable official in her position would understand to be unacceptable. There are numerous allegations in the complaint regarding the conditions at the prison. The plaintiffs connect every alleged inhumane condition to the broader condition of overcrowding. At no point have the plaintiffs explained what Edenfield could have done to correct the overcrowding at FCI Big Spring, either in the complaint, in subsequent briefing, or at oral argument. The complaint alleges only that Edenfield ‘has taken no steps to remediate’ the conditions. Without additional facts, we are unable to draw a reasonable inference that Edenfield is liable for the alleged harm to the plaintiffs.

. . .Because the complaint does not include facts establishing that Lappin and Holder were aware of the alleged unconstitutional conditions at FCI Big Spring, or that Edenfield responded unreasonably to the conditions, the defendants are entitled to qualified immunity.”)

*Walker v. Upshaw*, No. 11–20628, 2013 WL 829057, \*4-\*6 & n.19 (5th Cir. Mar. 4, 2013) (not published) (“Supervisory officials may not be held liable under § 1983 for the actions of their subordinates under any theory of vicarious liability. . .When, as here, plaintiffs allege that a supervisory official failed to train or supervise, they must prove that (1) the official failed to train or supervise the correctional officers, (2) a causal link exists between the failure to train or supervise and the alleged violation of the inmate’s rights, and (3) the failure to train or supervise amounted to deliberate indifference. . . To hold Upshaw liable on account of inadequate policy, Plaintiffs must show ‘(1) that the policy *itself* violated federal law or authorized or directed the deprivation of federal rights or (2) that the policy was adopted or maintained by the municipality’s policymakers with deliberate indifference as to its known or obvious consequences.’ . . Whether the evidence sufficiently ‘demonstrate[s] deliberate indifference for supervisory liability is a legal issue that this court may review on interlocutory appeal.’ . . . The parties agree that Upshaw had no actual knowledge of Hamilton’s prior attack of an inmate with his boots in a different unit years prior to Walker’s death and that Upshaw was not at the prison the night Walker died. Because Upshaw had no actual knowledge of the danger posed to Walker, any attempt to hold Upshaw liable for a personal failure to protect Walker would fail. . . Instead, plaintiffs claim that Upshaw is liable for his failure to train and supervise subordinates and his failure to implement adequate policies. . . .Although supervisor liability stems from a supervisor’s deliberate indifference to the violations his training causes, . . . Plaintiffs do not seem to base their claim against Upshaw on the actions or inactions of Upshaw’s employees due to his training. Plaintiffs make no attempt to show a pattern of Upshaw’s employees failing to protect inmates. In fact, they acknowledge that ‘normally, the rover on night patrol would come by every 15 to 20 minutes.’ This suggests that Upshaw’s training was usually effective but that his subordinates’ failure to make timely rounds the night Walker died played a significant role in Walker’s death. Plaintiffs instead focus on Hamilton’s violence and the fact that Upshaw, through his training and supervision of his employees, failed to prevent it. However, ‘mere proof that the injury could have been prevented if the officer had received better or additional training cannot, without more, support liability.’ . . The Supreme Court has acknowledged that ‘in a narrow range of circumstances, a pattern of similar violations might not be necessary to show deliberate indifference.’ . . . However, the Court stressed that the possibility of ‘single-incident liability’ based on a failure to train is ‘rare,’ . . . and this circuit has similarly ‘stressed that a single incident is usually insufficient to demonstrate deliberate indifference.’ . . Plaintiffs’ claims fall far short of the hypothetical offered in *Canton* in which the officers were offered *no* training in a highly dangerous situation. The evidence does not meet the requirements for single-incident liability. . . Similarly, demonstrating that a policy reflects deliberate indifference ‘generally requires that a plaintiff demonstrate at least a pattern of similar violations.’ . . Plaintiffs do not identify policies that Upshaw created or failed to enforce. Instead, they rely on Upshaw’s statement that he oversaw the Ferguson Unit to assert that Upshaw was deliberately indifferent in failing to enforce or create an adequate policy that would have prevented

Hamilton from having work boots, a cellmate, and being in a hot, uncomfortable cell that would promote violence given his mental history. Upshaw admitted to knowing that inmates have used their shoes to hurt other inmates, but he had no actual knowledge of Hamilton's prior transgressions. This, however, focuses on actions of inmates and fails to identify any prior constitutional violations resulting from Upshaw's policies. Again, this falls short of the standard required to show that Upshaw maintained a policy with deliberate indifference to its known or obvious consequences. . . . Although *Johnson* speaks to municipal liability, this court has noted 'the close relationship between the elements of municipal liability and an individual supervisor's liability' and held that 'the same standards of fault and causation should govern.'")

***Carnaby v. City of Houston***, 636 F.3d 183, 189 (5th Cir. 2011) ("Mrs. Carnaby maintains that Washington is liable for failure to supervise the other officers on the scene. Under § 1983, however, a government official can be held liable only for his own misconduct. *See Ashcroft v. Iqbal*, — U.S. —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Beyond his own conduct, the extent of his liability as a supervisor is similar to that of a municipality that implements an unconstitutional policy. There is no evidence that Washington established any sort of policy during this one incident, so summary judgment on this claim was proper.")

***Hernandez v. Horn***, No. 10-40384, 2011 WL 462159, at \*1 (5th Cir. Feb. 9, 2011) ("The State Defendants have waived the only issue they raise on appeal, *viz.*, the unavailability of supervisory liability. . . . For the first time on appeal, State Defendants assert that '[t]he Supreme Court has eliminated the doctrine of supervisory liability.... Although this Circuit has not had an opportunity to confirm its case law accordingly, other federal courts have recognized that claims for failure to supervise and failure to train – the substance of plaintiffs' complaint in this case – are exactly the types of claims that *Iqbal* forecloses.' We can find no argument by the State Defendants in the district court concerning the invalidity of supervisory liability post-*Iqbal*. . . The State Defendants assert that they have not waived this issue on appeal because they discussed *Iqbal* at length in their district court motion. There, however, the State Defendants addressed only the holding of *Iqbal* regarding pleading standards, never arguing the substantive holding of *Iqbal* concerning supervisory liability. Indeed, the State Defendants appear to have conceded in that motion that they could be liable under the standard set forth in *Youngberg v. Romeo*. . . They never contended in the district court that *Iqbal* had foreclosed claims grounded in failure to supervise or failure to train. . . As the only issue that the State Defendants advanced on appeal is waived, we must dismiss their interlocutory appeal and remand for further proceedings in the district court. We express no view on what matters may be properly raised there on remand.")

***Brown v. Callahan***, 623 F.3d 249, 253-57 (5th Cir. 2010) ("Whether Dr. Bolin, jail nurses, or other staff violated Brown's rights is not before us; the Browns' case against Dr. Bolin and Nurse Kracja, awaits trial pending the outcome of this appeal, and we express no opinion on its merits. Sheriff Callahan had no knowledge of and did not participate in the events surrounding Brown's fatal period of detention. Thus, the Sheriff can only be held liable in his capacity as a supervisor of the jail for his own unconstitutional conduct. . . . The Browns have alleged two theories of

supervisory liability, which, being founded on the same facts, may be discussed together. Mirroring the requirements in this circuit, they contend first that Callahan failed to train or supervise Dr. Bolin and the jail staff; that a causal link exists between the failure to train or supervise and the unconstitutional denial of medical care to Jason; and his failure to train or supervise amounts to deliberate indifference. . . Their second theory of liability is that the Sheriff ratified or condoned Dr. Bolin's custom or policy of intimidating nurses from providing needed medical care, and the custom or policy was 'so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.' . . Even if we assume *arguendo* that the sheriff's supervision of Dr. Bolin or the nursing staff was inadequate and that there was a causal link between his failure and Brown's death, we cannot conclude that there is a genuine material fact issue as to Callahan's deliberate indifference to constitutional rights. Evidence is also lacking to prove the objective unreasonableness, for immunity purposes, of Sheriff Callahan's management of the jail's medical care. . . Deliberate indifference implies an official's actual knowledge of facts showing that a risk of serious harm exists as well as the official's having actually drawn that inference. . . Deliberate indifference is more than mere negligence or even gross negligence. . . Proof of deliberate indifference normally requires a plaintiff to show a pattern of violations and that the inadequate training or supervision is 'obvious and obviously likely to result in a constitutional violation.' . . Here, evidence of Sheriff Callahan's failure to supervise Dr. Bolin and the nursing staff is simply too attenuated to permit the inference that the Sheriff was deliberately indifferent, *i.e.*, that he ignored a known or obvious risk of unconstitutionally deficient medical care. . . . [T]he Sheriff's potential liability for an unconstitutional policy runs afoul of the second prong of qualified immunity analysis, where the dispositive inquiry is 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' . . This court has interpreted 'clearly established law' on the subject of policy promulgation to require 'an intentional choice' and amount to subjective deliberate indifference. . . It must be 'obvious that the likely consequences of not adopting a policy will be a deprivation of civil rights.' . . Applied to this case, it would have had to be clear to the Sheriff that condoning or ratifying Dr. Bolin's practice of nurse intimidation would in fact discourage nurses from seeking constitutionally adequate medical care for the detainees. That he did not have the subjective knowledge required for deliberate indifference and imputation of liability has been explained above. There is also insufficient evidence from which a reasonable jury could infer that Callahan's conduct did not deserve qualified immunity. The district court relied on the same evidence related above that shows, at worst, the Sheriff's negligent supervision of Dr. Bolin and the doctor's relationship with the nursing staff. In the absence of any prior incidents that connoted inadequate medical care at the jail, it is impossible to infer that the Sheriff was essentially callous about inmate medical care or had any reason to suspect the level of care had become or could become constitutionally inadequate. The Sheriff was neither plainly incompetent nor knowingly violating the law, nor were his actions, in the circumstances he faced, objectively unreasonable.")

***Floyd v. City of Kenner, La.***, No. 08-30637, 2009 WL 3490278, at \*6 (5th Cir. Oct. 29, 2009) (unpublished) ("Floyd does not complain that Caraway himself filed the alleged unlawful affidavit

in support of the warrants. Instead, he claims that Caraway, in his capacity as chief investigator, directed and approved the applications filed by Cunningham. This is an alleged Fourth Amendment violation under *Franks*, as we stated in addressing the claim against Cunningham. ‘Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’ *Iqbal*, 129 S.Ct. at 1948. Liability under Section 1983 for a supervisor may exist based either on personal involvement in the constitutional deprivation or ‘a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.’ *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir.1987). We must determine whether Floyd alleged the ‘factual particulars’ necessary to state a valid Fourth Amendment claim against Caraway. . . . The relevant allegation is that Caraway ‘participated in, approved and directed’ the filing of false and misleading affidavits. In analyzing the issue, we turn to the Supreme Court’s recent decision in *Iqbal*. . . . Certainly our precedents have acknowledged that some limited discovery may at times be needed before a ruling on immunity is proper. As an example, we referred to ‘search cases, [because] probable cause and exigent circumstances will often turn on facts peculiarly within the knowledge of the defendants.’ . . . In such a case, ‘if there are conflicts in the allegations regarding the actions taken by the police officers, discovery may be necessary.’ . . . The importance of discovery in such a situation is not to allow the plaintiff to discover if his or her pure speculations were true, for pure speculation is not a basis on which pleadings may be filed. Rule 11 requires that any factual statements be supported by evidence known to the pleader, or, when specifically so identified, ‘will likely have evidentiary support’ after discovery. Fed.R.Civ.P. 11(b)(3) (emphasis added). There has to be more underlying a complaint than a hope that events happened in a certain way. Instead, in the ‘short and plain’ claim against a public official, ‘a plaintiff must at least chart a factual path to the defeat of the defendant’s immunity, free of conclusion.’ *Schultea*, 47 F.3d at 1430. Once that path has been charted with something more than conclusory statements, limited discovery might be allowed to fill in the remaining detail necessary to comply with *Schultea*. . . . Under these standards, Floyd’s allegations against Caraway amount to nothing more than speculation. The conclusory assertion that Caraway ‘participated in, approved and directed’ the filing of false and misleading affidavits is consistent with finding a constitutional violation, but it needed further factual amplification. *See Iqbal*, 129 S.Ct. at 1949. Floyd might not know everything about what occurred, but the bare allegation does not make it plausible that he knows anything. Unlike his allegations against Cunningham, this bare assertion does not provide any detail about what Caraway, as chief of investigations, did to seek to control Cunningham’s filing of an affidavit. Put differently, the conclusion presents nothing more than hope and a prayer for relief. An example of a situation that falls squarely within the kind of case justifying limited discovery is discussed in a recently released but non- precedential opinion by a panel of this court. *Morgan v. Hubert*, No. 08- 30388, 2009 WL 1884605 (5th Cir. July 1, 2009). In *Morgan*, a plaintiff who was in protective custody before Hurricane Katrina was transferred to a general prison population following the storm. . . . After being beaten and stabbed, the plaintiff filed a Section 1983 suit against the prison warden. . . . The complaint presented sufficient detail to demonstrate a highly plausible allegation of an Eighth Amendment violation. . . . The events cited were so clear, the practical effects of such conduct so obvious, that the defendants’ responsibility under Section

1983 for the plaintiff's harm simply needed the detail that limited discovery would either provide or deny. . . Unlike in *Morgan*, Floyd has shown nothing in his complaint to indicate a basic plausibility to the allegation. His Section 1983 claim premised on a Fourth Amendment violation therefore fails.”).

***Carr v. Montgomery Cnty., Tex.***, 59 F.Supp.3d 787, 808 (S.D. Tex. 2014) (“In the alternative to Hayden being individually liable for bringing third parties to plaintiff’s home for a private purposes during a search, she has claimed that he can be held liable for his failure to supervise his officers violated plaintiff’s rights. The court concluded in Section V.B that plaintiff pled sufficient facts to state a claim upon which relief could be granted as to Hayden’s supervisory liability for violating the constitutional right not to have officers bring third parties into a home for private purposes. Because the claim of supervisory liability is premised on Hayden’s deliberate indifference to plaintiff’s constitutional rights, which are well-settled rights, plaintiff has also stated a claim sufficient to defeat defendants’ motion to dismiss on qualified immunity grounds. Defendants’ motion to dismiss this specific supervisory liability claim against Hayden on the basis of qualified immunity is denied.”)

***Gonzalez v. Gordy***, No. 2:18-CV-220, 2020 WL 882049, at \*2 (S.D. Tex. Feb. 24, 2020) (“Gonzalez has identified a specific ‘quarantine’ policy which he states he was subject to and which he claims led to a near-death medical emergency because it denied him medical attention when he was ill. . . The Court concludes such an alleged policy and harm state a claim upon which relief can be granted against a supervisory official.”)

***Hawn v. Hughes***, 1:13-CV-00036-GHD, 2014 WL 4418050, \*5, \*7, \*9 (N.D. Miss. Sept. 8, 2014) (“Although a plaintiff who seeks to mount a case for supervisory liability against an individual under § 1983 is in for an uphill battle, the battle is not insurmountable; if it were, no individual could ever be brought into court on a § 1983 supervisory-liability claim, thus rendering the cause of action a nullity. For the reasons stated below, the Court finds that Plaintiffs’ § 1983 supervisory-liability claim survives summary judgment. . . .The Court is of the opinion that Plaintiffs have demonstrated for purposes of summary judgment that Director Berthay was aware of alleged acts of excessive force by Officer Hughes in 2007 involving Wampler–George and Brann and acted with deliberate indifference to the same, and that this alleged deliberate indifference proximately caused Officer Hughes’ pattern of excessive force to continue with Plaintiffs. Accordingly, Plaintiffs’ supervisory-liability claim against Director Berthay survives summary judgment on its merits. The Court now turns to whether Director Berthay is nonetheless qualifiedly immune from suit on the claim. . . . In the opinion of this Court, Plaintiffs have met their burden in showing that a reasonable official in Director Berthay’s shoes would have understood that his failure to train or supervise Officer Hughes, despite knowledge of the 2007 Lee County Jail incident involving Wampler–George and likely knowing of the subsequent incident involving Brann, would constitute deliberate indifference. For all of the foregoing reasons, Plaintiffs have overcome Director Berthay’s qualified-immunity defense at the summary-judgment stage.”)

***Martone v. Livingston***, 4:13-CV-3369, 2014 WL 3534696, \*7, \*12 (S.D. Tex. July 16, 2014) (“The TDCJ [Texas Dep’t of Criminal Justice] Defendants object that they cannot be held liable under § 1983 for the alleged violation of the Eighth Amendment since there is no allegation of their personal involvement in the conditions of Mr. Martone’s confinement. . . . To the contrary, Plaintiff seeks to hold the TDCJ Defendants liable under a theory of supervisory liability for ‘creating and approving the dangerous conditions that *caused* [Mr. Martone’s] heat stroke, and failing to remedy them.’ . . . Plaintiff has adequately alleged that the TDCJ Defendants acted, or failed to act, with deliberate indifference to constitutional violations as necessary for supervisory liability to attach under § 1983. . . . For the same reasons described above, the Court finds that Plaintiff has adequately stated violations of the Eighth Amendment based on Dr. Murray’s alleged failure to implement policies to protect inmates from the extreme heat, alleged policy of leaving the inmates without adequate medical care each night, and alleged failure to adequately train the staff about the risk of heat stroke.”)

***Khansari v. City of Houston***, 14 F.Supp.3d 842, 866-67 (S.D. Tex. 2014) (“Plaintiffs fail to allege any foundational facts capable of showing that Chief McClelland was directly involved in the training or supervising of the officers involved in the incident at the Khansari’s home on November 25, 2011; that the training or supervision that Chief McClelland provided to those officers was inadequate; or that Chief McClelland was aware of a pattern of prior violations by any of those officers that put him on notice that additional training or supervision was needed to prevent a violation of Corey’s constitutional rights. Plaintiffs’ argument that this case fits within the narrow scope of the single incident exception has no merit because a ‘lone incident is insufficient to pierce the qualified immunity enjoyed by Chief [McClelland]’ . . . Plaintiffs have neither cited a case that has relied on the single incident exception as a means of holding an individual supervisor liable in his personal capacity, nor alleged facts capable of establishing that this exception should be applied to Chief McClelland in this case. To rely on this exception plaintiffs must allege facts capable of establishing that the ‘highly predictable’ consequence of Chief McClelland’s failure to train or supervise would result in the specific constitutional injury at issue, and that the failure to train or supervise represented the ‘moving force’ behind that injury. . . . There are no allegations here that the officers at issue had not received any training or supervision, or that they had been involved in any cases involving the improper use of excessive force or tasers while responding to calls involving mental health patients. Instead, plaintiffs merely allege that the training all Houston police officers received as a result of Chief McClelland’s policies was not enough and that more or different training or supervision would have prevented the plaintiffs’ injuries. Such allegations are not sufficient to state a claim for failure to train or supervise against Chief McClelland in his personal capacity. . . . Accordingly, defendants’ motion to dismiss the § 1983 claims asserted against Chief McClelland for failure to train or supervise will be granted.”)

***Khansari v. City of Houston***, 14 F.Supp.3d 842, 867, 871 (S.D. Tex. 2014) (“This court is not aware of and plaintiffs have not cited any cases imposing personal liability on a supervisor based on ratification. To the extent that ratification might, in some instances, be characterized as the implementation of an unconstitutional policy that causally results in the constitutional injury,

subsequent ratification of a subordinate's excessive use of force does not state a claim for which relief may be granted in this case because such ratification could not have caused the constitutional injury about which the plaintiffs complain. Any § 1983 claim plaintiffs have attempted to state against Chief McClelland for ratification of a subordinate's allegedly excessive use of force is therefore subject to dismissal because, as a matter of law, no such claim may be stated against Chief McClelland. *See Hobart v. City of Stafford*, 916 F.Supp.2d 783, 799 (S.D.Tex.2013) (post-incident ratification cannot impart liability on a supervisor). . . . The mere failure to investigate a subordinate's decision does not amount to ratification. . . . And policymakers who simply go along with a subordinate's decision do not thereby vest final policymaking authority in the subordinate. . . . Applying the ratification theory as plaintiffs propose in this case would turn it into *de facto respondeat superior*. While the mere failure to investigate a police officer's conduct that allegedly violated a person's Fourth Amendment rights cannot amount to ratification, the converse must also be true: The mere decision to investigate and exonerate also cannot amount to ratification. . . . [E]ven assuming that the policymaker, Chief McClelland, reviewed the conduct of the officers who responded to the call for service at the Khansari's home, he reviewed that conduct after the fact, i.e., after the conduct had been committed without his approval. To hold the City liable because Chief McClelland concluded that the officers acted appropriately would convert liability through ratification into *respondeat-superior* liability.")

***Briggs v. Edwards***, Nos. 12–2145, 13–5335, 13–5342, 2013 WL 5960676, \*4, \*5 (E.D. La. Nov. 6, 2013) (“Supervisory liability in § 1983 cases is a murky area of the law. . . . Not only are there Circuit splits on this issue, there are conflicting standards that arise from the same Circuit, and even the same courts, and the Supreme Court has said little on the subject. . . . [T]he Fifth Circuit has repeatedly applied a ‘deliberate indifference’ standard to supervisory liability claims where the supervisor is not directly involved. [collecting cases] Accepting the fact that ‘deliberate indifference to the known or obvious fact that such constitutional violations would result,’ is the standard for supervisory liability cases, the Court must then determine how to apply the standard. . . . Applying the deliberate indifference standard to the instant case, the Court finds that, though Plaintiffs’ allegations sufficiently allege that Lt. Redmond was deliberately indifferent to the *dangers or installing an after market trigger*, Plaintiffs do not sufficiently allege that Lt. Redmond was deliberately indifferent to Dee Jay’s *constitutional rights*. . . . Plaintiffs’ allegations, even taken as true, cannot show that Lt. Redmond’s actions were the cause of or affirmatively linked to the constitutional violation. Lt. Redmond’s actions may have been the cause of Dee Jay’s death . . . because the gun would not have gone off were it not for the aftermarket trigger, that is not the same as saying that his actions caused the constitutional violations of excessive force and/or denial of medical care. . . . Regarding the excessive force claim, Plaintiffs argue that Deputy Phebus either intentionally shot Dee Jay or accidentally shot him because of the aftermarket trigger. Under the former theory, there is no way to conclude that the installation of an aftermarket trigger caused Deputy Phebus to intentionally shoot Dee Jay. If the latter theory is true, the excessive force would be Deputy Phebus’ decision to point the weapon at Dee Jay, not the actual shooting. . . . Again, there is simply no logical way to conclude that the installation of an aftermarket trigger on Deputy Phebus’ weapon *caused* Deputy Phebus to draw a weapon on a teenager who was allegedly

unarmed and had his hands in the air. As to the denial of medical treatment claims, there is, again, no way to determine that installation of an aftermarket trigger would cause Lt. Redmond to deny treatment to Dee Jay. Therefore, Defendants' motion to dismiss must be granted on this issue.”)

**Jackson v. Chavez**, No. A-11-CA-417-LY, 2013 WL 3328683, \*10, \*11 (W.D. Tex. June 26, 2013) (“The State Defendants argue the previously recognized standards for supervisory liability are no longer applicable in the wake of *Iqbal*. Their argument is based on statements in *Iqbal* making clear ‘each Government official, his or her title notwithstanding, is only liable for his or her own misconduct’ and holding *Iqbal*’s claim of ‘knowledge and acquiescence’ by a supervisor was insufficient to impose liability. . . The State Defendants note a number of appellate court decisions suggest *Iqbal* ‘call[s] into question our prior circuit law ... on supervisory liability.’[collecting cases] However, as the State Defendants admit, the Fifth Circuit has not yet addressed this issue. *See Hernandez v. Hom*, 410 F. App’x 819, 820 (5th Cir.2011) (stating ‘this Circuit has not had an opportunity to confirm its case law’ on issue post- *Iqbal*, but declining to consider issue on appeal as not properly raised in district court). They also admit other federal circuits have raised the issue, but have not yet ruled *Iqbal* has radically altered the civil rights landscape in the manner they suggest. [collecting cases] Accordingly, the undersigned declines to dismiss the claims against Steen, Cuevas, Weinberg and Fredricks based on this expansive reading of *Iqbal*.”)

**Jolley v. Geo Group**, No. 3:11CV481-LRA, 2013 WL 1364080, \*2 (S.D. Miss. Apr. 3, 2013) (“Plaintiff does not suggest that Epps was personally aware that he was not being provided with enough food, or that he was not taken to a specialist or given the medical care he requested or needed, or that he was not provided with toiletries. He simply charges that Epps *should have known*—had he been appropriately monitoring EMCF. Without more, Plaintiff’s allegations failed to establish that Epps was personally involved in any constitutional violation against him. Supervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act; instead, any liability must be based upon active unconstitutional behavior. *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir.1989). The Court finds that although Commissioner Epps would be immune from suit under these circumstances, Plaintiff has also failed to state a constitutional claim against Epps.”)

**Hobart v. City of Stafford**, 916 F.Supp.2d 783, 799 (S.D. Tex. 2013) (“This Court is aware of, and Plaintiffs have cited, no cases that impose liability on a supervisor based on ratification. . . To the extent that ratification might, in some instances, be characterized as the implementation of an unconstitutional policy that ‘causally result[s] in the constitutional injury,’ . . . subsequent ratification of a subordinate’s excessive use of force does not *cause* the constitutional injury. Accordingly, this Court finds that, as a matter of law, no claim may be stated against Chief Krahn based on ratification of a subordinate’s allegedly excessive use of force.”)

**Ard v. Rushing**, 911 F.Supp.2d 425, 432 (S.D. Miss. 2012) (“Even assuming the continued viability of supervisory liability following *Iqbal*, as Rushing points out, Miller admittedly had

notice of Rushing's policies and procedures regarding the male jailers' interactions with female inmates and plaintiff has failed to come forward with proof which would create a fact issue as to Rushing's knowledge of Miller's disregard of the policy. Moreover, Ard has not established an issue of fact as to whether Rushing was deliberately indifferent. . . She has thus failed to establish the elements of her failure to train/supervise claim, and it is clear that Rushing is entitled to immunity as to this claim as well.")

*Turner v. Caskey*, No. 4:09–CV–102–LRA, 2012 WL 2921797, \*3, \*4 (S.D. Miss. July 17, 2012)(“Fifth Circuit precedent requires either **personal involvement by an individual Defendant** in the alleged violation, or the **enforcement of some policy or practice resulting in the constitutional deprivation**. *Champagne v. Jefferson Parish Sheriff's Office*, 188 F.3d 312, 314 (5th Cir.1999) (emphasis added). If no personal involvement exists, then a causal link between their actions and the alleged constitutional deprivation must be shown. . .Turner's claim against Caskey is not based on his personal involvement in the incident; Turner did not notify Caskey personally that he feared for his safety. Caskey was not responsible for a “policy” or “custom” which caused Turner's injury. Turner's allegations are insufficient to establish supervisory liability against Caskey based on a failure to train or a failure to supervise theory of liability.”)

*Amerson v. Pike County, Miss.*, No. 3:09CV53–DPJ–FKB, 2012 WL 968058, at \*5 n.7 (S.D. Miss. Mar. 21, 2012) (“To the extent *Whirl* and *Barksdale* remained valid, the Supreme Court's opinion in *Ashcroft v. Iqbal*, calls them into further doubt. There, the Court appeared to reject ‘supervisory liability’ and limit an official's liability to his own misconduct. . . In *Carnaby v. City of Houston*, the Fifth Circuit apparently followed *Iqbal*'s rejection of supervisory liability, stating: Under § 1983, however, a government official can be held liable only for his own misconduct. . . . Beyond his own conduct, the extent of his liability as a supervisor is similar to that of a municipality that implements an unconstitutional policy.”)

*Milazzo v. Young*, No. 6:11CV350, 2011 WL 6955710, at \*4 (E.D. Tex. Dec. 11, 2011) (“The United States Court of Appeals for the Fifth Circuit has not yet interpreted this holding of *Iqbal*. Nonetheless, under existing Fifth Circuit jurisprudence, a supervisor may only be held liable if one of the following exists: (1) his personal involvement in the constitutional deprivation, or (2) sufficient causal connection between the supervisor's wrongful conduct and the constitutional violations. . . Neither of these two conditions contradict *Iqbal* but are consistent with the Supreme Court's holding that mere knowledge or acquiescence is insufficient to create supervisory liability in the § 1983 setting. Here, Plaintiff's allegations do not satisfy either condition. Warden Wheat can be held liable only to the extent that he personally engaged in misconduct. . . Plaintiff's allegations do not even come close to making such a showing.”)

*Carter v. St. John Baptist Parish Sheriff's Office*, No. 11–1401, 2011 WL 6140861, at \*7, \*8 (E.D. La. Dec. 9, 2011) (“To state a claim against LeBlanc for failure to train or failure to supervise, plaintiffs must allege that LeBlanc had subjective knowledge of a serious risk of harm. . . Plaintiffs fail to do so. Accordingly, they have not shown that LeBlanc acted with deliberate

indifference. . . . Plaintiffs’ also seek to hold LeBlanc liable as a supervisor on the grounds that he formulates the policies of the LDPSC and those policies directly caused the violations of plaintiffs’ rights. An official may be liable when enforcement of a policy or practice results in a deprivation of federally protected rights. . . . In their complaint, plaintiffs allege that the following policies of the LDPSC caused their deprivation of rights: (1) failing to ensure adherence to citizens’ constitutional rights; (2) failing to properly screen their officers before hiring; (3) approving a culture in which the personnel have an expectation that their actions will not be monitored and that their misconduct would not be investigated; and (4) failing to hold supervisory officers responsible for misconduct. None of the policies plaintiffs cites in their complaint states a claim against LeBlanc. First, the Fifth Circuit has explicitly held that the failure to establish policies ensuring the protection of constitutional rights is not an adequate basis for supervisor liability under Section 1983. . . . Second, plaintiffs assertions that the LDPSC fails to properly screen its officers before hiring, approves a culture in which the officers expect that their actions will not be monitored, and fails to hold supervisory officers responsible for misconduct are wholly conclusory and devoid of factual support. The Court acknowledges that at the motion to dismiss stage, it is difficult for a plaintiff to provide proof of an unconstitutional policy. But, plaintiffs must at least set forth sufficient facts to raise their right to relief above a speculative level. Plaintiffs do not provide any factual allegations beyond a bare assertion of the existence of a policy at a high level of generality. Further, plaintiffs fail to allege a causal connection between these policies and the asserted deprivations of their constitutional rights. Because the Court finds that plaintiffs fail to state a claim against LeBlanc in his individual capacity, an analysis of his defense of qualified immunity is unnecessary.”)

*Colgrove v. Gibson*, No. 9:11cv100, 2011 WL 6715821, at \*7 (E.D. Tex. Nov. 10, 2011) (“The United States Court of Appeals for the Fifth Circuit has not yet interpreted this holding of *Iqbal*. Nonetheless, under existing Fifth Circuit jurisprudence, a supervisor may only be held liable if one of the following exists: (1) his personal involvement in the constitutional deprivation, or (2) sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violations. . . . Neither of these two conditions contradict *Iqbal* but are consistent with the Supreme Court’s holding that mere knowledge or acquiescence is insufficient to create supervisory liability in the § 1983 setting.”)

*Enriquez v. Nolen*, No. 6:11CV320, 2011 WL 4716223, at \*5 (E.D. Tex. Oct. 2, 2011) (“The United States Court of Appeals for the Fifth Circuit has not yet interpreted this holding of *Iqbal*. Nonetheless, under existing Fifth Circuit jurisprudence, a supervisor may only be held liable if one of the following exists: (1) his personal involvement in the constitutional deprivation, or (2) sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violations. *Mesa v. Prejean*, 543 F.3d 264, 274 (5th Cir.2008); *Thompkins v. Belt*, 828 F.2d 298, 303-304 (5th Cir.1987). Neither of these two conditions contradict *Iqbal* but are consistent with the Supreme Court’s holding that mere knowledge or acquiescence is insufficient to create supervisory liability in the § 1983 setting.”)

*Olvera v. Alderete*, No. 4:10-cv-2127, 2010 WL 4962964, at \*12 (S.D. Tex. Dec. 1, 2010) (“In this case, Olvera does not allege that Defendant Tollett was personally involved in his arrest. Instead, he states in his Response to Defendants’ Motion to Dismiss, that he has sued Defendant Tollett under the theory that Tollett oversaw a policy that allowed police officers in the City of Sealy to arrest individuals for taking photographs of police officers, and that such a policy, based on an erroneous understanding of the law, is unconstitutional. However, Olvera’s complaint does not contain any mention of this theory, nor any facts that would support a claim against Defendant Tollett based upon this theory. Because this case is now at the motion to dismiss phase, the Court acknowledges that providing proof of an unconstitutional policy or Defendant Tollett’s actions that led to the violation of Olvera’s constitutional rights is exceedingly difficult for a plaintiff, who has no source of pre-discovery evidence that he may produce to support such a claim. However, Olvera must set forth at least *some* facts that allege the existence of policy, how such a policy is unconstitutional, and how Defendant Tollett implemented such a policy. This Olvera has not done. The Court allows Olvera leave to amend his complaint to address this deficiency.”)

*Ramirez v. Jim Wells County, Tex.*, No. CC-09-209, 2010 WL 2598304, at \*1, \*2 (S.D. Tex. June 25, 2010) (“Citing to *Bell Atlantic Corp. v. Twombly*. . . and *Ashcroft v. Iqbal*. . . , Defendants first object that the facts pled by Plaintiff are insufficient to state a failure to train or supervise claim against Sheriff Lopez and Deputy Valadez. The Court disagrees. . . .Plaintiff specifically pleads that Sheriff Lopez and Deputy Valadez referred to Deputy Martinez as ‘Taser Joe’ and were responsible for training and/or supervising him on the use of his taser gun. Plaintiff also alleges the following: Defendants Valadez and Lopez have never required Defendant Martinez to be held accountable for taser cartridges, including but not limited to, failing to require him to sign-out taser cartridges, failing to require him to document the extensive use of his taser, and failing to properly train and inform him that the taser gun is an intermediate weapon to be used to gain compliance and not to be used as a replacement for verbal commands and/or as punishment. Assuming these factual allegations are true, the Court finds Plaintiff has pled sufficient facts from which this Court may draw the reasonable inference that Sheriff Lopez and Deputy Valadez failed to train and/or supervise Deputy Martinez.”)

## SIXTH CIRCUIT

*Crawford v. Tilley*, 15 F.4th 752, 761, 766 (6th Cir. 2021) (“Dawn’s Eighth Amendment claim against Erwin depends on Erwin’s supervisory liability. So, on top of the deliberate indifference standard, Dawn’s complaint must also meet the requirements of supervisory liability in § 1983 cases. Supervisory liability comprises two concepts important here: active involvement by the supervisor and causation. . . . At most, Dawn’s complaint alleges the following: Erwin accepted Marc’s transfer to KSR. Through that process, Erwin was ‘made aware’ of Marc’s medical conditions. . . Erwin knew that Correct Care’s deficient policies and customs posed risks to Marc. Erwin never tried to alleviate these risks. And the combination of these actions and inactions proximately caused Marc’s injuries. That’s it. Even charitably construed, this is all the activity that Dawn’s amended complaint attributes to Erwin, and it is not enough to survive *Iqbal*. . . . Dawn’s

other claim that the problems at KSR were obvious to Erwin is also insufficient. In appropriate circumstances, we have attributed knowledge of obvious risks to prison officials. . . . But those defendants, both wardens, had day-to-day obligations at their institutions. . . . By contrast, Erwin is responsible for twenty-seven subdivisions within the Department of Corrections. . . . At least twelve of these are penal institutions, each of which a warden directly manages. . . . There is no allegation that Erwin regularly visited or received briefing on even some subset of them. We’ve never attributed knowledge of prison conditions so high up the chain of command with so little in the way of alleged exposure to those same conditions. So there are not enough well-pleaded factual allegations to establish that Erwin knew of particular issues related to Correct Care’s practices at KSR. . . . That leaves the ongoing lawsuits against Correct Care. The amended complaint provides no detail on where the alleged lawsuits came from. Rather, it observes that Correct Care was operating in more than five hundred institutions spread across thirty-four states. Erwin is never alleged to have read or had reason to know about any of the litigation; Dawn does not allege that any came from Kentucky generally or KSR specifically. So it is not plausible that Erwin knew about particular failures to provide adequate healthcare at KSR. . . . This is not enough to survive 12(b)(6) on an allegation of supervisory liability. Supervisory liability requires ‘active unconstitutional conduct’ by Erwin. . . . But, as explained above, there are no well-pleaded factual allegations that Erwin knew anything besides that he was approving the transfer of a patient with lung cancer and blood clots to KSR to facilitate better medical treatment. . . . Without more, Dawn has not pleaded that Erwin’s acceptance of Marc’s transfer implicitly authorized, approved, encouraged, or knowingly acquiesced in the alleged violation of Marc’s constitutional rights. . . . Dawn also has not pleaded that Erwin’s acceptance of Marc’s transfer was a proximate cause of his injuries. Supervisory liability is generally limited to times when the supervisor had existing knowledge of the specific type of conduct that led to a plaintiff’s injuries. . . . But the amended complaint does not describe the experience of any past inmates at KSR. And as explained above, the allegations about Erwin’s knowledge of an existing problem are conclusory and not entitled to a presumption of truth. . . . Without more, Dawn has not pleaded that Erwin’s acceptance of Marc’s transfer proximately caused the alleged violation of Marc’s constitutional rights.”)

*Troutman v. Louisville Metro Dep’t of Corr.*, 979 F.3d 472, 488 (6th Cir. 2020) (“Stephanie does not claim that Bolton encouraged a specific incident of misconduct, directly participated in that misconduct, or abandoned the specific positions of his duty in the face of actual knowledge of a breakdown in the proper workings of the jail. . . . Rather, Stephanie claims that Bolton inadequately performed his responsibilities—for instance, by failing to put in writing the policy of requiring medical clearance before transfer to solitary—but such allegations of inadequate performance fall short of the requirements to impose supervisory liability. . . . Indeed, there was a standing ‘no bars’ policy in place that medical would place on an inmate’s XJail if medical determined the inmate was a suicide risk. Even if we are to assume a ‘breakdown in the proper workings’ of this policy—which is plausible, considering the suicide at issue here—Stephanie does not allege that Bolton *knew* the policy was not working and nonetheless completely abdicated his responsibilities. She has not shown that Bolton ‘either encouraged the specific incident of misconduct or in some other way directly participated in it’ nor has she shown that Bolton ‘at least implicitly authorized,

approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.’. . . Rather, Stephanie claims that Bolton inadequately performed his duties, but such claims are insufficient for § 1983 supervisory liability.”)

*Garza v. Lansing School District*, 972 F.3d 853, 866-68, 874-75 (6th Cir. 2020) (“Plaintiff alleges in her complaint that Bacon and Robinson are liable for Duvall’s violation of C.G.’s rights because, as principals of the Beekman Center while Duvall taught there, they received and inadequately responded to multiple complaints that Duvall was physically abusing students. The district court dismissed Plaintiff’s claims, finding that ‘[a]ny action or inaction by Bacon and Robinson occurred years before the events at issue in this case, and neither of those defendants had any supervisory authority over Duvall at the time that he allegedly abused C.G.’. . . On appeal, Plaintiff argues that these are not valid bases for dismissal. Taking into account the circumstances involved in this case, we conclude that a lapse of time between a defendant’s deliberately indifferent conduct and a plaintiff’s injury does not necessarily preclude that defendant’s supervisory liability—at least where the defendant had ample notice of the supervisee’s likelihood of continuing violations, and the passage of time was not so great as to erase the connection between the supervisor’s conduct and the student’s subsequent abuse. We note that Plaintiff’s claims do not present a statute of limitations issue, as she pursued them promptly after C.G.’s injury. In the instant case, the success of these claims instead turns on whether Plaintiff can show that Defendants actually and proximately caused C.G.’s injury, despite the time lapse between their alleged misconduct and Duvall’s abuse of C.G. For the reasons that follow, given the specific facts of this case and for the purposes of a motion to dismiss, Plaintiff has sufficiently shown that Defendants’ alleged failure to carry out their duties to report and investigate student abuse caused C.G.’s subsequent abuse. Accordingly, we reverse the district court’s dismissal of Plaintiff’s claims against Bacon and Robinson. . . . Just as a party need not have ‘been present at the time of the constitutional violation’ in order to be found supervisorily liable, *Peatross*, 818 F.3d at 242, they need not have current supervisory authority over the alleged violator. If this were not the case, parties would become effectively immune from supervisory liability immediately upon leaving the relevant position of authority, even if a violation occurs just days later. This is not a logical result—if a supervisor has encouraged a violator’s misconduct, the effects of that encouragement do not cease at the moment of the supervisor’s departure. Moreover, this would encourage individuals to avoid liability for their supervisee’s constitutional violations not by responding to them adequately, but by passing the supervisee down the line to a different supervisor—or, more relevantly, by simply transferring the supervisee to another school. Instead, we ask whether Bacon and Robinson acted in a manner demonstrating deliberate indifference to the likelihood of Duvall’s future abuse and, if so, whether their deliberately indifferent conduct caused his violation of C.G.’s rights. . . . [V]iewing the evidence in Plaintiff’s favor, Alwardt’s decision to place Duvall in a new school, where his colleagues had less notice of his history, raises a genuine issue as to whether Alwardt was deliberately indifferent to the possibility of future abuse. Moreover, the record suggests that upon transferring Duvall to Gardner, despite having received multiple reports against Duvall and knowing that he had been suspended based on one, Alwardt assured Gardner’s principal, Defendant Nickson, that Duvall was known to be a good teacher and that none of the allegations

against him had been substantiated. This, too, arguably further increased Duvall’s risk of additional abuse. Defendants again contend that *Roseville* and *Claiborne County* require this Court to affirm the district court’s judgment as to Alwardt. We disagree. The record suggests that Alwardt was presented with many more specific reports of abuse than were any of the administrators in *Roseville* or *Claiborne County*. . . . Altogether, we are faced with evidence that raises questions as to whether Alwardt failed to fulfill his obligation to review investigatory reports, failed to investigate other allegations, exposed students to additional risk by transferring Duvall to a new school, and actually verbally encouraged the use of force. This evidence demonstrates a genuine issue of material fact as to whether Alwardt knowingly acquiesced in or was deliberately indifferent to the possibility that Duvall would continue his abuse. Plaintiff’s claim against Alwardt thus withstands summary judgment, and the district court erred in concluding otherwise.”)

***Graves v. Malone***, No. 18-2296, 2020 WL 1900458 (6th Cir. Apr. 17, 2020) (not reported) (“In cases where we have found supervisory liability for excessive force, it has been where the government official ordered, or at least implicitly authorized, the use of force. *See, e.g., Jones v. Sandusky Cty.*, 541 F. App’x 653, 667 (6th Cir. 2013)). Here, the record shows that Hedger ordered or authorized only the *circumstances* that, perhaps, ultimately led to the use of force; indeed, Myers and Potratz both testified that the decision to shoot was their own. Mere creation of the circumstances in which force is ultimately deployed does not give rise to a constitutional violation.”)

***Howard v. Knox County, Tenn.***, 695 F. App’x 107, 113-16 & n.2 (6th Cir. 2017)) (“Plaintiffs argue that although Wiegenstein did not himself physically abuse the minor children, he is nonetheless liable as a supervisor for causing minor Plaintiffs W.H. and L.R. to be deprived of a federal right. . . It is well-established that ‘a mere failure to act will not suffice to establish supervisory liability,’ and that a showing of ‘active unconstitutional behavior’ is required. *Peatross*, 818 F.3d at 241 (citation omitted). ‘However, “active” behavior does not mean “active” in the sense that the supervisor must have physically put his hands on the injured party or even physically been present at the time of the constitutional violation.’ . . . In order to bring a claim of supervisory liability against a school official, a plaintiff must show that the defendant’s ‘failure to take adequate precautions amounted to deliberate indifference to the constitutional rights of students.’ . . This requires, at a minimum, a showing ‘that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.’ . . The issue of deliberate indifference in this context is a question of proportionality. . . The court should first take into consideration the information available to the supervisor at the time, and whether the information available to the supervisor ‘showed a strong likelihood’ that the defendant would engage in similar behavior in the future. . . The likelihood of future harm may depend upon a showing that the supervisor ‘was confronted with a widespread pattern of constitutional violations,’ not merely isolated or ‘sporadic’ incidents. . . Next, the court must consider whether, in light of that information, the school official’s response rises to the level of deliberate indifference. . . Taking as true the allegations contained in the amended complaint, we conclude that Plaintiffs have alleged sufficient facts to demonstrate that Wiegenstein had actual

knowledge of Shoemaker's abuse. Plaintiffs point to numerous examples where parents and students complained to Wiegenstein about *specific* incidents of abuse witnessed or otherwise discovered, not just a general fear of potential abuse. . . . We must next consider whether, given Wiegenstein's actual knowledge of Shoemaker's abuse, his response rises to the level of deliberate indifference. On the basis of the complaint, it is clear that his actions, and more often, inaction, constituted deliberate indifference. Although knowing acquiescence implies more than 'sloppy, reckless, or neglectful' execution of duties, . . . 'failure to take *any* disciplinary action despite reports of repeated [abuse] rises to the level of deliberate indifference[.]' . . . Moreover, a defendant may be more likely to be considered deliberately indifferent if he took affirmative action that heightened the risk of harm to the plaintiff. . . . The complaint alleges that Wiegenstein made no efforts to investigate, report, train, or terminate Shoemaker upon receipt of numerous complaints from students, parents, and teachers. . . . This alone is sufficient to establish a claim for deliberate indifference. The complaint also alleges that Wiegenstein, despite knowledge of Shoemaker's abuse, took affirmative actions to heighten the risk of future harm to children. . . . Wiegenstein has failed to identify a single case where we held that a school supervisor who took no action in response to complaints of a constitutional violation was entitled to qualified immunity. . . . We have not yet determined whether a causal connection must be shown where the plaintiff can establish active participation. . . . The language of § 1983 itself holds liable any person acting under color of law who 'subjects, *or causes* [a person] to be subjected' to a constitutional violation. 42 U.S.C. § 1983 (emphasis added).")

***Peatross v. City of Memphis***, 818 F.3d 233, 240-46 (6th Cir. 2016) ("Although Officers Dunaway and McMillen shot Vanterpool, the Estate seeks to hold Armstrong liable in his individual capacity under a claim of supervisory liability. It is important to note at the outset that a § 1983 *individual*-capacity claim differs from a § 1983 *official*-capacity claim. . . . [fn. 3 Since *Iqbal*, the circuits have grappled with the precise contours of § 1983 supervisory liability, and while the claim of supervisory liability has not been altogether eliminated, the requirements for sustaining such a claim vary by circuit]. . . . We have long held that supervisory liability requires some 'active unconstitutional behavior' on the part of the supervisor. . . . However, 'active' behavior does not mean 'active' in the sense that the supervisor must have physically put his hands on the injured party or even physically been present at the time of the constitutional violation. . . . '[A] supervisory official's failure to supervise, control or train the offending individual is not actionable *unless* the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it.' . . . We have interpreted this standard to mean that 'at a minimum,' the plaintiff must show that the defendant 'at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.' . . . As part of this inquiry, this court also considers whether there is a causal connection between the defendant's wrongful conduct and the violation alleged. . . . A close reading of § 1983 affirms this point. The statute states that every person acting under color of law who 'subjects, *or causes* [a person] to be subjected' to deprivation of constitutional rights 'shall be liable to the party injured[.]' 42 U.S.C. § 1983 (emphasis added). Accordingly, where an official's execution of his or her job function causes injury to the plaintiff, the official may be liable under the supervisory-liability theory. . . . In the

instant case, the Complaint sufficiently alleges that Armstrong violated Vanterpool's constitutional rights because: (1) the facts plausibly allege that Armstrong knowingly acquiesced in the unconstitutional conduct of his subordinates through the execution of his job function; . . . and (2) the facts plausibly allege that there is a causal connection between Armstrong's 'acts and omissions' and Vanterpool's death[.] . . . Taken as true, these facts and the inferences drawn therefrom . . . support the plausible inference that in the execution of his job functions, Armstrong at least knowingly acquiesced in the unconstitutional conduct of Officers Dunaway and McMillen. . . .For the foregoing reasons, the Complaint sufficiently alleges that Armstrong 'at a minimum, knowingly acquiesced' in the unconstitutional conduct of his subordinates through the execution of his job functions. . . . [fn. 6 To be clear, we do not suggest that every time an MPD officer violates the constitutional rights of a citizen, Armstrong can be held liable for the conduct in his individual capacity. Qualified immunity is a fact-intensive analysis and will, therefore, turn on the particular circumstances of each case. Here, the Complaint sufficiently pleads that Armstrong *knowingly acquiesced* to the conduct that proximately caused the injury alleged, and we have long held that this behavior is enough.]. . . . [T]he Complaint here alleges that Armstrong essentially allowed the officers to 'do whatever they want, whenever they want, to whomever they want, irrespective of the United States Constitution.' It alleges that Armstrong was involved at least in part in creating and enforcing all department policies; that he did not punish officer misconduct, including the use of excessive force; that he failed to take action in the face of the growing use of excessive force by officers and admonishment from the Mayor on the issue; and that he 'rubber stamped' officer misconduct. . . .Armstrong's alleged conduct of 'rubber stamping' the behavior of officers who shot and killed individuals with increasing frequency 'could be reasonably expected to give rise to just the sort of injuries that occurred'—Vanterpool's unfortunate death. . . . Accordingly, the Complaint sufficiently pled a causal connection between Armstrong's acts and omissions and Vanterpool's death. . . . We next examine whether the right alleged to have been violated was clearly established at the time of the violation. As an initial matter, Armstrong argues that the Estate failed to allege a clearly established right because the Estate seeks to hold Armstrong liable under a theory of supervisory liability, and Vanterpool did not have a constitutional right to additional police training. Armstrong's argument evinces a misunderstanding of this prong of the qualified immunity analysis. The Estate need not show that Vanterpool had a constitutional right to additional training or adequate supervision from Armstrong; it need only show that the right that Officers McMillen and Dunaway violated was clearly established at the time of the violation. . . . Armstrong admits that Vanterpool's 'Fourth Amendment rights are clearly established insofar as the alleged misconduct of Officer's Dunaway and McMillen are concerned.'. . . Based on Armstrong's concession, which is consistent with this court's precedent, *see Smith v. Cupp*, 430 F.3d 766, 774 (6th Cir.2005), the right is clearly established. Viewing the allegations in the light most favorable to the Estate and accepting the facts and drawing all reasonable inferences from those facts in favor of the Estate, the Complaint 'adequately alleges the commission of acts that violated clearly established law.'. . . In discussing what is now known as § 1983 in the late 1800s, Congressman Hoar of Massachusetts summed up the need for a 'duty of protection': [For example,] [i]f every sheriff in South Carolina refuses to [hold persons accountable for wrongs allegedly committed against] a colored man and those sheriffs are kept in office year after year by

the people of South Carolina, and no verdict against them for their *failure of duty* can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are [tasked with affording] the equal protection of the laws ... has denied that protection.

*Carter*, 409 U.S. at 427 (emphasis added).

The words of Congressman Hoar capture the essence of the issue before the Court today, well over a century later. This fact is both ironic and disappointing. There is no doubt that several cities in this nation today are in a state of crisis regarding civilian and police relations. Here, we have allegations that a government official with supervisory responsibility ratified the conduct of officers who shoot first and make judgments later, evincing a brazen disregard for human life. Ratification of such conduct is abhorrent. It not only flouts accountability, but it undermines the integrity of our justice system. Where internal investigations repeatedly yield only ‘rubber stamps’ of approval for unconstitutional conduct, it sends the message that human beings are not being killed by accident—they are being killed by design. The law simply does not allow government officials to use qualified immunity to escape liability for such wrongs. At this stage of the proceedings, it is not known whether the Estate will be able to sustain these allegations, but it is clear that the facts alleged in the Complaint set forth a plausible claim of supervisory liability.”)

***Coley v. Lucas Cnty., Ohio***, 799 F.3d 530, 541-42 (6th Cir. 2015) (“A § 1983 claim of personal liability for a failure to train and supervise differs from a § 1983 claim against a municipality for a failure to train and supervise. In order to establish personal liability for a failure to train and supervise

[t]here must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. *At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.*

*Taylor v. Michigan Dep’t of Corr.*, 69 F.3d 76, 81 (6th Cir.1995) (emphasis in original) (quoting *Bradley v. Bellamy*, 729 F.2d 416, 421 (6th Cir.1984)). Plaintiffs allege that Telb had a duty to train and supervise employees of the Sheriff’s Department to avoid the use of excessive force and to ensure that the medical needs of persons in the Sheriff’s custody were met. They then allege that Telb failed to train and supervise staff regarding the proper use of force and failed to investigate properly allegations of excessive force. This failure to train and supervise specifically included a failure to train on ‘the use of a chokehold and the injuries derived therefrom’ which action resulted in Benton’s ‘injuries and death.’ Plaintiffs also allege that Telb had ‘full knowledge of the assault on Carlton Benton ... but nonetheless intentionally and deliberately made false statements to federal officials about [his] knowledge of Defendant Schmeltz’s assault and Defendant Gray’s chokehold and the deliberate failure to provide medical attention to Benton.’ These allegations are sufficient to show that Plaintiffs have established a valid claim under § 1983, insofar as they have shown that Telb ‘at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate’ when he helped Schmeltz and Gray to cover up their unconstitutional actions. . . Given Schemltz and Gray’s constitutional violations as well as the sufficiency of Plaintiffs’ allegations in establishing Telb’s potential

personal liability for his failure to train and supervise under § 1983, Telb has not shown entitlement to qualified immunity on this claim.”)

*Essex v. County of Livingston*, No. 11–2246, 2013 WL 1196894, \*4-\*6 (6th Cir. Mar. 25, 2013) (unpublished) (“For individual liability on a failure-to-train or supervise theory, the defendant supervisor must be found to have “encouraged the specific incident of misconduct or in some other way directly participated in it.” . . . A plaintiff must demonstrate that the defendant supervisor “at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.” . . . A mere failure to act will not suffice to establish supervisory liability. . . . In both *Taylor* and *Hill*, it was the defendant supervisors’ active engagement in a function of their position that directly resulted in injury to the plaintiffs. . . . This sort of ‘direct participation’ or, at the very least, active acquiescence in the known misconduct are likely examples of the outer bounds of the ‘active performance’ necessary for a supervisory liability claim. . . . There must be some conduct on the supervisor’s part to which a plaintiff can point that is directly correlated with the plaintiff’s injury. . . . Contrast a failure-to-train or supervise claim against a municipality; this is a broader claim concerning the custom or policy of a municipality, . . . and thus would implicate the conduct of a defendant supervisor insofar as he acted with deliberate indifference in his official capacity as a policymaker. . . . Such claims do not require direct participation in or encouragement of the specific acts; rather, these claims may be premised on a failure to act. . . . A plaintiff must establish that the municipality, through its policymakers, failed to train or supervise employees despite: 1) having actual or constructive knowledge of a pattern of similar constitutional violations by untrained employees. . . . or 2) the fact that the constitutional violation alleged was a patently obvious and ‘highly predictable consequence’ of inadequate training. . . . We highlight this crucial distinction between individual-capacity and official-capacity failure-to-train-or-supervise claims because, in the instant case, whether sexual assault was an obvious consequence of inadequate training or whether a pattern of sexual misconduct in other counties sufficed for proving actual or constructive knowledge speaks to the County’s liability for Bezotte’s conduct in his official capacity. These questions do not bear on the qualified-immunity inquiry of whether Bezotte exhibited the much higher culpability standard of personal involvement. Having discussed the two types of failure-to-train-or-supervise claims before us, we now turn to the issues of qualified immunity and pendent appellate jurisdiction. . . . In the instant case, the genuine issues of material facts found by the district court—whether sexual assault was an obvious consequence of inadequate training and/or supervision and whether a pattern of behavior in other jurisdictions constitutes knowledge of a risk—have no bearing on whether Bezotte was entitled to qualified immunity. As discussed above, such facts concern a deliberate-indifference inquiry in analyzing the claim against the County. Because the facts as alleged by Plaintiffs do not establish a constitutional violation by Bezotte in his individual capacity, we find that he is entitled to qualified immunity. . . . Although the sexual assaults on Plaintiffs are clearly established violations of their constitutional rights, Plaintiffs fail to assert any facts that Bezotte’s personal actions violated those rights. For Bezotte to be individually liable for failing to train or supervise, Plaintiffs needed to demonstrate that he took deliberate action or was otherwise involved in Boos’ illegal acts. . . . Plaintiffs allege only that Bezotte inadequately trained road patrol deputies and failed to supervise

Boos despite knowing that sexual assaults on inmates were occurring in other jurisdictions. This hardly counts as encouragement of the specific incident or knowing acquiescence in Boos' conduct. Indeed, it is an allegation of only a failure to act, which alone is insufficient to support a supervisory-liability claim. . . Plaintiffs were required to point to some actual conduct by Bezotte that directly contributed to their injury; we have no such showing here. We therefore find that the district court erred in denying Bezotte's motion for summary judgment. '[W]hereas the County's liability may be premised on its policymaker's deliberate indifference,' the individual defendant may be liable only upon a showing of personal involvement. *Harvey v. Campbell, Cnty.*, 453 F. App'x 557, 563 (6th Cir.2011). The question of deliberate indifference for establishing liability against the County for Bezotte's actions in his official capacity as policymaker is a separate inquiry. . . There are simply no facts in the record to support a finding of supervisory liability with respect to Bezotte.")

***Campbell v. City of Springboro, Ohio***, 700 F.3d 779, 790 (6th Cir. 2012) ("Although Kruithoff was not actively involved in the incidents involving Spike, a causal connection between his acts and omissions and the alleged constitutional injuries is suggested by the record. Chief Kruithoff allowed Spike in the field even after his training had lapsed. He never required appropriate supervision of the canine unit and essentially allowed it to run itself. He failed to establish and publish an official K-9 unit policy, and he was seemingly oblivious to the increasing frequency of dog-bite incidents involving Spike. Furthermore, Chief Kruithoff ignored Clark's many complaints regarding his need to keep Spike up to date on his training. Thus, Chief Kruithoff's apparent indifference to maintaining a properly functioning K-9 unit could be reasonably expected to give rise to just the sort of injuries that occurred. The district court correctly determined that the disputed facts preclude granting summary judgment.")

***Campbell v. City of Springboro, Ohio***, 700 F.3d 779, 791, 793-95 (6th Cir. 2012) (McKeague, J., concurring in part and dissenting in part) ("I concur in the holding that defendant Officer Nick Clark is not entitled to qualified immunity in relation to plaintiffs' § 1983 excessive force claims. . . . I disagree with the conclusion that Police Chief Jeffrey Kruithoff is not entitled to qualified immunity in relation to plaintiffs' claim that he is individually liable for Clark's use of excessive force on a theory of supervisory failure-to-train liability. . . I also disagree with the dismissal of the City of Springboro's appeal. . . . Neither the City nor Chief Kruithoff can be held liable for Clark's conduct on a theory of *respondeat superior*. . . The City may be held liable under § 1983 if it maintained a policy or custom that caused the violation of plaintiffs' rights. . . . The City can be held liable under plaintiffs' failure-to-train theory if plaintiffs' injuries can be attributed to the City's failure to adequately train Spike *and* this failure amounted to 'deliberate indifference' to the rights of members of the public. . . Specifically, plaintiffs must show three elements: (1) that Spike's training was inadequate to prepare him for the tasks he was expected to perform; (2) that the inadequacy persisted due to the City's deliberate indifference; and (3) that the inadequacy is closely related to or actually caused plaintiffs' injuries. . . [W]hereas the City's liability may be premised on its policymaker's deliberate indifference, Kruithoff cannot be held liable in his individual capacity for failing to supervise unless he 'either encouraged the *specific* incident of

misconduct or in some other way directly participated in it.’ . . . To hold Kruithoff liable in his individual capacity for injuries shown to be caused by deficiencies in Spike’s training or officers’ training, plaintiffs must show that Kruithoff ‘at least implicitly authorized, approved, or knowingly acquiesced’ in the violations and injuries sustained by plaintiffs Campbell and Gemperline. . . . Plaintiffs have neither alleged nor presented any evidence to support a finding of Kruithoff’s personal involvement in these incidents. The majority purports to apply the correct legal standard to plaintiff’s failure-to-train claim against Kruithoff. Further, the majority acknowledges that ‘Kruithoff was not actively involved in the incidents involving Spike.’ It follows that Kruithoff is entitled to qualified immunity. Yet, the majority affirms the denial of qualified immunity based on evidence of Kruithoff’s indifference to the need for better training of the canine unit. This determination that Kruithoff is exposed to liability in his individual capacity for his alleged failure to adequately train or supervise the canine unit ‘improperly conflates a § 1983 claim of individual supervisory liability with one of municipal liability.’ . . . To the extent plaintiffs have adduced evidence supporting findings that Kruithoff was a City policymaker on matters of training and was so deliberately indifferent to the need for more comprehensive training as to render the training deficiency a matter of *de facto* City policy, he would be liable, if at all, in his *official* capacity, i.e., rendering the City liable. . . . Thus, for lack of evidence of Kruithoff’s personal involvement in either of these particular incidents, it is clear that he should have been granted summary judgment based on qualified immunity—notwithstanding his responsibility, as Chief and City policymaker, for deficiencies in Spike’s and/or officers’ training.”)

***Heyerman v. County of Calhoun***, 680 F.3d 642, 647-49 (6th Cir. 2012) (“Section 1983 liability. . . cannot be premised solely on a theory of respondeat superior, or the right to control employees. . . . Supervisory officials are not liable in their individual capacities unless they ‘either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.’ . . . Heyerman’s attempt to hold Mladenoff liable in her individual capacity for her alleged failure to adequately supervise assistant county prosecutors or for her adherence to or continuation of a policy that, in Heyerman’s words, ‘abdicated’ her responsibility ‘to act on remand orders’, ‘improperly conflates a § 1983 claim of individual supervisory liability with one of municipal liability.’ . . . Municipal liability, however, also is not established in this case. . . . The record contains no evidence of any case in Calhoun County, other than Heyerman’s, where a defendant was not timely presented to the trial court after his or her case was remanded by the court of appeals. Thus this is not a circumstance where the need for action was ‘plainly obvious’ to the municipality’s policymakers or where what happened was a ‘highly predictable consequence’ of the County’s existing policy or the failure to train assistant prosecuting attorneys on the handling of remand orders. . . . Undoubtedly, the judicial system—to say nothing of the criminal defense system—has not functioned as it should when a criminal defendant remains imprisoned for seventeen years after his or her conviction has been reversed and no further action has been taken. Section 1983 liability, however, does not necessarily attach to any entity and/or individual as a result of this breakdown. It does not here. In short, Mladenoff was not personally involved in any conduct that led to any violation of Heyerman’s

speedy-trial rights to establish her individual liability. Heyerman fails to demonstrate a defective policy or practice to hold Calhoun County or Mladenoff in her official capacity liable.”)

**King v. Zamiara**, 680 F.3d 686, at 696, 697, 706, 707 (6th Cir. 2012) (“Superiors and supervisors . . . are generally not liable for the acts of those whom they oversee. . . . Having the right to control the offending employee is not enough, simply being aware of the misconduct is not enough, and even administrative approval of an action later found to be retaliatory, without more, is not enough. . . The supervisor must be said to have ‘directly participated, encouraged, authorized or acquiesced in the claimed retaliatory acts’ to be liable under § 1983. . . As an initial matter, we must evaluate Warden Berghuis under the theory of supervisory liability under § 1983. Liability will not lie absent active unconstitutional behavior; failure to act or passive behavior is insufficient. . . Warden Berghuis will be liable for the unconstitutional acts of her subordinates only if she actively participated in the unlawful conduct, such as if she “‘implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.’” . . The evidence presented a trial demonstrated that Berghuis at a minimum had knowledge of King’s protected conduct. . . . Despite Berghuis’s knowledge of King’s protected conduct, nothing about the transfer order she signed suggested any potential constitutional violation or retaliation was afoot. . . . Without some level of knowledge of the underlying constitutional violation. . . Berghuis cannot be liable for the acts of her subordinates.”)

**Broyles v. Correctional Medical Services, Inc.**, No. 10–1447, 2012 WL 1503760, at \*5 (6th Cir. Apr. 30, 2012) (not reported) (“In the amended complaint, Broyles sues an unknown medical services supervisor, John Doe, in both his individual and official capacities; however, Broyles makes allegations only on an individual-capacity basis in his amended complaint . . . Broyles alleges that an unknown medical services supervisor ‘failed to properly supervise, develop, and provide an adequate medical system and staff to respond to medical emergencies.’ Broyles asserts this failure to supervise and train allowed nurses and staff to make inadequate and incompetent medical determinations. These general allegations are insufficient to establish liability under § 1983 for failure to supervise. Section 1983 liability ‘must be based on more than respondeat superior, or the right to control employees.’ . . Thus, in such claims, the plaintiff must allege facts showing the defendant ‘either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.’ . . To attempt to hold John Doe liable in his individual capacity simply for his alleged failure to adequately train employees ‘improperly conflates a § 1983 claim of individual supervisor liability with one of municipal liability.’ . . Because Broyles does not allege that Doe took any deliberate action or otherwise involved himself personally in allegedly unconstitutional acts of others, Broyles’s failure-to-supervise claim fails.”)

**Hall v. Warren**, No. 09-2400, 2011 WL 4916703, at \*10 & n.4 (6th Cir. Oct. 18, 2011) (not published) (“Warren, who is the warden at TCF, argues that the district court’s summary judgment as to her was appropriate because Section 1983 liability may not be based on a *respondeat superior*

basis. Although we agree that liability may not be imputed to a supervisor based entirely upon the actions of a subordinate, . . . ‘this does not automatically mean that a supervisor can never incur liability under § 1983,’ *Taylor v. Mich. Dep’t of Corr.*, 69 F.3d 76, 81 (6th Cir.1995). Supervisors can be held liable for their own ‘active unconstitutional conduct ... rather than on their supervision of others engaging in unconstitutional conduct.’ *Spencer v. Bouchard*, 449 F.3d 721, 730 (6th Cir.2006). Hall claims that Warren personally failed to transfer him to tobacco-free housing despite receiving a written KITE alerting her to Hall’s serious medical condition and the need for a transfer. This was not a ‘vague and generalized’ notice insufficient to notify a warden ‘of the specific concerns about [a prisoner’s medical] needs and alleged deprivation.’ . . . Rather, it clearly documented his medically prescribed need for tobacco-free housing and requested Warren to effectuate a transfer to the Burns Unit because he was getting very ill. Warren has failed to introduce any evidence establishing her lack of involvement in making or overseeing transfer decisions at TCF. Taken in the light most favorable to Hall, this record is sufficient to create a genuine issue of fact as to whether Warren was subjectively aware of the risk of harm to Hall. . . . Even if Hall’s claim against Warren were based on her supervisory role, Warren could still be held liable if she ‘implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of [an] offending subordinate.’ *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.1984). The unanswered KITES could lead a reasonable juror to conclude that Warren knowingly acquiesced in her subordinates’ refusal to transfer Hall to a tobacco-free unit. For this additional reason, Warren is not entitled to summary judgment based on her supervisory position.”)

***Wright v. Leis***, No. 08-3037, 2009 WL 1853752, at \*3 (6th Cir. June 30, 2009) (not published) (“As for whether Wright sufficiently pleaded a violation by Sheriff Leis, the defendants offer a two sentence argument, essentially claiming that the amended complaint does not allege that ‘Leis had any personal contact with Wright....’ That, however, misses the point. Wright asserts that Sheriff Leis failed to train his subordinates, making it irrelevant whether Leis had physical contact with Wright. The defendants, by failing to adequately address the issue, waive any objection to the sufficiency of Wright’s failure-to-train claim.”).

***Rossell v. Armstrong***, No. 14-2737-JDT-DKV, 2015 WL 8773504, at \*4 (W.D. Tenn. Dec. 14, 2015) (“A supervisory official, who is aware of the unconstitutional conduct of his or her subordinates, but fails to act, generally cannot be held liable in his or her individual capacity. . . . A failure to take corrective action in response to an inmate grievance or complaint does not supply the necessary personal involvement for § 1983 liability. *See George v. Smith*, 507 F.3d 605, 609-10 (7th Cir. 2007) (“Ruling against a prisoner on an administrative complaint does not cause or contribute to the [constitutional] violation. A guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not.”). The complaint does not allege that Defendant Armstrong, through his own actions, violated Rossell’s rights.”)

***Laning v. Doyle***, No. 3:14-CV-24, 2015 WL 710427, at \*12-13 (S.D. Ohio Feb. 18, 2015) (“Plaintiffs seek to hold Chief Schommer and Sergeant John Doe personally liable under § 1983

for their alleged roles in failing to adequately train, supervise, and discipline Officer Doyle. Plaintiffs allege that Schommer and Doe knew of Doyle's history of violating the constitutional rights of citizens within his jurisdiction, and failed to take any remedial action. They further allege that Schommer and Doe failed to adequately investigate Laning's complaint of Doyle's misconduct. Defendants argue that they are entitled to qualified immunity on these claims, because a supervisor cannot be held liable unless he was actively and personally involved in the alleged constitutional violation. 'Supervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act ... and cannot be based upon simple negligence.' *Bass v. Robinson*, 167 F.3d 1041, 1048 (6th Cir.1999). . . . In this case, Plaintiffs' Amended Complaint is devoid of any allegations that Chief Schommer or Sergeant John Doe directly participated in Laning's arrest, or in any way encouraged Doyle to engage in the alleged unconstitutional conduct. Although Plaintiffs allege that Sergeant Doe appeared at the scene following the arrest, they do not allege that he played an active part in it. Rather, they allege only that he 'failed to investigate the circumstances of the stop.' . . . Likewise, Plaintiffs allege that, although Schommer and Doe knew of Officer Doyle's propensity to engage in misconduct, they failed to take appropriate measures to avoid 'foreseeable and highly predictable consequences.' . . . These allegations are insufficient as a matter of law to state a viable claim against them. So are the allegations that Schommer and Doe failed to adequately investigate Laning's complaint about Doyle. . . . Accordingly, the Court dismisses all claims asserted against Chief Schommer and Sergeant John Doe in their individual capacities.")

***Lacy v. Duell***, 1:14-CV-537, 2014 WL 3752919, \*6 (W.D. Mich. July 30, 2014) ("The acts of one's subordinates are not enough, nor can supervisory liability be based upon the mere failure to act. . . . Moreover, § 1983 liability may not be imposed simply because a supervisor denied an administrative grievance or failed to act based upon information contained in a grievance. . . . [A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.' . . . Plaintiff has failed to allege that Defendants Goodsen, Prelesnik, Stoddard or Huss engaged in any active unconstitutional behavior. Accordingly, he fails to state a claim against them.")

***A.M.S. v. Steele***, No. 1:11-cv-298, 2012 WL 2130971, at \*6, \*7 (S.D. Ohio June 8, 2012) (R&R) ("It is apparent that plaintiffs have erroneously conflated 'supervisory liability' with official capacity liability. Individual capacity claims seek to hold a defendant personally liable for actions taken under color of state law. . . . Official capacity claims, in contrast, are the equivalent of claims brought against the governmental entity itself. . . . Establishing 'supervisory liability' against defendant Bailey is a way of holding defendant Bailey personally liable in his individual capacity. As it is apparent to the Court that this is in fact plaintiffs' intent in this matter, the Court shall address whether plaintiffs' complaint contains sufficient allegations to state a § 1983 claim against Bailey in his individual capacity as a supervisor of defendants Steele and Mathis. A supervisor cannot be held liable under § 1983 simply by virtue of his position as supervisor over an offending individual. . . . Further, '[s]upervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act.' . . . Rather, to state a claim for supervisory liability

sufficient to withstand a Fed.R.Civ.P. 12(b)(6) challenge, a complaint must allege specific facts demonstrating that the defendant ‘either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.’. Defendants argue that plaintiffs’ complaint fails to satisfy this standard as it contains no factual allegations that Bailey was directly involved with, or even knew about, Steele’s and/or Mathis’ alleged unlawful conduct. . . .The factual allegations pertaining to Bailey in plaintiff’s complaint are sparse: Bailey was a Captain in the Cincinnati Police Department with direct supervisory authority over Steele and Mathis on the date R.M. was being held at the police station and ‘Steele told Bailey that [Steele] didn’t want to speak to [A.M.S.] and that he was going to “let her stew” a bit overnight.’. . . Viewing these limited allegations in the light most favorable to plaintiffs, the Court cannot draw a reasonable inference that Bailey encouraged, directly participated in, or even had knowledge of the unconstitutional conduct allegedly committed by Steele and/or Mathis. At most, plaintiffs have alleged that Bailey knew Steele did not want to speak to the mother of a juvenile in police custody. Regardless of Steele’s motives for avoiding the conversation, this conduct, in and of itself, is not unconstitutional. Accordingly, Bailey’s alleged knowledge that Steele did not want to talk to A.M.S. is insufficient to state a claim against Bailey for supervisory liability”)

***Sandoval v. Corrections Corp. of America***, No. 4:12CV0093, 2012 WL 1552265, at \*3, \*4 (N.D. Ohio Apr. 30, 2012) (“Supervisory liability cannot be based upon the failure to act, or simply because a supervisor denied a grievance or failed to act based upon information contained in a grievance. . . . In the instant case, Plaintiff alleges generally that Defendants Pugh, Johnson, and Hivner should be held liable for the conduct of their subordinates because they ‘knew[ ] about the conduct and facilitate[d] it, approve[d] it, condone[d] it, and turn[ed] a blind eye for fear of what they might see.’. . . Plaintiff fails, however, to allege any specific instances of ‘active unconstitutional behavior’ on the part of these Defendants relating to his alleged denial of medical care. In the absence of any such allegations, the Court finds Plaintiff has failed to establish any grounds to impose supervisory liability upon these Defendants.”)

***Mitchell v. City of Hamilton***, No. 1:11-cv-764, 2012 WL 701173, at \*3, \*4 (S.D. Ohio Mar. 1, 2012) (“Supervisory liability under § 1983 must be premised upon active behavior, not a failure to act. . . . Mitchell does not allege that Chief Ferdelman or Sheriff Jones participated in, authorized, or condoned his arrest on October 29, 2009. At most, Mitchell seeks to hold Chief Ferdelman and Sheriff Jones liable for establishing a policy and custom of training and supervision that was so inadequate as to inevitably result in the violation of his rights. . . . As recognized by the Sixth Circuit, general allegations that officers were not properly trained ‘are more appropriately submitted as evidence to support a failure-to-train theory against the [government entity] itself, and not the supervisors in their individual capacities.’ *Phillips v. Roane Cty., Tenn.*, 534 F.3d 531, 543–44 (6th Cir.2008). Mitchell’s sparse allegations against Chief Ferdelman and Sheriff Jones here, similar to those in *Phillips*, ‘improperly conflate[ ] a § 1983 claim of individual supervisory liability with one of municipal [or county] liability.’. . . Additionally, even if failure-to-train

allegations could be sufficient to establish supervisory liability, the allegations fail to meet the Rule 12(b)(6) pleading threshold. The allegations that Officer Britt and Sheriff Deputy Mohr were inadequately trained and supervised are conclusory, as explained in greater detail in the following section. Accordingly, the allegations fail ‘to raise a right to relief above the speculative level.’ . . . The Court will dismiss the claims against Chief Ferdelman and Sheriff Jones pursuant to Rule 12(b)(6).”)

***Thome v. Lake Erie Correctional Medical Management & Training Corp.***, No. 1:11 CV 2581, 2012 WL 273612, at \*3 (N.D. Ohio Jan. 27, 2012) (“It appears plaintiff may have named Warden Gansheimer as a defendant because, as the Warden, he is the supervisor of all personnel at the prison. . . . In order for liability to attach to Warden Gansheimer, plaintiff must prove that he did more than play a passive role in the alleged violations or show mere tacit approval of the goings on. . . . He must show the Warden somehow encouraged or condoned the actions of his subordinates. . . . There are no allegations in the Complaint reasonably suggesting that Warden Gansheimer actively engaged in unconstitutional behavior relating to the alleged denial of medical care to plaintiff. Accordingly, the claims against him under § 1983 must be dismissed.”)

***Debardelaben v. McKeon***, No. 2:11-cv-439, 2012 WL 234146, at \*2 (W.D. Mich. Jan. 24, 2012) (“Plaintiff alleges that Defendants Bauman and McKeon denied his Step II and III grievance appeals and failed to protect him from the unconstitutional conduct of their subordinates. Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability. . . . A claimed constitutional violation must be based upon active unconstitutional behavior. . . . The acts of one’s subordinates are not enough, nor can supervisory liability be based upon the mere failure to act. . . . Plaintiff has failed to allege that Defendants Bauman and McKeon engaged in any active unconstitutional behavior. Accordingly, he fails to state a claim against them.”)

***Trethewey v. Pekrul***, No. 2:10-CV-12335, 2011 WL 4945814, at \*6 & n.2 (E.D. Mich. Sept. 8, 2011) (“[E]ven if Pekrul could be considered a supervisory official, his failure to investigate the incident is insufficient to establish that he ratified, and thus was personally involved in, the alleged deprivation of plaintiff’s rights. As the Sixth Circuit has repeatedly explained, an allegation that a supervisor was aware of an actionable wrong committed by a subordinate and failed to take corrective action ‘is insufficient to impose liability on supervisory personnel under § 1983.’ . . . Here, there is no evidence that defendant Pekrul encouraged the arresting officer’s alleged use of excessive force or directly participated in it. Thus, he may not be found liable simply for his failure to investigate the incident. . . . In *Marchese v. Lucas*, 758 F.2d 181 (6th Cir.1985), the Court imposed supervisory liability on a Sheriff in part based on his failure to investigate. This case, however, is distinguishable. In *Marchese*, the Sheriff was sued in his official capacity, and was deemed by the court to be a policy maker for the county, rendering his failure to investigate an official policy or custom of the county for purposes of imposing liability. . . . *Marchese* is inapplicable to a suit brought against a non-policy making official in his individual capacity.”)

*Dillingham v. Millsaps*, 809 F.Supp.2d 820, 846, 847 (E.D. Tenn. 2011) (“Plaintiffs have incorrectly conflated the constitutional standards for individual supervisory liability and municipal liability. . . . Absent personal involvement in the underlying unconstitutional act, the attempt to hold [municipal supervisors] liable in their individual capacities for their alleged failure to adequately train employees ... “improperly conflates a § 1983 claim of individual supervisory liability with one of municipal liability.”) . . . In this case, there is no evidence that Sheriff Bivens was personally involved or authorized the alleged incident. Consequently, Plaintiffs have improperly brought suit against Sheriff Bivens in his individual capacity. Generally, there are two ways of imposing supervisory liability: (1) a pattern of conduct; or (2) a truly egregious single incident. . . . Because Plaintiffs have failed to establish a pattern of similar incidents, Sheriff Bivens will only be liable if there was ‘essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable or would properly be characterized as substantially certain to occur.’ . . . Even assuming that Deputy Millsaps never received a copy of the Policy Manual, he still received training on the appropriate use of force. . . . Deputy Millsaps graduated from the Tennessee Law Enforcement Training Academy in 1996 where he received training on the use of force. . . . At the time of the alleged incident, Deputy Millsaps was in good standing with the Sheriff’s Department and had not received any complaints. . . . Additionally, Deputy Millsaps received training at the Academy on how to deal with belligerent individuals, and this training was refreshed every couple of years. . . . In addition to the more general training, Deputy Millsaps also attended a taser training class in the fall of 2006 that lasted four to eight hours. . . . During this class, he was instructed on the appropriate use of force, both generally and specifically with regard to using tasers. . . . For example, Deputy Millsaps was taught that using a taser is appropriate when a person does not respond to verbal commands and is being combative. . . . The fact that Dillingham completed this training is significant. Plaintiffs are trying to equate ‘failure to give a policy manual’ with ‘failure to train,’ and completely ignoring the fact that Deputy Millsaps received training on the precise weapon at issue in this case. This training-which was tailored to the appropriate use of taser guns-is a lot more specific than the Policy Manual’s general statement that officers should use ‘reasonable force.’ . . . This general ‘failure to train’ claim should have been directed against Monroe County, not Sheriff Bivens in his individual capacity. . . . Moreover, even when considering this claim, Plaintiffs have failed to cite any specific, affirmative act by Sheriff Bivens that would subject him to liability. Accordingly, Dillingham’s Fourth Amendment ‘excessive force’ against Sheriff Bivens in his individual capacity is **DISMISSED WITH PREJUDICE**. Furthermore, because Sheriff Bivens cannot be held supervisorily liable, there is no need to determine whether Sheriff Bivens is entitled to qualified immunity.”)

*Campbell v. City of Springboro, Ohio*, 788 F.Supp.2d 637, 680, 681 (S.D. Ohio 2011) (“There is no allegation in this case that Chief Kruthoff either encouraged the specific incidents of misconduct or in some other way directly participated in them. Instead Plaintiffs seek to hold Chief Kruthoff liable for establishing a policy and custom of training and supervision that was so inadequate as to inevitably result in the violation of Plaintiffs’ rights. One way of showing knowing acquiescence is to show that a supervisor knew of a pattern of constitutional violations and failed

to address the problem. In the absence of evidence of a pattern of past misconduct that would suggest knowing acquiescence on the part of a supervisor, . . . the Sixth Circuit has held that ‘a supervisory official ... may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable.’ . . . [T]here is evidence in this case that in establishing the SPD’s canine unit, Chief Kruthoff took few if any steps to ensure that the unit functioned in accordance with the law. He chose to essentially abdicate any duty he may have had to set policies governing the operation of the unit and to provide training for the officers who were supposedly charged with supervising the unit. Plaintiffs set forth sufficient evidence from which a jury could conclude that the supervision and training in this case were so lacking that the resultant violations of Plaintiffs’ Fourth Amendment rights was almost a foregone conclusion.”)

***Clellan v. Karnes***, No. 2:10-CV-170, 2011 WL 249493, at \*2, \*3 (S.D. Ohio Jan. 25, 2011) (“Even though *Twombly* does not require detailed allegations at the pleadings stage, legal conclusions without any factual support do not meet the standard necessary to overcome a 12(b)(6) motion, which is the applicable standard for this 12(c) motion. Thus, the Plaintiffs in this case fail to make a showing that any of the three Defendants, all of whom are agents of Franklin County, was acting pursuant to a County policy, custom, procedure when the alleged constitutional violations occurred; therefore, their suit against all three Defendants in their official capacities fails. The Plaintiffs also bring suit against each of the three Defendants in their personal capacities. To establish personal liability in a 42 U.S.C. § 1983 action, the plaintiff must demonstrate that an official, acting under the color of state law, caused the deprivation of a federal right, which is a lower standard than must be met to find someone has committed a constitutional violation in an official capacity. . . The Plaintiffs allege that they suffered assault and battery, an intentional infliction of emotional distress, and were falsely arrested. For none of these claims, however, do the Plaintiffs suggest Karnes played a direct role in committing the offense. The Plaintiffs also do not mention that Karnes directed or encouraged the incidents of misconduct they allege Felkner and Montgomery committed. The Sixth Circuit has found that without such a showing, a supervisor cannot be held personally liable for a 42 U.S.C. § 1983 violation subordinates commit. . . Though the Plaintiffs claim the other two Defendants were ‘under the direct supervision of their superiors, including Defendant Sheriff Jim Karnes,’ they plead no facts which demonstrate that this was in fact the case and that such supervision involved encouraging the deputies to commit constitutional violations. Thus, because the Plaintiffs have not pled facts that indicate Karnes either encouraged the deputies to commit the alleged unconstitutional action or was directly involved in committing such action himself, their claim against him in his personal capacity fails.”)

***Peterson v. Cooper***, No. 1:09-cv-224, 2009 WL 2448141, at \*3 (W.D. Mich. Aug. 10, 2009) (“Plaintiff argues that Defendants Embry, Huss and Klinesmith failed to investigate Plaintiff’s claims regarding the August 22, 2006 incident after viewing the surveillance video and implicitly authorized, approved and acquiesced in the unconstitutional conduct of Defendants Cooper and Patterson and the two John Doe Defendants. Plaintiff also asserts that Defendants Smith and Caruso are liable for their policies of inaction when they should have known of the widespread

pattern of assaults by staff on prisoners. Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948 (2009) . . . The acts of one’s subordinates are not enough, nor can supervisory liability be based upon the mere failure to act. . . Moreover, § 1983 liability may not be imposed simply because a supervisor denied an administrative grievance or failed to act based upon information contained in a grievance. . . Plaintiff has failed to allege that Defendants . . . engaged in any active unconstitutional behavior. Therefore, Plaintiff fails to state a claim.”).

*Davis v. Strickland*, 2009 WL 2047891 (S.D. Ohio July 7, 2009) (prisoners’ claims against Governor in his individual capacity dismissed where no allegations that Governor was personally involved or encouraged alleged wrongs).

*Jacobs v. Strickland*, No. 2:08-cv-680, 2009 WL 1911781, at \*3 (S.D. Ohio June 30, 2009) (“Although there are other legal claims that can properly be asserted against a supervisor simply because someone under his or her supervision may have committed a legal wrong, liability for constitutional deprivations under 42 U.S.C. § 1983 cannot rest on such a claim. Consequently, unless the plaintiff’s complaint affirmatively pleads the personal involvement of a defendant in the allegedly unconstitutional action about which the plaintiff is complaining, the complaint fails to state a claim against that defendant and dismissal is warranted. . . This rule holds true even if the supervisor has actual knowledge of the constitutional violation as long as the supervisor did not actually participate in or encourage the wrongful behavior.”).

## SEVENTH CIRCUIT

*Kemp v. Fulton County*, 27 F.4th 491, 498-99 (7th Cir. 2022) (“Kemp argues that Standard and Ford knowingly hired and retained a hearing-impaired correctional officer. Although Standard and Ford deny knowing about Burget’s hearing loss, we assume, favorably to Kemp, that they knew about it. *Kingsley*’s objective-unreasonableness test applies equally to supervisory-liability claims. That is because the state of mind necessary to trigger a supervisor’s liability varies with the constitutional provision at the heart of the claim, in much the same way that the state of mind needed to establish a section 1983 violation does. . . Thus, applying *Kingsley*’s objective-unreasonableness test, Kemp can defeat summary judgment only if the facts viewed in the light most favorable to him show that Standard and Ford acted purposefully, knowingly, or with reckless disregard for the consequences of hiring and retaining Burget despite his hearing disability. . . Once again, he must show more than negligence. . . [T]here is no evidence in the record that would allow a reasonable jury to conclude that another officer with no hearing impairment would have heard the fight and intervened earlier. Second, Kemp has presented no evidence that Standard and Ford knew that Burget was not wearing his hearing aid or that they had any reason to believe that he was unable to perform his job duties without the device. Without notice that Burget was posing a danger to the people detailed in the Fulton County Jail, his supervisors’ decision to retain him may have been negligent, but there is no evidence that it was purposeful, knowing, or reckless.

. . . On this record, Kemp has not presented sufficient evidence for a reasonable jury to conclude that defendants Burget, Standard, or Ford took objectively unreasonable actions that caused his injuries.”)

***Horshaw v. Casper***, 910 F.3d 1027, 1029-30 (7th Cir. 2018) (“Liability under § 1983 is direct rather than vicarious; supervisors are responsible for their own acts but not for those of subordinates, or for failing to ensure that subordinates carry out their tasks correctly. . . . We held in *Vance* that a soldier cannot alter this rule by sending a letter of complaint directly to the Secretary of Defense. . . . But whether a given supervisor retained some operational responsibilities is a question of fact. Atchison’s testimony that he would have transferred Horshaw to protective custody had he received the note implies that he made important operational decisions personally rather than referring complaints to the staff. If so, he could be directly liable under *Farmer*.”)

***Hoffman v. Knoebel***, 894 F.3d 836, 841-43 (7th Cir. 2018) (“As we said at the outset, [there] is enough to show that the plaintiffs were deprived of a liberty interest without due process of law. But who is responsible? In particular, were either the individual defendants (Knoebel and Seybold) or the Clark County Sheriff’s Office subject to liability for a constitutional tort? For both sets of defendants, the crucial issue is personal (or departmental) responsibility. . . . We begin with the individual defendants. The plaintiffs do not argue that Knoebel and Seybold are responsible for the failure to provide due process protections in the first instance. Rather, they argue that both defendants were deliberately indifferent for failing to intervene while the plaintiffs were in jail. . . . The plaintiffs also argue that Seybold and Knoebel were deliberately indifferent for failing to bring an end to the DTC’s unlawful incarcerations earlier. But it is clear from the record that Knoebel and Seybold themselves lacked authority to change the DTC’s sanctioning practices. While Knoebel had some authority over the administrative policies of the Clark County DTC, neither she nor Seybold had the power to over-ride Judge Jacobi’s orders. When the staff and outside lawyers did bring due process concerns to Judge Jacobi’s attention, he dismissed them. Knoebel and Seybold had no ability to compel the judge to do otherwise. Recognizing this, the plaintiffs contend that Knoebel and Seybold should at least have ‘investigated and made a report of the obvious constitutional violations that were running rampant in 2012 and pre-November 2013.’ Seybold eventually did make such a report when he expressed his concerns to Clark County Chief Judge Vicki Carmichael in November 2013, and his report contributed to the eventual revelation of the DTC’s abuses. But the plaintiffs say more was required. To be sure, the Constitution imposes an affirmative duty to protect the well-being of those in custody. . . . And supervisors are liable for constitutional violations if they turn a blind eye or acquiesce to abuses of their subordinates. . . . The problem is that Knoebel and Seybold were not supervisors of the DTC, and they certainly had no supervisory authority over the judge. They supervised no one but the participants of the program, and no one argues that the plaintiffs were violating their own rights. . . . With supervisory liability out of the way, this theory lacks a legal basis. . . . The Constitution does not impose a general duty to expose wrongdoing anywhere within a government employee’s organization. State law might impose expanded reporting duties on employees such as

the defendants, but that would not help the plaintiffs. . . . Knoebel and Seybold were not deliberately indifferent for failing to take extra steps once internal efforts were rebuffed.”)

***Rasho v. Elyea***, 856 F.3d 469, 478-79 (7th Cir. 2017) (“Prison officials generally are entitled to rely on the judgment of medical professionals treating an inmate. . . While Dr. Elyea and Dr. Blank were themselves medical professionals who might ordinarily be held to a different standard than a non-medical prison official, in this case Rasho seeks to hold Dr. Elyea and Dr. Blank accountable as prison administrators and policymakers, not treaters. Rasho has not presented evidence that either of them should have realized that something was amiss with Dr. Massa’s and Dr. Garlick’s transfer recommendation. Accordingly, the grant of summary judgment in their favor was appropriate as well.”)

***Gill v. City of Milwaukee***, 850 F.3d 335, 344 (7th Cir. 2017) (“To succeed on a claim for supervisory liability, a plaintiff must show that the supervisor was personally involved in the constitutional violation. . . That means the supervisor ‘must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he] might see.’. . Gill’s complaint fails to plausibly allege that Chief Flynn had such personal involvement in the detectives’ conduct. It states only that Chief Flynn failed to train the detectives adequately and that he was ‘deliberately and recklessly indifferent’ to the detectives’ actions. There is, however, no allegation or plausible inference that Chief Flynn knew about or was personally involved in the specific conduct. Therefore, we agree with the district court that Gill cannot maintain a claim for supervisory liability.”)

***Estate of Miller by Chassie v. Marberry***, 847 F.3d 425, 428-29 (7th Cir. 2017) (“Although *Iqbal*, *Vance*, and *Burks* all hold that inaction following receipt of a complaint about someone else’s conduct is not a source of liability, Miller seeks support from *Haywood v. Hathaway*, 842 F.3d 1026 (7th Cir. 2016), in which the majority of a divided panel thought that allegations against a state prison’s warden created a triable Eighth Amendment issue. Haywood contended that he had been held for 60 days in freezing conditions. The panel’s majority stressed that the warden had given instructions to the prison’s engineering staff, received a report, visited the scene, and declared that all was well. That personal involvement permitted an inference that the warden’s own conduct was unconstitutional. Miller’s allegation, by contrast, is that Rogers and Marberry brushed off his complaints, leaving them to be handled through the chain of command. That brings Miller’s claim within the scope of *Iqbal*, *Vance*, and *Burks* rather than *Haywood*.”)

***Estate of Miller by Chassie v. Marberry***, 847 F.3d 425, 429-33 (7th Cir. 2017) (Posner, J., dissenting) (“Judge Easterbrook’s majority opinion speculates that medical personnel might issue lower-bunk restrictions for reasons that don’t imply the existence of a serious medical need; points out that not all brain tumors are serious; and reminds the reader that guards are not obliged to believe whatever a prisoner tells them. All true—but whether Rogers or Marberry was aware of the serious health risk to Miller from being assigned to an upper bunk is an open question that needs to be addressed at a trial. The record contains facts that support Miller’s claim that he had a

serious medical need and that the defendants knew it and did nothing despite their responsibilities. . . .The defendants knew after Miller’s first fall from an upper bunk, and from his complaints to both of them, that he was in danger of a serious injury if he remained in an upper bunk, and it would be the simplest thing in the world for either or both of them to have conveyed his complaints to the prison’s medical staff for confirmation of whether he already had, and if not should be given, a lower-bunk restriction. Warden Marberry’s reactions to Miller’s complaints made to her repeatedly in person as she made her rounds through the Special Housing Unit were grossly insensitive—so callous that they could have been expected to cost her her job. All she would have had to do in response to Miller’s complaints was alert the prison’s medical staff to them; the staff would have responded with alacrity to a directive *by the warden* to determine whether Miller should be given (or indeed already had, as indeed he did have after January 2008) a lower-bunk restriction. It would have taken her no time, no effort, and no detailed knowledge of Miller’s condition to respond intelligently to his repeated and plausible complaints (plausible given his brain tumor and his falls from the upper bunk). After his first fall, and certainly after his second, it must have been obvious to Marberry and Rogers and any other prison personnel who knew of Miller’s condition that he should not be consigned to an upper bunk. . . . Judge Easterbrook’s opinion cites *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), for its rejection of a theory of ‘supervisory liability’ that would make supervisors liable for ‘knowledge and acquiescence in their subordinates’ use of discriminatory criteria to make classification decisions among detainees.’ The Court in *Iqbal* thus rejected the proposition that a supervisor’s mere knowledge of a subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution. ‘[P]etitioners may not be held accountable for the misdeeds of their agents.... Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose ... liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.’ . . . I have no quarrel with that. But knowledge and duty can be entwined. ‘A prison official’s knowledge of prison conditions learned from an inmate’s communications can, under some circumstances, constitute sufficient knowledge of the conditions to require the officer to exercise his or her authority and to take the needed action to investigate and, if necessary, to rectify the offending condition.’ *Vance v. Peters*, 97 F.3d 987, 993 (7th Cir. 1996). Both Rogers and Marberry were responsible for the safety of prison inmates and were on notice that Miller’s safety was jeopardized as a consequence of confining him to an upper bunk. They were complicit in his suffering and may have hastened his death. A dog would have deserved better treatment. We should reverse.”)

***Haywood v. Hathaway***, 842 F.3d 1026, 1031-33 (7th Cir. 2016) (“Haywood brought forth evidence in opposition to Warden Hathaway’s motion for summary judgment that Warden Hathaway knew both of the extreme cold in the segregation unit and the causes of that cold. . . .The warden’s ‘plainly inappropriate’ responses to Hathaway’s grievance, to the extreme weather, and to the situation in the segregation unit allow the inference that he was deliberately indifferent

to the extreme cold suffered by Haywood and the other prisoners. . . Our dissenting colleague reads *Iqbal* and *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc), to support a contrary result. We do not believe, however, that *Iqbal* or *Vance* alters the standards set forth in *Farmer v. Brennan*. Indeed, *Iqbal* recognizes that “[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.” . . . In *Iqbal*, the *Bivens* claim alleged was ‘invidious discrimination’ on the basis of race, religion, and national origin ‘in contravention of the First and Fifth Amendments.’ . . . In such situations, the Court explained, ‘our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose,’ . . . and ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose’ is not sufficient[.] . . . *Iqbal* simply did not speak to standards of liability for Eighth Amendment violations, for *Iqbal* had not made a claim under that provision, and the Court certainly gave no indication of discontent with the settled law set forth in *Farmer*. Moreover, even if it had signaled an intent to depart from *Farmer*, the Supreme Court has admonished us not to anticipate its future steps. . . . [T]he standard articulated in *Vance* is satisfied here. The evidence showed that Warden Hathaway had actual knowledge of the unusually harsh weather conditions, that he had been apprised of the specific problem with the physical condition of Haywood’s cell (i.e., the windows would not shut), and that, during the time period of Haywood’s complaint, the warden toured the segregation unit himself. These facts establish that Warden Hathaway’s response was not simply ‘plainly inappropriate,’ but that Haywood’s complaints ‘literally [were] ignored’ by the individual in the position to remedy them. . . . In short, there simply is no evidence that, in *Iqbal*, the Supreme Court overruled or limited *Farmer*. . . *Vance*, as well, has no direct application to this case. *Vance* concerned the possibility of holding the cabinet secretary of a federal department responsible for the implementation of policy at the individual level—a far cry from holding the administrator of a single facility liable for known deficiencies that directly threatened the welfare of prisoners for whom he was responsible. . . *Vance* did not alter—nor could it alter—the standards set forth in the Court’s Eighth Amendment caselaw. Indeed, since *Vance*, we have continued to apply *Farmer* to allegations of unconstitutional conditions of confinement. . . . Consistent with our approach in *Townsend*, other courts of appeals have determined that, post-*Iqbal*, *Farmer*’s deliberate indifference standard continues to govern claims of unconstitutional conditions of confinement brought against supervisory prison officials. [collecting cases]).

***Haywood v. Hathaway***, 842 F.3d 1026, 1033-35 (7th Cir. 2016) (Easterbrook, J., dissenting in part) (“I agree with the court’s disposition of Haywood’s First Amendment claim but not with its conclusion that Warden Hathaway can be personally liable for cold temperatures in his cell. Haywood seeks to hold the warden directly (rather than derivatively) liable on the theory that he filed two grievances alerting the warden to the cold. But *Iqbal* concludes that knowledge is not enough. . . . Prisoners need to sue the persons responsible for the conditions of which they complain. A warden is an easy target—his name is known, and it is easy to achieve service of process. But decisions such as *Iqbal* and *Vance* mean that liability rests with the people who injure prisoners; the top of a bureaucratic hierarchy is the wrong person to sue, unless the claim concerns the prison’s formal policies or other decisions that the warden took personally. I do not read *Iqbal* or *Vance* as incompatible with *Farmer*, which did not address the question whether supervisors

can be liable for failing to cure problems created or ignored by their subordinates. By contrast, *Iqbal* and *Vance* do address that situation. . . . My colleagues are among many federal judges who prefer an approach under which notice to a supervisor is enough to create personal liability. The Supreme Court encountered such an approach in *Iqbal* and disapproved it. When a panel of this court adopted that approach in *Vance*, the court took the case en banc and disapproved it. As my colleagues observe, decisions in other circuits have continued to impose supervisory liability when notice does not lead to a remedy. They cite *Barkes v. First Correctional Medical, Inc.*, 766 F.3d 307, 320 (3d Cir. 2014), and *Colwell v. Bannister*, 763 F.3d 1060 (9th Cir. 2014), and might have added a citation to *Turkmen v. Hasty*, 789 F.3d 218, rehearing en banc denied, 808 F.3d 197 (2d Cir. 2015). *Barkes* has been reversed on immunity grounds, — U.S. —, 135 S.Ct. 2042, 192 L.Ed.2d 78 (2015), and the Justices did not tell us their view of the merits; *Colwell* concerned supervisors’ policies and not just failure to control subordinates, so its bearing on our dispute is doubtful; but *Turkmen* deals with both policy-creation and subordinate-control in one package. The grants of certiorari in *Turkmen* set the stage for a new look at the question whether and when supervisors (including Hasty, a prison’s warden) can be liable for failing to prevent or rectify misconduct by guards and other subordinates. See *Ziglar v. Turkmen*, — U.S. —, 137 S.Ct. 292, — L.Ed.2d — (2016) (consolidated with *Ashcroft v. Turkmen*, — U.S. —, 137 S.Ct. 293, — L.Ed.2d — (2016), and *Hasty v. Turkmen*, — U.S. —, 137 S.Ct. 293, — L.Ed.2d — (2016)). The sort of dispute represented by Haywood’s Eighth Amendment claim is now in the hands of the Supreme Court. *Turkmen* may be decided on other grounds (the lead argument is that the Second Circuit erred in implying a *Bivens* remedy against supervisors, while § 1983 supplies an express remedy in our case), but even so *Turkmen* may reflect on the circumstances under which heads of organizations who are alerted to problems but don’t fix them can be liable for that failure. They ducked in *Barkes*, a summary reversal, but may conclude that resolution is due in *Turkmen*, which will be briefed and argued.”)

***Daniel v. Cook County***, 833 F.3d 728, 737-38 (7th Cir. 2016) (“Sheriff Dart also argues that he cannot be liable in his personal capacity. He points out that there is no vicarious liability for supervisory officials under § 1983. This is correct but incomplete. The sheriff can be *directly* liable for Daniel’s injury. If a senior jail or prison official, including a person with final policymaking power, is ‘aware of a systemic lapse in enforcement of a policy critical to ensuring inmate safety, his failure to enforce the policy could violate the Eighth Amendment.’ . . . Similarly, if a supervisor designed or is aware of the institution’s ‘deliberately indifferent policy that caused a constitutional injury, then individual liability might flow from that act.’ *Armstrong v. Squadrito*, 152 F.3d 564, 581 (7th Cir. 1998). The Department of Justice Report, along with the later Agreed Order incorporating the investigation’s findings and the 2010 Monitor Report detailing the Jail’s progress, provides substantial evidence that Sheriff Dart had notice of the systemic deficiencies in the Jail’s health care. The totality of Daniel’s evidence would allow a jury to find that these problems persisted when Daniel received inadequate care and that the sheriff did not respond reasonably to them. Daniel may proceed with his claim against Sheriff Dart in his personal capacity.”)

*Perez v. Fenoglio*, 792 F.3d 768, 781-82 (7th Cir. 2015) (“As pertains to this case, in order to establish a constitutional violation based upon conditions of confinement, a plaintiff must allege that each prison official named as a defendant has been deliberately indifferent to that plaintiff’s objectively serious medical condition, . . . with deliberate indifference occurring where an official realizes that a substantial risk of serious harm to a prisoner exists, but disregards it . . . . Applying *Farmer*, we have stated that deliberate indifference may be found where an official knows about unconstitutional conduct and facilitates, approves, condones, or ‘turn[s] a blind eye’ to it. . . . An inmate’s correspondence to a prison administrator may thus establish a basis for personal liability under § 1983 where that correspondence provides sufficient knowledge of a constitutional deprivation. . . . Indeed, once an official is alerted to an excessive risk to inmate safety or health through a prisoner’s correspondence, ‘refusal or declination to exercise the authority of his or her office may reflect deliberate disregard.’ . . . In other words, prisoner requests for relief that fall on ‘deaf ears’ may evidence deliberate indifference. . . . In this regard, *Gentry v. Duckworth* is instructive. There, an inmate claimed that his right of access to the courts was violated because he was denied scribe materials (e.g., paper, some means of writing, and access to notary services) by prison guards. . . . He sent many letters to the superintendent concerning his claims, which went unanswered. . . . Although the superintendent may not have been directly responsible for the constitutional deprivation, we concluded that the superintendent knew of the denial of scribe materials because of the prisoner’s ‘many letters’ to him, and that the superintendent had systematically ignored these requests for redress. We thus allowed the inmate’s § 1983 action to survive summary judgment. . . . We find that Perez’s complaint alleges facts sufficient to form a basis for personal liability against the grievance officials for violations of the Eighth Amendment. The complaint alleges that the named defendants each obtained actual knowledge of Perez’s objectively serious medical condition and inadequate medical care through Perez’s coherent and highly detailed grievances and other correspondences. It also alleges that each of these officials failed to exercise his or her authority to intervene on Perez’s behalf to rectify the situation, suggesting they either approved of or turned a blind eye to his allegedly unconstitutional treatment. . . . Perez’s claims against the grievance officials thus should have been allowed to proceed. Again, we emphasize that the district court screened Perez’s complaint before discovery, before submission of any evidence, and before the defendants were even served process. At this early stage of the litigation, we ask only whether Perez’s complaint, liberally construed . . . and drawing all reasonable inferences in his favor . . . contains facts sufficient to state a plausible Eighth Amendment claim against the grievance defendants. We believe that it has. Of course, discovery will shed light on whether, as the State contends, the grievance defendants took ‘the needed action to investigate’ Perez’s grievances . . . and ‘reasonably rel[ied] on the judgment of medical professionals.’ . . . However, these are questions of fact that simply cannot be resolved in the absence of a record. Therefore, we reverse the dismissal of Perez’s complaint with respect to all of the defendants.”)

*Locke v. Haessig*, 788 F.3d 662, 669-73 (7th Cir. 2015) (“For discrimination claims like those at issue in *Iqbal* and here, where the state of mind of purposeful discrimination is an element of the violation, a supervisor is liable only if she had the specific intent to discriminate. . . . For these

claims, the plaintiff must show ‘more than “intent as volition or intent as awareness of consequences.”’ . . . The supervisor is liable for undertaking a course of action only because of, not merely in spite of, the action’s adverse effects upon an identifiable group. . . Although *Iqbal* involved a claim of invidious discrimination, the Court’s discussion shaped the law of supervisory liability for constitutional violations more generally. Before *Iqbal*, most circuits required that a supervisor act (or fail to act) with the state of mind of deliberate indifference to be liable, no matter the underlying constitutional violation. . . .After *Iqbal*, we re-examined the state of mind required for supervisory liability for sexual harassment in *T.E. v. Grindle*, 599 F.3d 583 (7th Cir.2010). . . . Haessig argues that *Iqbal* and *Grindle* together mean that there is a constitutional difference between action and inaction—that purposeful discrimination may be inferred from the former but not the latter. She contends the district court erred as a matter of law in holding that a jury could find Haessig liable for an equal protection violation for purposefully ignoring Locke’s complaint of harassment. . . We have doubts about this argument. For one, there is little support in these cases for a distinction between action and inaction. Haessig points us to the Supreme Court’s statement that purposeful discrimination ‘involves a decisionmaker’s undertaking a course of action because of . . . the action’s adverse effects upon an identifiable group.’ . . Haessig seizes on one phrase, ‘course of action,’ as implying that a supervisor who takes no action cannot, as a matter of law, intend discrimination. We reject such an expansive reading of *Iqbal*. Haessig’s argument conflicts with the principle that a supervisor could be liable for ignoring complaints from one identifiable group while acting on similar complaints from those of another group. . . . Short perhaps only of a confession of intentional discrimination, selective inaction can be strong evidence of discriminatory intent. In any event, Locke has provided evidence that tends to show that Haessig’s response was more than mere inaction. A reasonable jury could infer that Haessig had the requisite intent to discriminate because she threatened to retaliate against Locke after he complained of sexual harassment. . . . Locke may submit his evidence to a jury and can prevail if he can convince the jury that Haessig treated Locke’s complaint differently because he was a man complaining of sexual harassment. Locke does not need to prove that Haessig was motivated solely by his sex in the way that she responded to his complaint, but he must show that she chose her course of action at least in part because of his sex.”)

***Courtney v. Devore***, 595 F. App’x 618, 620 (7th Cir. 2014) (“Here Courtney has alleged that jail officials assigned female guards to monitor his bathroom activity in order to humiliate him. First, he contends that jail administrators granted the transfer requests of other detainees, but kept him assigned to a unit with cross-sex monitoring, despite his transfer requests, to shame him because he was a sex offender. Second, he adds that, when administrators later transferred him to another unit that also used cross-sex bathroom monitors, they did so to retaliate against him for complaining about the humiliation. The facts may later refute these allegations or show that the jail officials acted for institutionally legitimate reasons, but at this stage Courtney’s allegations suffice to state an Eighth Amendment claim. We pause to comment on the proper defendants. Courtney’s claim is valid only against the administrators who personally assigned him to these units. . . Courtney has sued the ‘Marion County Jail,’ which we take to be an inartful attempt to name pseudonymously these administrators. Because Courtney is pro se, on remand the district

court may and should assist him in identifying and naming the administrators who assigned him to his jail units. . . Courtney has also named the sheriff, but he has not alleged that the sheriff had any personal role in the assignment. Instead he has alleged only that, after he wrote to the sheriff to complain, the sheriff did not rectify the problem. But chief administrators are ordinarily not personally liable for decisions made by subordinates, even if they receive a letter complaining about those decisions and do not intervene. . . There can be an exception if the superior, by not acting, creates or increases some peril, . . . but Courtney alleges the opposite: the cross-sex monitoring never changed. So the sheriff is personally dismissed.”)

*Keller v. Elyea*, 496 F. App’x 665, 2012 WL 5869308, \*1, \*2 (7th Cir. Nov. 19, 2012) (“The district court indeed viewed this issue through too narrow a lens: there need not be a case ‘on all fours,’ with identical facts, in order for a constitutional right to be clearly established for the purposes of qualified immunity. . . Federal courts have long held that deliberate indifference to prisoners’ serious medical conditions violates their Eighth Amendment right to be free from cruel and unusual punishment. . . Of particular relevance here, we have ruled that a supervisor may be liable when he turns a blind eye to an inmate’s letters requesting medical treatment. . . Thus we cannot agree with the district court’s conclusion that there was no clearly established law that would have put Dr. Elyea on notice that his alleged conduct violated Keller’s constitutional rights. But we need not reach the question of qualified immunity because there is a more direct basis for affirmance—Keller has not shown that Dr. Elyea caused or participated in any constitutional violation. . . As the district court recognized, Dr. Elyea, the head of the prison system’s medical hierarchy, cannot be vicariously liable for the acts of his staff. . . But the principal case relied upon by the court to deny summary judgment on this issue, *Reed v. McBride*, differs from this case in an important way. In *Reed*, we found disputed issues of supervisory liability when supervisors acknowledged receiving the plaintiff’s complaint letters and were therefore aware of the continuing harm he was suffering. . . Here, by contrast, Keller has not produced evidence that Dr. Elyea was aware of Keller’s conditions or that the alleged violations by the treating medical staff were caused by any policy Dr. Elyea put in place.”)

*Vance v. Rumsfeld*, 701 F.3d 193, 198, 199, 203-05 (7th Cir. 2012) (en banc) (“Whatever presumption in favor of a *Bivens*-like remedy may once have existed has long since been abrogated. The Supreme Court has never created or even favorably mentioned the possibility of a non-statutory right of action for damages against military personnel, and it has twice held that it would be inappropriate to create such a claim for damages. See *Chappell v. Wallace*, 462 U.S. 296 (1983); *United States v. Stanley*, 483 U.S. 669 (1987). The Court has never created or even favorably mentioned a nonstatutory right of action for damages on account of conduct that occurred outside the borders of the United States. Yet plaintiffs propose a novel damages remedy against military personnel who acted in a foreign nation—and in a combat zone, no less. . . Even if we were to create a common-law damages remedy against military personnel and their civilian superiors, former Secretary Rumsfeld could not be held liable. He did not arrest plaintiffs, hold them incommunicado, refuse to speak with the FBI, subject them to loud noises, threaten them while they wore hoods, and so on. The most one could say about him—the most plaintiffs *do* say

about him—is that (a) in 2002 and 2003 he authorized the use of harsh interrogation techniques when dealing with enemy combatants, (b) he received reports that his subordinates sometimes used these techniques, without authorization, on persons such as plaintiffs despite the Detainee Treatment Act of 2005, and (c) he did not do enough to bring interrogators under control. The Supreme Court held in *Iqbal* that liability under a *Bivens*-like remedy is personal. . . Cabinet secretaries (in *Iqbal* the Attorney General) and other supervisory personnel are accountable for what they do, but they are not vicariously liable for what their subordinates do. The Court added that knowledge of a subordinate’s misconduct is not enough for liability. The supervisor can be liable only if he wants the unconstitutional or illegal conduct to occur. . . Yet plaintiffs do not allege that Secretary Rumsfeld *wanted* them to be mistreated in Iraq. His orders concerning interrogation techniques concerned combatants and terrorists, not civilian contractors. What happened to plaintiffs violated both Rumsfeld’s directives of 2002 and 2003, and the Detainee Treatment Act of 2005. In an ideal world, the Secretary of Defense and the Army’s Chief of Staff would have achieved full compliance with the Detainee Treatment Act, but a public official’s inability to ensure that all subordinate federal employees follow the law has never justified personal liability. . . Both *Iqbal* and *al-Kidd* say that supervisors are not vicariously liable for their subordinates’ transgressions. . . Plaintiffs’ theme is that Secretary Rumsfeld, having authorized harsh interrogation tactics for enemy combatants in 2002 and 2003, should have intervened after receiving reports that non-combatants were being subjected to these tactics and that interrogators had not properly implemented the Detainee Treatment Act of 2005. Yet the standard form of intervention would have been criminal prosecution (in the civilian courts or by court-martial). The Department of Defense did prosecute some soldiers through courts-martial, and the Department of Justice filed some criminal prosecutions. Plaintiffs think that they should have done more, but no one can demand that someone else be prosecuted. . . A court cannot say that, if there are too few prosecutions (or other enforcement), and thus too much crime, then the Attorney General or the Secretary of Defense is personally liable to victims of (preventable) crime. Yet that’s what plaintiffs’ approach entails. *Iqbal* held that knowledge of subordinates’ misconduct is not enough for liability. The supervisor must want the forbidden outcome to occur. Deliberate indifference to a known risk is a form of intent. But *Farmer v. Brennan*, 511 U.S. 825 (1994), holds that, to show *scienter* by the deliberate-indifference route, a plaintiff must demonstrate that the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm. A warden’s knowledge that violence occurs frequently in prison does not make the warden personally liable for all injuries. See *McGill v. Duckworth*, 944 F.2d 344 (7th Cir.1991). Prisons are dangerous places, and misconduct by both prisoners and guards is common. Liability for wardens would be purely vicarious. *Farmer* rejected a contention that wardens (or guards) can be liable just because they know that violence occurs in prisons and don’t do more to prevent it on an institution-wide basis. To get anywhere, Vance and Ertel would need to allege that Rumsfeld knew of a substantial risk to security contractors’ employees, and ignored that risk because he wanted plaintiffs (or similarly situated persons) to be harmed. The complaint does not contain such an allegation and could not plausibly do so. . . Although Vance and Ertel contend that their injuries can be traced (remotely) to Secretary Rumsfeld’s policies of 2002 and 2003, as well as to the misconduct of personnel in Iraq, they do not contend that the policies authorized harsh

interrogation of security detainees, as opposed to enemy combatants. It is therefore unnecessary to decide when, if ever, a Cabinet officer could be personally liable for damages caused by the proper application of an unlawful policy or regulation. As we observed in *Hammer v. Ashcroft*, 570 F.3d 798, 800 (7th Cir.2009) (en banc), the normal means to handle defective policies and regulations is a suit under the Administrative Procedure Act or an equivalent statute, not an award of damages against the policy's author. Accord, *Arar*, 585 F.3d at 572–73. No court has ever held the Administrator of the EPA personally liable for promulgating an invalid regulation, even if that regulation imposes billions of dollars in unjustified costs before being set aside. Cf. *Padilla v. Yoo*, 678 F.3d 748 (9th Cir.2012) (Deputy Assistant Attorney General not personally liable for preparing an opinion concluding that Secretary Rumsfeld's policies were valid). The extent to which untenable directives, policies, and regulations may support awards of damages can safely be postponed to another day. Because we have held that a common-law right of action for damages should not be created—and that plaintiffs' complaint would fail to state a claim against former Secretary Rumsfeld even if such a right of action were to be created—it is unnecessary to decide whether Rumsfeld violated plaintiffs' clearly established rights. The decisions of the district court are reversed.”)

***Vance v. Rumsfeld***, 701 F.3d 193, 210 (7th Cir. 2012) (en banc) (Wood, J., concurring in the judgment) (“I conclude, along with the majority, that the Supreme Court’s decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), governs our decision here. In *Iqbal*, the Court concluded that the Attorney General’s knowledge of and participation in the mistreatment of the plaintiff was remote enough that he could not be held vicariously liable for the actions of his subordinates. The same must be said of Secretary Rumsfeld. This is not because his leadership of the Department of Defense had nothing to do with the plaintiffs’ injuries. His approval of the so-called harsh techniques may have egged subordinates on to more extreme measures—measures that surely violated the standards of the Detainee Treatment Act of 2005, as well as broader norms such as those in the CAT. But the link between their mistreatment and the Secretary’s policies authorizing extreme tactics for enemy combatants is too attenuated to support this case.”)

***Vance v. Rumsfeld***, 701 F.3d 193, 223-25 (7th Cir. 2012) (en banc) (Hamilton, J., joined by Rovner, J. and Williams, J., dissenting) (“I agree with the majority’s general statements of the law of personal responsibility under *Bivens* and 42 U.S.C. § 1983. Responsibility is personal, not vicarious. Where we differ is in the application of those general principles to plaintiffs’ second amended complaint. . . . The plaintiffs may or may not be able to prove their allegations—it now is unlikely they will ever have the chance to try—but they allege that the use of harsh interrogation techniques amounting to torture was the subject of Mr. Rumsfeld’s personal attention. . . . They allege that he issued policies or orders contrary to governing U.S. law but authorizing the torture they suffered. . . . That should be enough to withstand a motion to dismiss under Rule 12(b)(6). In *Ashcroft v. Iqbal* itself, the Attorney General and the Director of the FBI conceded that they would have been subject to personal liability for actions of their subordinates if they ‘had actual knowledge of the assertedly discriminatory nature of the classification of suspects being of “high interest” and that they were deliberately indifferent to that discrimination.’ . . . We and other circuits

have taken that approach as well. [collecting cases] *Iqbal*'s different approach to pleading an individual's *discriminatory* intent does not address the issue of personal responsibility for an unconstitutional practice or policy asserted here. . . The case is before us on an interlocutory appeal from the denial of a motion to dismiss under Rule 12(b)(6). The allegations against Mr. Rumsfeld satisfy the plausibility standard of *Iqbal*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Erickson v. Pardus*, 551 U.S. 89 (2007). And even if they did not, the plaintiffs should be allowed to amend their pleadings, especially in view of the uncertainty of federal pleading standards after *Iqbal* and the fact that the district court and panel found their present pleadings sufficient to state plausible claims. . . . The majority's grant of absolute civil immunity to the U.S. military for violations of civilian citizens' constitutional rights departs from that long heritage. We leave citizens legally defenseless to serious abuse or worse by their own government. I recognize that wrongdoers in the military are still subject to criminal prosecution within the military itself. Relying solely on the military to police its own treatment of civilians fails to use the government's checks and balances that preserve Americans' liberty. The legal foundations for the claims before us are strong and in keeping with the Supreme Court's decisions and the best traditions of American liberty and governance. We should affirm the district court's decision to allow plaintiffs to try to prove their claims for torture.")

***Vance v. Rumsfeld***, 701 F.3d 193, 226 (7th Cir. 2012) (en banc) (Rovner, J., with Hamilton, J., and Williams, J., dissenting) ("Vance and Ertel have alleged Secretary Rumsfeld's direct participation in their torture. Vance contends, for example, that Secretary Rumsfeld authorized the interrogation tactics utilized on the plaintiffs and that some of these techniques required Secretary Rumsfeld's personal approval on a case-by-case basis thus inferring that Secretary Rumsfeld must have authorized the torturous interrogation himself. . . These claims may not be true, and if they are, the plaintiffs may have little chance of providing sufficient evidence to convince a trier-of-fact, but they are nevertheless plausible and contain more than bare legal conclusions. *Twombly* and *Iqbal* require no more. I fear future appeals of dismissals will be muddied by the court's attempt to refract the Rule 12(b)(6) standard to protect a high level governmental official engaged in a war to protect the citizens and ideals of this country. But even in the most difficult of cases, we must adhere to the federal pleading requirements dictated by Federal Rule of Civil Procedure 12(b)(6) and the precedent of the United States Supreme Court.")

***Vance v. Rumsfeld***, 701 F.3d 193, 231 (7th Cir. 2012) (en banc) (Williams, J., joined by Hamilton, J., and Rovner, J., dissenting) ("Whether the plaintiffs have adequately pled Rumsfeld's personal liability for violations of clearly established law is also a delicate question. Arguably qualified immunity should shoulder more of the burden of the majority's demonstrable hesitation to hold high government officials accountable for constitutional violations. *Cf. Padilla v. Yoo*, 678 F.3d 748, 768 (9th Cir.2012) (disposing of suit on qualified immunity grounds rather than affording total immunity to *Bivens* ). Nevertheless, I agree with my dissenting colleagues that the plaintiffs' complaint should survive. This complaint is unusually detailed and alleges Rumsfeld's personal participation in interrogation determinations, something the majority ignores. It is plausible (if not necessarily probable) to infer from Rumsfeld's direct involvement in developing interrogation

practices at Camp Cropper and his case-specific approval of techniques used on detainees that he personally authorized the plaintiffs' abuse or remained intentionally indifferent to it. These allegations go well beyond those deemed insufficient in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and present more than a mere possibility of liability. Therefore, I would permit the suit to continue to at least limited discovery.”)

***Paine v. Cason***, 678 F.3d 500, 512 (7th Cir. 2012) as amended on denial of rehearing and rehearing en banc (May 17, 2012) (“Earnest can be liable only for what he did; there is no doctrine of supervisory liability for the errors of subordinates such as Berglind. See *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009).”)

***Vinning-El v. Evans***, 657 F.3d 591, 592 (7th Cir. 2011) (“Warden Evans is entitled to prevail on the § 1983 claim without any need to consider immunity. Section 1983 does not authorize ‘supervisory liability.’ See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947-49 (2009). Section 1983 creates liability only for a defendant’s personal acts or decisions. Vinning-El does not contend that Evans made or ratified the decision about his diet. The district court therefore should have granted Evans’s motion for summary judgment.”)

***Arnett v. Webster***, 658 F.3d 742, 757 (7th Cir. 2011) (“Although *Iqbal* was a discrimination case involving discriminatory purpose, the Court’s reasoning in that case has raised questions about whether a stricter standard of personal liability for supervisors applies in deliberate indifference suits. We recently indicated that ‘mere “knowledge and acquiescence” is not sufficient to impose’ such liability, but that ‘*Iqbal* did not disturb the ... principles holding that a supervisor may be liable as an individual for wrongs he personally directed or authorized his subordinates to inflict,’ *Vance*, 2011 WL 3437511, at \*6 & n.5; see also *Starr v. Baca*, No. 09-55233, 2011 WL 2988827, at \*4 (9th Cir. July 25, 2011) (“We see nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases.”). The landscape of such claims after *Iqbal* remains murky, but we need not clear the waters here because the record doesn’t show that Dr. Webster was personally involved in the alleged constitutional violations under the standard set forth in *Gentry*.”)

***T.E. v. Grindle***, 599 F.3d 583, 588-91 (7th Cir. 2010) (“The parties focused their briefing on whether a theory of supervisory liability for equal protection claims was clearly established at the time of Grindle’s conduct. However, as the Supreme Court has made clear in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), an equal protection claim against a supervisor requires a showing of intentional discrimination. Because there is no theory of *respondeat superior* for constitutional torts, a plaintiff ‘must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’ *Id.* at 1948. In the equal protection context, this means showing that the supervisor, like the subordinate, intended to discriminate on the basis of a protected class. . . While it appears that our precedent would have previously allowed a plaintiff to recover from a supervisor based on that supervisor’s ‘deliberate indifference’ toward a subordinate’s purposeful discrimination, see *Nanda*, 412 F.3d at 842, after *Iqbal* a plaintiff must

also show that the supervisor possessed the requisite discriminatory intent. Nonetheless, even in light of *Iqbal*, plaintiffs have offered evidence sufficient to defeat summary judgment on Grindle’s qualified immunity defense. Plaintiffs need not prove discriminatory intent in the same manner it was established in *Nabozny*, where male and female victims were treated differently. Plaintiffs have offered evidence that would let a jury easily conclude that Sperlik, acting under color of state law, denied the girls equal protection by molesting and abusing them. Plaintiffs have also offered evidence that would allow a jury to conclude that Grindle knew about Sperlik’s abuse of the girls and deliberately helped cover it up by misleading the girls’ parents, the superintendent, and other administrators. From this evidence, a jury could reasonably infer – though it would not be required to infer—that Grindle also had a purpose of discriminating against the girls based on their gender. Cf. *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1190-91 (7th Cir.1986) (Posner, J., concurring) (suggesting that policy of deliberately refusing to respond to complaints of sexual harassment would support an inference of intentional discrimination). If Grindle wishes to argue that she merely wanted to avoid a scandal or that she would have taken similar steps to conceal abuse if boys had been the victims, she can present those arguments to the jury, but such suggestions do not mean that she is entitled to judgment as a matter of law. . . . [W]e must address the impact of *Iqbal* on plaintiffs’ due process claim. It is important to note that, as in *Stoneking*, plaintiffs are not relying on a theory that ‘mere failure of supervisory officials to act’ violates the Due Process Clause. . . . Rather, plaintiffs allege that Grindle is liable for actively concealing reports of abuse and creating an atmosphere that allowed abuse to flourish. In other words, they argue that Grindle’s own actions deprived them of their constitutional right to bodily integrity. Because plaintiffs seek to do no more than hold Grindle liable ‘for ... her own misconduct,’ their substantive due process theory is not foreclosed by *Iqbal*. . . . When a state actor’s deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate, and the actor may be held liable for the resulting harm.”).

***Turner v. Cook County Sheriff’s Office***, No. 19 CV 5441, 2020 WL 1166186, at \*5 (N.D. Ill. Mar. 11, 2020) (“Plaintiff’s individual claim against Sheriff Dart is not based on any direct involvement in Ms. Scott’s overdose, but rather on Sheriff Dart’s ineffective—or nonexistent—drug detection and treatment policies that allow inmates easy access to drugs and increase the risk/frequency of drug overdoses. . . . Plaintiff’s individual capacity claim against Sheriff Dart is rooted in his alleged failure to implement policies that provide constitutionally adequate healthcare to detainees suffering from drug addiction and overdose. . . . Because of his position, Sheriff Dart had final authority over Jail policies. . . . Therefore, Plaintiff’s allegations, if true, sufficiently allege that Sheriff Dart was personally involved in the decision-making that amounted to a violation of Ms. Scott’s constitutional right to be free from deliberate indifference to her serious medical needs. The Amended Complaint, read in the light most favorable to the Plaintiff, alleges systemic constitutional violations by way of Sheriff Dart’s Jail policies and practices. Therefore, the Court denies Sheriff Dart’s Motion to Dismiss the individual capacity claim.”)

***Powell v. City of Chicago***, No. 17-CV-5156, 2018 WL 1211576, at \*9 (N.D. Ill. Mar. 8, 2018) (“Plaintiff alleges that Cline and Kirby knew of the Officer Defendants’ grave misconduct and knew that the misconduct would likely continue, yet deliberately did nothing (in their capacity as supervisors) to correct the problem. . . Plaintiff neither claims a ‘constitutional right to an internal investigation,’ . . . nor states a theory of vicarious liability. Rather, Plaintiff says that Cline and Kirby deliberately disregarded his constitutional rights by failing to stop the Officer Defendants from continuing their illegal scheme of, among other things, fabricating evidence against residents of the Ida B. Wells Homes. . . At this early stage, those allegations suffice to state a claim against Cline and Kirby. . . While such claims may or may not survive summary judgment, this Court denies Defendants’ motion to dismiss claims against Cline and Kirby.”)

***Karim v. Obaisi***, No. 14 C 1318, 2017 WL 4074017, at \*7 (N.D. Ill. Sept. 14, 2017) (“Warden Lemke argues that he cannot be liable for deliberate indifference because he was not personally involved in any decision that led to a deprivation of Karim’s constitutional rights. Although it is true that ‘the Warden of each prison...is entitled to relegate to the prison’s medical staff the provision of good medical care,’ *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009), if a prison official, like Lemke, has a reason to believe, or actual knowledge that the prison’s medical staff are mistreating or failing to treat a prisoner, the prison official may be liable for deliberate indifference. . . When viewing the facts in the light most favorable to Karim, . . . even when putting aside Karim’s grievances and communications, Lemke had actual knowledge of Karim’s abscess and appointment on August 8 and refused to allow Karim to attend his appointment. Thus, he was personally involved in deciding that Karim would not get the treatment that medical professionals determined he needed on that day. Lemke argues that because of the lockdown he could not get Karim the needed treatment, yet his own testimony makes clear that prisoners with serious medical issues could be seen by doctors and dentists during a lockdown. . . Thus, Lemke’s decision to not grant Karim leave to get treatment during a lockdown may constitute deliberate indifference because according to Karim, Lemke saw the abscess on August 8th, understood it to be a serious condition, yet refused to allow Karim to attend the appointment to receive treatment. This is especially so because according to Karim, at the time he saw Lemke on August 8, the abscess was so grotesque that even a layperson like Lemke would have understood that Karim required urgent dental care.”)

***Miller v. Kienlen***, No. 14-CV-00031, 2017 WL 951342, at \*10 (N.D. Ill. Mar. 10, 2017) (“The complaint . . . states a plausible claim of deliberate indifference against Kienlen. To be liable under § 1983 in her individual capacity, ‘the supervisor must “know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see.”’ . . Miller alleges that he reported to Kienlen that Jefferson was not changing his wound dressings daily, irrigating his wound, and dispensing prescribed medication as his doctor recommended and that Kienlen knew about the risks Jefferson’s conduct posed. . . The complaint does not spell out how Kienlen knew of the risks, but it does not have to; that is what discovery is for. . . In the face of Miller’s reports, Kienlen did nothing according to the complaint. . . Viewed in the light most favorable to Miller,

these allegations state a plausible claim that Kienlen condoned, approved, or turned a blind eye to Jefferson's alleged conduct.”)

*Smith v. Burge*, 222 F.Supp.3d 669, 687 (N.D. Ill. 2016) (“In essence, Plaintiff asserts that Defendants Martin, Daley, and Hillard as supervisors had knowledge of the systemic torture leading to coerced confessions of innocent individuals, but nevertheless condoned it or turned a blind eye to it. . . The fact that Defendants Daley, Martin, and Hillard were not at Area 2 at the time of Plaintiff's torture and coerced confession does not absolve these Defendants under Plaintiff's theory of liability. *See Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir. 2001) (supervisor “does not have to have participated directly in the deprivation” to be personally involved).”)

*Smith v. Burge*, 222 F.Supp.3d 669, 697 (N.D. Ill. 2016) (“Plaintiff specifically alleges that while Defendant Daley was Mayor: (1) he did not disclose exculpatory information in his possession from the date he resigned as State's Attorney of Cook County in 1989 until he left the Mayor's office in 2011; (2) he did not intervene at any time to direct the CPD to disclose exculpatory information in its possession regarding Defendant Burge and detectives under his command; and (3) he did not direct the CPD to conduct a thorough and aggressive investigation of Defendants Burge, Byrne, Dignan, and the other detectives who tortured and abused African-American men while working under Defendant Burge's command. . . Plaintiff also alleges that in furtherance of this conspiracy, Defendant Daley: (1) repeatedly discredited OPS findings of the systemic torture under Defendant Burge at Area 2; (2) refused to direct Defendant Martin (as CPD Superintendent) to initiate criminal investigations or disciplinary proceedings against Defendant Burge and CPD Detectives under his command; (3) rejected advise from senior staff that the City should sue Defendant Burge rather than continue to defend him in civil proceedings despite Defendant Daley's knowledge of Defendant Burge's wrongdoing; and (4) made false public statements in July 2006 in response to a Special Prosecutor's Report. . . . These allegations sufficiently allege that Defendant Daley, as Chicago's Mayor, participated in a conspiracy to conceal evidence of police torture. . . . The Court therefore denies this aspect of Defendant Daley's motion to dismiss.”)

*Lemons v. City of Milwaukee*, No. 13-C-0331, 2016 WL 3746571, at \*20-21 (E.D. Wis. July 8, 2016) (“There is no principle of automatic supervisor liability for constitutional torts. Instead, to be held liable for conduct of a subordinate, a supervisor must have been personally involved in that conduct, meaning that he or she knew about the conduct and ‘facilitate[d] it, approve[d] it, condone [d] it, or turn[ed] a blind eye for fear of what [he or she] might see.’. . The supervisors must have acted either knowingly or with deliberate, reckless indifference. . . A supervisor who was merely negligent or grossly negligent in failing to detect and prevent a subordinate's misconduct is not liable, because negligence is not actionable under § 1983. . . Instead, the supervisor must be criminally reckless or at the least in conscious disregard of known or obvious dangers. . . . The City defendants contend that the Supreme Court in *Iqbal v. Ashcroft*, 556 U.S. 662 (2009), altered the above-described concept of a supervisor's liability to require actual participation in the subordinate's malfeasance. The City defendants argue that all individual-

capacity claims against Flynn and Hegerty must be dismissed because neither chief was personally involved with anything that happened in Lemons's home while Lemons was alone with Cates. But the City defendants are wrong. . . . Here, Lemons contends that Hegerty and Flynn are liable for their own actions (or inactions) in creating or maintaining insufficient IAD investigatory procedures and their own failures in supervising or disciplining Cates's conduct, enabling Cates to sexually prey upon women he encountered on the job. No evidence suggests that Hegerty or Flynn was present at Lemons's house during the rape, intended for Cates to rape Lemons, or actually knew Cates would do so, but that is beside the point. As to IAD procedures and officer supervision and discipline, Hegerty and Flynn *were* personally involved. There is no dispute that the chiefs were responsible for IAD investigating procedures, received reports regarding pending investigations, and were the ultimate decisionmakers regarding officer discipline. And there is no dispute that Hegerty and Flynn exercised decisionmaking authority regarding Cates individually. Taking the facts in Lemons's favor, Hegerty was apprised of the SW and TC matters, yet gave Cates only a six-day suspension as discipline for the former and nothing for the latter, even in light of information in Cates's file regarding his prior violence toward Officer C. Similarly, Flynn was apprised of the TC and TG matters, yet failed to discipline Cates, even in light of information in Cates's file regarding the Officer C, SW, TC, and TG matters. Taking the facts in Lemons's favor, both chiefs allowed IAD internal investigations to end upon a DA's decision not to charge a crime, failed to consider prior unsustained conduct, failed to implement any system to monitor for patterns of illegal conduct, and caused an attitude in the MPD that sexual misconduct was not going to be treated seriously. . . . A reasonable jury could find that Hegerty and Flynn turned a blind eye to any pattern, exhibiting deliberate indifference to the well-being of future females with whom Cates came into contact in his job and that sexual assault was a foreseeable next offense. . . . In sum, taking the facts in Lemons's favor, Hegerty and Flynn facilitated Cates's conduct and turned a blind eye to it by not disciplining him more severely (or at all) for prior rule infractions, abdicating responsibility for discipline to the DA's office, not providing a means for recognition of patterns of prior conduct even if unsustained, and responding to complaints of sexual misconduct by Cates so inadequately that Cates felt confident that he could rape Lemons with little to no consequence. A reasonable jury could find that Hegerty's and Flynn's personal choices in IAD oversight and in previously not disciplining Cates created the circumstances in which Cates believed that his word would outweigh Lemons's and that the most discipline he would receive was a short suspension—that he would be back on the force with little trouble. Thus, summary judgment will be denied as to this theory of liability.”)

*Smith v. City of Chicago*, 143 F.Supp.3d 741, \_\_\_ (N.D. Ill. 2015) (“Defendant McCarthy additionally argues that the Court must dismiss Plaintiffs’ constitutional claims brought against him in his individual capacity because Plaintiffs fail to allege that he was personally involved in the alleged constitutional deprivations. To clarify, because the doctrine of respondeat superior (blanket supervisory liability) does not apply to actions filed under § 1983, a plaintiff must allege that an individual defendant, through his own conduct, violated the Constitution. *See Perez v. Fenoglio*, 792 F.3d 768, 781 (7th Cir. 2015). A supervisor, such as Defendant McCarthy, can be liable under § 1983 if he knows about the misconduct and either facilitates it, approves it, condones

it, or turn a blind eye. . . Although Defendant McCarthy denies personal involvement in the approximately 50 individual incidents alleged in the Amended Complaint, Plaintiffs have presented sufficient factual allegations stating a claim for supervisory liability that is legally sound and plausible on its face, namely, that Superintendent McCarthy was aware of the police officers' unconstitutional stops and facilitated this conduct. Construing the facts and all reasonable inferences in Plaintiffs' favor – as the Court must do at this procedural posture – they allege that Defendant McCarthy had knowledge of the unlawful stops and frisks based on the CPD's history of conducting suspicionless stops and frisks, the 2003 Shani Davis lawsuit and the data collected therein, and other actions taken by the ACLU. . . Plus, Plaintiffs assert that Superintendent McCarthy put pressure on Chicago police officers to increase the number of stops and frisks giving the officers a strong incentive to make such stops because the officers' increased numbers would suggest productivity. . . Similarly, Plaintiffs contend that Superintendent McCarthy facilitated the alleged misconduct because he failed to set forth procedures to properly train police officers as to the legal and factual bases for conducting stops and frisks. . . Under the circumstances, Plaintiffs have sufficiently alleged a plausible claim for supervisory liability pursuant to the federal pleading standards. . . The Court thus denies Defendant McCarthy's motion to dismiss the constitutional claims brought against him in his individual capacity.”)

***Medrano v. Wexford Health Sources, Inc.***, No. 13 C 84, 2015 WL 4475018, at \*6 (N.D. Ill. July 21, 2015) (“For written notice to prison administrators to form the basis of a deliberate indifference claim, the plaintiff ‘must demonstrate that the communication, in its content and manner of transmission, gave the prison official sufficient notice to alert him or her to an excessive risk to inmate health or safety.’ *Arnett*, 658 F.3d at 755. Medrano cannot make such an allegation here. Rather, Medrano alleges he received regular appointments with doctors, a number of medical tests, and medication prescriptions in an attempt to address his medical conditions. It may be that Medrano has sufficiently alleged that some of this treatment fell below a constitutionally adequate level. That question is not at issue on this motion. But in the absence of allegations that Medrano was ‘completely ignored by medical staff,’ *Arnett*, 658 F.3d at 756, Director Godinez and Chairperson Miller were entitled to rely on the medical judgments supporting the treatments Medrano alleges he received. . . . Accordingly, Medrano’s claims against Director Godinez and Chairperson Miller are dismissed. . . . It is true that *respondeat superior* liability is not available for a claim under § 1983. Medrano, however, does not use the mere fact of Dr. Tilden’s title to establish his liability. Rather, Medrano alleges that he received inadequate care at Pontiac when he failed to receive the treatment prescribed by the UIC doctors. Medrano argues that Dr. Tilden had knowledge of this inadequate treatment due to his supervisory positions as Medical Director. In this way, Medrano’s allegation is quite different from the allegations against Director Godinez and Chairperson Miller, which the Court has already dismissed. Dr. Tilden is not merely responsible for prison administration generally, but is responsible for medical care in particular. This allegation is enough for the Court to infer that Dr. Tilden knew about any inadequate care Medrano received and did nothing to remedy the situation. This is sufficient to state a claim against him based on Medrano’s accompanying allegation that he has not received the treatment prescribed by the UIC doctors.”)

***Laba v. Chicago Transit Auth.***, No. 14 C 4091, 2015 WL 3511483, at \*4 (N.D. Ill. June 2, 2015) (“In Count III, Plaintiffs allege that Bhayani, Loughnane and Claypool enjoyed a supervisory capacity at the CTA and approved, facilitated, condoned and ordered the actions of Guidone and Woods in installing the hidden cameras for the alleged purpose of secretly filming Plaintiffs. The conclusory allegations in Plaintiffs’ Complaint, by themselves, would not be sufficient to raise Plaintiffs’ supervisory liability claim above the speculative level. However, in conjunction with the well-pleaded allegations, this claim survives. Plaintiffs specify each Defendant’s supervisory role and claim that these supervisors allegedly communicated together in person and knew that the installation was a violation of Plaintiffs’ rights to privacy, but still decided to allow the filming to occur. We may draw the reasonable inference that, by virtue of their positions as supervisors, they knew about the installation of the cameras and subsequently may have known that it was a violation of Plaintiffs’ rights to privacy. This is enough to plead knowledge, or at the very least, establish that it is plausible that these Defendants conducted, facilitated or condoned the conduct at issue. Thus, the Court denies Defendants’ motion to dismiss Count III.”)

***Elsayed v. Vill. of Schaumburg***, No. 14 C 8387, 2015 WL 1433071, at \*4 (N.D. Ill. Mar. 26, 2015) (“Although Elsayed states many of the elements that might give rise to supervisory liability, her allegations are mere legal conclusions, not facts. . . Elsayed’s proposed amendments to her complaint do not fix this problem. The added allegations that ‘Hudak and O’Brien’s superior officers ... were aware of Hudak and O’Brien’s regular practice of arresting individuals without probable cause’ do not add any *factual* matter to Elsayed’s complaint; they merely reiterate the legal conclusions. . . Stripped of the legal conclusions, there is essentially no factual matter—which would be taken as true in this stage of the litigation—to support a § 1983 claim against Hudak and O’Brien’s supervisors. The claim for ‘supervisory liability’ is dismissed.”)

***Chatman v. City of Chicago***, No. 14 C 2945, 2015 WL 1090965, at \*8-9 (N.D. Ill. Mar. 10, 2015) (“[T]he City argues that Plaintiff’s claim is deficient because ‘[s]upervisory officials who are simply negligent in failing to detect and prevent a subordinate’s misconduct are not culpable under § 1983 because they are not personally involved.’ . . The City’s recitation of the law is correct. For supervisors to be personally liable under § 1983, the supervisor must ‘know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see.’ . . That is, a supervisor must be personally responsible for the deprivation of a constitutional right. . . But nothing prohibits Plaintiff from bringing a claim against Defendants Walsh, Holy, and Joria for direct liability and, in the alternative, for supervisory liability. . . Here, Plaintiff has alleged that these supervising Defendants were aware of, facilitated, condoned, and oversaw specific unconstitutional activities by their subordinates, including the coercing of a false confession and the withholding of exculpatory evidence. . . Accepting the well-pleaded facts as true and drawing all reasonable inferences in Plaintiff’s favor, the motion to dismiss Count VII is denied as against Defendants Walsh, Holy, and Joria.”)

***Bentz v. Lindenberg***, No. 15-CV-00121-NJR, 2015 WL 1064525, at \*5 (S.D. Ill. Mar. 9, 2015) (“[I]t appears that Plaintiff’s claim against these supervisory defendants stems from their involvement in the grievance process. According to the exhibits, these defendants signed off on grievance denials and appeals. This type of claim arises under the Fourteenth Amendment’s Due Process Clause, not the Eighth Amendment. It is equally doomed. Prison grievance procedures are not constitutionally mandated and thus do not implicate the Due Process Clause per se. As such, the alleged mishandling of grievances ‘by persons who otherwise did not cause or participate in the underlying conduct states no claim.’ . . . In other words, the fact that a counselor, grievance officer, or even a supervisor received a complaint about the actions of another individual does not create liability. Therefore, Plaintiff’s claim against these individual defendants fails under a theory of supervisory liability rooted in the Eighth Amendment or due process violation arising from the Fourteenth Amendment.”)

***Hughes v. Moore***, No. 14-CV-1410-MJR, 2015 WL 800172, at \*4 (S.D. Ill. Feb. 25, 2015) (“[I]f a supervisory official is alleged to have directed the conduct or to have given knowing consent to the conduct which caused the constitutional violation, that defendant has sufficient personal involvement to be responsible for the violation, even though that defendant has not participated directly in the violation. . . . A defendant in a supervisory capacity may then be liable for “deliberate, reckless indifference” where he or she has purposefully ignored the misconduct of his/her subordinates. . . . Plaintiffs allegations fall squarely within this realm – he claims that Defendants Moore, Jennings, Dallas, and/or Freeman, as supervisors, knew about a pattern of assaults such as Plaintiff experienced, yet ‘turned a blind eye’ or condoned this pattern by their inaction. At the pleading stage, Plaintiff states a claim that survives review under 1915A, and he may proceed with Count 4 against Defendants Moore, Jennings, Dallas, and Freeman.”)

***Demouchette v. Dart***, No. 09 C 6016, 2015 WL 684805, at \*6-7 (N.D. Ill. Feb. 17, 2015) (“To prevail against a supervisor for deliberate indifference, an inmate still must establish personal participation. The inmate must show that the supervisor was personally involved in the deprivation of a constitutional right, and directed the conduct causing it or turned a blind eye to it. *Chavez v. Illinois State Police*, 251 F.3d 612, 651 (7th Cir. 2001); *Thomas*, 499 F.Supp.2d at 1093. To begin with and as discussed in the background, it is not clear what role, if any, Lieutenant Hernandez had in creating or implementing the CPR policy. Lieutenant Hernandez further was not the one who signed Officer Mason’s September 28, 2008 logbooks, so the record cannot show how Lieutenant Hernandez’s alleged practice of ratifying inadequate cell checks contributed specifically to Demouchette’s death. Even drawing all inferences in favor of Plaintiffs though, summary judgment is nonetheless warranted. The very arguments Plaintiffs raise here were rejected in *Thomas*, and this Court finds no basis to depart from the Court’s analysis there. In *Thomas*, the Court granted summary judgment to supervisors who lacked knowledge of the inmate’s medical condition. . . . Instructive for the present case, the fact that the supervisors failed to take steps to remedy ‘serious health and security risks’ that contributed to the inmate’s death, including cross-watching and broken monitors, was insufficient for the inmate to maintain a claim against the supervisors where they lacked awareness of the inmate’s medical condition. . . . [T]he

record shows that, far from ratifying misconduct, Lieutenant Hernandez met with his staff the day following Demouchette’s suicide and instructed them to be more observant and to better watch the detainees. . . The part of *Abdollahi* that Plaintiffs quote—about encouraging inadequate cell checks by failing to discipline the subordinate officers at fault, 405 F.Supp.2d at 1212—involves official capacity claims against the supervisors and thus is inapplicable here. . . Official capacity claims represent another way of pleading a *Monell* claim against an entity. *Estate of Abdollahi*, 405 F.Supp.2d at 1212. The *Monell* claims here, however, have been bifurcated . . . and the relevant claim against Lieutenant Hernandez is in his individual capacity . . . . Because Lieutenant Hernandez did not violate any constitutional right, this Court does not need to consider whether he is entitled to qualified immunity.”)

***Fisher v. McCallistor***, No. 15-CV-00007-JPG, 2015 WL 574542, at \*3 (S.D. Ill. Feb. 9, 2015) (“The complaint states an Eighth Amendment claim against Defendant McCallistor. This defendant supervised the strip search of Plaintiff in the presence of female guards on May 13, 2014 . . . . The allegations against Defendant McCallistor suggest that he not only approved of the conduct, but directed it and that the search may have been performed in a manner that was intended to harass or humiliate the inmates involved. Accordingly, Plaintiff shall be allowed to proceed with Count 1 against this defendant.”)

***Hilliard v. Illinois Dep’t of Corr.***, No. 15-CV-004-MJR, 2015 WL 468691, at \*2-3 (S.D. Ill. Feb. 3, 2015) (“Although the S.O.R.T. Team Commander and the Warden may have held supervisory authority over the two John Doe S.O.R.T. Team Officers, this is not enough to hold them liable for the unconstitutional actions of their subordinates. The doctrine of *respondeat superior* (supervisory liability) is not applicable to § 1983 actions. . . The facts do not suggest that either the Defendant S.O.R.T. Team Commander or Defendant Luth was ‘personally responsible for the deprivation of a constitutional right.’ . . Accordingly, the Defendant S.O.R.T. Team Commander shall be dismissed from Count 1 with prejudice. As noted, Defendant Luth had no personal involvement in the excessive force incidents. Further, if he indeed received Plaintiff’s letter or grievance over the incident, his role in reviewing such a complaint does not impose liability on him. . . However, Defendant Luth shall remain in the action for two reasons. First, Defendant Luth is an appropriate party to respond to Plaintiff’s discovery requests regarding the identities of the two John Doe S.O.R.T. Team Officer Defendants who assaulted him on August 23, 2014. . . Secondly, because Plaintiff is seeking injunctive relief, Defendant Luth shall remain in the action for the purpose of implementing any injunctive relief to which Plaintiff may ultimately be entitled if he should prevail.”)

***Sanders v. City of Chicago Heights***, No. 13 C 0221, 2014 WL 5801181, at \*4 (N.D. Ill. Nov. 7, 2014) (“In Count VII of the First Amended Complaint, Plaintiff brings a separate supervisory liability claim. Although § 1983 does not authorize a separate, cognizable claim for supervisory liability, § 1983 does create liability for a defendant’s personal acts, conduct, or decisions. . . Put differently, for supervisors to be personally liable, the supervisor must ‘know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see.’ . . In

short, a supervisor must be personally responsible for the deprivation of a constitutional right. . . Here, Plaintiff alleges that federal prosecutors prosecuted Defendant Mangialardi and a number of other Chicago Heights Police Officers for racketeering and witness tampering just prior to the incident underlying this lawsuit. . . Similarly, Plaintiff maintains that the Chicago Heights Police Department's misconduct was so widespread that the Mayor enlisted a retired Supreme Court of Illinois Justice to investigate the department. . . Plaintiff further explains that due to the systemic corruption in Chicago Heights, six police officers and fifteen public officials were convicted and sentenced. . . Accepting the well-pleaded facts as true and drawing all reasonable inferences in Plaintiff's favor, he has sufficiently alleged that after the Chicago Heights police officers were indicted and convicted—thereby putting supervisors on notice of the misconduct at issue—the misconduct in the Chicago Heights Police Department nevertheless continued. Moreover, the corruption charges for which Defendant Mangliardi and a number of other Chicago Heights Police Officers were prosecuted, including witness tampering, are similar, in part, to the allegations in Plaintiff's First Amended Complaint. Under the circumstances, Plaintiff has sufficiently alleged supervisor liability. The Court therefore grants Defendant Officers' motion to dismiss Plaintiff's supervisory liability claim in Count VII as a stand alone claim with the caveat that Plaintiff has sufficiently alleged supervisory liability as to his constitutional claims.”)

**Shesler v. Sanders**, No. 13-CV-394-JDP, 2014 WL 5795486, at \*10-11 (W.D. Wis. Nov. 6, 2014) (“I am reluctant to extend *Estate of Phillips* to a claim against an individual defendant because it stands to reason that a supervisor who intentionally allows her staff to act with gross negligence could in fact be acting with deliberate indifference herself. But that would be a very difficult claim to prove, and the undisputed facts do not support it here. In a recent decision, the Supreme Court rejected the plaintiff's argument that ‘a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.’ . . .

In the present case, plaintiff presents evidence showing that, at most, defendant Sanders was not actively involved in ascertaining whether DOC staff were properly reviewing prisoners' sentences. Plaintiff comes nowhere close to showing that Sanders *wanted* her staff to negligently review sentences. As with the other defendants, Sanders was at most negligent in her oversight of the sentence review process, but this is not sufficient to sustain an Eighth Amendment claim. Therefore I will grant defendants' motion for summary judgment on the supervisory claim against Sanders.”)

**Smith v. Hartmann**, 12-CV-09915, 2014 WL 4912010, \*3, \*4 (N.D. Ill. Sept. 30, 2014) (“Plaintiff's SAC offers several theories of Mayor Rockingham's liability in his individual capacity . . . At a minimum, the theory relating to his supervision of Officer Bogdala states a claim under Rule 12(b)(6). The allegations are as follows. Prior to Plaintiff's arrest, Mayor Rockingham learned of two or more incidents when Officer Bogdala used excessive force. He learned of Sharon Jackson's complaint accusing Officer Bogdala of punching her in the face and breaking her eye socket. . . He also learned from Assistant Chief of Operations Crystal Phillips that Officer Bogdala had previously used excessive force. . . Because of this record of misconduct, the Chief of Police recommended firing him. When Mayor Rockingham learned of this recommendation, he

intervened, ‘recommend[ing] and inform[ing] Chief of Police Newsome not to fire’ him. . . The Chief of Police refrained from firing Officer Bogdala ‘[a]s a result of Mayor Rockingham’s recommendation.’. . Instead, he gave Officer Bogdala a ‘last chance’ three-year employment agreement. During the course of this continued employment, Officer Bogdala allegedly violated Plaintiff’s constitutional rights. The SAC paints a picture that the FAC does not—one that is sufficient to state a claim under Rule 12(b)(6). According to the FAC, Mayor Rockingham facilitated a policy of police brutality; then two officers in the police force happened to use excessive force against Plaintiff. As the Court’s prior opinion explained, this theory lacked personal involvement and a causal connection. According to the SAC, however, Rockingham knew of the particular officer who injured Plaintiff—Officer Bogdala. He knew that this officer had a record of excessive force, he knew that the Chief of Police recommended firing him because of this record, and he put a stop to the firing process. As a result of the mayor’s intervention, Officer Bogdala participated in an arrest allegedly involving a constitutional injury to Plaintiff. This new theory of supervisory liability in the SAC sufficiently alleges that Mayor Rockingham was ‘personally responsible for the deprivation of the constitutional right.’ . . It alleges that Mayor Rockingham knew about Officer Bogdala’s prior misconduct and that he facilitated it, approved it and condoned it by preventing him from being fired. . . Defendants argue that the SAC fails to ‘substantiate that Mayor Rockingham condoned similar conduct to that which is alleged in the SAC.’. . The SAC alleges that Officer Bogdala caused Plaintiff a constitutional injury by failing to intervene, not by using excessive force himself. Yet, according to Defendants, the SAC does not provide that Mayor Rockingham had previous knowledge of Officer Bogdala failing to intervene in other incidents. ‘Therefore, the Mayor’s actions could not have conveyed to Officer Bogdala “that similar actions would be of no consequence in the future.”’. First, drawing all reasonable inferences in Plaintiff’s favor, the Court infers that, as a practical reality, if Mayor Rockingham approved of Officer Bogdala’s prior face-smashing incident with Sharon Jackson, his approval would apply equally (if not more so) to a failure to intervene—an omission being arguably less offensive than an overt act. Second, Defendant’s argument, which cites no supporting case law, misses a point made clear in Seventh Circuit precedent—that an affirmative act of excessive force and a failure to intervene in another officer’s use of excessive force both violate § 1983. . . To hold otherwise would insulate non-intervening officers from liability for ‘reasonably foreseeable consequences of the neglect of their duty to enforce the laws and preserve the peace.’. . Defendant’s attempt to formalistically limit the scope of Mayor Rockingham’s approval to Officer Bogdala’s misfeasance, as opposed to nonfeasance, contradicts the thrust of the case law under § 1983. At the pleading stage, Plaintiff has alleged enough factual details to support an inference that, as mayor, Rockingham knew that the law does not distinguish between misfeasance and nonfeasance and that, when he allegedly approved of Officer Bogdala’s past § 1983 violations, he effectively condoned future § 1983 violations, regardless of whether those involved misfeasance or nonfeasance.”)

***Wilbon v. Plovaniich***, 67 F.Supp.3d 927, \_\_\_ & n.16 (N.D. Ill. 2014) (“Nothing prohibits Plaintiffs from bringing a claim against McDermott for direct, personal liability and, in the alternative, a claim for supervisory liability. . . . To the extent that Defendants are arguing that Plaintiffs may

not sue both McDermott and also the City of Chicago under a theory of supervisory liability, that argument is also misplaced. The focus of the supervisory liability is McDermott's own personal knowledge of the events that affected Plaintiffs and whether she was personally responsible for those events. The City's liability, however, is not limited to McDermott's personal knowledge and participation, but rather whether Plaintiffs' deprivation is caused by an express policy, a widespread practice or custom, or the deliberate act of a policymaking official. . . McDermott is not the policymaking official of the City 'so any liability of the City based on the act of a policymaking official would be distinct from [McDermott's] liability.' . . . Having said that, summary judgment as to McDermott's supervisory liability is improper because Plaintiffs have not established whether there was probable cause to arrest Plaintiffs and thus whether there was any constitutional violation for McDermott to facilitate, approve, or condone. . . The conflicting evidence creates a jury question with respect to whether McDermott is liable under a theory of supervisory liability.")

*Estate of Heenan v. City of Madison*, 13-CV-606-WMC, 2014 WL 3778574, \*3-\*5 (W.D. Wis. July 30, 2014) (“[P]laintiff argues that defendants mistakenly rely on Eighth Amendment deliberate indifference cases, requiring a subjective notice standard, whereas plaintiff here asserts a Fourth Amendment failure to train or supervise claim where the ‘deliberate indifference standard is objective,’ requiring only ‘obvious or constructive notice.’ . . . In support of its view of the law, plaintiff cites *Farmer v. Brennan*, 511 U.S. 825, 841, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), but misreads that case. In *Farmer*, the Supreme Court described the test for *municipal* liability for deliberate indifference as described in *Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), but rejected applying an ‘obviousness’ test with respect to the individual liability of prison officials. . . . The distinction being drawn in *Farmer* is *not* between a failure to train claim under the Fourth Amendment as compared to the Eighth Amendment—as plaintiff argues—but rather between a claim against a municipality and a claim against an official of the municipality in his or her individual capacity. Plaintiff’s failure to recognize this distinction is troubling given that *all* of the other cases cited in support of applying an ‘obviousness’ or ‘constructive knowledge’ test involve claims against a municipality or a government official in his official capacity. . . . While the court understands a different standard applies in a Fourth Amendment claim (objective reasonableness) as compared to an Eighth Amendment claim (deliberate indifference), both apply a subjective standard, at least requiring knowledge for a supervisory official to be liable. . . . See, e.g., *Backes v. Vill. of Peoria Heights, Ill.*, 662 F.3d 866, 870 (7th Cir.2011) (describing supervisory liability test as requiring knowledge or reckless indifference in case involving an underlying Fourth Amendment excessive force claim). Recently, in a less discussed portion of *Ashcroft v. Iqbal* . . . the Supreme Court considered a supervisory liability claim premised on intentional discrimination under the First and Fifth Amendments. . . . After reiterating the Court’s long-standing rejection of supervisory liability premised on a theory of *respondeat superior*, the Court held that the plaintiff in that case failed to state a claim against government officials, rejecting the plaintiff’s argument for ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’ . . . Instead, the Court held that ‘each Government official, his or her title notwithstanding, is only

liable for his or her own misconduct.’ . . . As such, ‘purpose rather than knowledge’ is required to impose so-called ‘supervisory liability.’ . . . Courts initially grappled with the import of the Supreme Court’s holding in *Iqbal* with respect to supervisory liability claims, including the Seventh Circuit. . . . In an *en banc* opinion, however, the Seventh Circuit went to great lengths to clarify any uncertainty: ‘*Iqbal* held that knowledge of a subordinates’ misconduct is not enough for liability. The supervisor must want the forbidden outcome to occur.’ *Vance v. Rumsfeld*, 701 F.3d 193, 204 (7th Cir.2011) (*en banc*). . . . Judge Easterbrook, writing for the majority, went on to explain that ‘[d]eliberate indifference to a known risk is a form of intent,’ but ‘to show *scienter* by the deliberate-indifference route, a plaintiff must demonstrate that the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm.’ . . . As a result, the majority held that for the substantive due process claim at stake in *Vance* to proceed, the plaintiffs ‘would need to allege that Rumsfeld knew of a substantial risk to security contractors’ employees, and ignored that risk because he wanted plaintiffs (or similarly situated persons) to be harmed.’ . . . The court, therefore, reversed the district court’s denial of defendant’s motion to dismiss because the complaint did not allege that Rumsfeld wanted plaintiffs to be harmed ‘and could not plausibly do so.’ . . . Here, plaintiff only alleges that Chief Nobel Wray had knowledge of Heimsness’s prior violent acts in 2001 and 2006, but the complaint understandably stops short of alleging that Wray had actual knowledge of the risk Heimsness would shoot and kill an innocent citizen necessary for finding Wray *wanted* Heenan or someone similarly situated to be harmed. . . . While Heimsness allegedly sent disturbing communications in the months preceding Heenan’s shooting via the mobile command center that threatened—or at least expressed a desire—to shoot people or be otherwise violent, plaintiff does not allege that these messages reached Wray, nor is it reasonable to infer from the complaint that they did. At most, the complaint alleges that Wray was generally aware of Heimsness’s violent tendencies, and that is not enough to maintain a claim against him in his individual capacity. Rather, the proper outlet for such a claim is the one already directed against the City. *See Sanville v. McCaughtry*, 266 F.3d 724, 739 (7th Cir.2011) (“Failure to train claims are usually maintained against municipalities, not against individuals.”). Accordingly, the court will grant defendants’ motion and will dismiss Noble Wray as a defendant in this action.”)

***Boyce v. Johnson***, 13 C 6832, 2014 WL 3558762, \*5 (N.D. Ill. July 17, 2014) (“Boyce wrote letters to Godinez [Director of Illinois Dep’t of Corrections] complaining about the socket, the window, and the mattress. . . . A supervisory prison official may not turn a blind eye to alleged constitutional violations. . . . Thus, an allegation that a supervisory official knew about an alleged constitutional violation and failed to act is sufficient to state a claim for deliberate indifference. . . . Boyce’s letters to Godinez placed Godinez on notice regarding the conditions in Boyce’s cell, and Godinez did not take action based on those letters. Accordingly, Godinez’s request to dismiss the Eighth Amendment claim against him is denied.”)

***Smith v. Hartmann***, No. 12–cv–09915, 2014 WL 2134574, \*4–\*6 (N.D. Ill. May 22, 2014) (“Although *Stoneking* (or at least *Grindle*’s articulation of it) is viable law in the Seventh Circuit, the Court agrees with Defendants that our court of appeals has not had occasion to consider

whether the theory of liability recognized in *Stoneking* is cognizable in a case of police brutality. Therefore, Plaintiff is attempting to assert a new theory of excessive force liability here. The Seventh Circuit acknowledged the applicability of *Stoneking* in cases premised on due process violations stemming from invasions of one's personal security through sexual abuse. By contrast, Plaintiff's claim against Defendants here is premised on a violation of his Fourth Amendment rights stemming from allegations of excessive force during an arrest, and Plaintiff is seeking to hold supervisors liable on what is essentially a *Monell*-type theory of liability. So the allegations are different in kind—premiered on a different constitutional violation, in an entirely different context, and where a plaintiff can already hold the city responsible for unconstitutional policies/practices/customs that caused him harm. For that reason, the Court is reticent to break ground and proclaim, as Plaintiff urges, that supervisors in a police department, all the way up through a city's mayor, can be held liable for creating a 'climate' that enabled an officer to inflict harm on an arrestee, particularly when our court of appeals has not done so. However, the Court need not determine whether *Stoneking* has relevance in the police brutality context (or whether qualified immunity would shield either or both Defendants from liability if it did), because that answer would not affect the Court's ultimate determination on this motion. As mentioned, *Stoneking* does not disturb the well-settled principle in the Seventh Circuit that a supervisor cannot be held liable for a subordinate's unconstitutional conduct unless a plaintiff demonstrates that the supervisor 'kn[e]w about the conduct it, facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye for fear of what they might see.' . . . Here, for the purpose of surviving a motion to dismiss, Plaintiff has done that with respect to Police Chief Newsome. Plaintiff alleges that on September 4, 2011—just three months prior to the incident about which Plaintiff complains—Officer Hartmann 'viciously slammed' a suspect's face into the ground and into the side of his squad car. . . . The victim filed a citizen's complaint the following week, but Police Chief Newsome ensured that the complaint bypassed the internal affairs protocol, and came straight to his desk. . . . Because it did, Newsome was able to ignore the complaint and allow Officer Hartmann to go undisciplined. . . . Drawing all reasonable inferences in Plaintiff's favor, the FAC suggests that Newsome did this to ensure that Hartmann would not retaliate and expose Newsome's embezzlement. . . . Taking the facts in the light most favorable to Plaintiff, Newsome condoned Hartmann's practice of abusive treatment ( *i.e.*, viciously slamming the faces of arrestees) and, by covering up the citizen's complaint, signaled to Hartmann that similar actions would be of no consequence in the future. In that sense, it reasonably can be said that Newsome was 'personally responsible for the deprivation of the constitutional right' of which Plaintiff complains—Hartmann's smashing of *Plaintiff's* face just a few months later. . . . Irrespective of some amorphous custom, practice, or policy that Plaintiff alleges that Newsome instituted (and which, Plaintiff argues, supports the application of *Stoneking* here), Newsome, at the very least, turned a blind eye to the precise act complained of by Plaintiff, thereby conveying to Hartmann that he could perform this act with impunity. Newsome therefore facilitated the alleged excessive force inflicted on Plaintiff by Hartmann, and, as such, Plaintiff has stated a Section 1983 claim against Newsome. . . . Plaintiff, however, has not alleged personal involvement with respect to Mayor Rockingham. Plaintiff contends that Rockingham failed to implement the recommendations commissioned by the NAACP and memorialized in the 'Memorandum of Understanding Between the City of North Chicago and Minority Coalition,'

despite his knowledge of a ‘practice and pattern among the City of North Chicago’s police officers ... of using excessive force.’. . Plaintiff also alleges that Rockingham, along with Newsome, ‘prevented officers from reporting misconduct by violating the officers’ confidences when they reported this sensitive information.’. . According to Plaintiff, these acts demonstrate that Rockingham ‘established and maintained [a] policy of allowing the use of excessive force during the arrest and/or detention of accused individuals with deliberate and reckless indifference to the consequences.’. . This merely is a *Monell* claim dressed up in *Stoneking* language. . . In *Grindle*, the Seventh Circuit concluded that the Court’s prior references to *Stoneking* precluded the defendants from availing themselves of the protections of qualified immunity. . . But *Grindle* did not dispense with the requirement that, for supervisory liability to attach, a defendant supervisor must have been *personally involved* in the constitutional violation. Mayor Rockingham’s alleged failure to institute sweeping corrective measures in the department, such as those promulgated at the behest of the NAACP, amounts to mere inaction, not personal involvement. And the causal connection between Mayor Rockingham’s alleged effort to discourage officers from reporting their colleagues by breaching confidences and Hartmann’s alleged abuse of Plaintiff is too attenuated for the Court to conclude that Rockingham was ‘personally involved’ in the shattering of Plaintiff’s orbital. Plaintiff’s argument would have to be that Hartmann abused Plaintiff during his arrest, because he believed that Bogdala (his fellow arresting officer on the scene) would not report his misconduct thanks to Mayor Rockingham’s general discouragement of such a practice. Whereas Plaintiff alleges that Police Chief Newsome knew of, condoned, and facilitated Hartmann’s abuse of Plaintiff by keeping secret a recent, nearly-identical allegation, Plaintiff’s complaint does not even state that Mayor Rockingham was aware of Hartmann’s prior face-smashing incident (or that he even knew that Hartmann was a member of the city’s police force, for that matter). Accordingly, the Court concludes that Rockingham’s actions were too far removed from Plaintiff’s incident to say that he was personally involved, and Plaintiff’s allegations concerning unconstitutional policies or customs instituted by the Mayor of North Chicago must be brought as *Monell* claims against the city itself (which, the Court notes, Plaintiff has appropriately done in Count VI of his FAC). *Stoneking*, even if it did apply in the excessive force context, would not change this result. As mentioned above, the Third Circuit concluded that qualified immunity did not shield from liability the defendant principal—who personally received multiple complaints of sexual misconduct from female students, kept them hidden in secret files, and announced a corrective ‘policy’ to the band director whereby he forbade him from having one-on-one contact with female students. . . . However, the Court determined that the superintendent—who was told of some of the complaints, but took no part in the cover up—could not be held liable, because his behavior did not amount to an affirmative act that resulted in the plaintiff’s abuse. . . Here, Mayor Rockingham is more like the superintendent, who at most was aware of complaints of police abuse (by way of lawsuits against the city, if nothing else), than the principal, who actively attempted to hide complaints in a secret file. Although Plaintiff’s FAC makes the conclusory allegation that Rockingham and Newsome ‘approved and condoned the City of North Chicago’s police officers using excessive force’ by ‘actively concealing police misconduct,’ the actual facts that Plaintiff alleges do not support this conclusion with respect to Mayor Rockingham. Again, the FAC is devoid of allegations that Mayor Rockingham covered up (or even knew) of Officer Hartmann’s

previous face-smashing incident. Therefore, the allegation that Rockingham covered up incidents of police misconduct strikes the Court as a ‘formulaic recitation’ of the language from the case law, and one that does not give Defendant ‘fair notice of what the \* \* \* claim is and the grounds upon which it rests.’ . . In short, even under a *Stoneking* theory of liability, Plaintiff would fail to state a claim that Rockingham caused his injuries. That said, if Plaintiff is in possession of additional factual allegations with respect to Mayor Rockingham that he believes may overcome the deficiencies identified by the Court, he may amend his first amended complaint within 28 days.”)

***Payne v. City of Chicago***, No. 13 C 8643, 2014 WL 585310, \*1, \*2 (N.D. Ill. Feb. 14, 2014) (“[S]ome lawyers appear to believe that because the filing fee for a federal action is a flat \$400 irrespective of the number of defendants sought to be placed in its crosshairs, that provides a license to name anyone on that side of the ‘v.’ sign even though such inclusion may be clearly wrong. And here, targeting Superintendent McCarthy *is* clearly wrong. For one thing, naming him in his official capacity is at odds with established Supreme Court authority ( *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)), which really treats such a claim as one brought against the City of Chicago—which is already named as a defendant itself. Accordingly that ‘official capacity’ allegation cannot stand. Even more fundamentally, nothing in the Complaint asserts personal involvement on Superintendent McCarthy’s part. Complaint ¶ 7 alleges his ‘asserted responsibility for training, supervision, and conduct’ of the Officer defendants, but the nature of the conduct with which those Officers are charged is not such as to create a causal link between any such responsibility and their actions. There is really no need to elaborate—or, indeed, to call for a response by Payne’s counsel. Superintendent McCarthy’s motion for his dismissal as a defendant is granted.”)

***Bohannon v. City of Milwaukee***, 998 F.Supp.2d 736, 748 (E.D. Wis. 2014) (“[T]he plaintiff alleges only the conclusory statements that Flynn and Mucha knew or should have known about the officers’ pattern of engaging in improper searches (Compl.¶ 64) and ‘facilitated, approved, condoned, turned a blind eye to, and/or purposefully ignored’ that misconduct (Compl.¶ 65). Those limited and conclusory allegations, by themselves, would not be sufficient to raise the plaintiff’s supervisory liability claim above the speculative level; however, in conjunction with the other facts alleged in the complaint, the plaintiff clears that bar. As discussed more fully above, the plaintiff claims that the City and MPD received many complaints relating to improper searches prior to the incident in question. . . The plaintiff also asserts that the City and MPD failed to take any action to address those complaints. . . The defendants point out that, otherwise, ‘there are no allegations that support plaintiff’s assertion that Chief Flynn or Sergeant Mucha was aware of a pattern of unlawful searches being committed by [defendant officers] or other Fifth District officers.’ . . Be that as it may, the Court may draw the reasonable inference that, by virtue of their positions as supervisors, Flynn and Mucha both received reports of the many illegal-search complaints being lodged with the City and MPD. . . Thus, the Court finds that the plaintiff has alleged sufficient factual material to have plausibly pled Flynn’s and Mucha’s knowledge; he has also adequately pled that, at the very least, those individuals turned a blind eye to the complaints they were

receiving. . . Accordingly, the plaintiff's supervisory liability claim against Flynn and Mucha is sufficiently pled under *Iqbal*, 556 U.S. at 678. The Court is, therefore, obliged to deny the defendants' motion for judgment on the pleadings in this regard.")

*Hoskin v. City of Milwaukee*, 994 F.Supp.2d 972, 983 & n.4, 984 (E.D. Wis. 2014) ("Supervisors 'need not participate directly in the deprivation [of civil rights] for liability to follow under § 1983.' . . . Indeed, so long as the supervisors 'know about the conduct and facilitate it, condone it, or turn a blind eye for fear of what they might see,' they may be held liable. . . . In other words, supervisors may be held liable under § 1983 for the actions of their subordinates if they acted 'either knowingly or with deliberate indifference.' . . . The *Backes* court reached this conclusion in relation to several police supervisors who had been sued in their individual capacity. . . . Meanwhile, the plaintiff sued Flynn in both his individual and official capacities. . . . The defendants argue that there is some difference in the standard applied to individual-and official-capacity claims, but does not cite to any case law to support that contention. . . . The Seventh Circuit applied the standard described in *Backes* to defendants sued in their official capacity in the case of *Mathews v. City of East St. Louis*, without noting any distinction between the two. . . . The Court will take the same path and will treat both the individual-and official-capacity claims against Flynn as one and the same. The Court will also ignore the defendants' argument that Hudson and Mucha cannot be held liable under a *Monell* theory because they are not official policymakers (Br. in Supp. at 16–18); the plaintiffs acknowledge that they do not raise *Monell* claims against those defendants (Pl.'s Resp. at 12 n. 1), so this argument is irrelevant. The plaintiff's allegations on the supervisory liability issue do not go very far beyond those discussed above with relation to his *Monell* claim. . . . In fact, aside from his incorporation of facts (Compl.¶ 62) and statement that he suffered damages (Compl.¶ 65), the plaintiff alleges only the conclusory statements that Flynn, Hudson, and Mucha knew or should have known about the officers' pattern of engaging in improper searches (Compl.¶ 63) and 'facilitated, approved, condoned, turned a blind eye to, and/or purposefully ignored' that misconduct (Compl.¶ 64). Those limited and conclusory allegations, by themselves, would not be sufficient to raise the plaintiff's supervisory liability claim above the speculative level; however, in conjunction with the other facts alleged in the complaint, the plaintiff clears that bar. As discussed more fully above, the plaintiff claims that the City and MPD received many complaints relating to improper searches prior to the incident in question. . . . The plaintiff also asserts that the City and MPD failed to take any action to address those complaints. . . . The defendants point out that, otherwise, 'there are no allegations that support plaintiff's assertion that Chief Flynn, Captain Hudson, or Sergeant Mucha were aware of a pattern of unlawful searches being committed by Vagnini and other Fifth District officers.' . . . Be that as it may, the Court may draw the reasonable inference that, by virtue of their positions as supervisors, Flynn, Hudson, and Mucha, all received reports of the many illegal-search complaints being lodged with the City and MPD. . . . Thus, the Court finds that the plaintiff has alleged sufficient factual material to have plausibly pled Flynn's, Hudson's, and Mucha's knowledge; he has also adequately pled that, at the very least, those individuals turned a blind eye to the complaints they were receiving. . . . Accordingly, the plaintiff's supervisory liability claim against Flynn, Hudson, and Mucha, is sufficiently pled under *Iqbal*, 556

U.S. at 678. The Court is, therefore, obliged to deny the defendants’ motion for judgment on the pleadings in this regard.”)

*See also Freeman v. City of Milwaukee*, 994 F.Supp.2d 957 (E.D. Wis. 2014) (same); *Venable v. City of Milwaukee*, 2014 WL 197917 (E.D. Wis. Jan. 15, 2014) (same)

*Potts v. Moreci*, 12 F.Supp.3d 1065, (N.D. Ill. Nov. 7, 2013) (“In *Antonelli*, the Seventh Circuit explained that the Sheriff of Cook County should not be held liable in his individual capacity for ‘clearly localized’ claims brought by inmates where he had no knowledge of the facts underlying claims. . . It explained that the Sheriff and others in high-level positions are ‘far from most of the day-to-day decisions that may have affected inmates.’ . . Under the Seventh Circuit’s distinction between ‘clearly localized, non-systemic violations’ and ‘potentially systemic’ violations, allegations of the former should be dismissed as to the Sheriff. . . The court held that the Sheriff could be held liable in his individual capacity for those potentially systemic claims that did not solely involve the plaintiff. . . Thus, while high level officials normally cannot be held liable for localized violations, they ‘are expected to have personal responsibility for systemic conditions.’ . . For example, in *Byron v. Dart*, 825 F.Supp.2d 958, 963–64 (N.D.Ill.2011), the court held that the plaintiff had adequately alleged that jail officials were liable under a failure to protect claim after the plaintiff had been attacked in his jail cell because the plaintiff alleged the defendants ‘knew there was a widespread problem of faulty cell doors.’ *Id.* at 964.”)

*Robinson v. Leonard-Dent*, No. 3:12CV417–PPS, 2013 WL 5701067, \*3 (N.D. Ind. Oct. 18, 2013) (“[E]ven in the *postIqbal* case that defendants suggest has tightened the rules on supervisory liability, the Seventh Circuit held that ‘turning a blind eye to and affirmatively covering up’ sexual abuse by a subordinate can support personal capacity liability because such conduct may be found to demonstrate the requisite discriminatory intent. *T.E. v. Grindle*, 599 F.3d 583, 588, 590 (7th Cir.2010). Robinson’s report to Morton, Morton’s then contacting Dent, and the allegation that HASB began a retaliatory investigation rather than address Dent’s harassment of Robinson, are sufficient at the pleading stage to support the possibility that the factfinder may ultimately be persuaded that Morton personally had the requisite retaliatory (and therefore discriminatory) intent and participated in the retaliation. . . .The Seventh Circuit continues to acknowledge that one with authority to take action who stands ‘idly by’ in response to complaints of discrimination may be found to have discriminatory animus. . . The requisite personal responsibility for the constitutional deprivation can take several forms: the supervisor may ‘ ‘know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see.’’ . . Dent’s successor as Executive Director, George Byers, was on the scene in time to have played a role in (or turned a blind eye to) the retaliatory investigation of AMAAB that deprived Robinson of further business opportunities with the HASB. Morton’s fellow Board members may be shown to have had knowledge of Dent’s harassing behavior and/or the complaints of Robinson or others and stood idly by, failing to intervene to halt the harassment and facilitating or condoning the allegedly retaliatory investigation afterward. Robinson alleges that Human Resources Director McDonald ‘knew of and witnessed’ Dent’s harassment of Robinson ‘but did nothing to stop it.’ . . Maintenance

Manager Fleckner allegedly also ‘knew of the harassment and did nothing to prevent it.’. . Further challenges to the viability of Count I against each of these individual defendants must await summary judgment.”)

**Rose v. Justus**, No. 13–cv–00810–MJR, 2013 WL 5488451, \*2 (S.D. Ill. Oct. 1, 2013) (“The complaint sufficiently alleges personal involvement by Defendants Officer Mike, Levy Bridges, Sgt. Nickol and Sgt. Blackburn, in that each is personally tied to an alleged constitutional violation. There is no such personal involvement alleged on the part of Sheriff Justus. However, there are allegations that it was Justus’s policy for grievances and complaints about the conditions of confinement to be ignored—the ‘ostrich’ approach. At this juncture that is sufficient to state a claim of individual liability as to Justus.”)

**Miller v. Ryker**, No. 11–cv–436–MJR, 2012 WL 3705174, \*7 (S.D. Ill. Aug. 27, 2012) (“As to Warden Hodges, Plaintiff’s complaint only alleges in one paragraph that he asked to speak with Hodges ‘about his serious medical condition’ as he passed Hodges on his way to a class. The Court does not find that this allegation is sufficient to have given Hodges actual knowledge of a substantial risk of harm, and supervisory liability does not apply to § 1983 actions, *Burks v. Raemisch*, 555 F.3d 592, 596 (7th Cir.2009); *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir.2001). Plaintiff’s claim against Hodges is dismissed without prejudice.”)

**Thomas v. Illinois**, No. 11–cv–571–MJR, 2012 WL 3263587, \*11, \*12 (S.D. Ill. Aug. 9, 2012) (“Plaintiff names Defendants Michael Puisis (Medical Director of the Illinois Department of Corrections—”IDOC”), Michael Randle (IDOC Director), Derwin Ryker (Lawrence Warden), and Phillip Martin (Lawrence Medical Administrator) in the complaint. However, he does not identify any actions taken by any of these individuals that caused the constitutional deprivations giving rise to this lawsuit. Instead, he appears to assert claims against them based on their role as administrators with supervisory authority over the Defendants who caused the alleged deprivations. For example, in the case of Defendant Martin, Plaintiff claims he ‘gave nursing staff [Defendants Brooks and Morris] the assumed authority to circumvent ... rules, policies, training’ in order to retaliate and harass Plaintiff (Doc. 1, p. 24). In essence, Plaintiff seeks to impose supervisory liability. Contrary to the belief of many prisoner civil rights litigants, there is no supervisory liability in this type of lawsuit.”)

**Young v. Wexford Health Sources**, No. 10 C 8220, 2012 WL 621358, at \*5 (N.D. Ill. Feb. 14, 2012) (“Plaintiff contends that he is not being seen by health care providers with any regularity and that, at least at the time he filed suit, his medical condition—as well as the bleeding and severe chronic pain associated with that ailment—went largely undiagnosed and ‘virtually untreated.’ Plaintiff alleges that because Warden Hardy denied his emergency medical grievances, as well as appointment cancellations due to lockdowns and missing paperwork, Plaintiff went unseen by medical staff for six months. Where, as here, Plaintiff informed correctional officials that he was being denied access to the health care unit, those officials may be liable under 42 U.S.C. § 1983

for their purported inaction. . . Plaintiff's Eighth Amendment claims against Defendants Hardy and Harris will proceed.”)

**Jones v. Feinerman**, No. 09 C 03916, 2011 WL 4501405, at \*5 (N.D. Ill. Sept. 28, 2011) (“It is not clear what impact, if any, *Iqbal* has on the line of cases that hold supervisors may be held liable if they ‘facilitated, approved, condoned, or turned a blind eye’ to constitutional violations. *E.g.*, *Trentadue v. Redmon*, 619 F.3d 648, 652 (7th Cir.2010). Perhaps this is all just a way of saying what the Seventh Circuit has previously held, that ‘a supervising prison official cannot incur § 1983 liability unless that officer is shown to be personally responsible for a deprivation of a constitutional right.’ *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir.1996); *see also Vinning-El v. Evans*, \_\_\_ F.3d \_\_\_, 2011 WL 4336661, at \*1 (7th Cir., Sep.16, 2011) (“Section 1983 does not authorize ‘supervisory liability.’”) (citation omitted). Or perhaps *Iqbal* has set a more demanding standard than previously set for supervisors to be held responsible for conduct in which they did not personally engage. In this case, however, there is no need to reconcile the standards: here, Jones has not alleged any personal conduct or responsibility of Osafo at all, other than the conclusory allegations that address ‘Defendants’ as a group. . . For Osafo to be personally liable, the complaint must allege some causal connection between Osafo personally and the violation of Jones’s constitutional rights.”)

**Tillman v. Burge**, 813 F.Supp.2d 946, 972-75 & n.14 (N.D. Ill. 2011) (“Plaintiff has alleged that Burge was present at Area 2 during his interrogation, that the physical evidence of his torture was apparent to those at Area 2, and that Burge ‘encourag[ed], condon[ed] and permitt[ed]’ his torture. . . Though more details concerning Burge’s involvement would be useful, the court concludes these allegations are sufficient to support the inference that Burge was indeed personally involved in the deprivation of Plaintiff’s constitutional rights. . . . In *Ashcroft v. Iqbal*, . . .the Supreme Court made clear that the bar on *respondeat superior* liability applies in the *Bivens* context just as it does in the § 1983 context. In this court’s view, that case plows no new ground as to the allegations alleged here-it merely confirms what the existing § 1983 case law, including *Steidl*, has long held-‘a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’ . . Plaintiff does also allege that Burge ‘supervised, encouraged, sanctioned, condoned and ratified brutality and torture by other detectives and supervisors’ . . . , but those allegations are in addition to allegations that Burge was personally involved in the conduct underlying Plaintiff’s claims. . . . Finally, Plaintiff makes claims against Daley and Martin for their alleged involvement in his coercive interrogation. Plaintiff alleges that the repeated failures of Martin and Daley to intervene and prevent torture at Area 2, despite their knowledge that it was occurring, proximately caused Plaintiff’s torture. . . . With respect to his due process claims, Plaintiff has not alleged that Daley or Martin were personally involved in his torture, an allegation necessary to establish their liability under § 1983. . . .As explained earlier, for a supervisor to be liable for a constitutional deprivation, he ‘must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he] might see.’ . . . Plaintiff asserts that the Tenth Circuit has held that § 1983 liability can attach where ‘[a] defendant supervisor’s promulgation, creation, implementation, or utilization of a policy ... caused

a deprivation of plaintiff's rights.' Notably, the case he cites, *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir.2010) itself recognizes that *Iqbal* has called this holding into question, and that only 'defendants whose own individual actions cause a constitutional deprivation' face § 1983 liability. In any event, authority in this Circuit requires a showing that a supervisor's actions be tied to the specific constitutional violation at issue in order for the supervisor to be liable. . . . [T]oo many variables stand in the way of a determination that there is a causal connection between Daley and Martin's failure to investigate and the deprivation of Plaintiff's rights. The many years it has taken for the allegations of torture at Area 2 to come to light bear this out-the notion that the wrongdoing would have stopped once an inquiry was launched is simply too tenuous. *Iqbal* has reaffirmed the Supreme Court's unwillingness to extend supervisory liability for constitutional violations in the civil context. Absent any controlling authority for a finding of liability under a 'failure to investigate' theory, the court sustains these Defendants' objections, and grants Daley and Martin's motions to dismiss Count IV.'")

***Kitchen v. Burge***, 781 F.Supp.2d 721, 736 (N.D. Ill. 2011) ("The parties dispute at length whether 'supervisory liability' is allowed under § 1983. On inspection, however, the dispute is merely verbal. The Seventh Circuit has recognized liability for faulty supervision. [citing cases] Here, Kitchen is not seeking to hold Martin vicariously liable for others' actions; he claims that Martin is primarily liable for failing to stop others from violating his constitutional rights. . . His liability, if any, is not for the officers' actions but for his own action in failing to stop them. Accordingly, the municipal defendants' motion to dismiss Count IV is denied.'")

***Rojas v. Town of Cicero***, No. 08 C 5913, 2010 WL 4065483, at \*10, \*11 (N.D. Ill. Oct. 14, 2010) ("As the Seventh Circuit explained in *T.E. v. Grindle*, 599 F.3d 583 (7th Cir.2010), . . . after the Supreme Court's decision in *Ashcroft v. Iqbal*, . . . 'an equal protection claim against a supervisor requires a showing of intentional discrimination.' . . Thus, although prior Seventh Circuit precedent 'would have previously allowed a plaintiff to recover from a supervisor based on that supervisor's "deliberate indifference" toward a subordinate's purposeful discrimination,' after *Iqbal* a plaintiff must also show that the supervisor possessed the requisite discriminatory intent.' . . This same standard applies to claims under the First Amendment. . . In this case, Rojas relies on the pre-*Iqbal* standard, arguing that Dominick is liable for his 'deliberate indifference.' Specifically Rojas contends that Dominick had a 'head-deep-in-the-sand approach' and was 'unwilling to take a stand against retaliatory actions and threats made by Larry Dominick' and instead 'condoned' those actions. . . As explained in *Grindle*, however, the relevant consideration is not whether Dominick condoned discriminatory actions but rather whether Derek Dominick possessed the requisite discriminatory intent.'").

***Vetter v. Dozier***, No. 06-cv-3528, 2010 WL 1333315, at \*26 (N.D. Ill. Mar. 31, 2010) ("Recent Seventh Circuit case law indicates that the standards for supervisory liability in this circuit have been established for more than twenty years, and the case law suggests that qualified immunity is less likely when a defendant helps to cover up misconduct. *T.E. v. Grindle*, \_\_ F.3d \_\_, 2010 WL 938047, at \*3, \*4 (7th Cir. Mar.17, 2010) (citing *Jones*, 856 F.2d 985). In sum, if supervisors were

deliberately indifferent and caused their subordinate's misconduct, then they can be held liable under well delineated case law.”).

***Petrovic v. City of Chicago***, No. 06 C 6111, 2010 WL 1325709, at \*4, \*5 (N.D. Ill. Mar. 30, 2010) (“[I]n the instant case, because the following conclusory allegations merely parrot the elements of a supervisor liability claim, the Court holds that they are not entitled to the presumption of truth:

(1) ‘The Supervisory Defendants knew that the City maintained the widespread and settled policy and practice of failing to adequately train, supervise, discipline, and otherwise control its officers.’ (“m.Compl. & 41(a).)

(2) ‘They also knew that the maintenance of these practices would result in preventable police abuse, including the type of constitutional harm inflicted on Plaintiff.’ (*Id.*)

(3) ‘The Supervisory Defendants oversaw, acquiesced in, and even condoned the above-described policies and practices and refused to take steps to correct them.’ (*Id.* & 41(b).)

(4) ‘[T]he Supervisory Defendants caused and participated in the denial of Plaintiff’s constitutional rights’ by failing to: (a) ‘monitor police officers and groups of officers who violate civilians’ constitutional rights;’ (b) ‘discipline police officers who violate civilians’ constitutional rights;’ and (c) ‘implement an effective early warning system to identify police officers and groups of officers who systematically violate civilians’ constitutional rights.’ (*Id.*)

(5) ‘With respect to the Defendant Officers in this case, the Supervisory Defendants knew that the Defendant Officers had a practice of committing misconduct similar to that alleged by Plaintiff. Yet, the Supervisory Defendants approved, assisted, condoned and/or purposely ignored the Defendant Officers’ prior misconduct.’ (*Id.* & 41(d).)

(6) ‘As such, the Supervisory Defendants were, at all times material to this Complaint, deliberately indifferent to the rights and safety of Plaintiff.’ (*Id.* & 41(e).)

(7) ‘As a result of the unjustified and excessive use of force by Defendant Officers, the actions and inactions of the Supervisory Defendants and the City’s policy and practice, Plaintiff has suffered pain and injury, as well as emotional distress.’ (*Id.* & 42.)

Plaintiff argues that the *Iqbal* Court recognized that allegations that supervisors condoned discrete wrongs, *i.e.*, the beatings by lower-level governmental actors, could be grounds for inferring that the supervisors acted with wrongful intent. See 129 S.Ct. at 1952. Although the *Iqbal* Court stated that under some circumstances that could be true, it also stated that it would not be an appropriate inference in a section 1983 case against supervisors because respondeat superior liability is inapplicable. *Id.* The *Iqbal* Court explained that because the doctrine was inapplicable to Ashcroft and Mueller, plaintiff failed to state a claim in that he provided conclusory, formulaic allegations that supervisors ‘knew of, condoned, and willfully and maliciously agreed’ to subject plaintiff to such beatings without any factual allegation to suggest that they themselves intended to discriminate against him. *Id.* at 1951-52. So it is in this case. Petrovic has included formulaic recitations of the elements of a supervisor liability claim without any *factual* allegations to create a plausible suggestion that Cline and Morris, not merely indirectly approved, but encouraged the specific incident of misconduct involving Petrovic and Chevas or in some way directly participated in the incident. Thus, the Court grants Cline and Morris’ motion to dismiss and dismisses all claims against them without prejudice.”).

***Fox v. Ghosh***, No. 09 C 5453, 2010 WL 345899, at \*5 (N.D. Ill. Jan. 26, 2010) (“In this case, Fox has not sufficiently alleged that McCann is personally liable for his purported injuries. Fox’s Complaint merely avers that McCann ‘knew about [the other defendants’] conduct and facilitated, approved, condoned, or turned a blind eye to it’ (1st Am.Compl.&& 19, 26), and ‘promulgated rules, regulations, policies, or procedures as Warden of Stateville Correctional Center that directly resulted in [the other defendants’] conduct.’ (*Id.*) The court finds that these allegations are precisely the type of ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements’ which the Supreme Court found insufficient to state a claim against a government official in *Iqbal*. . . . Fox’s section 1983 claims against McCann, therefore, are dismissed without prejudice.”)

***Terry v. Cook County Dept. of Corrections***, No. 09-cv-3093, 2010 WL 331720, at \*3 (N.D. Ill. Jan. 22, 2010) (“Thus, the gravamen of Plaintiff’s individual capacity claim against Dart is his alleged failure to train and to implement policies designed to provide constitutionally adequate healthcare to pretrial detainees in the Cook County Jail. At first blush, Plaintiff’s claim against Dart appears to be more akin to an official capacity claim. . . . However, the Seventh Circuit has stated that ‘if [a] supervisor personally devised a deliberately indifferent policy that caused a constitutional injury, then individual liability might flow from that act.’ *Armstrong v. Squadrito*, 152 F.3d 564, 581 (7th Cir.1998) . . . . Read in the light most favorable to Plaintiff, the amended complaint alleges that Dart failed to correct a deliberately indifferent policy that caused a constitutional injury. The Court does not see a material difference between a policymaker’s failure to correct an unconstitutional policy and a policymaker’s establishment of such a policy in the first place. Therefore, Defendants’ motion to dismiss the individual capacity claim against Dart is denied.”).

***Estate of Allen ex rel. Wrightsman v. CCA of Tennessee, LLC***, No. 1:08-cv-0774-SEB-TAB, 2009 WL 2091002, at \*3 (S.D. Ind. July 14, 2009) (“Plaintiffs do not rely solely on a theory of supervisory liability. Plaintiffs allege that Sheriff Anderson had ‘knowledge of the substandard medical care provided to inmates at Jail # 2 by CCA, yet he remained indifferent to the medical needs of inmates at the facility, including the needs of Brian Keith Allen resulting in his death.’ . . . With this allegation Plaintiffs do not rely on a theory of supervisory liability. Instead, by alleging that Sheriff Anderson did nothing despite knowing that Allen and others were not receiving necessary medical attention, Plaintiffs attempt to hold Sheriff Anderson liable for his own conduct, not the misconduct of his subordinates.”)

***Levy v. Holinka***, 2009 WL 1649660, at \*3 (W.D. Wis. June 11, 2009) (“[Plaintiff] alleges that defendants Holinka and Feathers are responsible for the policies that prevent the recognition of Hebrew Israelites and prohibit the wearing of turbans. He alleges that defendant Jones enforced these policies when he confiscated his kufi and that defendants Holinka and Feathers approved this decision. However, plaintiff should be aware that supervisors cannot be held liable for mere ‘knowledge and acquiescence’ of their subordinates’ unconstitutional acts. *Iqbal*, 129 S.Ct. at

1948. If as this case progresses, it becomes apparent that defendants Holinka and Feathers merely knew of and consented to defendant Jones’s alleged wrongdoing, he will not be able to establish their liability for any constitutional violation.’ [RFRA claim]).

## **EIGHTH CIRCUIT**

*McGuire v. Cooper*, 952 F.3d 918, 922-23 (8th Cir. 2020) (“Sheriff Dunning contends that, even taking in a light most favorable to McGuire all of the reported incidents of prior sexual misconduct by deputies employed by the Sheriff’s Office, he is entitled to qualified immunity because these incidents are insufficient to provide notice that an on-duty deputy might sexually assault a member of the public like Cooper did. The circumstances of the prior incidents are contained in the record at paragraph 86 of Sheriff Dunning’s declaration dated March 28, 2018. The district court listed in a footnote fifteen prior incidents of sexual misconduct that Sheriff Dunning knew about, but neither made detailed findings regarding them nor reasoned how they were similar to the sexual misconduct at issue in this case. Constraining ourselves to the version of facts in the record that the district court assumed or likely assumed in favor of McGuire, we conclude that the prior instances of sexual misconduct are not similar in kind or sufficiently egregious in nature to demonstrate a pattern of sexual assault against members of the public by deputies. In order to establish a pattern, our case law requires a showing of more than general allegations of a wide variety of sexual misconduct. It requires the other misconduct to ‘be very similar to the conduct giving rise to liability. . . . Put another way, the conduct must be ‘sufficiently egregious in nature.’. . . In this case, the other misconduct included trading cigarettes for a detainee’s display of her breasts; licking a minor stepdaughter’s nipples during horseplay; asking ‘deeply personal and inappropriate questions’ to members of the public; engaging in verbal sexual harassment; having consensual sexual contact at the office; and abusing work hours to conduct personal business or ask women out on a date. While this behavior is troubling, it is not enough to put a supervising official on notice that a deputy might use his position and authority to separate a woman from her boyfriend at the park and coerce her to engage in sexual contact with him. The summary judgment record, even when viewed in a light most favorable to McGuire, fails to establish that Sheriff Dunning received notice of a pattern of similar unconstitutional acts being committed by his subordinates. A reasonable officer in Sheriff Dunning’s position would not have known that he needed to more closely supervise his deputies, including Cooper, or they might sexually assault a member of the public.”)

*Barton v. Taber*, 908 F.3d 1119, 1125-26 (8th Cir. 2018) (“The record is devoid of any evidence establishing that Wright knew that Martin was inadequately trained or supervised. Regina Barton’s brief asserts that ‘Martin has been involved in several lawsuits, the majority of which involve allegations of denial of medical care,’ but she cited no evidence to support that assertion. . . . While Martin testified that she had been sued by four plaintiffs, there is no indication that the claims against her involved the denial of medical care. Moreover, there is no evidence regarding the nature of Martin’s alleged acts or omissions, when those acts or omissions occurred, or when the plaintiffs filed suit. In the absence of such evidence, the mere assertion of prior suits does not support an

inference that Wright had notice on September 12, 2011, that the County’s training procedures and supervision were inadequate and likely to result in constitutional violations.”)

*Marsh v. Phelps County*, 902 F.3d 745, 754-56 (8th Cir. 2018) (“Marsh’s claim that Samuelson and Gregg ‘knew or should have known’ their actions or omissions created a substantial risk of injury to Marsh evinces a negligence standard not contemplated under § 1983. . . ‘To establish personal liability of the supervisory defendants, [Marsh] must allege specific facts of personal involvement in, or direct responsibility for, a deprivation of [her] constitutional rights.’. . . As to Marsh’s failure-to-train claim, ‘[a] supervisor’s failure to train an inferior officer may subject the supervisor to liability in his individual capacity only “where the failure to train amounts to deliberate indifference to the rights of persons with whom the [officers] come into contact.”’. . . Overarching these claims is qualified immunity. A supervising officer will not be individually liable for an otherwise unlawful act if he is entitled to qualified immunity. Qualified immunity protects government officials from liability for civil damages in their individual capacities if their conduct did not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’. . . Marsh does not allege that Samuelson or Gregg ordered or directed Campana to sexually assault female inmates, or Marsh particularly. Thus, their alleged liability cannot be based on direct participation in this constitutional violation. In this action, Marsh alleges that Samuelson and Gregg failed to protect her from the substantial risk of harm that Campana presented to herself and other inmates. She argues the evidence that Campana might possibly have problems working around females, that he was counseled to be careful with his interactions lest he open himself up to a law suit, the verbal complaints of Johnson not wanting to work alongside Campana, and the evidence of Campana’s character while performing his job duties, all support an inference that Samuelson and Gregg were aware of the risk Campana posed to female inmates. Marsh claims as to Samuelson that it was his inaction against the ‘known’ danger Campana posed that establishes his liability. Sheriff Samuelson is entitled to qualified immunity unless he had notice of a pattern of conduct that was sufficiently egregious in nature. Qualified immunity from supervisory liability turns on what Samuelson knew of Campana’s actions. . . Here, there is insufficient evidence to infer that Samuelson knew of any danger posed by Campana, and most certainly he did not receive notice of a pattern of unconstitutional acts. Much of the problem in this matter is that the evidence Marsh points to as creating material fact issues, is largely information garnered *after* Campana’s suspension. That it became known later, when Campana no longer had a presence at the jail, there were red flags lurking but unknown at the time of his hiring does not create liability for Samuelson, nor does it create a fact issue on appeal when these facts were not known by Samuelson prior to Campana’s suspension. . . . On these facts, a reasonable officer in Sheriff Samuelson’s shoes would not have known that he needed to more closely supervise Campana. . The district court correctly granted Samuelson qualified immunity. . . . Marsh claims that there were written policies that prohibited male officers from being in the female cells and claims without record citation that Samuelson and Gregg were aware Campana ‘openly defied’ those policies. ‘Assuming without deciding that “turning a blind eye” could ever constitute actual notice’ of wrongdoing sufficient to support a constitutional claim, being aware that Campana violated jail policy, without more, by

accompanying female inmates in their cells ‘falls far short of notice of a pattern of conduct that violated’ Marsh’s constitutional rights. . . .On the facts before us, neither Gregg (nor Samuelson) had information that would have raised an inference that Campana was violating his duties as an officer by sexually assaulting female inmates. It is not a reasonable inference on these facts, for example, to assume that a general claim that someone might possibly have a problem working with women indicates that individual poses a threat of sexually assaulting women.”)

***Saylor v. Nebraska***, 812 F.3d 637, 644-45 (8th Cir. 2016) (“As for the named medical defendants, Dr. Kohl, Dr. White, Dr. Weilage, and Dr. Perez, none were treating physicians. Thus, these defendants also acted in a supervisory capacity. ‘To impose supervisory liability, other misconduct [by the medical defendants] must be very similar to the conduct giving rise to liability.’ *Livers v. Schenck*, 700 F.3d 340, 356 (8th Cir.2012). This means that there is no real vicarious liability. . . . Rather, to be liable under § 1983 the medical defendants had to personally violate Saylor’s rights or be responsible for a systematic condition that violates the Constitution. . . . Saylor’s main argument is that the treatment that occurred after Dr. Christensen left NSP rises to the level of cruel and unusual punishment. Dr. Christensen’s treatment plan was three-part: regular psychotherapy treatment, medication, and a safe environment. The medical defendants attempted to provide Saylor with another psychiatrist at NSP, ultimately found him another psychiatrist at TSCI, continued medication as they saw fit within their independent medical judgment, and gave him his requested private cell. To the extent there was any change in Dr. Christensen’s treatment plan, Saylor requested some and agreed to other deviations. Specifically, Saylor stated he was willing to forgo seeing a doctor so long as he could continue taking his medications. After the meeting with Dr. Baker wherein she suggested easing him off Seroquel because it did not seem to be helping and was causing low blood pressure, Saylor agreed to continue taking Xanax. Throughout his time of incarceration, the record shows that Defendants met Saylor’s medical needs beyond the minimum standard required. Defendants were aware of his medical needs and took steps to meet those needs. Because Saylor cannot show that Defendants acted with deliberate indifference, there was no deprivation of his Eighth Amendment rights, and thus, Defendants are entitled to qualified immunity.”)

***S.M. v. Krigbaum***, 808 F.3d 335, 340-42 (8th Cir. 2015) (“When a supervising official who had no direct participation in an alleged constitutional violation is sued for failure to train or supervise the offending actor, the supervisor is entitled to qualified immunity unless plaintiff proves that the supervisor (1) received notice of a pattern of unconstitutional acts committed by a subordinate, and (2) was deliberately indifferent to or authorized those acts. . . . This rigorous standard requires proof that the supervisor had notice of a pattern of conduct by the subordinate that violated a clearly established constitutional right. Allegations of generalized notice are insufficient. . . . For purposes of this appeal, Krigbaum concedes that Edwards’s sexual assaults deprived plaintiffs of a clearly established constitutional right to substantive due process when he committed ‘an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective.’ . . . Sheriff Krigbaum is entitled to qualified immunity unless he had notice of a pattern of conduct that was sufficiently egregious in nature. Qualified immunity from

supervisory liability turns on what Sheriff Krigbaum knew of Edwards’s actions as tracker, not what Drug Court Administrator Graham–Thompson or Commissioner Sullivan knew. . . . Assuming without deciding that ‘turning a blind eye’ could ever constitute actual notice, and that Krigbaum knew of this conduct, being aware that Edwards violated jail policy by taking Drug Court participants out for a cigarette break falls far short of notice of a pattern of conduct that violated plaintiffs’ rights to substantive due process. . . . Like the defendant sheriff in *Walton*, Krigbaum acted to fire Edwards as soon as Krigbaum learned of Edwards’s egregious misconduct. . . . In addition to notice of a pattern of unconstitutional conduct, plaintiffs must present sufficient evidence that Krigbaum acted with deliberate indifference to their rights. When the issue is qualified immunity from individual liability for failure to train or supervise, deliberate indifference is a subjective standard that ‘entails a level of culpability equal to the criminal law definition of recklessness.’ . . . [Plaintiffs] must prove [Krigbaum] *personally knew* of the constitutional risk posed by [his] inadequate training or supervision’ of Edwards. . . . Plaintiffs also rely on our statement that to be liable ‘[t]he supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he] might see.’ . . . The statement preceded the Supreme Court’s decision in *Farmer* and therefore must be ignored to the extent it is inconsistent with the subjective test for deliberate indifference. Here, plaintiffs presented no evidence that Krigbaum had knowledge of sexual misconduct by Edwards that would create an inference Krigbaum turned a blind eye to or consciously disregarded a substantial risk of the constitutional harm Edwards was causing—conscience-shocking violations of plaintiffs’ substantive due process rights by a member of the Sheriff’s Department performing duties for the Drug Court.”)

***Jackson v. Nixon***, 747 F.3d 537, 545 (8th Cir. 2014) (“To state a claim against Warden Burgess, Jackson must plead facts to show that Burgess was directly involved in making, implementing or enforcing a policy decision that ‘create[d] unconstitutional conditions.’ . . . Our case law is clear that the warden’s general supervisory authority over prison operations does not make him liable under § 1983. . . . We note that personal involvement may be assessed differently depending on the alleged constitutional violation at issue. In cases regarding prison violence, for instance, it can be difficult to demonstrate the warden’s ‘knowledge of, or connection with’ individual incidents between guards and prisoners or among prisoners. . . . Here, although Jackson challenges the curriculum of a treatment program—the choice of which was inherently a policy decision—and its effect on him, his conclusory statement that Warden Burgess ‘knew or should have known’ of the alleged First Amendment violation is insufficient. Instead, Jackson must plead facts that plausibly show direct involvement by the warden in the formation, implementation, or enforcement of that policy, which at this stage of the litigation he has failed to do. Jackson’s claims regarding Salsbury’s involvement are more specific than his statements regarding the other defendants. In particular, he alleged that as director of the treatment program, she could have allowed him to avoid the religious portions of the program but still remain enrolled in order to comply with his parole stipulation. . . . The scope of her authority as to the OUTP curriculum and inmates’ participation in it is unclear. Even if she did not determine the OUTP curriculum, however, the claim concerns her ability to help ameliorate the constitutional violation alleged. . . . Affording Jackson reasonable inferences from the facts in his complaint, we find that he has plausibly alleged Salsbury’s personal involvement.”)

***Ellis v. Houston***, 742 F.3d 307, 325, 326 (8th Cir. 2014) (“Long before the actions of supervisors in this case, the Supreme Court had recognized employee rights to be free from racial harassment and retaliation in *Jones*, 541 U.S. at 383, and *CBOCS*, 553 U.S. at 451. In light of this preexisting law it was readily apparent that a ‘continuous racially invidious climate’ in a penitentiary, *Snell*, 782 F.2d at 1099, and undertaking ‘systematic[ ]’ retaliation following complaints, *Kim*, 123 F.3d at 1052, would violate clearly established rights. . . .The black officers presented evidence here that the Nebraska penitentiary’s own administrative regulation 112.07 recognized that inflammatory racial comments and jokes violate employee rights. Any reasonable supervisor would have recognized that racial slurs and remarks like those used here would illegally affect the working environment. . . .As in the prison in *Snell*, there is also evidence that conduct by the supervisors at the Nebraska penitentiary caused black guards to question whether white officers would come to their aid if they were in danger. . . .The evidence in this case is nearly identical to that shown to violate the law in *Allen*, including black officers being monitored more closely than white employees and told not to congregate in the yard, receiving baseless citations, and being denied career advancement opportunities. . . .We conclude that existing precedent put the supervisors on notice that such actions would violate constitutional rights. A reasonable prison supervisor would have understood that permitting and participating in racially derisive remarks and assigning inferior work assignments would violate the black officers’ rights under §§ 1981 and 1983. Based on the record evidence, Sergeant Miles has not shown that he is entitled to qualified immunity on the black officers’ harassment claims, nor have Lieutenants Stoner and Haney shown they are entitled to qualified immunity on the retaliation claims of Officer Ellis.”)

***Ellis v. Houston***, 742 F.3d 307, 327, 328 (8th Cir. 2014) (Loken, J., concurring in the judgment, joined by Colloton, J.) (“Even if the individual defendant exercised at least some supervisory authority over the plaintiff, as in this case, liability under §§ 1981 and 1983 is not established merely by proof that the defendant was deliberately indifferent to racial harassment by his subordinates, as we suggested in *Ottman*, 341 F.3d at 761, or by proof of a ‘general racial animus in the prison’ and ‘lack of response by the supervisors,’ as the courts ruled in *Snell v. Suffolk County*, 782 F.2d 1094, 1097 (2d Cir.1986), and *Allen v. Michigan Department of Corrections*, 165 F.3d 405, 410–11 (6th Cir.1999). In my view, those rulings were overruled by *Ashcroft v. Iqbal*. . . .Thus, ‘where the intent to discriminate is an element of the constitutional violation .... the plaintiffs must show that the supervisory officials *themselves* acted with an impermissible motive, not merely that they knew of their subordinates’ impermissible motives and did not put a stop to their actions.’ *Dodds v. Richardson*, 614 F.3d 1185, 1210 (10th Cir.2010) (Tymkovich, J., concurring), *cert. denied*, 131 S.Ct. 2150 (2011). Applying this standard to a case where multiple co-workers are accused of engaging in racial jokes, taunts, and insults that, over an undefined period of time, created a hostile work environment for five minority plaintiffs, is a complex task. It is not enough that a defendant ‘participated’ in the racial taunts and insults and turned a blind eye to harassing conduct by his subordinates. Plaintiffs must prove he acted (and failed to act) for the *purpose* of creating a hostile work environment for the plaintiffs, that is, that he intended to alter the terms and conditions of their employment through severe and pervasive racial harassment.

Determining the liability of an individual supervisor or co-worker in this type of case is very different than determining when the public employer is liable for the existence of such a hostile work environment in its workplace. *See Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2441–42 (2013). Viewing the current record in the light most favorable to plaintiffs, I agree there is sufficient evidence of Sgt. Miles’s sustained participation in racial harassment to preclude summary judgment dismissing the hostile work environment claims against him. Plaintiffs allege that Miles made offensive ‘jokes’ regularly over the course of a few months in front of the entire first shift, with one witness describing it as ‘almost like a daily occurrence.’ Miles made the majority of the alleged derogatory comments at roll call, and plaintiffs testified that the harassment was worse when he was there. Though the record suggests that Sgt. Miles was not in charge at roll call, he was an employee of superior rank. . . Even if the insensitive comments were initially thought to be mere teasing or joking, a jury could reasonably infer that a supervisor who continued to participate in the hazing after Ellis, one of the targets, exclaimed, ‘damn the jokes’ and ‘enough is enough,’ was intentionally creating a hostile work environment. Taking all of these circumstances into account, I agree there is enough evidence in this record to submit to a jury whether Sgt. Miles participated in sufficiently severe or pervasive racial harassment with the purpose of creating a hostile work environment for one or more of these plaintiffs.”)

*Livers v. Schenck*, 700 F.3d 340, 356, 357 (8th Cir. 2012) (“Notice of allegations Commander Kofoed committed dishonest acts unrelated to handling evidence is not sufficient to support Sheriff Dunning’s liability for a failure to supervise. . . . The district court’s finding that some DCSO employees knew of Commander Kofoed’s ‘administrative lapses’ is legally insufficient to impose supervisory liability. . . . Nor does our own review of the record reveal notice to Sheriff Dunning. . . . Our cumbersome review of more than 65 bound volumes and 40 video DVDs drew a blank. There is no evidence, or reasonable inference from any evidence, indicating Sheriff Dunning had notice Commander Kofoed may have mishandled evidence in this or any other investigation until after the Stock investigation ended, too late to prevent injury to Livers. Livers also alleges Sheriff Dunning’s supervision was inadequate because he did not properly investigate and discipline DCCSI employees for misconduct. Livers contends Sheriff Dunning never disciplined DCCSI employees for possible mishandling of evidence, which made Commander Kofoed think he would not be punished for planting evidence. This assertion is mere speculation and argument, and is not a basis for denying qualified immunity. . . .Livers’ final contention—that Sheriff Dunning knew Captain Olson instructed Commander Kofoed not to correct Commander Kofoed’s report about the date he ‘discovered’ the blood evidence in Will’s car—is similarly unavailing. Captain Olson did not share this information with Sheriff Dunning until March 2008, long after Sheriff Dunning could have prevented injury to Livers. Again, the record does not support any finding that Sheriff Dunning received notice of the alleged misconduct in time for any failure to act by Sheriff Dunning to have injured Livers. Sheriff Dunning is entitled to qualified immunity both on Livers’ failure-to-train claim and his failure-to-supervise claim. . . .Livers also cites *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988), and *Speer v. City of Wynne, Ark.*, 276 F.3d 980, 987 (8th Cir.2002), for his claim Sheriff Dunning should be liable because he ratified Commander Kofoed’s fabrication of evidence after it occurred. *Praprotnik* and *Speer* are inapposite because they involve

municipal—not individual—liability. . .Applying those cases would violate the principle that a supervisor who does not directly participate in an employee’s constitutional violation can only be liable for the violation when it was caused by the supervisor’s failure to train or supervise his or her employees properly.”)

***L.L. Nelson Enterprises, Inc. v. County of St. Louis, Mo.***, 673 F.3d 799, 810 (8th Cir. 2012) (“Supervisors like Overall, Buckles, and Fox cannot be held vicariously liable under § 1983 for the actions of a subordinate. . . To state a claim, the plaintiff must plead that the supervising official, through his own individual actions, has violated the Constitution. . . Where, as here, the alleged constitutional violation requires proof of an impermissible motive, the amended complaint must allege adequately that the defendant acted with such impermissible purpose, not merely that he knew of a subordinate’s motive. . . The amended complaint in this case does not adequately allege that Overall, Buckles, or Fox took adverse action against Landlords Moving with retaliatory motive. Landlords Moving alleges that each of the three supervisors ‘either participated himself in the conspiracy and retaliation against [Landlords Moving], knew of the conspiracy and retaliation but failed to take action to halt it, or should have known of the conspiracy and retaliation but deliberately or willfully failed to discover it and halt it.’ . . Like the complaint in *Iqbal*, which alleged that supervisory officials ‘knew of, condoned, and willfully and maliciously agreed to’ subject the plaintiff to harsh conditions for an illegitimate reason, these asseverations against Overall, Buckles, and Fox are conclusory, and they are not entitled to a presumption of truth. . . The amended complaint asserts that Main took her actions ‘openly,’ and that they were ‘obviously designed to disadvantage Landlords Moving,’ but this probably does not suffice to allege even that the actions were known to the particular supervisory officials named as defendants . . . and it assuredly does not plead adequately that the supervisors acted with impermissible *purpose* as required by *Iqbal*. The amended complaint does allege that Fox ‘was informed on many occasions throughout 2004’ about ‘the irregularities within the Sheriff’s office,’ and then deliberately failed to take corrective action. . . But even assuming the alleged retaliation is among the ‘irregularities’ this assertion is insufficient to allege that Fox acted with a retaliatory motive. We therefore conclude that the district court properly dismissed the claims against Overall, Buckles, and Fox.”)

***Wagner v. Jones***, 664 F.3d 259, 275 (8th Cir. 2011) (“Wagner’s claim against Dean Jones is based on Dean Jones’s own actions and omissions during the hiring process. Wagner has alleged facts establishing that even though Dean Jones was on notice that Wagner’s political beliefs and associations may have impermissibly affected the faculty’s hiring recommendation, she still refused to hire Wagner for any position. Accordingly, Dean Jones’s position as a supervisor does not shield her from § 1983 liability. The district court erred in finding that qualified immunity protects Dean Jones from liability in her individual capacity. We reverse the district court’s grant of summary judgment as to Carolyn Jones in her personal capacity, and we remand for further proceedings consistent with this opinion.”)

***Schaub v. VonWald***, 638 F.3d 905, 920 (8th Cir. 2011) (“The dissenting opinion is correct that VonWald had no personal interaction with Schaub. However, VonWald was aware of his serious

medical needs and deliberately disregarded them by falsely assuring a judge the ADC could handle his needs and then failing to take the proper steps to insure that the ADC could provide adequate care. A prison official may be liable if the official has actual knowledge of a substantial risk of serious harm. . . . When VonWald saw Schaub return to the special management unit, it was incumbent upon him to take the necessary steps to provide Schaub adequate medical care, or inform Judge Williamson that the ADC could not accommodate his full-time care; VonWald's inaction constituted deliberate indifference.”)

***Doe v. Flaherty***, 623 F.3d 577, 584 (8th Cir. 2010) (“There is no question, under our precedent, that Doe’s substantive due process rights were indeed violated when Coach Smith sexually abused her. . . . Whether Wilcher is liable under § 1983 for Smith’s abusive conduct, however, is another matter. Supervisory school officials, like Wilcher, can be liable under § 1983 only if they are ‘deliberately indifferent to acts committed by a teacher that violate a student’s constitutional rights.’ . . . Therefore, the plaintiffs must prove that Wilcher had [actual] notice of a pattern of unconstitutional acts by Smith, that she showed deliberate indifference to those acts, that she failed to take sufficient remedial action, and that such failure proximately caused injury to Jane Doe.”)

***Langford v. Norris***, 614 F.3d 445, 461, 462 (8th Cir. 2010) (“In this case, it is plain that if Byus knew all the relevant facts about Langford’s and Hardin’s medical needs, the unlawfulness of failing to ensure that they received adequate treatment would have been apparent. The more difficult question centers on how much Byus actually knew about Langford’s and Hardin’s medical needs and the allegedly inadequate treatment they received. As we have said, we may take as given the facts that the district court assumed. . . . But the only relevant fact identified in the magistrate judge’s proposed findings and recommendations is that Byus sent letters to Langford and Hardin in which he acknowledged receiving letters from them. . . . The district court likely inferred that the letters from Langford and Hardin contained at least some description of their medical needs – Langford’s stomach and back pain and Hardin’s Charcot foot – and the perceived inadequacy of the treatment they had received to that point. . . . Considering these facts together, and drawing all reasonable inferences from them in favor of the plaintiffs, we are convinced that the constitutional right at issue was clearly established as of the time of the relevant conduct, such that a reasonable supervisory official would have known that his actions were unlawful. That is to say, a reasonable official standing in Byus’s shoes would have understood that ignoring Langford’s and Hardin’s complaints about receiving deficient medical care contravened clearly established principles of Eighth Amendment jurisprudence.”).

***Parrish v. Ball***, 594 F.3d 993, 1001 & n.1, 1002 (8th Cir. 2010) (“As we have held, a supervising officer can be liable for an inferior officer’s constitutional violation only ‘ Aif he directly participated in the constitutional violation, or if his failure to train or supervise the offending actor caused the deprivation.’ . . . The Supreme Court’s recent pronouncement in *Iqbal* may further restrict the incidents in which the ‘failure to supervise’ will result in liability. . . . However, we do not address the extent to which *Iqbal* so limits our supervisory liability precedent because, even under our prior precedent, Sheriff Ball is entitled to qualified immunity. . . . The summary judgment

record, even when viewed in a light most favorable to Parrish, reveals nothing that suggests that Sheriff Ball received any notice of a pattern of unconstitutional acts committed by any of Sheriff Ball's subordinates. Moreover, pursuant to the parties' stipulation of facts at summary judgment, the parties agreed that Sheriff Ball had no occasion to know that Fite was about to engage in a sexual assault. Thus, a reasonable officer in Sheriff Ball's shoes would not have known that he needed to more closely supervise Fite. Therefore, to the extent that such a failure to supervise may survive *Iqbal*, Sheriff Ball was, nevertheless, entitled to qualified immunity on such a claim.”).

*Nelson v. Correctional Medical Services*, 583 F.3d 522, 534, 535 (8th Cir. 2009) (en banc) (“Nelson claims that Director Norris violated her Eighth Amendment rights by failing to ensure that proper policies and customs were implemented with respect to the restraint of female inmates in labor . . . In a § 1983 case an official ‘is only liable for his ... own misconduct’ and is not ‘accountable for the misdeeds of [his] agents’ under a theory such as respondeat superior or supervisor liability. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948-49 (2009). 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*, 511 U.S. at 842. Nelson does not contend, nor does the record reflect, that Norris had any personal involvement in Turensky’s decision to keep Nelson restrained while she was in labor. Indeed, there is no evidence that Norris, who was responsible for managing a large state wide prison system, had any personal knowledge of Nelson or the medical care she was receiving. . . . The regulations, directives, and orders in the record suggest administrative concern for the health and safety of pregnant inmates. Without further allegation or evidence of deliberate indifference, Nelson’s Eighth Amendment claim against Norris must fail. We conclude therefore that the district court erred in denying summary judgment to Director Norris based upon qualified immunity.”)

*Cole v. Does*, No. 21-CV-1282 (PJS/JFD), 2021 WL 5645511, at \*8-9 (D. Minn. Dec. 1, 2021) (“Even when a supervising official did not directly participate in a constitutional violation committed by his inferior officers, he may still be held liable under § 1983 when his ‘failure to properly supervise and train the offending employee[s] caused a deprivation of constitutional rights.’ . . . In order to recover for a failure to train or supervise, however, a plaintiff must establish four elements: (1) the supervisor was on ‘notice of a pattern of unconstitutional acts committed by subordinates;’ (2) the supervisor ‘was deliberately indifferent to or tacitly authorized’ the pattern of unconstitutional acts; (3) the supervisor failed to take ‘sufficient remedial action’ to address the pattern of unconstitutional acts; and (4) the supervisor’s failure to remedy the pattern of unconstitutional acts proximately caused the plaintiff’s injury. . . . Cole and Hennessy-Fiske have not adequately pleaded even the first of these four elements. During the hearing, the Court questioned the parties about what, exactly, Dwyer and Salto would have to know in order to be on ‘notice of a pattern of unconstitutional acts committed by subordinates.’ . . . For example, is it sufficient if they knew that *any* state trooper had engaged in a pattern of unconstitutional acts? Or must they have known that a trooper *under their command* had engaged in such a pattern? Or must they have known that *John Does 1, 2, and 3* had engaged in such a pattern? And what type of conduct must have come to their attention? Is it sufficient if they were aware of *any* type of

unconstitutional conduct? Or must they have been aware of instances of *excessive force*? Or must they have been aware of instances of excessive force *against journalists*? With respect to the ‘who’ question, both sides agreed that it is not sufficient that Dwyer or Salto knew of unconstitutional acts by just any state trooper; Dwyer and Salto argued that they had to know of unconstitutional acts committed by John Does 1, 2, and 3, while Cole and Hennessy-Fiske argued that they had to know of unconstitutional acts committed by troopers under their command (even if those troopers were not John Does 1, 2, or 3). With respect to the ‘what’ question, Dwyer and Salto argued that they had to know of the prior use of excessive force against members of the press, while Cole and Hennessy-Fiske argued that knowledge of *any* use of excessive force—including, say, excessive force against a suspect or detainee—could suffice. Neither side, however, was able to cite case law that directly supported their positions. For purposes of this motion, the Court will assume, without deciding, that plaintiffs are correct as to both questions. In other words, the Court will assume that Cole and Hennessy-Fiske must plausibly allege that Dwyer and Salto knew that one or more troopers under their command had engaged in a pattern of excessive force (against anyone). Even if this is a correct application of the law—and the Court has its doubts . . . [,] Cole and Hennessy-Fiske have not pleaded a plausible failure-to-train or failure-to-supervise claim, because their complaint does not identify a single instance of excessive force committed by a state trooper under the command of Dwyer and Salto, much less a *pattern* of excessive force, much less a pattern of excessive force of which Dwyer or Salto was *aware*.”)

## NINTH CIRCUIT

***Richards v. Cox***, 842 F. App’x 49, \_\_\_ (9th Cir. 2021) (“Here, the parties agree that the requisite state of mind for the Supervisor Defendants—when enacting the birdshot policy in combination with get-down orders—is ‘deliberate indifference’ to inmate safety. . . The ‘deliberate indifference’ standard requires a prison official to subjectively know of and consciously disregard an excessive risk to inmate safety. . . The district court here properly determined that, viewing the material facts in a light most favorable to Richards, a reasonable jury could find that the Supervisor Defendants were deliberately indifferent to inmate safety in implementing the birdshot policy in combination with get-down orders. The district court also determined that the Supervisor Defendants’ policy was ‘so deficient’ that it constituted the moving force behind Richards’s constitutional violation. . . The Supervisor Defendants admitted that Richards was shot in the face by a correctional officer attempting to follow their birdshot policy. We agree with the district court that the Supervisor Defendants’ policy was ‘so deficient’ that it constituted the moving force behind a constitutional violation. That is because the Supervisor Defendants’ policy required bystander inmates to lie on the ground while correctional officers fired 12-gauge shotguns—loaded with birdshot cartridges containing hundreds of metal pellets—directly at the ground during non-deadly prison disturbances. To make matters worse, the Supervisor Defendants admitted that their policy did not require correctional officers to consider the safety of any bystander inmate lying on the ground before firing a 12-gauge shotgun directly at the ground.”)

*Addison v. City of Baker City*, 758 F. App'x 582, \_\_\_ (9th Cir. 2018) (“To prove supervisory liability under § 1983, courts must look at the requisite mental state for the specific constitutional violation alleged. See *OSU Student All. v. Ray*, 699 F.3d 1053, 1071–72 (9th Cir. 2012). For claims of free speech violations under the First Amendment, knowledge and acquiescence suffice for supervisor liability. *Id.* at 1075. The district court concluded that Addison presented sufficient evidence to raise a genuine dispute of material fact as to whether Chief Lohner knew about the alleged retaliation and acquiesced to it, and as to whether Chief Lohner directed the actions of his subordinates. Chief Lohner’s claim that he cannot be held liable under a supervisory liability theory is therefore unavailing.”)

*Felarca v. Birgeneau*, 891 F.3d 809, 820-21 (9th Cir. 2018) (“We first consider Vice Chancellor Le Grande, Associate Chancellor Williams, and Associate Vice Chancellor Holmes, none of whom was in the police chain of command. Because these administrators had no supervisory authority over the police who allegedly committed the violations, they did not participate in or cause such violations. . . They cannot be supervisors of persons beyond their control. . . Therefore, the district court erred in denying summary judgment to these three administrators. . . We next consider the other UC administrators, Chancellor Birgeneau, Executive Vice Chancellor Breslauer, and Police Chief Celaya, each of whom was in the police chain of command. Viewing the facts in the light most favorable to plaintiffs, as we must, we assume these officials ordered police to remove the tents, acquiesced in the use of batons to effectuate removal of the tents, and learned that batons had been used during the afternoon protest and injuries had occurred. The question, then, is whether these facts show the degree of personal involvement or causal connection required by our precedents. . . We hold that they do not. Plaintiffs’ brief does not describe any specific instance of force against those plaintiffs alleging only supervisory claims. Although some submitted affidavits claiming that police officers used force against them, they have not connected the force applied by each officer to the actions of these administrators. Accordingly, they have failed to establish that the three UC administrators in the police chain of command ‘set[ ] in motion a series of acts’ that they ‘knew or reasonably should have known’ would cause the officers ‘to inflict a constitutional injury.’. . Without that crucial connection, plaintiffs’ argument is nothing more than an attempt to hold the UC administrators liable solely by virtue of their office. That argument fails because ‘there is no respondeat superior liability under section 1983.’. . We conclude that Chancellor Birgeneau, Executive Vice Chancellor Breslauer, and Police Chief Celaya did not have sufficient personal involvement in the alleged acts of force. Summary judgment should have been granted by the district court on these claims, and we reverse and remand for the district court to do so.”)

*Rodriguez v. County of Los Angeles*, 891 F.3d 776, 798-99 (9th Cir. 2018) (“As explained above, the deputies’ actions violated clearly established law. The question specific to the supervisors is whether they are individually liable for those constitutional violations under principles of supervisory liability. We conclude that they are. A supervisory official is liable under § 1983 so long as ‘there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.’. . . Thus, a supervisor may ‘be liable in his individual capacity for his own culpable

action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others.’ . . . Sergeants McGrattan, Ohnemus, and Washington concede that they were personally present and directed the deputies’ use of force against appellees. Even assuming that their presence and direction of the extraction teams does not constitute ‘personal involvement,’ there is a ‘sufficient causal connection’ to establish the sergeants’ supervisory liability for their ‘own culpable action or inaction in the ... supervision [and] control of’ the deputies. . . . We do not accept appellants’ argument that the nature of the pre-extraction disturbance, standing alone, justified the supervisors’ inaction. Long before the incident in question, the Supreme Court established that government officials violate the Eighth Amendment when they use malicious and sadistic force in the course of quelling a prison disturbance, even one that ‘indisputably poses significant risks to the safety of inmates and prison staff.’ . . . To the extent that appellants Cruz and Blasnek stood by and observed the extractions but ‘knowingly refus[ed] to terminate’ the deputies’ unconstitutional acts, . . . they are individually liable for the same reasons as Sergeants McGrattan, Ohnemus, and Washington. Ample evidence—including appellants’ own testimony—supports the conclusion that appellants Cruz and Blasnek directed and observed most of the extraction teams. For example, there was evidence that appellant Blasnek ‘observe[d] each extraction.’ . . . It is not clear from the record before us that appellant Cruz directly observed Nunez’s and Rodriguez’s extractions. Assuming without deciding that Cruz did not observe these extractions, the jury could still have reasonably found the ‘requisite causal connection’ to hold Cruz liable for his ‘own culpable action or inaction in the training, supervision, or control of his subordinates.’ . . . The jury could have concluded from evidence in the record, including Olmstead’s testimony, that Cruz knowingly participated in creating and maintaining a culture of impunity for officers’ use of unconstitutionally excessive force, thereby ‘setting in motion a series of acts by’ his subordinates that Cruz ‘knew or reasonably should have known would cause’ the violations of appellees’ Eighth Amendment rights. . . . The jury could also reasonably have concluded that in disabling or failing to follow procedures used to identify uses of excessive force, and in ensuring that violators escaped punishment, Cruz created an environment where the mechanisms for supervision and control over the use of force operated ineffectively and sometimes not at all. Thus, the jury could also reasonably conclude that Cruz’s ‘inaction in the training, supervision, or control of his subordinates’ provided a basis for supervisory liability.”)

*Peralta v. Dillard*, 744 F.3d 1076, 1095, 1096 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946 (2015) (Christen, J., with whom Rawlinson, M. Smith, and Hurwitz, JJ., join, and with whom Bybee, J, joins as to Parts I, II, and III, dissenting in part and concurring in part) (“The majority holds that Dr. Dillard’s failure to review Peralta’s appeal—an obligation conferred upon him by California law—shields him from liability. Unchecked, this rule will allow care providers to defeat claims of deliberate indifference by arguing that they had no actual knowledge of the prisoner’s condition, even if that lack of knowledge is the result of failing to perform duties expressly assigned to them. The majority not only charts a path that permits prison officials to escape liability by arguing that they have inadequate funds to provide emergency care to inmates, it condones an escape hatch from liability available to officials willing to look the other way or who fail to perform

assigned duties that might cause them to gain actual knowledge of an inmate's condition. Neither circuit nor Supreme Court authority permits such a result. . . . Here, a reasonable jury could conclude that some Lancaster prisoners' emergency dental problems would go unaddressed if the only staff dentist qualified to review first level appeals did not actually review them. Dr. Dillard knew he was obligated to review the first level appeals, and he knew he was the only staff dentist qualified to do so. On this record, a jury could conclude that Dr. Dillard did not fulfill his obligations and consciously disregarded a substantial risk of serious harm to the dental needs of prisoners at Lancaster. The law does not require that Dr. Dillard intended harm to result. Judgment as a matter of law was inappropriate.”)

***Lemire v. California Dept. of Corrections and Rehabilitation***, 726 F.3d 1062, 1085 (9th Cir. 2013) (“Here, the evidence is undisputed that Carey and Tranquina complied with the order in *Coleman* and implemented a CPR policy at CSP–Solano. Plaintiffs have presented no evidence that either Carey or Tranquina were on notice that staff at CSP–Solano were not complying with the CPR policy, or that some staff were unaware of the policy. While at least two staff members, MTA Hak and RN Hill, were not trained on the policy until a day after St. Jovite died, there is no evidence that Carey or Tranquina knew or had reason to know of this lapse. . . . Plaintiffs also argue that the training provided was deficient because it allowed custody staff to acquiesce to medical staff once on the scene. Plaintiffs have offered no evidence, however, that this interpretation of the Dovey Memo is impermissible. Nor do they show that Carey was deliberately indifferent in interpreting the policy in that way, requiring custodial staff to provide CPR to inmates but to allow medical staff to take primary responsibility once on the scene. We affirm the grant of summary judgment as to Carey and Tranquina on the failure to train claims.”)

***Maxwell v. County of San Diego***, 708 F.3d 1075, 1086 (9th Cir. 2013) (“We must decide whether to grant summary judgment to Captain Reynolds and Lieutenant Salazar alone. Reynolds and Salazar did not directly participate in any of the allegedly unlawful acts. The Maxwells contend that summary judgment is nonetheless inappropriate because a jury could reasonably find Reynolds and Salazar liable as the ranking officers present. We agree. A supervisor is liable under § 1983 for a subordinate's constitutional violations ‘if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.’ *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). Reynolds and Salazar testified that they were mere observers who stayed at the end of the Maxwells' driveway. But based on the Maxwells' version of the facts, which we must accept as true in this appeal, we draw the inference that Reynolds and Salazar tacitly endorsed the other Sheriff's officers' actions by failing to intervene. It is undisputed that Reynolds and Salazar were aware of the Maxwells' detention and witnessed at least part of Jim's arrest and beating. Reynolds testified that he heard Kneeshaw yelling ‘stop, stop, stop’ right before the latter pepper-sprayed and struck Jim. Salazar testified that he heard a ‘commotion’ at that time. On this appeal we do not weigh the evidence to determine whether Reynolds and Salazar's stated reasons for not intervening are plausible.”)

*Maxwell v. County of San Diego*, 708 F.3d 1075, 1097, 1098 (9th Cir. 2013) (Ikuta, J., dissenting) (“[E]ven if the majority were correct that the deputies violated clearly established law, it is impossible to conclude that Captain Gregory Reynolds and Lieutenant Anthony Salazar could be held liable merely because they were standing behind yellow crime tape at the scene. We have long held that officers may not be held liable ‘merely for being present at the scene of an alleged unlawful act’ or for being a member of the same team as the wrongdoers. . . More recently, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), clarified that there is no respondeat superior liability under § 1983. Rather, a government official may be held liable only for the official’s own conduct. . . To bring a § 1983 action against a supervisor, the plaintiff must show: (1) the supervisor breached a legal duty to the plaintiff, *see Starr v. Baca*, 652 F.3d 1202, 1207–08(9th Cir.2011); (2) the breach of duty was ‘the proximate cause’ of the plaintiff’s constitutional injury, . . . and (3) the supervisor had at least the same level of *mens rea* in carrying out his superintendent responsibilities as would be required for a direct violation of the plaintiff’s constitutional rights . . . . Here the Maxwells do not allege that Reynolds and Salazar took any affirmative acts to set in motion the allegedly unconstitutional acts of their subordinates, nor do they present any evidence that Reynolds and Salazar knew about their subordinates’ conduct in delaying the ambulance or detaining and separating the Maxwells. Moreover, they do not dispute that neither Reynolds nor Salazar crossed the yellow tape across the Maxwells’ driveway that restricted entry to the crime scene. The Maxwells allege merely that Reynolds and Salazar (1) were the highest ranking officials at the scene, (2) could observe the crime scene from the driveway, and (3) heard Kneeshaw yelling at Jim Maxwell to ‘stop, stop’ just before using pepper spray and striking Jim with his baton. These facts are insufficient to create a genuine issue of material fact that Reynolds and Salazar breached a legal duty to the Maxwells, that they were the proximate cause of the Maxwells’ constitutional injuries, or that they acted with the requisite state of mind. First, the Maxwells do not allege that the supervisors were even aware that the deputies delayed Kristin’s departure, let alone that the supervisors acted with deliberate indifference. Nor can we infer, solely based on geographic proximity, that Reynolds and Salazar knew or reasonably should have known that the other Sheriff’s deputies had forcibly detained the Maxwells and prevented them from seeing their daughter and each other, and that there were no exigent circumstances to justify the detention. This is especially true given that Reynolds and Salazar never entered the crime scene. Nor is there any evidence ‘of a *specific* policy implemented by the Defendants or a *specific* event or events instigated by the Defendants that led to these purportedly unconstitutional’ seizures. . . . As in *Hydrick*, ‘the factual allegations in Plaintiffs’ complaint resemble the “bald” and “conclusory” allegations in *Iqbal*, instead of the detailed factual allegations in *Starr*.’ . . It is therefore clear that Reynolds and Salazar cannot be held liable for the alleged constitutional violations of other deputies on the scene. . . .It is a truism that ‘tragic facts make bad law.’ . . Nevertheless, we may not furnish a cause of action where the law does not supply one. . . The deputies arriving at the Maxwells’ residence faced a chaotic scene: a woman had been shot in the jaw; the perpetrator was still in the house; multiple ambulances and paramedics were responding to the scene; and frantic relatives were milling about. From the perspective of the deputies, it was more than merely reasonable to take steps to secure the crime scene and separate the witnesses—it was their duty. The majority has not pointed to a single case that clearly establishes that the deputies’ actions here

violated the Maxwells’ constitutional rights. Under existing case law, the deputies are entitled to qualified immunity for their actions. I therefore respectfully dissent.”)

*OSU Student Alliance v. Ray*, 699 F.3d 1053, 1058, 1070, 1071-78 & nn. 15, 18 (9th Cir. 2012) (“Plaintiffs, the *Liberty’s* student editors and student publishers, sue under 42 U.S.C. § 1983. We have little trouble finding constitutional violations. The real issue is whether the complaint properly ties the violations to the four individual defendants, who are senior University officials. Plaintiffs confront a familiar problem: they do not know the identities of the employees who threw the newsbins into the trash heap, and they do not know which University official devised the unwritten policy or which official gave the order to confiscate the bins. Plaintiffs do know, however, that three of the four defendants participated in the decision to deny them permission to place bins outside of the designated areas after the confiscation. We conclude that the complaint states claims against those three defendants based on this post-confiscation decision. We also hold that the complaint states a claim against one defendant—the Director of Facilities Services—based on the confiscation itself. . . . *Iqbal* emphasizes that a constitutional tort plaintiff must allege that every government defendant—supervisor or subordinate—acted with the state of mind required by the underlying constitutional provision. . . . The claims against President Ray and Vice President McCambridge require closer examination. According to the complaint, neither defendant actually made the decision to deny plaintiffs permission to place their newsbins throughout campus; Martorello did that. Both Ray and McCambridge, however, oversaw Martorello’s decision-making process and knowingly acquiesced in his ultimate decision. . . . According to the complaint, then, Ray and McCambridge knew that their subordinate, Martorello, was applying the previously unannounced and unenforced policy against the *Liberty*, but not against any of the other off-campus newspaper, and they did nothing to stop him. The question is whether allegations of supervisory knowledge and acquiescence suffice to state claims for speech-based First Amendment and equal protection violations. . . . *Iqbal* does not answer this question. That case holds that a plaintiff does not state invidious racial discrimination claims against supervisory defendants by pleading that the supervisors knowingly acquiesced in discrimination perpetrated by subordinates, but this holding was based on the elements of invidious discrimination in particular, not on some blanket requirement that applies equally to all constitutional tort claims. *Iqbal* makes crystal clear that constitutional tort claims against supervisory defendants turn on the requirements of the particular claim—and, more specifically, on the state of mind required by the particular claim—not on a generally applicable concept of supervisory liability. . . . Put simply, constitutional tort liability after *Iqbal* depends primarily on the requisite mental state for the violation alleged. . . . Here, where President Ray and Vice President McCambridge are alleged to have knowingly acquiesced in their subordinate Martorello’s violation of plaintiffs’ free speech rights under the First and Fourteenth Amendments, we must decide whether knowledge (as opposed to purpose) satisfies the mental state requirement for free speech violations. With some notable exceptions, courts before *Iqbal* generally did not have to determine the required mental state for constitutional violations, particularly not free speech violations. A uniform mental state requirement applied to supervisors: so long as they acted with deliberate indifference, they were liable, regardless of the specific constitutional right at issue. . . . As for the subordinate officials

who violate constitutional rights directly—the officer who shoots the suspect, the Facilities Department employee who junks the newsbins—they act intentionally in most cases. Perhaps they do not always know that their actions are unconstitutional (hence, the qualified immunity defense), but they do intend to take the violative action. Thus, before *Iqbal*, fixing the mental state requirement for a particular constitutional provision was most often unnecessary. The line officers generally satisfied every mental state because they acted intentionally, and supervisors were subject to a uniform mental state requirement divorced from the underlying claim. . . . By abrogating the second half of this framework, however, *Iqbal* places new weight on the state of mind requirement for constitutional torts. Now claims against supervisors present problems that claims against subordinates typically do not: must the supervisor have harbored the specific intent to subject the plaintiff to the injury-causing act, or does knowledge or some lesser mental state suffice? . . . . We understand *Iqbal*'s language eliminating the doctrine of “supervisory liability” to overrule circuit case law that, following *City of Canton v. Harris*, had applied a uniform test for supervisory liability across the spectrum of constitutional claims. . . . *Iqbal* means that constitutional claims against supervisors must satisfy the elements of the underlying claim, including the mental state element, and not merely a threshold supervisory test that is divorced from the underlying claim. *Iqbal* does not stand for the absurd proposition that government officials are never liable under § 1983 and *Bivens* for actions that they take as supervisors. . . . *Iqbal* holds simply that a supervisor's liability, like any government official's liability, depends first on whether he or she breached the duty imposed by the relevant constitutional provision. . . . For two reasons, we conclude that knowledge suffices for free speech violations under the First and Fourteenth Amendments. . . . First, it is black-letter law that government need not target speech in order to violate the Free Speech Clause. . . . In other words, the government may violate the speech clause even if it acts without the purpose of curtailing speech. Free speech claims do not require specific intent. Second, only in limited situations has the Supreme Court found constitutional torts to require specific intent. We know of three examples: (1) due process claims for injuries caused by a high-speed chase, *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 836, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); (2) Eighth Amendment claims for injuries suffered during the response to a prison disturbance, *Whitley v. Albers*, 475 U.S. 312, 320–21, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986); and (3) invidious discrimination under the Equal Protection Clause and the First Amendment Free Exercise Clause. . . . For these two reasons—because Supreme Court case law indicates that free speech violations do not require specific intent, and because the rationales that have led the Court to read specific intent requirements into certain other constitutional tort claims do not apply in the free speech context—we conclude that allegations of facts that demonstrate an immediate supervisor knew about the subordinate violating another's federal constitutional right to free speech, and acquiescence in that violation, suffice to state free speech violations under the First and Fourteenth Amendments. The complaint alleges that Ray and McCambridge knowingly acquiesced in Martorello's decision to continue restricting the *Liberty's* circulation under the standardless, unwritten newsbin policy. They stood superior to Martorello; they knew that Martorello denied plaintiffs' publication the same access to the campus that the *Barometer* received; and they did nothing. The complaint therefore states First Amendment and Equal Protection claims against Ray and McCambridge. [footnote observing that “same analysis

controls the First Amendment and speech-based equal protection claims. Unlike equal protection claims for racial or religious discrimination, speech-based equal protection claims do not require a showing that the plaintiff was singled out *because of* a particular characteristic. Rather, speech-based equal protection claims require only a showing that the plaintiff was subjected to differential treatment that trenched upon a fundamental right.”] . . . The allegations portray Martorello as the University official responsible for enforcing the unwritten newsbin policy. Thus, the question on which plaintiffs’ due process claim against Martorello turns is not whether knowledge and acquiescence, deliberate indifference, or some lesser mental state meets the state of mind requirement for the claim, but rather whether an official’s administration and oversight of an unconstitutional policy meets the required threshold. The Tenth Circuit confronted this question in *Dodds*, where the issue was whether the complaint stated a § 1983 claim against a Sheriff for a due process violation that occurred when jail officials denied the plaintiff the opportunity to post bail for several days after his arrest. . . . We agree with *Dodds*. When a supervisory official advances or manages a policy that instructs its adherents to violate constitutional rights, then the official specifically intends for such violations to occur. Claims against such supervisory officials, therefore, do not fail on the state of mind requirement, be it intent, knowledge, or deliberate indifference. . . . Advancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability, no matter what the required mental state, so long as the policy proximately causes the harm—that is, so long as the plaintiff’s constitutional injury in fact occurs pursuant to the policy. . . . Thus, because it alleges that Martorello was in charge of the newsbin policy and that the confiscation without notice was conducted pursuant to that policy, the complaint pleads a due process claim against Martorello. We note two distinctions from the invidious discrimination claims that *Iqbal* rejected. First, Javaid Iqbal’s complaint did not ‘contain facts plausibly showing that [Ashcroft and Mueller] purposefully adopted a policy of classifying post–September–11 detainees as “of high interest” because of their race, religion, or national origin.’ . . . Simply put, the complaint did not tie the alleged unconstitutional conduct—purposeful discrimination by race or religion—to any policy that the supervisory defendants advanced. This case is different. Through concrete allegations, the complaint ties the unconstitutional confiscation of the newsbins to the policy that Martorello administered. Second, the small scope of Martorello’s operation matters. It is one thing to allege that, because some low-level government officers engaged in purposeful discrimination, a cabinet-level official must also have engaged in purposeful discrimination. But it is another thing to say that the director of a university facilities department had a hand in the unconstitutional manner in which his employees enforced a department-wide policy. The second claim is plausible. Like all claims at the pleading stage, of course, it requires development. . . . The complaint does not tie President Ray and Vice President McCambridge to the confiscation, through the policy or any other means. Unlike Martorello, these officials are not alleged to have run the department that enforced the policy or to have had any familiarity with the policy’s requirements before the confiscation. . . . Therefore, the complaint does not state due process claims against these defendants.”)

*OSU Student Alliance v. Ray*, 699 F.3d 1053, 1079-81 (9th Cir. 2012) (Ikuta, J., dissenting in part) (“Simply put, to state a claim under § 1983 against a government official, a plaintiff must

allege that the official's 'own misconduct' violated the plaintiff's constitutional rights. . . What the plaintiff must plead and prove 'will vary with the constitutional provision at issue,' based on the Supreme Court's decisions regarding what conduct violates that particular provision. . . But the Supreme Court is quite clear that 'supervisory liability' is a 'misnomer' in § 1983 cases, and that officials 'may not be held accountable for the misdeeds of their agents.' . . The majority muddles and obscures this simple principle. Plaintiffs' complaint adequately alleges that Vincent Martorello, OSU's facilities services director, violated their First Amendment rights under § 1983 by personally and arbitrarily limiting *The Liberty's* distribution on campus. But their complaint nowhere indicates how OSU's president, Ed Ray, and the vice president of finance and administration, Mark McCambridge, also violated those rights through their 'own individual actions.' . . The majority considers it sufficient that Ray and McCambridge 'knowingly acquiesced' in Martorello's actions. . . Under *Iqbal*, however, an official is not liable under § 1983 for simply knowing about a lower ranking employee's misconduct and failing to act. In holding otherwise, the majority resurrects the very kind of supervisory liability that *Iqbal* interred. I disagree with this departure from *Iqbal*. . . In sum, for an official's inaction to deprive plaintiff of constitutional rights under color of law, the official must fail to act when the law requires action. . . Neither exception applies here. Plaintiffs do not allege that Ray or McCambridge had a legal duty to stop Martorello from continued enforcement of his newsbin policy, that they exerted any control over the decisions of the facilities department, or that their failure to intervene in the dispute between Plaintiffs and Martorello violated any law, statute, or even university requirement. . . . Nor do plaintiffs allege that either Ray and McCambridge personally took an action that deprived plaintiffs of their constitutional rights. . . . In sum, the complaint merely recites 'the *organizational* role of the[ ] supervisors,' and makes 'no allegation that the supervisors took any specific action resulting in' the constitutional violation. *Moss v. U.S. Secret Serv. (Moss II)*, 675 F.3d 1213, 1231 (9th Cir.2012) (emphasis in original). This is not sufficient to state a claim under § 1983. The majority misses this central point because it focuses solely on one component of a § 1983 claim: the proper mental state for First Amendment claims. The majority's detailed and elaborate discussion of this issue. . . boils down to the simple, though erroneous, proposition that a plaintiff can adequately allege a § 1983 claim for violation of that plaintiff's First Amendment rights merely by alleging that the official had knowledge of such violation. The majority brushes aside § 1983's requirement that a defendant engage in conduct that 'subjects, or causes to be subjected' a plaintiff to a deprivation of constitutional rights, and instead holds it suffices if a supervisory official 'knowingly acquiesces' in the misconduct of a lower ranking employee. . . But of course, 'acquiescence' is merely a way to describe knowledge and inaction. . . Further, the majority erroneously implies that an allegation of 'knowledge' suffices to establish the causation element of a § 1983 claim, namely, that the official caused the plaintiff's injury. The majority relies on a novel and somewhat impenetrable formulation that 'duty' is generally equivalent to acting with a specified state of mind, and this duty 'eclipses' proximate cause where the plaintiff acts with knowledge that a violation may occur. . . Because (in the majority's view) the mental state of knowledge stands in for both misconduct and causation, the plaintiffs can state a § 1983 claim by alleging only that a supervisor had knowledge of a subordinate's misconduct and took no action. This is not enough. While plaintiffs here must plead the elements of a First Amendment

violation, including mental state, they must also plead that each official acted in a way that ‘subject[ed], or cause[d] to be subjected,’ a citizen to the deprivation of First Amendment rights. . . . Plaintiffs here did not allege that Ray or McCambridge engaged in any misconduct or that these officials caused their injury. Therefore, the complaint in its current form does not meet the bare minimum for stating a First Amendment claim under § 1983 against Ray or McCambridge, and this claim must be dismissed.”)

***Lacey v. Maricopa County***, 693 F.3d 896, 916 (9th Cir. 2012) (en banc) (“For an official to be liable for another actor’s depriving a third party of his constitutional rights, that official must have at least the same level of intent as would be required if the official were directly to deprive the third party of his constitutional rights. . . . With this proviso, a supervisor can be held liable for the constitutional torts of his subordinates if ‘a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation’ exists, *Starr*, 652 F.3d at 1207 (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir.1989)); *see Iqbal*, 556 U.S. at 677. But an official with no official authority over another actor can also be liable for that actor’s conduct if he induces that actor to violate a third party’s constitutional rights, provided that the official possesses the requisite intent, such as retaliatory animus. *See Hartman v. Moore*, 547 U.S. 250, 262 (2006); *see also Harris v. Roderick*, 126 F.3d 1189, 1196–97, 1204 (9th Cir.1997) (finding liability for both supervisory and nonsupervisory officials). . . . In claims under the Eighth Amendment, we have recognized that a supervisor also may be accountable under § 1983 if he was deliberately indifferent to unconstitutional conditions in the prison. *See Starr*, 652 F.3d at 1205.”)

***Williams v. County of San Mateo***, No. 08–17747, 2012 WL 2513962, at \*1 (9th Cir. July 2, 2012) (not published) (“Williams has also raised a genuine issue of material fact as to Sheriff Horsley’s supervisory liability, because a jury could reasonably find that the Sheriff was aware of the policies and practices concerning the detention of civil detainees. . . . As we have previously stated, “acquiescence or culpable indifference” may suffice to show that a supervisor “personally played a role in the alleged constitutional violations.”. . . The Trindle affidavit presents evidence that civil detainees were subjected to the same conditions as criminal detainees. This evidence plausibly suggests that Sheriff Horsley, as the person ‘required by statute to take charge of and keep the county jail and the prisoners in it,’ . . . acquiesced in the unconstitutional conduct of his subordinates.”)

***Williams v. County of San Mateo***, No. 08–17747, 2012 WL 2513962, at \*2 (9th Cir. July 2, 2012) (Ikuta, J., dissenting in part) (not published) (“Because a supervisor who lacks knowledge of any risk to inmate health or safety cannot be deliberately indifferent to such risk, the majority errs in concluding that Williams raised a genuine issue of material fact as to Sheriff Horsley’s liability. We use a ‘deliberate indifference’ standard to analyze claims that a prison official violated pretrial detainees’ constitutional rights by subjecting them to punitive treatment. . . . Under this standard, a pretrial detainee must show that the prison official both was “‘aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,’” and also actually drew that inference. . . . The Supreme Court has made it clear that government officials are not liable for

the misdeeds of their subordinates; rather, officials can be held liable under § 1983 only for their ‘own individual actions’ that violate the Constitution. . . Here, Williams has not raised a genuine issue of material fact that Sheriff Horsley evinced ‘deliberate indifference.’ There is no evidence that Sheriff Horsley personally reviewed Williams’s grievances or received any notice that civil detainees were being treated the same as or less considerately than criminal detainees. . . Although the majority relies on the Trindle affidavit, . . .this offers no assistance, because the affidavit is entirely silent regarding the state of Sheriff Horsley’s knowledge. In fact, Williams fails to cite any evidence that Sheriff Horsley was actually ‘aware of facts from which the inference could be drawn’ that pretrial detainees were receiving inappropriate treatment, let alone that he actually drew that inference. . . In short, Williams’s claims against Sheriff Horsley are based solely on a theory of respondeat superior: because Sheriff Horsley was the ultimate supervisor of the prison system, he can be held liable. Because the Supreme Court has made clear that a supervisor cannot be held vicariously liable in this manner, *Iqbal*, 556 U.S. at 676, I respectfully dissent.”).

*Chavez v. U.S.*, 683 F.3d 1102, 1107-12 (9th Cir. 2012) (“After the Ninth Circuit reinstated plaintiffs’ *Bivens* claims against the supervisory defendants, the Supreme Court decided *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In light of *Iqbal*, the supervisory defendants filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The district court denied the motion, finding that the supervisory defendants failed to provide a plausible nondiscriminatory explanation for the alleged stops. Moreover, the district court held that plaintiffs did not need to allege that the supervisory defendants directly participated in constitutional violations. Instead, citing *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991), the district court held that the plaintiffs had plausibly alleged that the supervisory defendants had either knowingly refused to terminate a series of acts they reasonably should have known would cause constitutional violations, acquiesced in constitutional deprivations by subordinates, or displayed reckless or callous indifference to others’ rights. The supervisory defendants now appeal from that decision. . . . Relying on *Iqbal*, the supervisory defendants invite the Court to hold that the Fourth Amendment, like the Fifth Amendment, requires plaintiffs to allege that supervisors acted with a ‘discriminatory purpose.’ This argument, however, misreads *Iqbal*. In *Iqbal*, the Supreme Court did not require allegations of ‘discriminatory purpose’ in order to render supervisors liable for any constitutional violation by their subordinates. Rather, the Supreme Court noted that plaintiffs cannot base a claim against supervisors on a theory of *respondeat superior*, and must instead show that the supervisors, ‘through [their] own individual actions, ha[ve] violated the Constitution.’ . . . Because a plaintiff claiming invidious discrimination under the Fifth Amendment must allege facts showing that officers acted with a ‘discriminatory purpose,’ allowing that Fifth Amendment claim to proceed against a supervisor in the absence of a particularized showing of such a purpose would, in effect, render the supervisor vicariously liable for her subordinates’ intent. . . The requirement that a plaintiff allege a ‘discriminatory purpose,’ then, derived from the Fifth Amendment rather than from the fact that the plaintiff pled claims against supervisors. We see nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law by adding a ‘discriminatory purpose’ requirement to a Fourth Amendment claim against supervisors. *See Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir.2011) (reaching same conclusion for an Eighth Amendment

claim). . . .Because *Iqbal* requires courts to apply an equivalent standard to supervisors and subordinates, we hold that, taking qualified immunity into account, a supervisor faces liability under the Fourth Amendment only where ‘it would be clear to a reasonable [supervisor] that his conduct was unlawful in the situation he confronted.’ A lower standard would impose vicarious liability on supervisors based on their subordinates’ clearly unlawful conduct. Because the plaintiffs’ complaint, as described below, does not come close to meeting this standard except with respect to defendant Hunt, who faces liability for his direct participation in the stops, we leave to future cases the determination of what conduct by supervisors may qualify as clearly unlawful. Judged under the standard described above, plaintiffs’ complaint fails to state a Fourth Amendment claim against any supervisory defendant except Hunt. Turning first to the supervisory defendants other than Hunt, even assuming *arguendo* that the plaintiffs have sufficiently alleged that Border Patrol agents conducted stops without reasonable suspicion, plaintiffs have not alleged facts that would allow a court to draw a reasonable inference that a reasonable supervisor in these defendants’ situations would have found their conduct to be clearly unlawful. The Court discounts, as it must, the plaintiffs’ wholly conclusory allegation that the supervisory defendants ‘personally reviewed and, thus, knowingly ordered, directed, sanctioned or permitted’ the allegedly unconstitutional stops. Having done so, the remaining allegations do not plausibly suggest that these supervisors clearly should have regarded their conduct as unlawful. . . . In contrast to the other supervisory defendants, Hunt faces liability not only as a supervisor, but also for his direct participation in the stops. As noted above, the Fourth Amendment prohibits an officer on roving patrol near the border from stopping a vehicle in the absence of an objectively ‘reasonable suspicion’ that the ‘particular vehicle may contain aliens who are illegally in the country’ or is involved in some other criminal conduct. . . . Here, plaintiffs plausibly allege conduct by Hunt that would be a clear Fourth Amendment violation to a reasonable officer. Plaintiffs allege that, because they traveled at highway speeds, Border Patrol agents could not make the particularized observations necessary to form a reasonable suspicion that plaintiffs’ shuttle contained aliens. They further allege that Border Patrol agents instead focused principally on ‘the Latin, Hispanic or Mexican appearance of drivers and/or other occupants of vehicles,’ a characteristic that, under *Brignoni–Ponce*, clearly does not give rise to reasonable suspicion. . . . Based on the facts set forth in the complaint, we hold that plaintiffs have plausibly alleged that Hunt stopped them based solely on their and their passengers’ ‘apparent Mexican ancestry,’ a characteristic that a reasonable officer clearly would have known did not create reasonable suspicion. Accordingly, the complaint adequately states a claim against Hunt for Fourth Amendment violations, and, at least on the facts alleged, qualified immunity does not shield Hunt from liability. . . . In sum, we hold that, to state a claim against supervising officers for causing their subordinates’ purported violations of the Fourth Amendment, a complaint must allege facts that plausibly suggest that a reasonable supervisor would find it ‘clear’ that the defendant’s conduct was ‘unlawful in the situation he confronted.’ Applying that standard to this case, we hold that plaintiffs’ complaint fails to state a claim against any supervisory defendant other than Hunt, who directly participated in the alleged underlying violations. Accordingly, we affirm the district court’s ruling with respect to Hunt, but reverse it and direct the entry of final judgment with respect to Ziglar, Aguilar, Obregon, Felix Chavez, and Campbell.”)

*Chavez v. U.S.*, 683 F.3d 1102, 1113 (9th Cir. 2012) (Wallace, J., concurring) (“I fully concur in the opinion and judgment, but I would have preferred to resolve this appeal without addressing the effect of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), on supervisory liability in the Fourth Amendment context. This is because even under the pre-*Iqbal* standard described in *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991), plaintiffs’ claims meet the same fate described in the panel’s opinion for substantially the same reasons. Once we strip away plaintiffs’ conclusory allegations as mandated by the section of *Iqbal* addressing general pleading standards, . . . there are no factual allegations alleging that any of the supervisory defendants except Hunt knew or reasonably should have known that their conduct would cause others to inflict a constitutional injury. . . Our court recently reasoned that it did not need to consider the debate regarding the extent to which the Ninth Circuit’s pre-*Iqbal* supervisory liability standard remains good law because the complaint’s allegations fell even under the old standard. *Moss v. United States Secret Serv.*, 675 F.3d 1213, 1231 n.6 (9th Cir.2012). Similarly, at least eight opinions from other circuit courts have explicitly recognized that *Iqbal* might restrict supervisory liability, but have refused to rule on the extent of the restriction when the question could be avoided. [collecting cases] I would choose to follow an approach signaled by a prior Ninth Circuit opinion whenever we can because it makes good sense and assists us to keep our law intact. That so many other circuit opinions have also taken the same course strongly suggests that it would be a better practice to do so here. Although I do not disagree with the standard we adopt in our opinion, I would have preferred to follow the wisdom of prior circuit opinions (including our own) and resolve this case without adopting any new standard at all.”)

*Henry A. v. Willden*, 678 F.3d 991, 1003-05 (9th Cir. 2012) (“[T]he State defendants argue that plaintiffs have failed to state a claim against them for supervisory liability. We recently reaffirmed that a plaintiff may state a claim under § 1983 against a supervisor for deliberate indifference. *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011). . . . After thoroughly examining the plaintiffs’ complaint, we agree that there are few specific allegations against the State defendants. Most of the allegations in the complaint simply reference ‘Defendants,’ without specifying whether the conduct at issue was committed by the named State officials, County officials, or the ‘John Doe’ supervisors or caseworkers. . . .The allegations that do expressly reference the State defendants are too general to state a claim for supervisory liability. In *Starr v. Baca*, the plaintiff alleged that Sheriff Baca himself had been given clear notice by the Department of Justice of the specific unconstitutional conditions in the jails; that the Sheriff received numerous reports documenting inmate violence caused by the unconstitutional conduct of his deputies; and that the Sheriff ultimately acquiesced in these constitutional violations. . . In contrast, the allegations here claim that the agencies directed by Willden and Comeaux have oversight responsibility for Clark County’s foster care system and are required to ensure that Clark County is complying with state and federal law. The complaint also alleges that all of the defendants had knowledge of independent reports documenting the systemic failures of foster care in Nevada. But it does not allege that Willden or Comeaux had any personal knowledge of the specific constitutional violations that led to Plaintiffs’ injuries, or that they had any direct responsibility to train or

supervise the caseworkers employed by Clark County. The allegations that come closest to pleading personal involvement by Willden and Comeaux concern the failure to provide medical records to the children and their foster parents in order to facilitate their medical care. . . .When read together, these allegations suggest that there may be a causal connection between the State defendants' failure to share these medical records and the injuries suffered by plaintiffs such as Henry, who received a dangerous combination of prescription drugs because his medical records were not given to his treatment providers. But even if the complaint in its current form fails to state a claim against the State officials for substantive due process violations, the district court abused its discretion by failing to give the plaintiffs an opportunity to amend their complaint. . . . Here, Plaintiffs offered to amend their complaint if necessary in their response to the motion to dismiss, but the district court did not grant leave to amend and did not provide any reasons for its decision. As we have already concluded, the complaint adequately pleads violations of Plaintiffs' clearly established substantive due process rights, and it plausibly suggests an entitlement to relief from at least some of the defendants. Where the complaint falls short in some places is tying its factual allegations to particular defendants. But this type of deficiency can likely be cured by amending the complaint, and there is certainly no evidence to suggest that allowing amendment would be futile. Therefore, on remand, Plaintiffs should be given an opportunity to amend their substantive due process claims. We note that in any future proceedings in the district court, each defendant's liability must be analyzed individually using the proper standard, whether that individual is a line-level caseworker, a supervisory official, or a municipality.”)

***Hydrick v. Hunter***, 669 F.3d 937, 939-42 (9th Cir. 2012) (on remand from the Supreme Court for reconsideration in light of *Ashcroft v. Iqbal*) (“As discussed in more detail below, after reviewing the Supreme Court’s decision in *Iqbal*, the parties’ supplemental briefs, and our court’s recent decision in *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011), we now hold that Defendants are entitled to qualified immunity on Plaintiffs’ claims for money damages. The conclusory allegations in Plaintiffs’ Second Amended Complaint are insufficient to establish Defendants’ individual liability for money damages. Our holding, however, is limited. Qualified immunity is only an immunity from a suit for money damages, and does not provide immunity from a suit seeking declaratory or injunctive relief. . . .Accordingly, on remand, the Plaintiffs may proceed with their claims for declaratory and injunctive relief. . . .As discussed in greater detail below, in the case before us, the factual allegations in Plaintiffs’ complaint resemble the ‘bald’ and ‘conclusory’ allegations in *Iqbal*, instead of the detailed factual allegations in *Starr*. . . .Accordingly, Plaintiffs pleaded insufficient facts to establish ‘plausible’ claims against the Defendants in their individual capacities and the Defendants are entitled to qualified immunity. . . .The Plaintiffs’ complaint proceeds under two theories of liability against the Defendants in their individual capacities. Plaintiffs allege that the Defendants are: (a) liable for their own conduct because they created policies and procedures that violated the Plaintiffs’ constitutional rights; and, (b) liable because they were deliberately indifferent to their subordinates’ constitutional violations. . . .Plaintiffs’ allegations fail to state claims against Defendants in their individual capacities under either theory of liability. Plaintiffs’ complaint is based on conclusory allegations and generalities, without any allegation of the specific wrong-doing by each Defendant. For example, Plaintiffs’ Fourth

Amendment claim alleges that Defendants’ ‘policies, practices and customs subject [Plaintiffs] to unreasonable searches; searches as a form of punishment; degrading public strip searches; improper seizures of personal belongings; and the use of unreasonable force and physical restraints.’ But there is no allegation of a *specific* policy implemented by the Defendants or a *specific* event or events instigated by the Defendants that led to these purportedly unconstitutional searches. Plaintiffs’ remaining claims suffer from the same infirmities. Plaintiffs’ First Amendment retaliation claim alleges that ‘Defendants have personal knowledge of retaliation against [the Plaintiffs] for participation in lawsuits, but Defendants’ policies, practices and customs permit and encourage retaliation.’ But there is no allegation of a *specific* policy or custom, nor are there specific allegations regarding each Defendant’s purported knowledge of the retaliation. The remainder of Plaintiffs’ claims are likewise devoid of specifics. The absence of specifics is significant because, to establish individual liability under 42 U.S.C. § 1983, ‘a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’ *Iqbal*, 129 S.Ct. at 1948. Even under a ‘deliberate indifference’ theory of individual liability, the Plaintiffs must still allege sufficient facts to plausibly establish the defendant’s ‘knowledge of’ and ‘acquiescence in’ the unconstitutional conduct of his subordinates. *Starr*, 652 F.3d at 1206–07. In short, Plaintiffs’ ‘bald’ and ‘conclusory’ allegations are insufficient to establish individual liability under 42 U.S.C. § 1983.”)

***Starr v. County of Los Angeles***, 659 F.3d 850, 851-55 (9th Cir. 2011) (O’Scannlain, Circuit Judge, joined by Gould, Tallman, Bybee, Callahan, Bea, M. Smith, and Ikuta, JJ., dissenting from the order denying rehearing en banc), *cert. denied*, 132 S. Ct. 2101 (2012) (“A mere two years ago, the Supreme Court rejected the argument that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), applied only to antitrust and similarly complex commercial cases, stating that its ‘decision in *Twombly* expounded the pleading standard for “all civil actions.”’ *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1953 (2009) (quoting Fed.R.Civ.P. 1). The panel majority in this case disregards that holding, suggesting instead that the *Twombly/Iqbal* standard does not apply to all civil actions. In reaching this erroneous result, the panel also resurrects a theory of supervisory liability for constitutional torts that the Supreme Court has foreclosed. I therefore must dissent from the regrettable failure of our court to rehear this case en banc. . . . Though the majority ultimately professes to apply something like the *Iqbal* plausibility standard, in the end, it applies what might be deemed ‘*Iqbal Lite*’ (“Same insufficient complaints, fewer dismissals!”). The majority states that a complaint’s factual allegations must ‘plausibly suggest an entitlement to relief,’ . . . but it wrongly requires that the determination of whether this standard is met be made in light of whether it would be ‘unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.’ . . . The majority thus creates a sliding scale in which the greater the anticipated discovery expense, the greater the showing of plausibility that is required. The Supreme Court has rejected such an approach. . . . Such a reading is nothing more than a thinly veiled artifice to confine *Twombly* to cases in which discovery is especially costly. In doing so, the majority inexplicably muddies the waters made crystal clear by the Supreme Court’s pronouncement in *Iqbal*. Today’s unfortunate decision yet again places the Ninth Circuit on the wrong side of a circuit split. Although courts have struggled to determine precisely what *Iqbal* requires, *see, e.g., Swanson v.*

*Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir.2010), there was-until now-no dispute that *Twombly/Iqbal* is the standard that applies. . . The panel majority’s decision leaves our district court judges in the unenviable position of reconciling the instructions of the Supreme Court with those we announce today. The panel majority’s analysis of the facts demonstrates what little resemblance its standard bears to the rule articulated in *Twombly* and *Iqbal*. Starr alleges an Eighth Amendment claim based on the conditions of his confinement. He therefore must plead ‘factual content that allows the court to draw the reasonable inference,’ *Iqbal*, 129 S.Ct. at 1949, that he was injured as a result of ‘an excessive risk to inmate health or safety’ that Sheriff Baca ‘kn[ew ] of and disregard[ed],’ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Sheriff Baca must have been both ‘aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also [have] draw[n] the inference.’ *Id.* (emphasis added). The majority contends that ‘the factual allegations in Starr’s complaint plausibly suggest that Sheriff Baca acquiesced in the unconstitutional conduct of his subordinates, and was thereby deliberately indifferent to the danger posed to Starr.’ . . . But the majority never explains – indeed, cannot explain-how it is able to draw this inference. The facts pleaded by Starr do not plausibly suggest that Baca ‘kn[ew] of and disregard[ed] an excessive risk to inmate health or safety.’ *Brennan*, 511 U.S. at 837. To be sure, a *possible* explanation for ten varied and discrete incidents of inmate-on-inmate violence amongst a prison population of 20,000 might be that the leader of the prison bureaucracy is callously indifferent to such violence. But *possible* is not sufficient. *Twombly* and *Iqbal* require a *plausible* explanation and held that an explanation is not plausible when an “obvious alternative explanation” exists. . . Here, ‘the obvious alternative explanation’ for the inmate-on-inmate assaults is that it is virtually impossible for an administrator in charge of 20,000 inmates – many of whom are violent – to ensure that they never assault each other. Starr’s complaint amounts to nothing more than a general indictment of the LASD. The LASD is the largest sheriff’s department in the nation. With a budget of \$2.4 billion and a staff of 18,000, it is charged with directly protecting over 4 million people in the 9.8 million person county. It also provides critical support to city police departments by housing all of Los Angeles County’s nearly 20,000 locally jailed inmates. See Los Angeles County Sheriff’s Department, <http://lasheriff.org/aboutlasd/execs.html>. While size alone does not absolve its leadership of responsibility for its shortcomings, it does underscore the difficulty of attributing any specific incident to the deliberate indifference of the official at the top of this large bureaucracy. . . These ten incidents suggest-at most-that Sheriff Baca is an ineffective leader. They do not plausibly suggest that he is deliberately indifferent to inmate violence. . . . The majority’s conclusion has the effect of inserting *respondeat superior* liability into section 1983 despite the Supreme Court’s admonition that ‘a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’ . . . As a result, even assuming that Sheriff Baca was deliberately indifferent to an excessive risk of inmate violence, Starr still cannot recover unless Baca’s indifference caused the assault on Starr. . . Thus, to state a cause of action, a plaintiff must ‘allege facts sufficient to show that the defendants had actual knowledge of an impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant’s failure to prevent it.;’ *Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir.2010) . . . Starr’s allegations get nowhere close to this standard. As noted above, Starr alleges

that the prior incidents of inmate-on-inmate violence were caused by correctional officer negligence – e.g., poor supervision and misclassification of prisoners. But according to Starr’s own account, *his* assault was caused by a group of sadistic correctional officers who intentionally helped several inmates stab Starr twenty-three times and then, unsatisfied, joined in the assault themselves. Thus, even if Sheriff Baca had solved the alleged problems of lax supervision and inmate misclassification, it is difficult to see how that would have stopped this assault. Yet the panel resists the notion that Starr must adequately plead a nexus between Baca’s alleged deliberate indifference and Starr’s injury. Instead, it infers deliberate indifference from violent episodes that do not have a common, concrete cause that a high-level administrator could readily remedy. In resisting any attempt to require Starr to tie the prior incidents to his injury, the majority reveals its true purpose: to impose *respondeat superior* in any jurisdiction which has a history of prior prison problems, no matter how unrelated those problems are to the plaintiff’s injuries. In allowing Starr’s claim to proceed, this court creates a road map for circumventing the rule against vicarious liability in constitutional litigation. First, allege a constitutional violation committed by a low-level employee of a large administrative agency. Next, list a number of tangential bad acts committed by other members of that agency. And, finally, fault the head of that agency for not sufficiently addressing the general problem of his subordinates’ poor behavior. Indeed, it is hard to see why every L.A. County prisoner who is assaulted by another prisoner does not now have a viable claim against Sheriff Baca. . . . The court’s ruling today conflicts with *Iqbal* in its statement of the pleading standard, in its application of the pleading standard, and in its far-reaching conclusions regarding supervisory liability. By failing to rehear this case en banc, we fail to correct these errors and once again must wait for the Supreme Court to do so for us.”)

*Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011), *reh’g en banc denied by Starr v. County of Los Angeles*, 659 F.3d 850 (9th Cir. 2011) and *cert. denied*, 132 S. Ct. 2101 (2012) (“We see nothing in *Iqbal* that indicates that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases. We also note that, to the extent that our sister circuits have confronted this question, they have agreed with our interpretation of *Iqbal*. [citing *Dodds v. Richardson*, 614 F.3d 1185, 1204 (10th Cir.2010), *Sandra T.E. v. Grindle*, 599 F.3d 583, 591 (7th Cir.2010), and *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir.2009)] We therefore conclude that a plaintiff may state a claim against a supervisor for deliberate indifference based upon the supervisor’s knowledge of and acquiescence in unconstitutional conduct by his or her subordinates.”).

*Starr v. Baca*, 652 F.3d 1202, 1218, 1219, 1221 (9th Cir. 2011) (Trott, J., dissenting), *reh’g en banc denied by Starr v. County of Los Angeles*, 659 F.3d 850 (9th Cir. 2011) and *cert. denied*, 132 S. Ct. 2101 (2012) (“Alleging that the Sheriff ‘*could*’ have known, ‘*should*’ have known, and ‘*should*’ have become aware is tantamount to admitting that Starr had no facts to support his allegations. The test that governs this case consists of two words, not one. Indifference is not enough. For indifference to be actionable, it must be deliberate. Starr’s conclusory allegations amount to no more than formulaic flak fired into the sky in an attempt to bring down the squadron leader. When we cease to look at the Los Angeles Sheriff’s Department (LASD) as an abstraction

and look at the reality, we see good reasons for requiring facts before permitting lawsuits against the Sheriff himself: the agency is gigantic. The LASD is the largest Sheriff's Department in the world. It covers 3,171 square miles, 2,557,754 residents, and by contract 42 of the 88 incorporated cities in Los Angeles County. The Department employs 8,400 law enforcement officers and 7,600 civilians and is responsible for 48 courthouses and 23 substations. The Men's Central Jail alone houses a revolving population of 5,000 inmates. In addition, the Department operates the Twin Towers Correctional Facility, the Mira Loma Detention Facility, the Pitchess Detention Center, and the North County Correctional Center. Persons charged with or convicted of crimes are in over one hundred different locations. The layers of administration and management between what happens in a jail are many and they are complex. To infer that specific incidents which occur in a jail are necessarily known by the Sheriff is to engage in fallacious logic. This complexity does not absolve the Department of responsibility for respecting the constitutional rights and general well-being of its charges, but it does show how inappropriate it is to sue the Sheriff individually *unless* in terms of causation the Sheriff can be personally tied to the actionable behavior at issue. Just being a disappointing or even an insufficiently engaged public servant is not enough. Those issues are for the ballot box and the County Board of Supervisors, not the courts. . . . The days of pleading conclusions without factual support accompanied by the wishful hope of finding something juicy during discovery are over. Wisely, we have moved up judgment day to the complaint stage rather than bog down the courts and parties with pre-summary judgment combat. This conclusion, of course, does not leave Starr without redress. He may sue the Sheriff in his official capacity, which is the same as suing the County of Los Angeles and the Sheriff's Department, and he may pursue his lawsuit on the ground of official policy or longstanding custom and practice – but he may not sue the Sheriff individually just because he is the Sheriff.”)

***Cross v. City and County of San Francisco***, No. 18-CV-06097-EMC, 2019 WL 1960353, at \*14-15 (N.D. Cal. May 2, 2019) (“[S]upervisory liability turns on the substantive scienter requirements of the constitutional claim at issue. As the Ninth Circuit explained in *OSU Student Alliance: Iqbal* makes crystal clear that constitutional tort claims against supervisory defendants turn on the requirements of the particular claim – and, more specifically, on the state of mind required by the particular claim – not on a generally applicable concept of supervisory liability.’. . The Ninth Circuit continued: ‘courts before *Iqbal* generally did not have to determine the required mental state for constitutional violations, particularly not free speech violations’ and, instead, ‘[a] uniform mental state requirement applied to supervisors: so long as they acted with deliberate indifference, they were liable, regardless of the specific constitutional right at issue.’. . In other words, ‘[t]he line officers generally satisfied every mental state because they acted intentionally, and supervisors were subject to a uniform mental state requirement divorced from the underlying claim.’. . But *Iqbal* abrogat[ed] the second half of this framework’ and ‘place[d] new weight on the state of mind requirement for constitutional torts. Now claims against supervisors present problems that claims against subordinates typically do not: must the supervisor have harbored the specific intent to subject the plaintiff to the injury-causing act, or does knowledge or some lesser mental state suffice?’. . Given the above legal framework for supervisory claims, the first question in the instant case is what kind of claim has been brought by Plaintiffs. Based on the allegations in the FAC,

Plaintiffs seem to be asserting both a claim for invidious discrimination (as in *Iqbal*) and a claim for failure to train. For the invidious discrimination claim, Plaintiffs must allege purposeful discrimination by the supervisory defendants, and not just knowing acquiescence or deliberate indifference. . . . For a failure-to-train claim, the intent requirement is not as high as it is for an invidious discrimination claim. For a failure to train, deliberate indifference is the requisite intent. . . . Deliberate indifference may be shown by knowledge and acquiescence on the part of the supervisor. . . . In the instant case, Plaintiffs claim invidious discrimination because Deputy Chief Redmond and Captain Cherniss knew about the racial targeting in OSS but failed to intervene. For failure to train, Plaintiffs assert that, at the very least, Deputy Chief Redmond and Capt. Cherniss should have known about the racial targeting in OSS but failed to act. If these allegations are credited, then both causes of action would survive the motion to dismiss. The problem for Plaintiffs is that, as the FAC is currently pled, there is an insufficient factual basis for the allegations that the supervisors had the requisite intent under either theory. If the two supervisors were actually involved in some concrete way with OSS, that would be a basis for knowledge; however, at the hearing, Plaintiffs essentially conceded that they did not know if either supervisor did have a role in OSS and that they were simply presuming such because Deputy Chief Redmond and Captain Cherniss are, as a general matter, supervisors over police officers who were actually involved in OSS. The Court therefore grants the motion to dismiss the claims against Deputy Chief Redmond and Captain Cherniss. The dismiss, however, is without prejudice. If, during discovery, Plaintiffs uncover evidence indicating that one or both did have a role in OSS, then they may move for leave to amend to add the supervisor(s) back to the case.”)

*Estate of Lopez v. Torres*, No. 15-CV-0111-GPC-MDD, 2016 WL 429910, at \*6-8 (S.D. Cal. Feb. 4, 2016) (“The law recognizes that personal participation in a constitutional deprivation is not the only predicate for section 1983 liability. . . . Anyone who ‘causes’ any citizen to be subjected to a constitutional deprivation is also liable. . . . In the years post-*Iqbal*, lower courts have interpreted *Iqbal*’s supervisory liability holding in different ways, with some circuits treating *Iqbal* as a pleading decision, others limiting *Iqbal* to its facts, and others reading *Iqbal* as annihilating supervisory liability to various degrees. . . . The Ninth Circuit has generally interpreted *Iqbal* in a more limited way. . . . However, under *Iqbal* and under the Ninth Circuit’s more expansive interpretation of supervisory liability in the § 1983 context, the Court finds that Plaintiffs have failed to state a claim predicated on supervisory liability. In the Ninth Circuit, a defendant may be held liable as a supervisor under § 1983 ‘if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.’. . . The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation but also by ‘set[ting] in motion a series of acts by others [ ] or knowingly refus[ing] to terminate a series of acts by others, which [a supervisor] knew or reasonably should have known, would cause others to inflict the constitutional injury.’. . . The critical question is whether it was reasonably foreseeable to a supervisor that the actions of particular subordinates would lead to the rights violations alleged to have occurred. . . . Plaintiffs allege that Defendants failed to analyze and investigate the reliability of the information provided by an anonymous informant, which they knew or should

have known to be false, before conveying this information with reckless or deliberate indifference to its truth or falsity in a ‘misleading and inaccurate fashion’ to SWAT, which resulted in Lopez’ death. . . The Court finds that Plaintiffs’ allegations are again insufficient to state a claim for excessive force premised on supervisory liability. First, There is no dispute that the anonymous informant provided truthful information regarding Lopez’ status as a parolee at large and his address. In addition, this information was corroborated before the SWAT team was deployed. These corroborated facts unquestionably supported the actions to arrest Lopez. While a 20-20 hindsight review of the incident reveals that Lopez was not armed and there was no AK-47 in the Apartment 58, short of making contact with Lopez and searching his apartment, these allegations could not have been investigated prior to the attempted arrest. Second, although Plaintiffs’ FAC provides additional facts regarding the role Defendants allegedly played in conveying unverified information to SWAT, they are insufficiently vague. . . . The FAC nowhere identifies the mission parameters, goals, or commands that the ‘mission leaders’ allegedly issued, or otherwise allege facts suggesting that Lt. Leos and/or Sgt. Holslag instructed or encouraged SWAT officers to use more force than necessary under the circumstances. . . . Plaintiffs do not allege sufficient facts to find that Defendants ‘set in motion a series of acts by others...which [they] *knew or reasonably should have known*, would cause others to inflict the constitutional injury.’ . . . Plaintiffs contend that Defendants knew providing the information they did to SWAT ‘would cause heightened tension, awareness, and fear, and would give rise to a likelihood of the immediate use of deadly force if Walb or other agents perceived a threat.’ . . . Even assuming the truth of Plaintiffs’ allegations, it is not reasonable to infer that Defendants knew or should have known that conveying that information to SWAT and requesting SWAT’s engagement would result in a SWAT officer using excessive force. . . . [E]ven assuming Defendants were supervisors and set in motion the series of acts that ultimately resulted in Lopez’s shooting, Defendants did not proximately cause Lopez’s death because the actions of the SWAT unit were an intervening event. . . It was the SWAT team’s decision to use submachine guns, to pursue Lopez when he fled into the apartment building, and to shoot him when he allegedly was kneeling in compliance with the Officer Walb’s order that led to the deprivation of constitutional rights. Although Plaintiffs allege that Lt. Leos and Sgt. Holslag served as mission leaders of the operation, Plaintiffs do not allege any facts suggesting that they instructed or encouraged SWAT officers to employ more force than necessary under the circumstances. Defendants could not have foreseen that highly trained SWAT officers allegedly would use excessive force in attempting to apprehend Lopez, even SWAT officers armed with the very information Defendants provided them with. Thus, the Court finds that Plaintiffs do not allege sufficient facts to find that Defendants ‘set in motion a series of acts by others...which [they] knew or reasonably should have known, would cause others to inflict the constitutional injury’ (*Larez*, 946 F.2d at 646), demonstrating ‘a reckless or callous indifference to the rights of others.’ *Starr*, 652 F.3d at 1208. Officer Walb’s use of lethal force was unforeseeable in light of the information Defendants conveyed to SWAT when requesting SWAT’s engagement.”)

***Murillo v. Parkinson***, No. CV 11-10131-JGB VBK, 2015 WL 3791450, at \*11 (C.D. Cal. June 17, 2015) (“[T]he allegations of the First Amended Complaint are wholly bald and conclusory and assert merely that Defendant Sheriff Parkinson knew or should have known that Plaintiff’s rights

would be violated by the conditions of her confinement at the jail. Plaintiff does not allege any facts that plausibly suggest Defendant Sheriff Parkinson knew of any constitutional deprivations occurring at the San Luis Obispo County Jail. The mere fact that Defendant Sheriff Parkinson is the Sheriff of San Luis Obispo, and thus is the top official with respect to the administration of the Jail, is not an adequate factual predicate for stating a § 1983 claim against him based on the subject matter of the First Amended Complaint. As in *Hydrick*, ‘[T]he absence of specifics is significant,’ because *Iqbal* has made clear that a complaint against a government official must show that the official’s own individual actions violated the Constitution. . . Plaintiff’s First Amended Complaint does not provide allegations describing why and how Defendant Sheriff Parkinson ‘reasonably should have known’ that his rank and file employees were engaged in some ‘series of acts’ (which he did not initiate, command or encourage) which would cause constitutional injury to Plaintiff if Defendant Sheriff Parkinson did not terminate that ‘series of acts[.]’. . . Nor does the First Amended Complaint supply specific allegations describing, in more than conclusory fashion, how Defendant Sheriff Parkinson might have ‘set [ ] in motion a series of acts by others’. . . that he knew or reasonably should have known would cause his subordinates to inflict constitutional injury on Plaintiff. Without a factually based, non-conclusory allegation that Defendant Sheriff Parkinson actually knew of the conditions to which Plaintiff refers, as a matter of law it cannot be said that Defendant Sheriff Parkinson ‘acquiesced’ in those conditions or that his conduct exhibited ‘reckless or callous indifference to the rights of’ Plaintiff. Accordingly, Defendants Sheriff Parkinson and the County of San Luis Obispo are entitled to summary judgment.”)

*Perez v. United States*, 103 F. Supp. 3d 1180, 1199-1206 (S.D. Cal. 2015) (“Defendant Napolitano is sued in her individual capacity for her allegedly unlawful acts and omissions as Secretary of DHS. Defendant Bersin is sued in his individual capacity for his allegedly unlawful acts and omissions as Commissioner of CBP. Defendant Fisher is sued in his individual capacity for his allegedly unlawful acts and omissions as Chief of Border Patrol. Defendants Napolitano, Bersin, and Fisher contend that at the time of the alleged constitutional violation, the ‘knowledge and acquiescence’ standard was not clearly established in the Fourth Amendment context. Defendants contend that, even if it was clearly established, the SAC fails to allege sufficient facts demonstrating Defendants Napolitano and Bersin’s knowledge and acquiescence of the Rocking Policy. . . Plaintiffs contend that the knowledge and acquiescence standard applied to supervisors for excessive force claims long before Yañez was killed. . . . *Chavez* demonstrates that supervisory liability in the Fourth Amendment context requires, at a minimum, knowledge of a pattern or practice of unconstitutional actions taken by subordinates, coupled with culpable action or inaction. . . . Although *Connick* analyzed a claim against a governmental official in his official capacity, *Connick* is equally applicable to claims against government supervisors in their individual capacity. . . .The SAC alleges no facts to support the inference that either Defendant Janet Napolitano, as Secretary of DHS, or Defendant Bersin, as Commissioner of CBP, were directly responsible for the training of Border Patrol agents in their use of force. Instead, the facts alleged in the SAC suggest that the Chief of Border Patrol, not the Secretary of DHS or Commissioner of CBP, is directly responsible for implementing Border Patrol training programs. . . .In addition, the SAC fails to allege sufficient facts to permit the ‘reasonable inference’ that

Defendants Napolitano and Bersin ‘disregarded a known or obvious consequence’ of their failure to properly train Border Patrol agents on use of force in response to rock-throwing. . . The fact that there were ten rock-throwing deaths along the United States–Mexico Border over an eight year period does not plausibly demonstrate an ‘obvious’ need for rock-throwing-specific use of force training, such that the failure to provide that training amounts to ‘deliberate indifference.’ . . The Associated Press article incorporated by reference in the SAC reveals that Border Patrol Agents were attacked with rocks 339 times in 2011 and 185 times in 2012. . . .The SAC alleges that Defendant Napolitano was Secretary of the Department of Homeland Security for the relevant period and that Defendant Bersin was the Commissioner for Customs and Border Protection for the relevant period. At this level of the supervisory chain of command, the Court cannot draw the ‘reasonable inference’ that Defendants Napolitano and Bersin were aware of a pattern or practice of excessive force in response to rock throwing, absent factual allegations demonstrating specific notice of a such a pattern or practice. . . . The allegation that Defendants Napolitano and Bersin received a mass email each time a Border Patrol agent used force does not permit the ‘reasonable inference’ that these Defendants were able to appreciate a pattern of excessive force specific to alleged rock-throwing incidents that would require them to take corrective action. . . . The SAC again alleges facts demonstrating that Defendants Napolitano and Bersin were specifically put on notice of the death of Sergio Hernandez, but fails to allege facts that they were given similar notice of other rock-throwing deaths, let alone a pattern or practice of excessive force used in response to rock-throwing, prior to Yañez’s death. The Court concludes that the SAC ‘fail[s] to nudge the *possible* to the *plausible*’ in demonstrating Defendant Napolitano and Bersin’s knowledge of a pattern or practice of excessive force in response to rock throwing, and are therefore liable for culpable action or inaction that caused Yañez’s death. . . The Court concludes that Defendants Napolitano and Bersin are entitled to qualified immunity on the ground that the allegations of the SAC fail to make out a constitutional violation. . . Because the Court finds that further amendment would be futile, Plaintiffs’ fourth claim is dismissed with prejudice as to Defendants Napolitano and Bersin.”)

*Perez v. United States*, 103 F. Supp. 3d 1180, 1206-12 (S.D. Cal. 2015) (“In the Court’s September 3, 2014 Order, the Court concluded that the FAC stated a plausible Fourth Amendment supervisory liability claim against Defendant Fisher. Defendant Fisher now contends that he is entitled to qualified immunity on the grounds that the Fourth Amendment supervisory liability standard was not clearly established at the time of Yañez’s death. Defendant Fisher contends that, at the time of the alleged shooting—June 21, 2011—it was not clearly established that ‘knowledge and acquiescence’ governed supervisory liability for Fourth Amendment excessive force claims. . . Defendant Fisher contends that at this time, the governing standard was *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), which held that ‘knowledge and acquiescence’ is ‘insufficient to satisfy’ the standard for supervisory liability in the *Bivens* context. . . Defendant Fisher contends that months later, in *al-Kidd*, . . . the dissent questioned whether the ‘knowing failure to act’ standard survived *Iqbal*. . . Defendant Fisher contends that the Court relied on *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011) in its September 3, 2014 Order, even though that case was decided four weeks after the alleged shooting incident. Defendant Fisher contend[s] that *Starr v.*

*Baca*'s holding is limited to Eighth Amendment deliberate indifference claims. Defendants contend that as late as 2013 it has been debated whether the 'knowledge and acquiescence' standard survived *Iqbal*. Plaintiffs contend that, as early as 1991, 'it was clearly established in this Circuit that supervisors are liable when they know of and acquiesce in their subordinates' use of excessive force.' . . . Plaintiffs contend that *Iqbal* did not "unsettle" the knowledge and acquiescence standard governing excessive use of force claims' because *Iqbal* 'held only that knowledge and acquiescence was insufficient to establish a claim of *purposeful discrimination*, and the Court expressly tied the level of intent necessary for supervisor liability to *the underlying constitutional tort*.' . . . Plaintiffs contend that *Starr v. Baca* was decided before the alleged shooting, and clarified that '*Iqbal* does not affect the standard governing supervisor liability claims when, as is the case here, the level of intent necessary for supervisor liability is greater than needed for the underlying constitutional tort....' . . . *Chavez* is the current standard for supervisory liability in the Fourth Amendment context. 'Because *Iqbal* requires courts to apply an equivalent standard to supervisors and subordinates ... a supervisor faces liability under the Fourth Amendment only where "it would be clear to a reasonable [supervisor] that his conduct was unlawful in the situation he confronted."' . . . To meet this standard, a plaintiff must allege, at a minimum, a 'factual basis for imputing ... knowledge' of an unconstitutional practice undertaken by subordinates, coupled with culpable action or inaction. . . . Prior to May, 18, 2009, the date *Ashcroft v. Iqbal* was decided. . . . [s]upervisors could be liable for their subordinates use of excessive force if they were on notice of a pattern or practice of excessive force, failed to take corrective action, and that failure foreseeably caused the plaintiff's injury. . . . The Court finds that the pre-May 18, 2009 and current standards for supervisory liability in the Fourth Amendment context both require knowledge of an unconstitutional pattern or practice of excessive force used by subordinates, coupled with culpable action or inaction. However, Defendant Fisher contends that, at the time of the alleged shooting, June 21, 2011, the governing standard was *Ashcroft v. Iqbal*, . . . which held that 'knowledge and acquiescence' is 'insufficient to satisfy' the standard for supervisory liability in the *Bivens* context. . . . Alternatively, Defendant Fisher contends that, on June 21, 2011, there was enough disagreement in the Courts following *Iqbal* such that any Fourth Amendment supervisory liability standard established prior to *Iqbal* was no longer clearly established law. . . . *Starr* demonstrates that *Iqbal* does not necessarily impose a 'purpose' requirement in all constitutional contexts, but instead required that the same requirements for holding a subordinate liable for a *Bivens* violation are equally applicable to 'an official charged with violations arising from his or her superintendent responsibilities.' . . . At the time of *Yañez's* death, there were no Supreme Court or Ninth Circuit cases available that applied *Iqbal* to a Fourth Amendment excessive force claim asserted against supervisors. However, Fourth Amendment excessive force law was clearly established, and *Iqbal* requires that the Fourth Amendment's mental state requirements be applied equally to supervisors. '[S]pecific intent [is not] required in order to establish a violation of the Fourth Amendment.' . . . The facts known to the governmental actor are relevant in determining the objective reasonableness of the actor's actions. . . . Following *Iqbal*, the pre-May 11, 2009 standard remained good law in the Fourth Amendment excessive force context because it was consistent with the Fourth Amendment's mental state requirements: a supervisor's knowledge of a pattern or practice of excessive force by subordinates and failure to take corrective action is not "objectively

reasonable” in light of the facts and circumstances confronting [the supervisor].’ . . . As stated previously, the pre-May 11, 2009 standard and *Chavez* both require knowledge of a pattern or practice of excessive force committed by subordinates, coupled with culpable action or inaction. The Court concludes that the standard remained substantially unchanged both before and after *Iqbal* and before and after *Chavez*. The Court further concludes that nothing in *Iqbal* raises the standard for supervisory liability for Fourth Amendment excessive force from knowledge of an unconstitutional pattern or practice, coupled with culpable action or inaction, to a standard requiring a higher mental state. The Court concludes that Defendant Fisher is not entitled to qualified immunity on the ground that the applicable mental state for supervisory liability in the Fourth Amendment context was not clearly established at the time of Yañez’s death.”)

***Jones v. Cate***, No. 2:12-CV-2181 TLN CKD, 2015 WL 1440168, at \*10-11 (E.D. Cal. Mar. 27, 2015) (“In *OSU*, the Ninth Circuit held that a supervisor’s knowledge of and acquiescence in a First Amendment free speech violation was sufficient to impose liability on the supervisor for the constitutional tort. The court gave two reasons for the holding: first, that First Amendment free speech claims do not require specific intention; and second, that United States Supreme Court has ‘only in limited situations ... found constitutional torts to require specific intent.’ . . . The three situations cited by the *OSU* court are ‘(1) due process claims for injuries caused by a high-speed chase ... (2) Eighth Amendment claims for injuries suffered during the response to a prison disturbance ... (3) and invidious discrimination under the Equal Protection Clause and the First Amendment Free Exercise Clause.’ . . . The case at bar presents a fourth constitutional tort that includes a specific intent requirement. Success on a retaliation claim requires proof that retaliation for the exercise of protected conduct ‘was a “substantial” or “motivating” factor’ in imposing adverse employment consequences. . . . Under *Iqbal* and its Ninth Circuit progeny, Plaintiffs must allege facts which suggest that Defendants Cate and McDonald had the intent necessary to support a retaliation claim when they allegedly failed to train correctional officers and acquiesced in retaliatory events of which they had knowledge. There are no allegations in the FAC which suggest that either Defendant Cate or Defendant McDonald had the requisite animus in allegedly failing to train, investigate, or discipline officers. For this reason, the third claim for relief must be dismissed. It is not clear to the Court whether the deficiencies in this claim could be cured by amendment. Accordingly, the Court will grant Plaintiffs leave to file a second amended complaint.”)

***Roberts v. Blades***, No. 1:13-CV-00312-BLW, 2014 WL 7149576, at \*4-5 (D. Idaho Dec. 15, 2014) (“Plaintiff alleges that Warden Blades had notice of Plaintiff’s ongoing problem and did not do anything further to solve his problem. This is enough to infer deliberate indifference—knowledge, plus a conscious disregard of an allegedly serious health need. Non-medical prison personnel are generally entitled to rely on the opinions of medical professionals with respect to appropriate medical treatment of an inmate. However, if ‘a reasonable person would likely determine [the medical treatment] to be inferior,’ the fact that an official is not medically trained will not shield that official from liability for deliberate indifference. . . . Other courts are in agreement. If an alleged constitutional violation is ongoing, and a supervisory official reviewing

the inmate's report of a problem has the duty and authority to review the propriety of the medical treatment and take action to remedy the alleged deficiencies (not necessarily by providing medical care himself, but by obtaining the answer to whether the medical care was proper from a person with medical training and directing a remedy to be implemented), then a cause of action lies, because the defendant 'knew of an ongoing constitutional violation and ... had the authority and opportunity to prevent the ongoing violation,' under supervisory liability principles applicable to § 1983 actions. . . Stated differently, where claims are asserted against persons who supervise the provision of prison medical care, the question is not whether the supervisor was 'directly involved' in the plaintiff's diagnosis, but whether the plaintiff has sufficiently alleged or provided evidence from which a jury could find that the supervisor's knowing failure to address the treating provider's deficient care rendered Plaintiff's medical treatment constitutionally inadequate. . . .Based on all of the foregoing, Plaintiff will be permitted to proceed to the discovery and summary judgment stages on his claims against Warden Blades in his personal or individual capacity for damages purposes.")

*Hagen v. Williams*, No. 6:14-CV-00165-MC, 2014 WL 6893708, at \*3 (D. Or. Dec. 4, 2014) ("It is clear that there is a high bar for what is considered a sufficient claim for supervisory liability under section 1983. Turning to the allegations in this case, Plaintiff has not met that bar. She has not alleged a sufficient causal connection between Defendants Williams, Morrow, Nooth, and Gilmore's acts or failures to act and Hagen's death. Here, Plaintiff fails to allege facts with sufficient detail to infer that Williams and Morrow plausibly were aware of the unconstitutional conduct of DOC personnel and were deliberately indifferent to the safety of Hagen. Plaintiff instead relies on the bare assertion that Williams and Morrow would have been aware of 'an ongoing problem of inmate violence throughout the DOC and, specifically ... the murder of an inmate at SRCI by an inmate with whom he had a known conflict.' . . The fact that an inmate was killed in a prison setting prior to Hagen's murder, without more, does not provide the type of notice outlined in *Starr*. And while a homicide in a prison can never be tolerated by prison officials, there is nothing in this record to indicate any similarity or pattern between the prior homicide and Hagen's death that would give rise to deliberate indifference. The claims against Williams and Morrow are dismissed, without prejudice.")

*Estate of Shafer ex rel. Shafer v. City of Elgin, Or.*, No. 2:12-CV-00407-SU, 2014 WL 6633106, at \*16 (D. Or. Nov. 21, 2014) ("Defendants argue in order to hold a supervisor liable in an excessive force case, there must be evidence the officer previously used the same type of force that was used against the complaining plaintiff. . . Specifically, defendants argue that to hold Chief Lynch liable in this case, there must be evidence of a prior shooting by Officer Kilpatrick. . . The court disagrees. In a case alleging excessive force by a police officer, liability of the police chief depends on whether he 'set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury.' . . Although there is no evidence of a shooting by Officer Kilpatrick prior to the shooting of Richard Shafer, a jury could find a causal link in this case from evidence that Chief Lynch knew Officer Kilpatrick repeatedly pointed his gun at unarmed Elgin residents.

Summary judgment is improper in a § 1983 claim alleging Fourth Amendment violations against a police chief for supervisor liability when there is evidence of prior citizen complaints made against an officer for use of force, and the opinion of a qualified expert witness demonstrates the police chief failed to take remedial action in response to those complaints. . . This case presents precisely that. The court finds there are issues of fact surrounding whether Chief Lynch took proper remedial action against Officer Kilpatrick after complaints were made to him that Officer Kilpatrick had pointed his gun at other Elgin residents. As such, defendants' motion for summary judgment on the § 1983 claim against Chief Lynch is denied.”)

***Palmer v. Wexford Med.***, No. CV 12-08214-PCT-SPL, 2014 WL 5781305, at \*9 (D. Ariz. Nov. 6, 2014) (“To the extent Ryan argues that he is not liable because his only involvement was in the grievance process, he overstates the holding of *Shehee*, a Sixth Circuit opinion. Whether involvement in the grievance process is sufficient personal involvement to state a claim of a constitutional deprivation would depend on several factors, such as whether, at the time of the grievance response, the violation is ongoing, *see e.g., Flanory v. Bonn*, 604 F.3d 249, 256 (6th Cir.2010), or the unconstitutional conduct is completed, *see Shehee*, 199 F.3d at 300, and whether the defendant responding to the grievance has authority to take action to remedy the alleged violation, *see Bonner v. Outlaw*, 552 F.3d 673, 679 (8th Cir.2009). Further, under Sixth Circuit law, liability under § 1983 requires ‘active unconstitutional behavior; failure to act or passive behavior is insufficient.’ *King v. Zamiara*, 680 F.3d 686, 706 (6th Cir.2012). But under Ninth Circuit law, a defendant can be liable for the failure to act. *See Taylor*, 880 F.2d at 1045.”)

***Dasovich v. Contra Costa Cnty. Sheriff Dep’t***, 14-CV-00258-MEJ, 2014 WL 4652118, \*7, \*8 (N.D. Cal. Sept. 17, 2014) (“The Ninth Circuit has explained various ways in which a supervisory figure can be individually liable in a § 1983 case. A supervisor can be liable if he or she directed his or her subordinates to commit the offensive act. . . Liability also can attach when the supervisor ‘set[s] in motion a series of acts by others ..., which he knew or reasonably should have known, would cause others to inflict the constitutional injury.’. . . Even when the supervisor does not direct his or her subordinates to commit the offensive act, or set in motion a series of acts by others which caused others to inflict the constitutional injury, the supervisor can still be liable if he or she ‘knew of the violations’ being committed by subordinates yet ‘failed to act to prevent them.’. . . The Ninth Circuit also recognizes that ‘[s]upervisory liability [can be] imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional deprivations of which the complaint is made, or for conduct that showed a reckless or callous indifference to the rights of others.’. . . Finally, a supervisory official can be liable if he or she ‘implement[s] a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.’. . . Here, as discussed above, Plaintiff alleges that Defendants, including Sheriff Livingston, developed and maintained training policies that ‘led to the improper use of canines by individual officers, including the release of canines to bite on individuals when it is not objectively reasonable to do so.’. . . If Plaintiff is able to establish that Sheriff Livingston failed to train, supervise, or control his subordinates in the deployment of canines, he can be held

liable under § 1983. . . He can also be held liable if this policy is ‘so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.’. Accordingly, under the liberal pleading standard of Rule 8(a)(2) and drawing all reasonable inferences that Sheriff Livingston is liable for the misconduct alleged, the Court finds that the FAC contains sufficient allegations of underlying facts to give fair notice to Sheriff Livingston and to enable him to defend against the allegations effectively. Accordingly, the Court DENIES Defendants’ Motion on this ground.”)

*Perez v. United States*, 13CV1417-WQH-BGS, 2014 WL 4385473, \*10-\*12 (S.D. Cal. Sept. 3, 2014) (“Plaintiffs allege that each and every Supervisor Defendant violated Yañez’s Fourth Amendment rights by ‘personally developing, authorizing, and conspiring to effect, and permitting and directing their subordinates to implement, the Rocking Policy’ and by ‘failing to establish adequate procedures to train the Border patrol agents, failing to establish adequate disciplinary procedures and adequate procedures to investigate agents’ misconduct, and acting and failing to act in disregard of previous allegations of Border Patrol agents’ use of excessive, lethal force.’. Defendants contend that Plaintiffs cannot maintain suit against the Supervisor Defendants by alleging their knowledge and acquiescence to the alleged unconstitutional conduct. Defendants assert that Plaintiffs have failed to allege the specific roles of each Defendant beyond their general responsibilities within DHS, such as how each became aware of the Rocking Policy. Plaintiffs contend that allegations of ‘deliberate indifference’ or ‘knowledge and acquiescence’ are sufficient to state *Bivens* violations. . . Plaintiffs assert that all of the public information alleged in the FAC reasonably gives rise to the inference that each Supervisor Defendant was aware of the Rocking Policy, and that they have alleged the specific knowledge of Defendants Napolitano and Fisher. . . Plaintiffs have alleged in detail several instances of border shootings related to alleged rock throwing and detailed public debate on the Border Patrol’s use of lethal force in response to rock throwing, including statements by the NBPC. These allegations make it possible that some or all of the Supervisor Defendants were aware of the alleged Rocking Policy, but ‘the non-specific allegations in the complaint regarding [each Supervisor Defendant’s individual involvement] fail to nudge the *possible* to the *plausible*, as required by *Twombly*.’ *al-Kidd v. Ashcroft*, 580 F.3d 949, 979 (2009), *rev’d on other grounds*, — U.S. —, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011); *see also Hydrick v. Hunter*, 669 F.3d 937, 942 (2012) (complaint must allege facts demonstrating that each supervisor was personally responsible for the alleged constitutional violation). Plaintiffs only make specific factual allegations as to Defendants Napolitano and Fisher. As to Defendant Napolitano, the report that the Mexican Attorney General complained to her of excessive force used in one instance is not sufficient to plausibly put her on notice of the alleged Rocking Policy. . . This allegation alone is insufficient to state a claim against Defendant Napolitano on a supervisory liability theory. . . As to Defendant Fisher, the article incorporated by reference in the FAC begins by reporting that ‘Border Patrol agents will be allowed to continue using deadly force against rock-throwers, [Defendant Fisher] said, despite the recommendation of a government-commissioned review to end the practice.’. . The incorporated article permits the inference that Defendant Fisher knew of and was responsible for the alleged Rocking Policy. Although the article post-dates Yañez’s death, Plaintiffs have alleged that Defendant Fisher has served as the Chief of

the Border Patrol since May 2010, and have set forth facts to permit the inference that the alleged Rocking Policy existed for the entirety of Defendant Fisher's tenure. This individualized factual allegation is sufficient to state a claim against Defendant Fisher. The Court concludes that Plaintiffs have failed to allege sufficient facts to state a Fourth Amendment claim against all Defendants except Fisher. The Motion to Dismiss the Fourth Claim as to Defendant Fisher is denied. The Motion to Dismiss the Fourth Claim as to all other Supervisor Defendants is granted.")

*Estate of Peterson v. City of Missoula*, CV 12-123-M-DLC, 2014 WL 3868217, \*18-\*21 (D. Mont. Aug. 6, 2014) ("Here, Plaintiffs do not allege or provide evidence that either supervisor was ever present at any point during the investigation related to Colton. Nor do Plaintiffs point to any other instances where other members of the Drug Task Force violated the constitutional rights of other confidential informants or drug suspects. Plaintiffs thus do not forward a valid acquiescence or ratification theory on which to impose supervisory liability. . . . Instead, Plaintiffs focus exclusively on deficiencies in Detective Krueger's training as it relates to the use of confidential informants and the handling of potentially suicidal suspects or individuals. . . . Though Chief Muir was responsible for Detective Krueger's training and supervision, Plaintiffs fail to present sufficient evidence to create a genuine dispute that the need for more training in the handling of confidential informants or suicidal drug suspects was obvious. Though a Plaintiff need not always point to evidence of other constitutional violations in order to demonstrate a need for more training, the need for more training in such cases must be 'patently obvious.' . . . Here, Defendants present evidence that Detective Krueger received a great deal of training, though perhaps only limited training in the specific areas of evaluating individuals for suicide risk and the use of confidential informants. Detective Krueger attended a DEA basic drug investigator training course. The Missoula Police Department also had established a process for how to sign up confidential informants. In addition, all City of Missoula police officers receive brief ongoing training daily, must meet or exceed minimum standards for hiring, must meet the employment education and certification standards, and are required to complete the basic academy at the Montana Law Enforcement Academy or that of another state. Also, Missoula City Police Officers must complete a variety of other training courses before they can work on their own. The Missoula Police Department has received national recognition for its training program for new officers. Plaintiffs point to deficiencies related to specific HIDTA training, . . . but do not dispute that Detective Krueger received all of the training required by the Missoula Police Department and the DEA course for drug investigators. . . . Under these circumstances, the Court does not regard the need for additional, specific training regarding the use of confidential informants and suicidal suspects to fall in the 'narrow range of circumstances' where the need for more training is 'so patently obvious' that a claim can be maintained without demonstrating a pattern of or any other similar violations. . . . In addition, Plaintiffs fail to address Chief Muir's claim for qualified immunity. Notably, Plaintiffs do not cite any case where a failure to train claim against a supervisor has succeeded despite a plaintiff's failure to demonstrate another instance or pattern of similar violations. The Court thus concludes that Plaintiffs fail to create any genuine dispute of fact that Chief Muir was deliberately indifferent to an obvious need for more or better training. Accordingly, Chief Muir is entitled to summary judgment. . . . For many of the same reasons that

Plaintiffs' claims against the individual supervisory officials fail, Plaintiffs' *Monell* claims also fail. Plaintiffs' fail to create any genuine issue of fact that the need for more training or supervision in the area of confidential informant handling and suicidal suspects was obvious. Plaintiffs present no evidence of similar violations or a pattern of unconstitutional conduct on the part of either the Sheriff's Department or the Missoula Police Department. Accordingly, Missoula County and the City of Missoula are entitled to summary judgment on Plaintiffs' § 1983 claims.")

***Hernandez v. City of Beaumont***, No. EDCV 13–00967 DDP (DTBx), 2014 WL 1669990, \*4, \*5 (C.D. Cal. Apr. 28, 2014) (“To impose supervisory liability for failure to train, the supervisor must have been ‘deliberately indifferent’ to the need for ‘more or different training.’. . .As the chief of the BPD, Plaintiffs allege that Coe ‘possessed the power and the authority and [was] charged by law with the responsibility to enact policies and to prescribe rules and practices concerning the operation of the BPD.’. . . The Court finds that Plaintiffs have pled sufficient facts to state plausible claims for supervisory liability and for negligent training against Coe for the same reasons their *Monell* claim is sufficient. . . .Here, in determining whether Plaintiffs have stated a claim for municipal and supervisory liability, the Court has already determined that Plaintiffs have pled facts demonstrating that Coe's conduct in failing to adequately train BPD officers in the constitutional implications of using the JPX amounted to a constitutional violation, satisfying the first prong of the *Saucier* test. The Court also determined that Coe and the City could be liable for the failure to train because the need for such training was ‘so obvious’ that it amounted to deliberate indifference. This amounts to essentially the same thing as finding that it should have been ‘readily apparent’ that the failure to train would amount to a violation of constitutional rights. Therefore, the Court finds that Coe is not entitled to qualified immunity.”)

***Nicholson v. Finander***, No. CV 12–9993–FMO (JEM), 2014 WL 1407828, \*7, \*8 (C.D. Cal. Apr. 11, 2014) (“The Ninth Circuit has not ruled on whether a supervisor who learns about unconstitutional behavior from a prisoner's grievance and fails to intervene is personally involved in the constitutional violation, and the district courts are divided on the issue. . . . Some district courts have reasoned that no constitutional claim of any sort may be based upon the administrative appeals process, [collecting cases] while others have held that a grievance appeal reviewer who fails to remedy a denial of adequate medical care personally participates in an Eighth Amendment violation. [collecting cases] In *Michaud v. Bannister*, for example, the District Court for Nevada held that ‘an Eighth Amendment violation can attach to *any* official who denies an inmate constitutionally adequate medical care,’ and, therefore, ‘a supervisor who denies medical care via grievance is equally liable as a physicians’ panel determining the medical necessity of a particular treatment.’. . . Here, Plaintiff's only claims against Dr. Finander involve her denial of Plaintiff's administrative grievances. Although Plaintiff states that ‘from day one, Dr. Finander denied my pain medication and my chrono,’. . . he does not assert that Dr. Finander was ever involved in a decision to deny him Methadone or a lower bunk chrono except through the grievance procedure. . . . The Court cannot infer from Dr. Finander's supervisory position alone that she directed the other Defendants to ignore Plaintiff's serious medical needs. Nevertheless, a supervisor who learns about an unconstitutional denial of adequate medical care from a prisoner's grievance and fails to

intervene may be found to have personally participated in the Eighth Amendment violation. . . Accordingly, the Court recommends denying the Motion to Dismiss the claim against Dr. Finander on the grounds that her role in the alleged Eighth Amendment violation was limited to reviewing Plaintiff's grievances.")

*Doe v. City of San Diego*, 35 F.Supp.3d 1214, 1226-29 (S.D. Cal. 2014) ("The pivotal question. . . is not whether Plaintiff was constitutionally harmed, but whether the Supervisor Defendants are personally liable for the harming. The answer resides within the confines of Section 1983's supervisory liability jurisprudence. As the Court previously noted, supervisory liability can be imposed only if (1) the supervisor was personally involved in the constitutional deprivation, or (2) there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. . . It is undisputed that the Supervisor Defendants did not personally participate in the sexual assault and battery of Jane Doe. Accordingly, to prevent summary judgment, Doe must produce evidence demonstrating a causal connection between the Supervisor Defendants' conduct and Doe's injury. The Supervisor Defendants contend that this burden is insurmountable because the requisite causal connection can only be forged by demonstrating repeated failure to act to abate repeated constitutional violations, and it is undisputed that at the time of Doe's injuries each Supervisor Defendant knew of only one prior allegation of sexual misconduct against Officer Arevalos. . . Plaintiff disagrees with the Supervisor Defendants' interpretation of supervisory liability requirements. She contends that the requisite culpability for supervisory inaction can be established on the basis of a single incident of subordinate misconduct. . . Upon review of *Gutierrez-Rodriguez* and the other cases relied on by Plaintiff, however, the Court finds that the limits of supervisory liability are not so unrestrained. . . . Importantly, supervisory liability in *Gutierrez-Rodriguez* was not premised on knowledge of one past incident of misconduct, but, rather, a long history of past complaints and violence. . . Upon review of the case law—cited by Plaintiff or otherwise—the Court cannot find any case which imposes personal liability on a supervisor for having knowledge of a single prior act of misconduct on the part of a subordinate. . . . Upon review of the case law, the Court concludes that, for cases involving supervisory inaction following subordinate misconduct, a supervisor must have knowledge of pervasive and widespread conduct posing an unreasonable risk of constitutional injury before supervisory liability can attach.")

*Jones v. Skolnik*, No. 3:10-cv-00162-LRH-VPC, 2013 WL 6498955, \*3 (D. Nev. Dec. 10, 2013) ("Thus, although in *Ashcroft v. Iqbal* the United States Supreme Court rejected the idea that 'knowledge and acquiescence' of subordinates' conduct is enough to hold supervisory officials liable under § 1983 where the a claim is one of purposeful and unlawful discrimination, . . . the Ninth Circuit Court of Appeals concluded that where the applicable constitutional standard is deliberate indifference, 'a plaintiff may state a claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates.' . . Neither the Ninth Circuit nor the United States Supreme Court has squarely addressed whether knowledge of and acquiescence in a subordinates' conduct is sufficient to impose supervisory liability where the underlying constitutional violation does not

involve either purposeful discrimination or deliberate indifference. However, other courts have concluded that such a theory may remain viable. [collecting cases]”)

***Mackenzie v. Hutchens***, No. LA CV 12–00584–VBF–JC, 2014 WL 8291423, \*6 n.9, \*12, \*13 (C.D. Cal. Sept. 9, 2013), aff’d 623 F. App’x 483 (9th Cir. 2015) (“The Court will use the phrase ‘hold a supervisor liable’ or ‘hold the sheriff liable’, not the term ‘supervisory liability.’ The Tenth Circuit cogently observed that while that court ‘ha[s] referred [in past cases] to claims against supervisors as based on “supervisory liability” ... this label can be misunderstood as implying vicarious liability.’ . . . [W]e are left with nothing in the complaint alleging that the sheriff ever directed or encouraged her subordinates to subject plaintiff to any particular condition of confinement, nor that any of the allegedly unconstitutional conditions of confinement were taken pursuant to the jail’s policies rather than contrary to them, nor that she actually knew of any condition of confinement and acquiesced in it, nor that she otherwise exhibited callous indifference for the rights of others. Rather, as quoted above, the complaint does not even allege that the sheriff knew of any of the conditions of his confinement, saying only that the sheriff knew ‘or reasonably should have known’ that the OC Jail’s conditions, in general terms, were unconstitutional for civil detainees. . . . [T]he mere fact that an official has ultimate authority over the policies and activities of his office, in this case a county jail, is not by itself sufficient to state a claim for relief against that official without some factual basis to connect the specific policy—or the specific application or interpretation of a policy—to the sheriff.”)

***Orr v. County of Sacramento***, No. CIV. S–13–0839 LKK/AC, 2013 WL 4519637, \*8, \*9 (E.D. Cal. Aug. 26, 2013) (“Defendants assert that the allegations against the individual defendants are not specific enough under *Iqbal*, to find supervisory liability. The court finds that plaintiffs have alleged sufficient facts. The Complaint alleges that the named supervisory defendants knew that plaintiff had a medical need to be assigned to a lower tier (and a lower bunk) in order to avoid serious injury. It alleges how they knew this—from a prior incident, and from his medical file. The Complaint alleges that because of their failure to train and control their subordinates, plaintiff was nevertheless placed into an upper tier cell. It alleges that plaintiff fell on the stairs, trying to reach his upper-tier cell. The Complaint alleges that the fall on the stairs could not have occurred if plaintiff had been placed in a lower tier cell. Defendants assert that these allegations are conclusory, but they are in fact very specific factual allegations, sufficient to meet the pleading standard of Fed.R.Civ.P. 8, as interpreted by *Twombly* and *Iqbal*. Defendants complain that plaintiff has lumped all the individual defendants together. That is true, but it is not enough to dismiss the claims against them. Plaintiff has named the four senior officials who, collectively, are responsible for creating and implementing policies to ensure that his medical needs are seen to, and who, collectively, are alleged to be responsible for ensuring that those policies are carried out. Plaintiff presumably does not currently know exactly which official was responsible for which aspect of the policies. That would appear to be a matter for plaintiff to learn in discovery, it is not a basis for dismissal.”)

***Collins v. Lopez***, No. 1:11–cv–01534–LJO–SKO PC, 2013 4041828, \*4, \*5 (E.D. Cal. Aug. 7,

2013) (“Deliberate indifference is shown where a prison official ‘knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it,’ *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994), and in this Circuit, a sworn allegation that a supervisor or an administrator was placed on notice of a medical problem by letter but failed to take action is sufficient to defeat summary judgment, *Jett v. Penner*, 439 F.3d 1091, 1098 (9th Cir.2006) (citing *Moore v. Jackson*, 123 F.3d 1082, 1087 (8th Cir.1997)) (triable issue of fact in medical care case where inmate alleged he sent letters and administrators denied receiving them). It is therefore sufficient to support a claim at the pleading stage. Indeed, this basis for liability falls within one of the viable and longstanding supervisory liability theories identified by Defendants: alleged knowledge of a violation and the failure to take action to prevent it. *Snow v. McDaniel*, 681 F.3d 978, 989 (9th Cir.2012) (citing *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989)); *Starr v. Baca*, 652 F.3d 1202, 1205–08 (9th Cir.2011), *cert. denied*, 132 S.Ct. 2101 (2012). To the extent Defendants wish to persuade the Court that the act of sending a letter does not, for purposes of supporting a claim, equate to knowledge, the law does not support this interpretation. *Jett*, 439 F.3d at 1098. An allegation of notice given supports an inference of knowledge, and it is immaterial whether the notice was provided through a chance meeting on the yard, a medical examination in the clinic, an inmate appeal, a letter, or some other avenue.”)

***Love v. Salinas***, No. 2:11-cv-00361-MCE-CKD, 2013 WL 4012748, \*8-\*10 (E.D. Cal. Aug. 6, 2013) (“[T]he Court finds that the evidence presented by Plaintiff with respect to the lack of any meaningful training in cell door operations at DVI is sufficient to create a factual dispute as to whether supervisory Defendants Salinas and Rackley were deliberately indifferent to inmates’ safety. From this evidence, the jury also could reasonably conclude that the lack of training caused Defendants Montgomery and Berghorst to engage in the inherently dangerous practice of ‘blind’ door closing which led to Plaintiff’s serious injury on February 12, 2010. The fact that Plaintiff became the first casualty of the inadequate training does not necessarily absolve Defendants Rackley and Salinas of liability. Since a jury could reasonably conclude that Plaintiff’s injury was a ‘highly predictable consequence’ of supervisory Defendants’ failure to implement any meaningful training on cell door operations at DVI, *see Connick*, 131 S.Ct. at 1360, Defendants’ motion for summary judgment with respect to Plaintiff’s ‘failure to protect’ claim against Rackley and Salinas should be denied. . . . The state of the law in 2010, when the alleged constitutional violation took place, would have given Defendants a fair warning that their failure to protect Plaintiff from a substantial risk of harm from a known dangerous condition was unconstitutional. . . . Since Plaintiff has presented sufficient evidence to allow a reasonable jury to conclude that the manner of cell door operations at DVI created significant risk to his safety and that Defendants knew of the risk but chose to disregard it, Defendants are not entitled to qualified immunity with respect to Plaintiff’s ‘failure to protect’ claim at this stage in the proceedings.”)

***Alvarez-Orellana v. City of Antioch***, No. C-12-4693 EMC, 2013 WL 3989300, \*6 (N.D. Cal. Aug. 2, 2013) (“Plaintiff makes only conclusory allegations that Livingston knew or should have known that his subordinates were engaging in a pattern or practice of not complying with Penal Code sections 821, 822, and 1269b. . . . Plaintiff has not pled facts indicating that Livingston was

notified of his subordinates' allegedly unconstitutional conduct. Unlike in *Starr*, where the plaintiff pled that the sheriff was notified of constitutional deficiencies through the reports, Plaintiff fails to allege any specific facts indicating that Livingston was given any notice that a pattern or practice existed amongst his subordinates. . . . As in *Moss*, Plaintiff's allegations that Livingston's actions and failure to train his subordinates amount to deliberate indifference are similarly conclusory.")

***Estate of Prasad ex rel. Prasad v. County of Sutter***, 958 F.Supp.2d 1101, 1113, 1114 (E.D. Cal. 2013) ("Where a complaint 'specifically alleges ... that [a supervisory defendant] was given notice, in several reports, of systematic problems,' and he 'did not take action to protect inmates under his care despite the dangers ... of which he had been made aware,' such allegations 'plausibly suggest that [he] acquiesced in the unconstitutional conduct of his subordinates, and was thereby deliberately indifferent to the danger posed to [plaintiff].'. . . Here, the complaint pleads just that. Plaintiffs allege that Cummings, Bhattal, and Garbett authorized and implemented a policy whereby Jail medical staff were available only from 4:00 a.m. to midnight . . . and despite the lack of 24-hour medical staff and the consequent danger to inmates with emergency medical needs, Parker, Samson, and Bidwell created and enforced a policy whereby only medical staff obtained medical care for inmates. . . . Plaintiffs further allege that the Supervisory Defendants were on notice from earlier documented reports that medical staff should be at the Jail seven days a week, twenty-four hours a day. . . . This is enough to state a claim for deliberate indifference against the Supervisory Defendants.")

***Dukes v. Harrington***, No. 1:12cv00941 DLB PC, 2013 WL 1003672, \*3 (E.D. Cal. Mar. 13, 2013) ("Here, Plaintiff attempts to allege liability against Defendant Harrington based on a letter he wrote to Defendant Harrington. However, simply sending a letter does not support a presumption of knowledge. Pursuant to *Iqbal*, Plaintiff must affirmatively allege that Defendant Harrington received the letter and knew of its contents. He therefore fails to state any claims against Defendant Harrington.")

***Downing v. Graves***, No. 2:12-cv-00332-JCM-CWH, 2013 WL 420424, \*15 (D. Nev. Jan. 31, 2013) ("Although the United States Supreme Court has rejected the idea that 'knowledge and acquiescence' of subordinates' conduct is enough to hold supervisory officials liable under section 1983 where the a claim is one of purposeful and unlawful discrimination, *Ashcroft v. Iqbal*, 556 U.S. 662, 677-684, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), the Ninth Circuit Court of Appeals has held that where the applicable constitutional standard is deliberate indifference, 'a plaintiff may state a claim against a supervisory for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates.' *Starr*, 652 F.3d at 1205. 'Even under a deliberate indifference theory of individual liability, the [p]laintiffs must still allege sufficient facts to plausibly establish the defendant's 'knowledge of' and 'acquiescence in' the unconstitutional conduct of his subordinates.' *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir.2012) (citing *Star v. Baca*, 652 F.3d at 1206-07). In the instant case, plaintiff has alleged sufficient facts to plausibly establish that defendants Skolnik and Cox had knowledge of the improper use of the NDOC disciplinary and grievance procedures and purposes, and failed

to train defendants Graves, Griggs, Williams, Wilson, Burson, Howell, Dreesen, Connett, Smith, Foster, Romero, and Woodbury. However, plaintiff has failed to allege facts to state a colorable claim against defendants Skolnik and Cox for failure to train their subordinates in ‘the effective operation of the SDCC law library’ and ‘the constitutional rights of plaintiff and NDOC prisoners in general with respect to prison conditions.’ The claim against defendants Skolnik and Cox for failure to train their subordinates in the use of the NDOC disciplinary and grievance procedures may proceed.”)

***Cornelio v. Hirano***, Civ. No. 12–00072 LEK/RLP, 2012 WL 5414836, \*5 (D. Hawai’i Nov. 6, 2012) (“*Iqbal* emphasizes that a constitutional tort plaintiff must allege that every government defendant-supervisor or subordinate acted with the state of mind required by the underlying constitutional provision.’ [citing *OSU Student Alliance*] Vague and conclusory allegations concerning the involvement of official personnel in civil rights violations are not sufficient. . . . Despite four attempts to do so, Plaintiff fails to provide any details showing that Hirano knew of a specific danger to Plaintiff and failed to act to prevent the alleged assault. That is, Plaintiff alleges nothing showing that Hirano acted with the state of mind required for an Eighth Amendment violation: deliberate indifference. Plaintiff again simply alleges that Hirano is ‘in charge of [MCCC’s] overall operation.’. . . An individual’s ‘general responsibility for supervising the operations of a prison is insufficient to establish personal involvement.’. . . Plaintiff fails to state a claim against Hirano and claims against him are DISMISSED with prejudice.”)

***Hoslett v. Dhaliwal***, No. 3:11–CV–00674–KI, 2012 WL 3878415, \*3 (D. Or. Sept. 6, 2012) (“As is clear from the allegations, Hoslett brings claims against De Las Heras, Jacquez and Thomas even though none of them are medical providers. Hoslett’s allegations dwell on these defendants’ supervisory roles at FCI Sheridan. The allegations are conclusory and do not allege sufficient facts for the court to draw a reasonable inference that these defendants are liable under a theory of supervisory liability based on the supervisor knowing of the constitutional violations and failing to prevent them. Claims under Section 1983 cannot rest on respondeat superior liability. Moreover, negligence and medical malpractice do not constitute deliberate indifference. . . . The allegations refer to medical malpractice several times. Thus, Hoslett fails to state a claim against De Las Heras, Jacquez, and Thomas that is plausible on its face. Hoslett alleges Dr. Davis constantly denied his need for pain medication. As a doctor, he might be making decisions about Hoslett’s treatment. The allegations, though, are more indicative of supervisory liability. Dr. Davis supervises Dr. Dhaliwal, Hoslett’s primary caregiver. Hoslett alleges Dr. Davis knew about his pain but does not allege how Dr. Davis gained that knowledge, other than through his supervision of Dr. Dhaliwal. There are no specific allegations Dr. Davis ever treated Hoslett. Accordingly, Hoslett also fails to state a claim against Dr. Davis.”)

***Martinez v. Delio***, No. 1:11–cv–01088–LJO–MJS (PC), 2012 WL 3778842, \*2, \*3 (E.D. Cal. Aug. 30, 2012) (“Under § 1983, Plaintiff must demonstrate that each defendant personally participated in the deprivation of his rights. . . . This requires the presentation of factual allegations sufficient to state a plausible claim for relief. . . . The statute requires that there be an actual

connection or link between the actions of the defendants and the deprivation alleged to have been suffered by the plaintiff. . . Government officials may not be held liable for the actions of their subordinates under a theory of respondeat superior. . . Since a government official cannot be held liable under a theory of vicarious liability in § 1983 actions, Plaintiff must plead sufficient facts showing that the official has violated the Constitution through his own individual actions. . . In other words, to state a claim for relief under § 1983, Plaintiff must link each named defendant with some affirmative act or omission that demonstrates a violation of Plaintiff's federal rights. . . Plaintiff alleges that Defendant Hedgpeth was the Warden at KVSP and thus responsible for supervising and monitoring the facility. The mere fact that Hedgpeth may have supervised the individuals responsible for a violation is not enough. Defendants may only be held liable in a supervisory capacity if they 'participated in or directed the violations, or knew of the violations and failed to act to prevent them.' *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). The Court's previous screening order instructed Plaintiff on the applicable law and gave him an opportunity to amend. Plaintiff has again failed to allege facts connecting Defendants Zamora and Hedgpeth to the violations alleged. No useful purpose would be served by granting additional leave to amend. The Court recommends Plaintiff's claims against Defendants Zamora and Hedgpeth be dismissed with prejudice.")

***Parrish v. Solis***, No. C 11-1438 LHK (PR), 2012 WL 3902689, \*4, \*5 (N.D. Cal. Aug. 28, 2012) ("Here, as in *Hydrick*, Plaintiff does not allege any specific past incidents of the use of excessive force by subordinates of Defendants Solis, Muniz, and Hedrick. Neither does Plaintiff allege any specific incident during which Defendant Solis, Muniz, or Hedrick was given notice of a subordinate's unconstitutional conduct. Plaintiff's allegations are generally conclusory recitals. *Hydrick* makes clear that general allegations failing to describe specific incidents or policies are not enough to survive the *Iqbal* standard of pleading for a supervisory liability. Thus, Defendants Solis, Muniz, and Hedrick are entitled to summary judgment, and are DISMISSED from this action.")

***Bock v. County of Sutter***, No. 2:11-cv-00536-MCE-GGH, 2012 WL 3778953, \*11 (E.D. Cal. Aug. 31, 2012) ("The requisite causal connection between a supervisor's wrongful conduct and the violation of the prisoner's constitutional rights can be established in a number of ways. Plaintiffs may show that a supervisor set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a Constitutional injury. . . Similarly, a supervisor's own culpable action or inaction in the training, supervision, or control of his subordinates may establish supervisory liability. . . Finally, a supervisor's acquiescence in the alleged constitutional deprivation, or conduct showing deliberate indifference toward the possibility that deficient performance of the task may violate the rights of others, may establish the requisite causal connection. . . The Court dismissed Plaintiffs' supervisory liability claim in their First Amended Complaint on the basis that it did not sufficiently plead facts demonstrating each supervisory Defendant's role in any alleged deprivation. However, the additional facts pled in Plaintiffs' TAC allow the Court to infer that a reasonable trier of fact, after discovery, could reasonably find that

the supervisory Defendants were aware of and failed to act on constitutional violations regularly practiced by the Sutter County Jail. The very fact that, as alleged, Decedent's court-ordered transfer, which could have saved his life, was purportedly disregarded implicates the supervisors because the type of error alleged suggests that the mistake was a result of flawed measures which were likely implemented by employees in managerial roles. Defendants' Motion to Dismiss Plaintiffs' Supervisory Liability claim against Defendants Parker, Samson and Bidwell is therefore DENIED.”)

*Campos v. County of Los Angeles*, No. CV 11–09613 DDP (PJWx), 2012 WL 3656518, \*3, \*4 (C.D. Cal. Aug. 23, 2012) (“Defendants also argue that all claims against Sheriff Baca should be dismissed because the SAC does not allege that he personally participated in Decedent's confinement or treatment. . . A supervisor may be individually liable if he is personally involved in a constitutional injury or where there is a ‘sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.’ . . Knowing refusal to terminate the acts of subordinates, inaction in training or control of subordinates, acquiescence in constitutional violations, or reckless or callous indifference to constitutional rights may constitute sufficient causal connection to a violation to confer individual liability upon a supervisor. . . In *Starr*, the Ninth Circuit found supervisory liability allegations against Sheriff Baca sufficient where the plaintiff's complaint alleged several incidents of deputy-on-inmate violence and inmate-on-inmate violence in Los Angeles County jails, that Sheriff Baca received notice of the incidents, and that Sheriff Baca acquiesced in the unconstitutional actions of his subordinates. . . Here, Defendants argue that *Starr* does not apply because this case about suicide, not the deputy-on-inmate violence and inmate-on-inmate violence alleged in *Starr*. The court is not persuaded. First, the SAC here *does* allege inmate-on-inmate violence. The SAC alleges that Decedent feared he would be killed by fellow inmates and requested a transfer to protective housing. . . The SAC further alleges that Decedent reported at least one, and possibly two, violent assaults against him by other inmates. . . Second, and more importantly, even putting aside inmate violence issues, the SAC makes numerous allegations regarding instances of inadequate mental health treatment within the jails (e.g. ¶¶ 26, 30, 39), as well as allegations regarding Sheriff Baca's knowledge of mental health-related incidents and issues (e.g. ¶¶ 15–17, 19–20, 28–29). Contrary to Defendants' argument, the question is not whether the allegations here are identical to those in *Starr*, but rather whether the SAC sufficiently alleges a causal connection between Sheriff Baca's conduct and Decedent's constitutional injuries.[footnote omitted] The court is satisfied that it does, and that the individual claims against Sheriff Baca are adequately pled.”)

*Tandel v. County of Sacramento* , Nos. 2:11–cv–00353–MCE–GGH, 2:09–cv–00842–MCE–GGH, 2012 WL 3638449, at \*8, \*10, \*11 (E.D. Cal. Aug. 22, 2012) (“A supervisor's physical presence is not required for supervisory liability. . . Rather, the requisite causal connection between a supervisor's wrongful conduct and the violation of the prisoner's Constitutional rights can be established in a number of ways. The plaintiff may show that the supervisor set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury. . .

Similarly, a supervisor's own culpable action or inaction in the training, supervision, or control of his subordinates may establish supervisory liability. . . Finally, a supervisor's acquiescence in the alleged constitutional deprivation, or conduct showing deliberate indifference toward the possibility that deficient performance of the task may violate the rights of others, may establish the requisite causal connection. . . Plaintiff relies on *Starr* and *Redman* to sustain his claim that Dr. Hambly should be found deliberately indifferent as a supervisor. (Pl.'s Opp. at 12:8–22.) In *Redman*, a plaintiff specifically alleged that the Sheriff was ultimately in charge of the facility's operations, that the Sheriff knew that the facility was not a proper place to detain the plaintiff and posed a risk of harm to the plaintiff, but placed the plaintiff there anyway. . . In *Starr*, the plaintiff similarly alleged that the Sheriff knew of the unconstitutional activities in the jail, including that his subordinates were engaging in some culpable actions. . . In fact, the plaintiff's complaint in *Starr* contained numerous specific factual allegations demonstrating the Sheriff's knowledge of unconstitutional acts at the jail and the Sheriff's failure to terminate those acts, including that the U.S. Department of Justice gave the Sheriff clear written notice of a pattern of constitutional violations at the jail, that the Sheriff received 'weekly reports from his subordinates responsible for reporting deaths and injuries in the jails,' that the Sheriff personally signed a Memorandum of Understanding that required him to address and correct the violations at the Jail, and that the Sheriff was personally made aware of numerous concrete instances of constitutional deprivations at the jail. . . Here, on the other hand, Plaintiff's CSAC does not contain sufficient factual allegations demonstrating that Hambly was aware of Plaintiff's constitutional deprivations or of any other wrongful acts by Jail personnel. Dr. Hambly was not the interim medical director until the beginning of 2007, and yet most of Plaintiff's allegations that Dr. Hambly was on notice rely on reports made before he assumed this post. Accordingly, Plaintiff has not pleaded sufficient facts to support the inference that Hambly was deliberately indifferent to Plaintiff's medical needs. Inasmuch as leave to amend has already been accorded, the Court now dismisses Defendant Hambly from Plaintiff's first claim for relief.”)

*Ornelas v. Dickinson*, No. 1:12-cv-0499-MJS (PC), 2012 WL 3638502, \*3, \*4 (E.D. Cal. Aug. 21, 2012) (“Plaintiff has not alleged facts demonstrating that Defendants Dickinson, Kramer, Riddle, Robles, Hein, and the Warden's Advisory Group personally acted to violate Plaintiff's personal rights. Plaintiff's allegations against these Defendants only relate to general actions taken against Southern Hispanic inmates generally. Plaintiff does not allege these individuals took any specific actions directed against him. Plaintiff's claims against Defendants Dickinson and the Warden's Advisory Group all relate to their policy-making activities or lack of supervision of policy making. Plaintiff's claims against Defendants Riddle, Robles, and Hein describe only orders they gave to other individuals. Plaintiff has not alleged that any of these Defendants, through their individual actions, violated his rights. Plaintiff shall be given the opportunity to file an amended complaint curing these deficiencies and undertaking specifically to link these Defendants to a violation of his rights.”)

*Tucker v. City of Santa Monica*, No. CV 12-5367-SVW (MAN), 2012 WL 2970587, \*6 (C.D. Cal. July 20, 2012) (“[A]lthough plaintiff alleges that Jackman ‘turned a blind eye’ to proof of the

officers' wrongdoing in connection with the investigation of plaintiff's citizen's complaint (Complaint ¶ 10), allegations that a supervisor ratified an officer's conduct through the handling of a subsequent investigation cannot show that the supervisor *caused* the officer's conduct. See *Jones v. County of Sacramento*, 2010 WL 2843409, \*6–7 (E.D.Cal., July 20, 2010) (discussing applicable case law and concluding that a supervisor's "isolated and subsequent ratification" of an officer's conduct by failing to sustain a citizen's complaint "can never be sufficient to show that the supervisor caused the officer's conduct," especially after *Iqbal* ).")

***Brown v. Hoops***, No. CV 11–5415–CAS (DTB), 2012 WL 3582003, \*13 (C.D. Cal. July 13, 2012) (R & R) ("Sheriff Hoops's liability is not so clear. In a post- *Iqbal* decision, the Ninth Circuit reiterated in *Starr v. Baca*, that, '[a] supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others.' 652 F.3d 1202, 1208 (9th Cir.2012) (citing *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir.1998)). Under *Starr*, the Court finds that were plaintiff able to cite to an official policy of the Sheriff regarding the use of force that was unconstitutional on its face, liability could be imposed on Hoops when his subordinates acted pursuant to that policy. While plaintiff alleges that Hoops enacted the policy that lead to the use of force, no such official policy has been provided to the Court and no detail of the contents of any such policy has been set forth. Nor has plaintiff alleged that Hoops was present at the arrest or in any way involved in the arrest, or that he, for example, failed to intervene with the deputies['] unconstitutional use of force. As such, the Court finds that to the extent plaintiff is attempting to allege an excessive force claim against Sheriff Hoops, the allegations of the FAC are insufficient to do so.")

***Ramirez v. County of Los Angeles***, No. CV 11–5370 AHM (MANx), 2012 WL 2574826, at \*4, \*5 (C.D. Cal. July 3, 2012) ("The Ninth Circuit's decision in *Starr* dealt with allegations similar to those at issue here. In that case, the plaintiff sued Baca in his individual capacity under a supervisory liability theory for injuries he suffered in a Los Angeles County Jail. The plaintiff specifically mentioned in the operative complaint 'numerous incidents in which inmates in Los Angeles County jails have been killed or injured because of the culpable actions of the subordinates of Sheriff Baca.' . . The plaintiff also alleged that Baca was given notice of these incidents and failed to take action to protect inmates in his care. . . The Ninth Circuit held that even under the *Twombly/Iqbal* standard, the allegations against Baca were sufficient. . . The court stated two reasons for its holding: (1) the detailed factual allegations in *Starr*'s complaint went 'well beyond reciting the elements of a claim of deliberate indifference,' and (2) the allegations were 'plausible' because, unlike in *Iqbal*, there was no 'obvious alternative explanation' for why Baca took no action despite his knowledge of the constitutional violations occurring in his jails. . .Recently, in *Hydrick v. Hunter*, 669 F.3d 937, 2012 WL 89157, 4 (9th Cir.2012), the Ninth Circuit reaffirmed its holding *Starr*. The court made clear, however, that the decision in *Starr* was dependent on the numerous allegations describing *specific incidents* 'where Sheriff Baca was on notice of inmate deaths and injuries...'. . . In contrast, the defendants in *Hydrick* had made 'no allegation of a specific policy implemented by the Defendants or a specific event or events instigated by the

Defendants that led to these purportedly unconstitutional searches.’ . . . As a result, the Ninth Circuit held that the plaintiff had failed to allege supervisory liability claims. . . . In this case, Plaintiffs make the following allegations in the FAC:

- Hernandez died of a severe head injury he received during the time he was detained in the Twin Towers. (FAC ¶¶ 22–24.)
- Agents of the LASD either severely beat Hernandez or caused him to fall, causing injuries that resulted in his death. (FAC ¶ 28).
- Agents of the LASD ‘routinely use excessive force on inmates.’ (FAC ¶ 13.)
- Baca knew or reasonably should have known of the routine use of excessive force and that these acts would be ‘likely to, and regularly did, result in severe injuries, including death, inflicting extreme anguish on the family members of the victims.’ (FAC ¶¶ 12, 17.)
- ‘[I]n spite of his awareness,’ Baca has refused to implement policy changes to prevent the use of excessive force and has enacted policies that prevent investigation of the allegations of abuse. (FAC ¶ 14–15.)
- Baca placed Hernandez under the custody and care of deputies who had documented propensities for unwarranted violence. (FAC ¶ 16.)

Like the defendants in *Hydrick*, Plaintiffs do not allege any specific past incidents of the use of excessive force by Baca’s subordinates. Neither does Plaintiff allege any specific incident during which Baca was given notice of his subordinates’ unconstitutional conduct. Plaintiffs’ other allegations are generally conclusory recitals of the elements of a supervisory liability claim. *Hydrick* makes clear that without allegations describing specific incidents or policies, these allegations are not enough to survive the *Iqbal* standard of pleading for a supervisory liability. Thus, Plaintiff’s § 1983 claim against Baca is dismissed with leave to amend.”)

***Fellows v. Baca***, No. CV 10–0698–RSWL (JEM), 2012 WL 3150346, \*12 (C.D. Cal. June 8, 2012) (R & R) (“Plaintiff alleges that Sheriff Baca was responsible for operation of the Jail and protecting the civil rights of inmates, including providing adequate medical care and treatment for civil detainees. . . . Plaintiff further alleges that Sheriff Baca is responsible for administration of the Jail, particularly staff training regarding proper medical care, but that Baca failed to train, supervise and control his subordinates, which resulted in the deprivation of adequate medical care to Plaintiff. . . . Specifically, Plaintiff has alleged facts demonstrating that a ‘no room for civil detainees’ policy was implemented at the Jail, which resulted in the regular denial and delay of medical treatment to civil detainees generally, and Plaintiff specifically. It is a reasonable inference that Sheriff Baca, as the Jail administrator, was aware of this policy and at least allowed it to continue. There is also evidence of a policy against providing expensive medical care for temporary civil detainees at the Jail, such as treatment to remove a kidney stone. The facts alleged demonstrate a lengthy history of Plaintiff complaining about severe abdominal pain, delay in providing medical appointments to diagnose the condition, and refusal to provide adequate care even after the condition was diagnosed. The facts alleged also evidence a long and widespread pattern of denying or delaying treatment of Plaintiff’s other serious medical conditions, which

could support a finding of culpable inaction directly attributable to Sheriff Baca in the supervision or control of his subordinates, or acquiescence in the constitutional deprivations at issue. Construing Plaintiff's pro se pleadings liberally, Plaintiff has alleged sufficient facts at this stage of the litigation to state a claim for deliberate indifference and failure to train and/or supervise against Sheriff Baca in his individual capacity.”)

*Alexander v. Nevada*, No. 3:10-cv-00429-RCJ (WGC), 2012 WL 2190837, at \*6, \*7 (D. Nev. Mar. 12, 2012) (R & R), aff'd, 617 F. App'x 718 (9th Cir. 2015) (“*Iqbal* did not involve a claim of deliberate indifference under § 1983. In *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011), the Ninth Circuit stated, ‘[w]e see nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases.’. . . The Ninth Circuit found that the plaintiff in *Starr* included ‘many allegations’ ‘detailing what Sheriff Baca knew or should have known, and what Sheriff Baca did or failed to do.’. . . In the recent case of *Hydrick v. Hunter*, 2012 WL 89157 (9th Cir. Jan. 12, 2012), the Ninth Circuit determined that the factual allegations before the court more closely ‘resemble[d] the “bald” and “conclusory” allegations in *Iqbal*, instead of the detailed factual allegations in *Starr*.’. . . In *Hydrick*, like the case currently before the court, the plaintiff’s predicated, at least in part, on the theory that the defendants were liable because they created policies that violated the plaintiff’s constitutional rights. . . The Ninth Circuit concluded that instead of including specific allegations of wrongdoing, the plaintiff fell short by including only ‘conclusory allegations and generalities.’. . . Here, the only allegations Plaintiff includes with respect to Defendants Bannister, Hartman, Morrow, Baca, Neven, Cox, and Skonik are that they are indirectly liable because they: (1) created policies which prohibit constitutional medical care; (2) failed to provide adequate staff or space to provide constitutional medical care; and (3) failed to resolve the issue after being informed there was a problem. . . . The allegations of the Amended Complaint are more akin to the conclusory allegations contained in *Iqbal* and *Hydrick*, than to the specific allegations in *Starr*. Accordingly, Defendants’ motion to dismiss Defendants Bannister, Hartman, Morrow, Baca, Neven, Cox, and Skolnik should be granted with leave to amend.”)

*Hamad v. Gate*, No. C10-591 MJP, 2012 WL 1253167, at \*4-\*7 (W.D. Wash. Apr. 13, 2012) (“Gates argues Plaintiff’s Second Amended Complaint still fails to allege Gates was personally involved in violating Hamad’s constitutional rights. In this limited respect, the Court agrees. To proceed with his *Bivens* claim, Hamad must allege facts indicating that Secretary Gates was personally involved in and responsible for the alleged constitutional violations. . . . Hamad’s allegation that Gates ‘knew’ that there were innocent men being held at Guantanamo Bay yet continued the policies of his predecessor is not a fact-based allegation; rather, it is still a bald legal conclusion. While ‘legal conclusions can provide the framework of a complaint,’ to survive a motion to dismiss ‘they must be supported by factual allegations.’. . . The Court finds Hamad’s four added factual allegations are not enough to meet *Iqbal*’s plausibility standard. First, Hamad’s reliance on a statute setting forth the Secretary of Defense’s responsibilities is weak. . . . Hamad fails to allege any policy guidance that Gates himself set regarding Guantanamo Bay let alone policy guidance that Gates set related to Hamad’s unlawful detention. Second, Hamad’s allegation

that various officials evaluated and identified problems with Guantanamo Bay's military commissions is inapposite. . . . There is no factual allegation that Gates knew military officials were holding detainees whom the military itself determined should be freed. Third, a letter from 145 Congressmen to then-President Bush does not plausibly suggest Gates was personally involved in Hamad's unlawful detention. . . . While it is certainly *possible* that the letter put Gates on notice of constitutional violations in Guantanamo Bay, the Court does not find the letter suggests it was *plausible*. . . . Fourth, Hamad's pending habeas petition does not create a reasonable expectation that Gates was aware of Hamad's unlawful detention and/or Gates personally violated Hamad's constitutional rights. . . . At most, Hamad's factual allegations suggest Gates was aware Guantanamo Bay was under scrutiny when he took office in September 2006. However, Hamad's allegations do not nudge his claim that Gates personally participated in his unlawful detention 'across the line from conceivable to plausible.' . . . To the extent Hamad argues Gates is subject to supervisory liability, the Court finds Hamad's argument is weak. In the Ninth Circuit, a supervisor may be liable for the actions of subordinates only if the supervisor is personally involved in the constitutional deprivation, or if there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional deprivation. . . . While 'wrongful conduct' may include a supervisor's inaction or acquiescence in the constitutional deprivation, the supervisor must still be aware of the unconstitutional conduct; otherwise, supervisory liability would melt into vicarious liability-which is not recognized in *Bivens* actions. . . . As discussed, there is minimal factual allegation that Gates knew detainees were being unconstitutionally held in Guantanamo Bay let alone Gates implemented policies resulting in Hamad's constitutional deprivation. While Gates may have known he inherited a flawed detention system, Hamad has not alleged enough facts to suggest Gates knew detainees were being held in violation of the Fifth Amendment and therefore is not liable under supervisory liability. In sum, it is possible Gates knew Hamad was unlawfully detained, but it is not plausible based on the facts alleged. Unfortunately, this is not enough to survive dismissal under *Iqbal*.”)

***Hightower v. Tilton***, No. C08-1129-MJP, 2012 WL 1194720, at \*3, \*4 (E.D. Cal. Apr. 10, 2012) (“Defendants argue that the ‘supervisory Defendants’ . . . ‘cannot be held liable based on knowledge and acquiescence in a subordinate’s unconstitutional conduct because government officials, regardless of their title, can only be held liable under Section 1983 for his or her own conduct and not the conduct of others.’ . . . This is a partial and inaccurate statement of the law. A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, *or knew of the violations and failed to act to prevent them*. There is no *respondeat superior* liability under section 1983. . . . The supervisory Defendants may be held liable for the unconstitutional conduct of their subordinates which they were aware of and failed to prevent. Defendants are correct, however, that a causal link between the supervisors and the unconstitutional actions or policies must be specifically alleged. . . . In arguing that Plaintiff has not specifically alleged actions by these Defendants with a causal link to the constitutional/statutory violations, Defendants treat all of his allegations ‘on information and belief’ as conclusory and/or speculative. In fact, the rule in the Ninth Circuit is that pleading ‘on information and belief’ is sufficient to survive a motion to dismiss as long as the other *Iqbal*-

*Twombly* factors are satisfied. . . . The Court holds that allegations pled on ‘information and belief’ should be reviewed in the same way as all factual allegations in a Complaint. That is, the Court will review them under *Twombly*’s 12(b)(6) formulation requiring sufficient facts pleading to make a claim plausible. The mere fact that allegations begin with the statement ‘on information and belief’ will not automatically render them insufficient.”)

***Chacoan v. Rohrer***, No. 2:05–cv–02276–MCE–KJN, 2012 WL 1021067, at \*3 (E.D. Cal. Mar. 27, 2012) (“[C]ontrary to Plaintiff’s contention, *Starr* did not create a new legal standard regarding supervisory liability under § 1983; it merely held that the United States Supreme Court’s ruling in *Ashcroft v. Iqbal* . . . did not eliminate supervisory liability from the scope of Section 1983. . . . After concluding that it did not, the court reaffirmed the long-standing 9th Circuit standards governing supervisory liability under Section 1983. . . . To this end, the court did not err in utilizing Ninth Circuit Model Jury Instruction 9.3.”)

***Coley v. Baca***, No. CV09–08595 CAS (AJW), 2012 WL 1340373, at \*4-\*6 (C.D. Cal. Mar. 8, 2012) (“Defendant contends that ‘[r]ather than alleging specific nonconclusory facts’ sufficient to state a claim for supervisory liability against Baca, the amended complaint ‘merely regurgitates’ and ‘copies nearly word for word’ portions of the order dismissing plaintiff’s complaint, in particular portions of footnote 3 of that order referring to allegations in the *Starr* complaint ‘indicating that Baca received several reports of recurring serious problems in the jail and failed to correct them.’ . . . Defendant contends that plaintiff’s ‘plagiarized’ allegations fail to show ‘a history of similar occurrences’ or Baca’s personal participation in the alleged constitutional violations. . . . The mere fact that plaintiff’s allegations charging Baca with knowledge of his subordinates’ unconstitutional conduct are derived from *Starr* does not make those allegations conclusory or irrelevant in this action. The facts relevant to the question whether Baca knew or should have known that inmates faced a substantial risk of serious harm from particular conditions of confinement in the county jail will not be unique in every case, nor are they dependent on the identity of the inmate filing suit. At issue in *Starr* was whether the plaintiff adequately alleged that Baca was deliberately indifferent to the substantial risk to inmates of death and injuries posed by inmate-on-inmate violence and deputy-on-inmate violence. Like the plaintiff in *Starr*, plaintiff alleges that he was the victim of an unwarranted physical attack by a deputy that resulted in a serious physical injury. In *Starr*, the alleged incident of deputy-on-inmate violence occurred in January 2006. In this case, the alleged incident occurred in October 2007, approximately twenty months later. Like the plaintiff in *Starr*, plaintiff alleges that Baca received reports from the DOJ and the Special Counsel of ‘a continuing and serious pattern and practice of constitutional violations, including abuse of inmates by deputies,’ as well as ‘notice of increasing levels of inmate violence, lax security and discipline, and other serious defects in Sheriff’s Department practices and procedures....’ . . . For purposes of a motion to dismiss, the elapsed time between the attack on the plaintiff in *Starr* and the deputy’s alleged attack on plaintiff in this case and is not long enough to negate the inference that Baca knew or should have known that county inmates such as plaintiff faced a serious risk of injury of substantial harm from deputy-instigated violence and failed to take adequate steps to protect those inmates. Plaintiff’s first amended complaint contains facts plausibly

suggesting that Baca is ‘liable in his individual capacity for his own culpable action or *inaction* in the training, supervision, or control of his subordinates.’ . . . Therefore, Baca’s motion to dismiss the first amended complaint should be denied.”)

***Dubrin v. Bonilla***, No. 1:11–cv–01484 AWI/JLT (PC), 2012 WL 761714, at \*3,\*4 (E.D. Cal. Mar. 6, 2012) (“A defendant may be held liable as a supervisor under § 1983 if there exists ‘either (1) his or her personal involvement in the constitutional deprivation; or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.’ . . . In order to establish a causal connection, a plaintiff may show that the supervisor set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury. . . . However, a sufficient causal connection may be shown ‘by evidence that the supervisor implemented a policy so deficient that the policy itself is a repudiation of constitutional rights.’ . . . Given Plaintiffs’ allegations that Stainer approved of a policy to deprive the SHU inmates of exercise, Plaintiffs have alleged sufficient facts to state a claim against Defendant Stainer.”)

***Vaught v. Clark***, No. CIV S–09–3422 MCE CKD P, 2012 WL 530198, at \*5–\*7 (E.D. Cal. Feb. 17, 2012) (“The central, offending act alleged in this case was the maintenance of lockdowns over periods of several weeks without provision for outdoor exercise. Although plaintiff is not specific exactly which defendant had direct control or involvement in the lockdowns, the defendants bear the initial burden of showing that as a matter of law it could not have been McDonald, Gower or Wright. It is reasonable to conclude, indeed, that *by virtue of their supervisory positions in the prison*, one or all of them were directly involved in the decision to enact the lockdowns and one or all of them were involved in the decision(s) to maintain the lockdowns over a long period of time. . . . The defendants cannot simply assert their supervisory positions as prima facie evidence that they had no connection to the alleged deprivation of exercise when plaintiff’s core allegation is that the lockdowns were managed in such a way as to deprive him of the ability to exercise for weeks on end. Indeed, it is disingenuous to so argue in the face of plaintiff’s clearly written claims: as to defendant Gower, he alleges that Gower ‘is in [cahoots] with others to deprive Plaintiff of exercise for much longer than 10 days at a time’; as to defendant Wright, he alleges that Wright has violated his rights under the Eighth Amendment by not providing plaintiff the ability to exercise; and as to defendant McDonald, he alleges that McDonald used his ‘controlling authority’ in ‘not affording Plaintiff his exercise every 10 days ... in violation of the Constitution[.]’ . . . These are clear allegations of direct involvement in a constitutional violation. Defendants’ argument that the complaint asserts liability against them only under a theory of vicarious liability is contradicted by these plain words and is without merit. . . . As for the subjective prong of his claims, plaintiff does not explicitly aver ‘deliberate indifference’ by defendants. However, he does color the long-term prohibition on outdoor exercise as ‘similar to keeping two pit bulls in a cell for months at a time,’ “treating human beings like trash,” and indicative of a practice in which a ‘human [is] less than an animal.’ . . . For purposes of this motion, these allegations, while unorthodox as assertions of deliberate indifference, satisfy the subjective prong of plaintiff’s Eighth Amendment claim.”)

***Ofeldt v. McDaniel***, No. 3:10-cv-00494-R CJ-WGC, 2012 WL 506010, at \*1, \*2 (D. Nev. Feb. 15, 2012) (“[T]he Court disagrees that McDaniel can be personally liable under § 1983 as the First Amended Complaint is pled. There is no respondeat superior liability under § 1983. . . A supervisor can be held liable under § 1983 without committing the act himself or even being present when another commits it, but only if he directly sets into motion the particular violation at issue via his supervisory authority or refuses to stop actions of which he is or should be aware. *See Starr v. Baca*, 652 F.3d 1202, 1205–07 (9th Cir.2011). Under this standard, the magistrate judge reasonably opined that McDaniel as warden could potentially be held personally liable for deliberate indifference to the allegedly unconstitutional conditions complained of in disciplinary segregation at ESP, because McDaniel is alleged to have put in place the policies that led to those conditions and was aware of those conditions but did not remedy them. But the magistrate judge did not have the benefit of *Hydrick v. Hunter*, No. 03–56712, 2012 WL 89157 (9th Cir. Jan. 12, 2012), which case distinguished *Starr*. In *Hydrick*, the plaintiff complained of unconstitutional conditions of confinement, as Plaintiff does here, and the Court of Appeals ruled that the complaint did not satisfy *Iqbal* with respect to supervisory liability under § 1983, because ‘there is no allegation of a specific policy implemented by the Defendants or a specific event or events instigated by the Defendants that led to these purportedly unconstitutional searches.’. . The same is true here. Plaintiff complains of the conditions in disciplinary segregation at ESP but does not identify any specific policies implemented by McDaniel leading to the alleged harms or any specific events instigated by McDaniel himself.”)

***Hardesty v. Barcus***, No. CV 11–103–M–DWM–JCL, 2012 WL 705862, at \*9 (D. Mont. Jan. 20, 2012) (“While the factual allegations in support of Hardesty’s Section 1983 supervisory liability claim are relatively sparse, they are adequate to satisfy *Twombly* and *Iqbal*. Hardesty alleges, for example, that Barcus violated MHP policies on the use of force by hitting him with the Maglite flashlight, and that Tooley set those events in motion by failing to properly train, supervise, or control Barcus ‘such that the laws, rules and regulations regarding the use of force and deadly force were violated by Trooper Barcus.’. . Hardesty also alleges that Tooley ‘failed to properly investigate and punish prior constitutional deprivations, which encouraged a culture in the[ ] department[ ] of excessive use of force.’. . These allegations are sufficient to state a claim that is ‘plausible on its face,’ and to ‘raise a reasonable expectation that discovery will reveal evidence of’ a basis for Tooley’s liability. . . Hardesty’s supervisory liability claim is thus sufficient to withstand Tooley’s Rule 12(b)(6) motion to dismiss.”)

***Schwartz v. Lassen County ex rel. Lassen County Jail***, 838 F.Supp.2d 1045, 1056 (E.D. Cal. 2012) (“In this case, based on two of the aforementioned theories, Plaintiff’s complaint contains sufficient factual allegations to establish a causal connection between Mineau’s allegedly wrongful conduct and the constitutional violation such that it survives Defendants’ motion to dismiss. First, the complaint contains sufficient factual allegations to permit the court to reasonably infer that Mineau plausibly refused to terminate a series of acts by his subordinates, which the supervisor knew or reasonably should have known would cause others to inflict a Constitutional injury. Specifically, Plaintiff alleges that Decedent’s physical health was visibly deteriorating, that he had

requested medical care on numerous occasions, that Mineau knew of his deteriorating health but, as undersheriff of Lassen County, failed to ensure that the Facility provided him sufficient medical care. Moreover, based on these same facts, the court can reasonably infer that Mineau plausibly acquiesced in the alleged constitutional deprivation and was deliberately indifferent to the possibility that his subordinates deficiently performed in providing Decedent necessary medical care. In sum, at this stage of the litigation, in which little to no discovery [footnote omitted] has been conducted, and where all reasonable inferences must be drawn in favor of Plaintiff, the Court cannot conclude that, based on the facts as alleged, Plaintiff has *no* plausible claim that Mineau is liable under Section 1983 for Plaintiff's constitutional deprivation in either his individual or supervisory capacity.”)

*Lovejoy v. Arpaio*, No. CV09–1912–PHX–NVW, 2011 WL 6759552, at \*19, \*23, \*24 (D. Ariz. Dec. 23, 2011) (“On this record, it was unconstitutional to arrest Lovejoy for animal cruelty. But as noted previously, Lovejoy has not sued the officers who actually performed the arrest (Simonson and Summers). Lovejoy hangs his entire case on proving that Arpaio was responsible. A supervisor may be liable for subordinates’ unconstitutional acts if the supervisor engaged in ‘culpable action or inaction in the training, supervision, or control of his subordinates.’ *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991). Thus, a supervisor may be liable if he or she:

- sets in motion a series of acts by others, or knowingly refuses to terminate a series of acts by others, which he knows or reasonably should know, would cause others to inflict the constitutional injury;
- acquiesces in the constitutional deprivations of which the complaint is made; or
- otherwise engages in conduct that shows a reckless or callous indifference to the rights of others.

. . . Summary judgment in favor of Arpaio is appropriate unless Lovejoy has sufficient evidence from which a jury could conclude that one of these supervisory liability standards i[s] met. Sufficient evidence exists from which a reasonable jury could conclude that Arpaio, in his supervisory role, acted to ensure that Lovejoy would be charged, or culpably failed to act to prevent others from bringing such charges. . . . As the Court concluded in a prior order, Arpaio is a final policymaker for Maricopa County in the context of criminal law enforcement. . . His acts therefore represent official Maricopa County ‘policy.’ Lovejoy has raised a triable issue of fact here. Indeed, Lovejoy’s *Monell* case is substantially the same as his case against Arpaio personally. Both depend on proving that Arpaio caused or acquiesced in Lovejoy’s arrest, and that Arpaio ensured Lovejoy would be prosecuted or otherwise remains responsible for the prosecution as the continuing injury caused by the arrest. As discussed above, Lovejoy has sufficient evidence to put those accusations before a jury. The only difference between Lovejoy’s claim against Arpaio personally and Lovejoy’s claim against the County is that the County has no qualified immunity defense. . . Thus, even if Arpaio was entitled to qualified immunity in his individual capacity (which he is not, *see* Part V.D, *above* ), trial would still be necessary on Lovejoy’s claim of County liability. Summary judgment on County liability will therefore be denied.”)

*Anderson v. Hartley*, No. 1:09-cv-1924-LJO-MJS (PC), 2011 WL 5876913, at \*3 (E.D. Cal. Nov. 22, 2011) (“Plaintiff alleged that Defendant Hartley had or should have had knowledge of the risk created by Defendant Hansen and was deliberately indifferent to that risk. Specifically, Plaintiff alleged that multiple incidents of excessive force by Defendant Hansen were brought to the attention of Defendant Hartley. Despite having knowledge of several such incidents, Defendant Hartley took no action to prevent further harm to prisoners. Instead he left Defendant Hansen in a position where he could, and did, continue using excessive force on prisoners and did use such force against Plaintiff. . . . Plaintiff has alleged sufficient facts to state a claim against Defendant Hartley for failure to protect in violation of the Eighth Amendment.”)

*McCabe v. Gibbons*, No. 3:09-cv-00244-LRH-RAM, 2011 WL 2608603, at \*3 (D. Nev. June 30, 2011) (“Here, plaintiff alleges that all of the supervisory defendants became ‘aware of the grossly inadequate and dangerously negligent medical care ... at Ely State Prison as early as May 2007’ when they learned of the investigation being conducted by the American Civil Liberties Union (“ACLU”) . . . Plaintiff alleges that his medical treatment was specifically investigated by the ACLU and included in a report sent to the supervisory defendants in 2008. . . Plaintiff also alleges that the supervisory defendants became aware of the inadequate medical treatment he was being provided because of the media and medical releases he signed in conjunction with the ACLU investigation. . . Plaintiff claims that despite the supervisory defendants’ knowledge of his medical situation, they failed to take any action in response to his serious medical needs. . . These allegations are sufficiently detailed to put the supervisory defendants on notice of plaintiff’s claims that they had knowledge of unconstitutional conduct by others and acquiesced in that conduct. Additionally, plaintiff’s allegations contain enough facts to raise a reasonable expectation that discovery will reveal evidence to support those allegations. Although the court recognizes that the supervisory defendants who are members of the Board of Prison Commissioners are policymakers who may not be present for the day-to-day activities at the prisons, even policymakers may be held liable when, with a sufficient level of personal participation, they condone or ratify the unconstitutional conduct of subordinates.”)

*Cruz v. County of San Bernardino*, No. CV 11-1821 CAS (DTBx), 2011 WL 1790717, at \*6 (C.D. Cal. May 9, 2011) (“Defendants argue that the Court should dismiss plaintiff’s supervisory liability claim because the allegations are conclusory and fail to set forth sufficient facts showing a causal connection between Sheriff Hoops’s conduct and plaintiff’s injury. . . The Court disagrees. Plaintiff alleges that Sheriff Hoops has taken no measures to implement any form of independent review of deputies’ statements or investigation of citizen complaints. . . According to plaintiff, this practice of ‘rubber stampin’” deputies’ statements and reports, has resulted in a system whereby deputies’ false statements are never investigated. . . Plaintiff further alleges that Sheriff Hoops is aware of numerous citizen complaints and lawsuits alleging excessive force by sheriff’s deputies, but that he has taken no measures to independently investigate them. . . The Court concludes that these allegations relating to Sheriff Hoops’s inaction in the training, supervision, and control of his deputies are sufficient to state a claim.”).

**Taylor v. Clark**, No. 1:07-cv-00032-AWI-SMS PC, 2011 WL 917382, at \*6, \*7, \*9 (E.D. Cal. Feb. 16, 2011) (“It is true that the Supreme Court has rejected liability on the part of supervisors for ‘knowledge and acquiescence’ in subordinates’ wrongful *discriminatory* acts. . . However, Defendants argument that *Iqbal* effectively eviscerated supervisory liability is without merit as in the very same decision, the Supreme Court held that ‘discrete wrongs – for instance, beatings – by lower level Government actors ... if true and if *condoned* by [ supervisors ] could be the basis for some inference of wrongful intent on [the supervisors’] part.’ *Iqbal*, 129 S.Ct. at 1952 (emphasis added). Further, the Ninth Circuit very recently held that ‘... where the applicable constitutional standard is deliberate indifference, a plaintiff may state a claim for supervisory liability based upon the supervisor’s knowledge of and acquiescence in unconstitutional conduct by others.’ *Starr v. Baca*, \_\_\_ F.3d \_\_\_, 2011 WL 477094, \*4 (9th Cir. Feb. 11, 2011). It is under this rubric that the traditional and still valid elements of supervisor liability within the Ninth Circuit are properly analyzed. . . . Accordingly, the crux of issues in this case for purposes of this motion is whether Defendants Clark and Adams knew, or reasonably should have known, of Defendant McKesson’s propensity for violence (via the various investigations into accusations against him) and whether they could have taken supervisory and/or disciplinary actions towards Defendant McKesson, other than as actually occurred to equate to a failure to act, that they knew or reasonably should have known would cause instances of Defendant McKesson using excessive force such as the type Plaintiff claims caused him injury in this case. . . . Defendants further suggest that supervisor liability has been ‘entirely eliminated,’ or has at least been severely narrowed such that ‘liability may no longer be based on inaction, such as knowledge and acquiescence and a failure to act or deliberate indifference regarding a subordinate’s alleged unconstitutional conduct,’ but rather that ‘liability may only be found where the supervisor commits a purposeful act that leads to the deprivation of the plaintiff’s constitutional rights.’. . While Defendants’ arguments along this vein would be true if this case dealt with a discrimination action under the First or Fifth Amendments, as discussed above, this argument does not extend and should not be applied to claims of deliberate indifference under the Eighth Amendment.”)

**Gonzales v. Cate**, No. 1:09-cv-02149 LJO GSA PC, 2011 WL 23068, at \*2 (E.D. Cal. Jan. 4, 2011) (“[I]n order to hold Warden Hartley liable, Plaintiff must allege facts from which the inference could be drawn that a substantial risk of serious harm exists, and facts indicating that Wardeny Hartley drew the inference. . . Here, Plaintiff alleges that he was assaulted, and that Hartley and the other defendants should have known of the risk. Plaintiff has not alleged any facts indicating how Defendant Hartley knew of the risk. He should therefore be dismissed.”)

**Kennedy v. Hayes**, No. 1:09-cv-01946 JLT (PC), 2010 WL 5440805, at \*8 (E.D. Cal. Dec. 28, 2010) (Here, Plaintiff seeks to impose liability on the A-Yard medical supervisor (“Doe 1”) and the direct supervisor of defendant Hayes (“Doe 2”). . . However, Plaintiff has failed to allege these defendants knew of any alleged unlawful action. Furthermore, the deliberate indifference standard is met only when prison officials have actual knowledge; it is not sufficient to allege the defendants should have been aware of Plaintiff’s medical needs. Finally, though Plaintiff states the supervisors

acted with deliberate indifference, this conclusory statement, unsupported by any facts, is insufficient to state a claim.”)

**Fields v. Adam**, No. 1:09-cv-1770-MJS (PC), 2010 WL 5113071, at \*4 (E.D. Cal. Dec. 8, 2010) (“In this case, Plaintiff alleges only that the Supervisory Defendants knew of the unlawful search and failed to prevent it. There is no allegation that any of them actually participated in the search, that they ordered the search, or that the search was conducted pursuant to a policy that they implemented. Accordingly, Plaintiff has failed to state a claim against any of the Supervisory Defendants. He shall be given leave to amend these claims to attempt to address the deficiencies noted herein.”)

**Pruitt v. Clark**, No. 1:07-cv-01709-AWI-SMS, 2010 WL 3063254, at \*5 (E.D. Cal. Aug. 3, 2010) (“The Court finds that Plaintiff’s allegations state a claim against Defendants Curtiss and Wan but not Defendant Watking. Defendant Watking conducted an administrative review of Plaintiff’s appeal and did not have authority over the work change area or its employees, policies, and practices. There simply is not sufficient factual support for a facially plausible claim that Defendant Watking violated Plaintiff’s Fourth Amendment rights. . . Defendants Curtiss and Wan, by contrast, had authority over work change and its policies and practices, and were aware that routine cross-gender strip searches were taking place. This is sufficient to state a claim under section 1983. . . Turning last to Defendants Clark and Fisher, Plaintiff alleges only that he sent Warden Clark a letter and Fisher responded on Clark’s behalf, telling Plaintiff to file an inmate appeal. Defendants Clark and Fisher are only liable for their own misconduct, and the allegations that a letter was sent and responded to with the direction to file an inmate appeal fall short of stating a facially plausible Fourth Amendment claim against them.”).

**Herrera v. Hall**, No. 1:08-cv-01882-LJO-SKO PC, 2010 WL 2791586, at \*4, \*5 (E.D. Cal. July 14, 2010) (“[I]t was unclear whether the plaintiff’s administrative appeal was a request for medical treatment or whether the plaintiff was merely complaining about another prison official’s failure to provide him with treatment. The distinction is important because an appeals coordinator does not cause or contribute to a completed constitutional violation that occurs in the past. *See George v. Smith*, 507 F.3d 605, 609-610 (7th Cir.2007) (“[a] guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not”). However, if there is an ongoing constitutional violation and the appeals coordinator had the authority and opportunity to prevent the ongoing violation, a plaintiff may be able to establish liability by alleging that the appeals coordinator knew about an impending violation and failed to prevent it. . . . *Iqbal* does not support Defendants’ proposition that ‘a defendant who is involved only to the extent that he or she considered a plaintiff’s inmate appeal may not be held liable.’ *Iqbal* does not even discuss the processing of inmate appeals. Further, even if Defendants could be considered supervisors, Plaintiff is not attempting to hold them liable for the unconstitutional conduct of their subordinates. Plaintiff has sufficiently alleged that Defendants’ own individual actions in denying Plaintiff’s requests for

medical treatment violated the Constitution. Plaintiff has alleged sufficient facts to state a claim against [Defendant supervisors].”)

*Lee v. Alameida*, No. 1:02-cv-05037-LJO-GSA-PC, 2010 WL 2629800, at \*4 (E.D. Cal. June 29, 2010) (“In the order granting Plaintiff leave to file a first amended complaint, he was advised that in *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court held that, under certain circumstances, a municipality may be held liable based on the failure to train its employees. This Court finds no authority for the extension of *City of Canton* and its progeny to state prison officials being sued in their personal capacity. It appears to this Court, following a review of relevant case law, that the cases involving failure to train are limited to suits against city and county entities. This claim should therefore be dismissed.”).

*Jones v. Stieferman*, No. CIV S-06-2732-FCD-CMK-P, 2010 WL 2546061, at \*2 (E.D. Cal. June 23, 2010) (“Plaintiff names Warden Pliler as a defendant in this action based solely on the allegation that she refused to intervene in his mistreatment. As stated above, a supervisory defendant can only be liable for his or her own conduct, not that of others. Except for his allegation that he attempted to communicate with Warden Pliler about his mistreatment, and therefore she was presumably aware of it and failed to intervene, there are no allegations of any affirmative conduct by Warden Pliler. Plaintiff makes no allegation that Warden Pliler actively participated in his alleged mistreatment. Knowledge and acquiescence of mistreatment is insufficient to impose liability on a supervisory defendant. As discussed above, Plaintiff has been provided sufficient opportunity to cure defects in his complaints, and therefore the undersigned recommends that defendant Pliler be dismissed from this action, without leave to amend, for failure to state a claim.”)

*Coleman v. Adams*, No. 1:06-cv-00836-AWI-SKO PC, 2010 WL 2572534, at \*6, \*7 (E.D. Cal. June 22, 2010) (“Defendants contend that mere ‘awareness’ of the negligent acts of their subordinates is not sufficient to hold them liable under Section 1983. However, Plaintiff has alleged more than mere negligence. . . Defendants’ awareness of the fact that Plaintiff was not receiving treatment for his vision problem and did not receive a lower bunk assignment is sufficient to hold them liable for their failure to act. Plaintiff has alleged sufficient facts to hold [Defendants] liable for their participation in the alleged deprivation of Plaintiff’s constitutional rights. . . Taken together, *Mann*, *Ramirez*, and *Buckley* cannot be read broadly enough to support the proposition that the processing of an administrative appeal cannot, in any circumstances, form the basis of a claim to relief under Section 1983. *Mann*, *Ramirez*, and *Buckley* are limited to holding that a Plaintiff has no substantive right to a prison grievance system and that due process claims based on the denial of or interference with a prisoner’s access to a prison grievance system are not cognizable. Thus, if a prisoner were to raise a claim premised on an asserted denial of due process caused by denied or obstructed access to a prison’s administrative grievance system, the claim would not be cognizable under *Mann*, *Ramirez*, and *Buckley*. Here, Plaintiff is not claiming a loss of a substantive right in the processing of his appeals caused by denied or obstructed access to a prison grievance system. Plaintiff’s Section 1983 claim is not premised on Defendants’ failure to

process his grievances, consider evidence, hear witnesses, provide written findings or otherwise deny Plaintiff's administrative complaints without adequate process. Plaintiff is raising an Eighth Amendment claim, not a Fourteenth Amendment claim. Plaintiff's reference to the administrative complaint system merely bolsters his allegation that supervisory personnel had actual awareness of the risk to Plaintiff's safety. Nothing in the cases cited by Defendants bars Plaintiff from proceeding on that theory. The decisions in *Mann* and *Ramirez* do not touch upon whether an appeal reviewer's actions can be considered 'cruel and unusual' within the meaning of the Eighth Amendment.")

***Bovarie v. Tilton***, No. 06CV687 JLS (NLS), 2010 WL 743741, at \*3, \*4 (S.D. Cal. Mar. 1, 2010) ("This Court has previously found that the Plaintiff has sufficiently pled causation on behalf of Defendants, which included directors, wardens, lieutenants, captains and library staff in his Third Amended Complaint. . . The Court found that 'plaintiff alleged the implementations and enforcement of law library policies that effectively denied plaintiff access to the court.' . . . Magistrate Judge Stormes went on to reject defendants' argument that Plaintiff merely alleged the conclusory statement that Defendant [sic] were 'grossly negligent in the supervision and duty' and found that Plaintiff adequately pled that Defendants adopted and enforced policies which led to a deprivation of Plaintiff's constitutional rights. . . Despite this earlier Order, Defendants ask the court to re-evaluate the 4AC in light of *Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S.Ct. 1937, 1943 (2009), where the United States Supreme Court clarified the pleading standard under Rule 8. In Defendants R & R currently at issue, Magistrate Judge Stormes recommends that this Court reverse its earlier finding and grant the Defendant Directors' . . . motion to dismiss with prejudice. . . The Court disagrees. . . . In light of the Court's holding in *Iqbal*, Magistrate Judge Stormes found that Plaintiff's allegation that the Directors interfered with his access to the courts by 'promulgating, enforcing and allowing policies, procedures and operations that deny access to legal resources' was no more than a 'formulaic recitation of the elements of a constitutional ... claim.' . . Then, the magistrate judge found that the allegations that Defendant were grossly negligent in their supervision and failed to provide adequate training, funding, and policy for the law libraries was 'insufficient to state a claim against the Directors because even if true, they fail to allege the necessary knowledge and state of mind to established that the Director Defendants caused a violation of Plaintiff's right to access the courts.' . . Plaintiff objects to this recommendation, arguing that *Iqbal* involved a different constitutional violation than in the present case and that the magistrate judgment mis-characterized and mis-summarized his allegations as they pertain to the Director Defendants. . . The Court sustains Plaintiff's objections and rejects Magistrate Judge Stormes' recommendation as it pertains to the Director Defendants. First, it is unclear what standard regarding state of mind and knowledge Magistrate Judge Stormes found was insufficiently pled. The standard applied in *Iqbal* was purposeful discrimination; here, it is deliberate indifference. Moreover, Magistrate Judge Stormes does not explain why *Iqbal* would change the Court's earlier finding that Plaintiff sufficiently pled deliberate indifference on behalf of the Director Defendants. *Iqbal* did not change this standard, nor what must be pled under this standard. . . . The fact that both the Director Defendants and the respondents in *Iqbal* were high-ranking government officials is not sufficient to overturn this Court's previous findings.

Accordingly, the Court, having reviewed the 4AC and the decision in *Ashcroft v. Iqbal*, adheres to its original determination that Plaintiff has sufficiently pled a violation of his constitutional right of access to courts on behalf of the Director Defendants.”).

***Rupe v. Cate***, No. CV-08-2454-EFS, 2010 WL 430826, at \*4 (E.D. Cal. Feb. 1, 2010) (“The Court finds that Plaintiff sufficiently pled that Defendants Martel, Subia, and Long were aware of the violations and failed to prevent them. Plaintiff alleges that he wrote to Defendants Subia, Long, and Martel about the alleged violations. . . Additionally, Plaintiff alleges that all these Defendants were ‘made completely aware of the inappropriate actions of their subordinates ... but actively chose to be deliberately indifferent to these actions.’”).

***Eastman v. City of North Las Vegas***, No. 2:07-cv-01658-RLH-RJJ, 2010 WL 428806, at \*5 (D. Nev. Feb. 1, 2010) (“In his deposition, Chief of Police Mark Paresi testified that under his leadership the North Las Vegas Police Department decided to allow their officers to carry and use tasers and implemented a set of policies and procedures regulating their use. . . Paresi further testified that after reviewing the police report in this case, he concluded that Officer Miller appropriately followed police department procedure when he chose to tase Eastman. As noted above, a genuine factual dispute exists regarding whether Officer Miller violated the Eastman’s Fourth Amendment rights when he used his taser on him. Consequently, if the finder of fact concludes that Miller is liable under § 1983, the Supervising Officers can also be held liable because they approved and implemented the policies governing the use of tasers that led to this incident.”).

***Avila v. Cate***, No. 1:09-cv-00918-SMS PC, 2009 WL 5029827, at \*3 (E.D. Cal. Dec. 15, 2009) (“[W]hile a supervisor may be held liable for the constitutional violations of his or her subordinates under section 1983 if he or she ‘participated in or directed the violations, or knew of the violations and failed to act to prevent them,’ *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989); *also Corales v. Bennett*, 567 F.3d 554, 570 (9th Cir.2009); *Preschooler II v. Clark County School Board of Trustees*, 479 F.3d 1175, 1182 (9th Cir.2007); *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir.1997), mere knowledge is insufficient to impose liability on a prison official for unconstitutional discrimination, which requires purpose, *Iqbal* at 1949. Therefore, Plaintiff’s attempt to hold Defendants liable for racial discrimination because they were placed on notice of it via his inmate appeals fails as a matter of law. *Id.* These Defendants were not personally involved in intentionally discriminating against Plaintiff and the claim against them is subject to dismissal.”).

***Castillo v. Skwarski***, No. C08-5683BHS, 2009 WL 4844801, at \*7, \*8 (W.D. Wash. Dec. 10, 2009) (“Defendants argue that in *Ashcroft v. Iqbal* . . . ‘the Supreme Court eliminated the theory of supervisory liability from *Bivens* suits.’. . . In *Iqbal*, the Court stated that because ‘vicarious liability is inapplicable to *Bivens* ... suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’. . . Although this holding seems to have limited the liability of supervisors, the Court disagrees with

Defendants' proposition that supervisor liability has been 'eliminated.' In an opinion issued post-*Iqbal*, the Ninth Circuit identified four general situations in which supervisory liability may be imposed: (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a reckless or callous indifference to the rights of others. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir.2009) . . . In this case, Defendant Melendez argues that the Court should dismiss Plaintiff's claims against him because the complaint lacks an allegation of his personal participation. . . The Court agrees. Plaintiff's complaint alleges as follows: 1.2.5. At all times relevant, Michael Melendez was the Immigration and Customs Enforcement Supervising Deportation and Removal Officer for the Northwest Detention Center. On information and belief, at all times relevant, Michael Melendez was responsible for training and supervision of the ICE agents and officers whose conduct caused the injuries alleged herein. As part of his job responsibilities, Officer Melendez had a duty to ensure that no U.S. citizens were detained by ICE. At all relevant times Officer Melendez was acting under color of federal law and is sued in his individual capacity. \* \* \* 3.33. On information and belief, with deliberate indifference, intent, or reckless disregard, Defendants failed to adequately and properly train and supervise Agents Carl Stephens and Julie Stephens and other officers and agents involved in the arrest, detention, questioning, and removal proceedings to which Mr. Castillo was subjected. On information and belief, Defendants' failure to provide proper and adequate training and supervision was a proximate cause of the injuries that Mr. Castillo suffered. . . The pleaded facts against Defendant Melendez are no more than labels and conclusions because Plaintiff alleges only that Defendant Melendez 'was responsible for training and supervision' and that he failed to provide 'proper and adequate training.' Moreover, based on these assertions, the Court is left to simply infer the mere possibility of culpable conduct by Defendant Melendez. Therefore, the Court grants Defendants' motion on this issue and Plaintiff's claims against Defendant Melendez are dismissed without prejudice. With respect to Defendant Potter, he argues that Plaintiff's complaint against him is 'similarly flawed.' . . The Court disagrees because Plaintiff has alleged more than mere labels and conclusions. For example, Plaintiff has alleged that (1) Defendant Potter unlawfully approved the Form I-213 and issued an invalid Notice to Appear when he knew, or recklessly or callously disregarded evidence that Plaintiff was a United States citizen, Complaint, & 3.11-3.13, and (2) Defendant Potter's failure to conduct any investigation into the I-213, despite inconsistencies, demonstrates deliberate indifference to [Plaintiff's] constitutional rights, *Id.* & 3.33, 5.3, 5.7. The Court finds that Plaintiff has pled sufficient facts to state a claim that is plausible on its face. Therefore, the Court denies Defendants' motion to dismiss Plaintiff's claim against Defendant Potter.").

***Booth v. Carvell***, No. CV-F-08-1912 LJO GSA, 2009 WL 4730910, at \* 8 (E.D. Cal. Dec. 7, 2009) ("The fourth cause of action for failure to instruct, supervise, control and discipline is . . . insufficient under *Iqbal*. The claim incorporates all preceding allegations and states in a conclusory fashion: 23. At all relevant times, the defendants executing the warrants were acting under the

direction and control of the unknown DOE superiors and supervisors. 24. Acting under color of state law, the unknown DOE superiors and supervisors intentionally, knowing, recklessly and with deliberate indifference to the rights of the inhabitants of the area failed to instruct, supervise, control and/or discipline the defendants who executed the warrants to refrain from conducting unlawful searches and seizures, and otherwise depriving citizens of their constitutional and statutory rights, privileges and immunities. 25. Defendant unknown DOE superior and supervisors had knowledge or should have had knowledge that the wrongs alleged herein were going to be committed and had the power to prevent, or aid in preventing, the commission of said wrongs, could have done so, and intentionally, knowingly, or with deliberate indifference to the rights of inhabitants of the area, failed or refused to do so. . . Plaintiff has failed to allege any factual support for his claims of supervisor liability under section 1983. . . . Plaintiff has alleged no facts indicating any personal involvement by defendants. The fact that each of the DOE defendants holds a supervisory position alone, does not render them liable for conduct of their staff. The fourth cause of action alleges no more than what the Supreme Court explicitly warned against, ‘a plaintiff armed with nothing more than conclusions.’ *Iqbal*, 129 S.Ct. at 1949. These claims are factually insufficient pursuant to the *Iqbal* standard.”).

***Gonzales v. Price***, No. 1:07-cv-01391-AWI-SMS (PC), 2009 WL 4718850, at \*7 (E.D. Cal. Dec. 2, 2009) (“To state a claim for relief under section 1983 based on a theory of supervisory liability, Plaintiff must allege some facts that would support a claim that supervisory defendants either: personally participated in the alleged deprivation of constitutional rights; knew of the violations and failed to act to prevent them; or promulgated or ‘implemented a policy so deficient that the policy “itself is a repudiation of constitutional rights” and is “the moving force of the constitutional violation.’” *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir.1989) (internal citations omitted); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). Under section 1983, liability may not be imposed on supervisory personnel for the actions of their employees under a theory of *respondeat superior*. *Iqbal*, 129 S.Ct. at 1949. ‘In a § 1983 suit or a Bivens action-where masters do not answer for the torts of their servants-the term ‘supervisory liability’ is a misnomer.’ *Id.* Knowledge and acquiescence of a subordinate’s misconduct is insufficient to establish liability; each government official is only liable for his or her own misconduct. *Id.*”).

***Wiseman v. Hernandez*** No. 08cv1272-LAB (NLS), 2009 WL 5943242, at \*8 n.5, \*9 n.8 (S.D. Cal. Nov. 23, 2009) (“Although not specified in *Iqbal*, it seems logical that the more removed a defendant is from a plaintiff, the more factual specificity would be necessary to entitle an allegation to the presumption of truth and to plausibly suggest an entitlement to relief. In other words, where defendants are closely connected to the plaintiff’s day to day activities, it would take less factual specificity to survive a motion to dismiss than where the defendants are as far removed as the Attorney General and the FBI Director. . . . The *Iqbal* Court rejected the plaintiff’s argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’ *Id.* at 1949. This rejection, however, was based upon the requirement of pleading a discriminatory purpose in order to state a claim for discrimination. Thus, the allegation of knowledge of a subordinate’s discriminatory purpose was insufficient to state a

claim against the supervisor because there was no allegation that the supervisory individually had a discriminatory purpose. Accordingly, *Iqbal* does not invalidate prior case law stating that supervisory knowledge and failure to stop a constitutional violation is sufficient to state a claim for supervisory liability.”).

***Kelly v. State of Arizona, acting ex rel. the Arizona Dept. of Corrections***, No. CV-09-824-PHX-DGC, 2009 WL 3756699, at \*4, \*5 & n.3 (D. Ariz. Nov. 6, 2009) (“Plaintiffs do not allege that Defendants Schriro or Larson were present on the yard when Sean Kelly was murdered. They do not allege that Defendants Schriro and Larson had any direct involvement in the unfortunate events of that day. Given Defendant Schriro’s role as director of the Arizona Department of Corrections and Defendant Larson’s role as warden of the entire Arizona State Prison Complex–Lewis, it is not plausible to believe that either of them knew specifically what was occurring on the yard on the day Sean Kelly was murdered, knew the location or movements of specific inmates that day, knew that the inmates were somehow gaining access to the housing unit in which Sean Kelly was located, or knew that prisoners were allowed to pass through a metal detector without monitoring. The greater factual detail contained in these paragraphs almost certainly applies to the guards who were on the ground – the John Doe defendants named in the case. The paragraphs cannot reasonably be read as applying to Defendants Schriro and Larson. The Court presumes that this is why Plaintiffs assert the allegations only against ‘Defendants’ generically. Because the more factually specific paragraphs cannot be read as applying to Defendants Schriro and Larson, and the paragraphs that do name Defendants Schriro and Larson are entirely conclusory, the count one claims against Schriro and Larson must be dismissed. . . . Plaintiffs have pleaded no factual material which plausibly suggests that Defendants Schriro and Larson acted with deliberate indifference toward Sean Kelly – that they were aware of the risk of harm to Sean Kelly and deliberately chose to disregard that risk. As noted above, the requirement is one of actual, subjective intent ‘the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.’ *Farmer*, 511 U.S. at 837. Because Plaintiffs have failed to plead facts that satisfy this standard, count one will be dismissed as to Defendants Schriro and Larson. . . . *Iqbal* also appears to have scaled back supervisory liability under § 1983 and *Bivens* claims. *Iqbal* rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’ 129 S.Ct. at 1949. The Supreme Court explained: ‘In a § 1983 suit or a *Bivens* action – where masters do not answer for the torts of their servants – the term ‘supervisory liability’ is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.’ *Id.* The Supreme Court concluded that ‘purpose rather than knowledge is required.’ *Id.* The Court need not decide whether this language would eliminate the liability of Defendants Schriro and Larson based solely on their knowledge that others within the Department of Corrections were violating Sean Kelly’s constitutional rights. Even if such knowledge remains sufficient for a § 1983 claim, Plaintiffs have not alleged facts sufficient to show such knowledge.”).

*Shehee v. Baca*, No. CV 08-2277-FMC (E), 2009 WL 3462174, at \*6 n.6 (C.D. Cal. Oct. 23, 2009) (“After *Iqbal*, the issue of whether an individual’s knowing failure to act, alone, can justify section 1983 liability is unclear. *Iqbal* noted that ‘purpose rather than knowledge’ is required to impose liability on defendants for discharging their responsibilities in a way that may have resulted in constitutional deprivations. See *Iqbal*, 129 S.Ct. at 1949 (discussing same); see also *al-Kidd v. Ashcroft*, 580 F.3d at 976 & n. 25 (acknowledging dissent’s contention that the ‘knowing failure to act’ standard did not survive *Iqbal*, but refusing to reach the issue).”).

## TENTH CIRCUIT

*Burke v. Regalado*, 935 F.3d 960, 1001 (10th Cir. 2019) (“It was reasonable for the jury to find (1) Sheriff Glanz was responsible for ‘an unconstitutional policy or custom,’ *Dodds*, 614 F.3d at 1199, of poor training, inadequate staffing, and lack of urgency surrounding jail medical care; (2) that this policy or conduct resulted in a violation of Mr. Williams’s right to adequate medical care under the Fourteenth Amendment; and (3) Sheriff Glanz acted with deliberate indifference toward the risk that the policy or conduct of providing inadequate medical care would result in an injury like Mr. Williams’s. Accordingly, the evidence was sufficient to support the jury’s verdict against Sheriff Glanz holding him liable for supervisory liability.”)

*Stevenson v. Cordova*, No. 17-1053, 2018 WL 2171179, at \*8 (10th Cir. May 11, 2018) (not reported) (“Finally, Stevenson also fails to show plain error in the district court’s instruction on the state of mind necessary to find that Cordova and Holloway used excessive force. . . He argues the standard should have been deliberate indifference. We have applied that standard to a supervisor’s liability for a subordinate’s use of excessive force against a prisoner. See *Serna v. Colo. Dep’t of Corr.*, 455 F.3d 1146, 1151-52 (10th Cir. 2006). But it remains an open question whether that standard still applies in the wake of the Supreme Court’s decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See *Dodds*, 614 F.3d at 1197-99 (discussing *Iqbal* and concluding that a claim against a supervisory defendant must allege that he acted with the state of mind necessary to establish the alleged constitutional violation). To the extent that Stevenson is challenging the district court’s decision not to give an instruction on supervisory liability based upon the defendants’ deliberate indifference, the lack of evidence of any constitutional violation by a subordinate precluded that theory of liability. And he otherwise fails to demonstrate that Instruction Nos. 10 and 11 erroneously required the jury to find that Cordova and Holloway acted maliciously and sadistically in refusing to loosen the handcuffs, as is required for liability on an Eighth Amendment claim of excessive use of force.”)

*Moya v. Garcia*, 895 F.3d 1229, 1232-34, 1237-39 (10th Cir. 2018) (*amended opinion on denial of rehearing en banc*), *cert. denied*, 139 S. Ct. 1323 (2019) (“The first question is whether Mr. Moya and Mr. Petry have adequately alleged a deprivation of due process. We need not decide this question because of our answer to the second question: in our view, the complaint does not plausibly allege facts attributing the potential constitutional violation to the sheriff or wardens. . . To prevail, Mr. Moya and Mr. Petry must have alleged facts showing that the sheriff and wardens

had been personally involved in the underlying violations through their own participation or supervisory control. . . . The district court rejected both theories of liability. Here, though, Mr. Moya and Mr. Petry rely only on their theory of supervisory liability. For this theory, Mr. Moya and Mr. Petry blame the sheriff and wardens for the delays in the arraignments. In our view, however, the sheriff and wardens did not cause the arraignment delays. . . . [T]he arraignments could not be scheduled by anyone working for the sheriff or wardens; scheduling of the arraignments lay solely with the state trial court. . . . [T]he court was firmly in control here. Grand juries indicted Mr. Moya and Mr. Petry, and both individuals were arrested based on outstanding warrants issued by the court. And after these arrests, jail officials notified the court that Mr. Moya and Mr. Petry were in custody. The arrests triggered New Mexico’s Rules of Criminal Procedure, which entitled Mr. Moya and Mr. Petry to arraignments within fifteen days. Rule 5-303(A) NMRA. Compliance with this requirement lay solely with the court, for an arraignment is a court proceeding that takes place only when scheduled by the court. . . . The court failed to comply with this requirement, resulting in overdetention of Mr. Moya and Mr. Petry. These overdetections were caused by the court’s failure to schedule and conduct timely arraignments rather than a lapse by the sheriff or wardens. *See Webb v. Thompson*, 643 Fed.Appx. 718, 726 (10th Cir. 2016) (unpublished) (Gorsuch, J., concurring in part and dissenting in part) (“[T]he only relevant law anyone has cited to us comes from state law, and it indicates that the duty to ensure a constitutionally timely arraignment in Utah falls on the *arresting* officer—not on *correctional* officers.”). Mr. Moya and Mr. Petry argue that the sheriff and wardens could have mitigated the risk of overdetention by keeping track of whether detainees had been timely arraigned, requesting arraignments for those who had been overdetained, or bringing detainees to court prior to a scheduled arraignment. But the sheriff and wardens did not *cause* the overdetention. At most, the sheriff and wardens failed to remind the court that it was taking too long to arraign Mr. Moya and Mr. Petry. But even with such a reminder, the arraignments could only be scheduled by the court itself. . . . [T]he dissent reasons that the right at issue must be the right to freedom from pretrial detention rather than the right to a timely arraignment. Based on this reasoning, the dissent concludes that our misplaced focus on arraignment has caused us to improperly focus on the state district court’s role and overlook actions that the defendants could have taken, such as releasing Mr. Moya and Mr. Petry. We have focused on the plaintiffs’ right to timely arraignment because that’s what the plaintiffs have alleged. As the dissent admits, Mr. Moya and Mr. Petry are imprecise about their asserted right, conflating the right to an arraignment within fifteen days of arrest and the right to pretrial release (or bail). This conflation is understandable because the rights are coextensive under their theory of the case. . . . Under the theory articulated by Mr. Moya and Mr. Petry, the defendants violated the right to freedom from detention by failing to ensure timely arraignments. . . . As discussed above, the defendants were powerless to cause timely arraignments because arraignments are scheduled by the court rather than jail officials. The dissent agrees. But the dissent theorizes that jail officials could have simply released Mr. Moya and Mr. Petry. This theory is not only new but also contrary to what Mr. Moya and Mr. Petry have told us, for they expressly disavowed this theory. . . . The state trial court’s alleged failure to schedule timely arraignments cannot be attributed to the sheriff or wardens. Thus, the complaint does not plausibly allege a basis for supervisory liability of the sheriff or wardens. . . . Mr. Moya and Mr. Petry also assert § 1983 claims against the county,

alleging that it failed to adopt a policy to ensure arraignments within fifteen days. These claims are based on the alleged inaction by the sheriff and wardens. But, as discussed above, the sheriff and wardens did not cause the arraignment delays. Thus, the county could not incur liability under § 1983 on the basis of the alleged inaction. . . . Mr. Moya and Mr. Petry allege a deprivation of due process when they were detained for more than fifteen days without arraignments. We can assume, without deciding, that this allegation involved a constitutional violation. But Mr. Moya and Mr. Petry sued the sheriff, wardens, and county, and these parties did not cause the arraignment delays. Thus, the district court did not err in dismissing the complaint or in denying leave to amend.”)

*Marin v. King*, No. 16-2225, 2018 WL 272008, at \*14–15 (10th Cir. Jan. 3, 2018) (not reported) (“When a § 1983 plaintiff pursues a claim of supervisory liability, he must show the subordinate violated his constitutional rights—a supervisor cannot be liable if the subordinate did not commit a violation. . . . Having concluded that Plaintiffs have not successfully advanced their Fifth and Fourteenth Amendment claim against Ms. Ferguson or Dr. Norris, Plaintiffs’ attempt to hold Mr. King and Mr. Suttle liable for any purported violation must fail. Moreover, when a supervisor seeks qualified immunity in a § 1983 action, the clearly established prong is met only when the supervisor’s and the subordinate’s actions violate clearly established law. . . . As stated, Plaintiffs fail to show Ms. Ferguson or Dr. Norris violated clearly established law for their Fourth and Fourteenth Amendment claim. Thus, we conclude that Mr. King and Mr. Suttle are entitled to qualified immunity on Plaintiffs’ supervisory-liability claim arising out of that alleged violation.”)

*Ellis v. Oliver*, No. 16-1387, 2017 WL 4857427 (10th Cir. Oct. 26, 2017) (not reported) (“Ultimately, Mr. Ellis has failed to identify any ‘specific actions taken by [the warden], or specific policies over which [the warden] possessed supervisory responsibility, that violated [his] clearly established constitutional rights.’ . . . While this court is sympathetic to the informational disparity. . . between a prisoner and prison officials, especially in the pre-discovery context, something more is required to establish a constitutional violation and overcome the presumption of qualified immunity. . . . Since Mr. Ellis has failed to allege facts plausibly showing that the warden’s individual actions violated his constitutional rights, he has also failed to show that Warden Oliver caused the constitutional harm and did so with the requisite state of mind.”)

*Vega v. Davis*, No. 16-1028, 2016 WL 7448067, at \*4-5 (10th Cir. Dec. 28, 2016) (unpublished) (“Although Plaintiff’s Second Amended Complaint does ‘nudge’ his deliberate indifference claim more toward the line of plausibility than his initial complaint, . . . it still fails the facial plausibility standard. . . . Plaintiff was required to demonstrate that the Warden was aware of facts from which the inference could be drawn that Vega was at a substantial risk of harm or suicide, and the Warden ‘must also draw the inference.’ . . . The Second Amended Complaint fails in both respects. . . . Plaintiff fails to demonstrate how one can infer the Warden was aware of any of the facts that predated his tenure. As this court admonished during the prior appeal, ‘[t]he mere presence of records, by themselves, does not create the reasonable inference that Davis read them. The plaintiff fails to

explain why it is reasonable to infer that a warden would review all of the records of each inmate, or each inmate in the Control Unit, or [Vega's] records in particular.' . . . In the current appeal, Plaintiff suggests it is reasonable to conclude that the Warden was aware of Vega's earlier mental health history because he 'reviewed documents related to [Vega] that outlined his disciplinary history dating back to 2003.' We are not persuaded. Although the Warden did review documents that discussed Vega's behavior in 2003—specifically, the assaultive behavior that landed Vega in the Control Unit—those documents say nothing about mental illness. Though the Warden, by reviewing these documents, clearly became aware of Vega's *conduct*, there is nothing to suggest he was aware of or knowingly disregarded Vega's *mental health*, particularly where the facility's own psychologist opined that Vega 'ha [d] no current mental health issues.'")

***Keith v. Koerner***, 843 F.3d 833, 838-40, 846-47, 849 (10th Cir. 2016) (“[W]e need not define the standard for personal involvement in all instances because Ms. Keith’s theories of liability either fail on their merits or fall within the basis of liability we recognized in *Dodds* as surviving *Iqbal*. To establish personal involvement, Ms. Keith first alleges a failure to train by Warden Koerner. Although we have not determined whether a failure to train satisfies the post-*Iqbal* personal-involvement requirement, the evidence in this case does not support Ms. Keith’s theory even under our pre-*Iqbal* precedent. Accordingly, we need not determine whether the failure-to-train theory would be legally sufficient under a heightened standard. Second, Ms. Keith argues Warden Koerner failed to implement and enforce policies that would have prevented the sexual assault by Mr. Gallardo. Because we concluded in *Dodds* that personal involvement may be established by a supervisor’s responsibility for policies, Ms. Keith may rely on the same theory here. We discuss each of these personal liability theories below. . . . Because Warden Koerner provided multiple, explicit prohibitions against sexual interaction with inmates, we cannot conclude he failed to train his employees in a way that would establish his personal involvement in Ms. Keith’s injury. Indeed, we have held that allegations of failure to train were inadequate to support a § 1983 claim where the officer completed a state training program and we found no evidence of a deficiency in the training. *Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998). In *Barney*, we further explained that, even if the training was ‘less than adequate, we [were] not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates. Specific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior.’ . . . Similarly here, there is no evidence that additional training would have prevented Mr. Gallardo’s misconduct. Indeed, Mr. Gallardo raped Ms. Keith after acknowledging that engaging in sex with or sexually assaulting an inmate was grounds for termination and criminal prosecution. . . . Ms. Keith has not identified case law clearly establishing a warden’s personal liability based solely on instances of inappropriate conduct that may be considered undue familiarity but that do not rise to the level of sexual misconduct. Consequently, we distinguish between these forms of misconduct in analyzing Warden Koerner’s personal involvement, relying on the evidence relating to undue familiarity to the extent it provides context for the conditions at TCF. . . . Although TCF had formal policies prohibiting sexual misconduct, the evidence raises questions about whether those policies were being followed or enforced. Despite facing a higher number of allegations of sexual misconduct and undue familiarity than

similar facilities, Warden Koerner's most common response was to deem the allegations unsubstantiated whenever the employee denied them. In turn, even when breach of policies designed to protect inmates from undue familiarity and sexual misconduct was independently corroborated, discipline was lax. Considering the evidence as a whole, a jury could reasonably infer that Warden Koerner was personally involved in failing to enforce policies in a way that allowed sexual misconduct to occur at TCF. . . . Viewing this evidence together with the high volume of complaints at TCF, the multiple complaints against individual employees, and the lackluster response to such complaints, we conclude Ms. Keith has demonstrated a genuine issue of material fact about whether Warden Koerner acted with deliberate indifference to the risk of sexual misconduct by his employees. . . . At trial, Warden Koerner may introduce evidence to rebut any inference of knowledge or to show his actions were reasonable under the circumstances, *Farmer*, 511 U.S. at 844, but the weighing of such evidence is the jury's role, not ours, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In summary, Ms. Keith has presented sufficient evidence to establish Warden Koerner's personal involvement, causation, and state of mind, as necessary to present her constitutional violation to a jury. Viewing the circumstances at TCF as a whole, there is sufficient evidence from which a reasonable jury could infer that Warden Koerner was aware of but failed to address a substantial risk that his employees would engage in sexual misconduct and thereby harm TCF inmates, including Ms. Keith.")

***Durkee v. Minor***, 841 F.3d 872, 876-78 (10th Cir. 2016) ("Plaintiff's claim against Defendant Minor in his individual capacity amounts to a claim of direct supervisory liability. . . . To establish such liability, Plaintiff must show Defendant Minor's '*direct personal responsibility*' for the claimed deprivation of his Eighth Amendment right. . . . Accordingly, Plaintiff must prove Defendant Minor caused his injury with a state of mind amounting to deliberate indifference for Plaintiff's safety. *See Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010) (recognizing the elements of individual supervisory liability as (1) personal involvement, (2) causation, and (3) a culpable state of mind equal to that required to establish the underlying constitutional violation). In *Dodds*, we decided a sheriff could be held individually liable for his deliberately indifferent maintenance of a policy that prevented arrestees from posting preset bail for no legitimate reason, in violation of the Fourteenth Amendment's liberty guarantee. . . . Plaintiff tells us the parallels of his case to *Dodds* are clear. To us those parallels are clear as mud. *Dodds* involved a policy or procedure that was constitutionally infirm in the overwhelming majority of its applications, if not on its face. . . . The policy Plaintiff challenges here presents us with no such dilemma. The detention center's policy of unshackling inmates in the booking area next to the visitation room does not appear problematic on its face; nor has it proven problematic in its application—at least on the record before us—save the present isolated incident. . . . Apart from a supervisor's promulgation of the sort of policy at issue in *Dodds*, some of our sister circuits have held a supervisor may cause a constitutional violation when he has actual knowledge of subordinates' past constitutional violations but does nothing to stop future occurrences. . . . Nothing in the present record suggests, however, that the policy in question here led to any constitutional violations prior to Ramos's assault on Plaintiff. . . . We suppose cases of supervisory liability under § 1983 are not necessarily limited to those two factual scenarios we have just outlined. But whether Plaintiff's theory of

causation is based on an improper or inadequate policy or something else such as failure to train or supervise, the fact remains that he must still present record evidence sufficient to permit a jury to find that *Defendant Minor caused his injury while deliberately indifferent* to his safety. This Plaintiff has not done, which perhaps accounts for the district court's inadequate findings. That Plaintiff misunderstands his burden is well illustrated by his argument to both the district court and us that Defendant Minor's 'inadequate training and supervision of Hochmuth and others at the jail led to Hochmuth's deliberate indifference to [Plaintiff's] safety.' . . . Plaintiff's argument in support of his individual liability claim against Defendant Minor amounts to little more than Minor should be held liable because he was in charge of the detention center. This simply is not enough to hold Defendant Minor liable in his individual capacity.")

**Castillo v. Jones-Cooper**, 660 F. App'x 614, 617 (10th Cir. 2016) ("The deliberate-indifference standard is not a negligence standard—Dolan had to *actually know* of the risk. We agree with the district court that Appellants fail to show that Dolan knew of such a risk. Once he knew of the risk—when Gaytan told him why she did not want to see Bobelu on May 29, 2009—Dolan quickly removed Bobelu from his position. Apart from what Dolan learned from Gaytan, Appellants rely only on their own beliefs that Dolan should have inferred that Bobelu might sexually assault a worker based on unrelated disciplinary incidents. Nothing in the record presents a genuine dispute of material fact that Dolan knew of the risk of sexual assault before meeting with Gaytan. Thus, Appellants have failed to show deliberate indifference sufficient to overcome qualified immunity.")

**Wright v. Collison**, 651 F. App'x 745, 747-49 (10th Cir. 2016) ("Mr. Wright alleges that Officers Collison and Cannon violated his constitutional rights by acting with deliberate indifference in failing to protect him from other inmates despite their threats to harm him. And he claims that Sheriff Stanley's supervisory policy and practice of housing inmates in overcrowded cells, with actual knowledge that those conditions posed a substantial risk of serious harm to inmates, caused his constitutional rights to be violated. . . . [The district court] concluded that Sheriff Stanley's supervisory conduct could be considered unconstitutional because it was clearly established that 'prison officials have a duty to protect prisoners from violence at the hands of other prisoners.' . . . But the law governing a sheriff's obligations *in these circumstances* was not clearly established. The issue is whether case law existing as of August 2011 would alert any reasonable sheriff that he had a constitutional duty to reduce overcrowding by any of the measures suggested by Mr. Wright. But neither Mr. Wright nor the district court has cited such case law. Sheriff Stanley is entitled to qualified immunity.")

**Webb v. Thompson**, 643 F. App'x 718, 724-25 (10th Cir. 2016) ("Thompson's final argument is that the district court applied the wrong mens rea standard for supervisor liability. We addressed supervisor liability under § 1983 in *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir.2010), noting that 'the factors necessary to establish a [supervisor's] § 1983 violation depend upon the constitutional provision at issue, including the state of mind required to establish a violation of that provision.' . . . In other words, 'there's no special rule of liability for supervisors. The test for them

is the same as the test for everyone else.’ . . . In *Dodds*, the constitutional right at issue was substantive due process, which we assumed requires a showing of deliberate indifference. . . . In contrast, Webb’s right to a prompt judicial determination of probable cause is protected by the Fourth Amendment. . . . Fourth Amendment claims are subject to an objective reasonableness standard, and we do not consider an actor’s state of mind. . . . Thompson nevertheless argues that the applicable mens rea standard is intent. He contends that supervisor liability under § 1983 requires ‘a deliberate and intentional act on the part of the supervisor to violate the plaintiff’s legal rights.’ . . . However, this language in *Wilson* merely reinforces that § 1983 does not authorize respondeat superior liability, and therefore to be liable ‘a supervisor, as with everyone else’ must have ‘subjected, or caused to be subjected a plaintiff to a deprivation of his legal rights.’ . . . After observing that the plaintiff in *Wilson* alleged that the defendant’s act caused constitutional violations, we noted appellants did not challenge the district court’s conclusion that deliberate indifference was ‘a sufficiently culpable mental state to impose supervisory liability [for prolonged detention claims] under § 1983.’ . . . We did not engage the question of which mens rea standard applies in *Wilson*, and thus did not contradict the conclusions that we apply an objective reasonableness test to Fourth Amendment claims under § 1983, . . . and that the same standard applies to § 1983 claims against supervisors . . . . Nevertheless, the district court did apply the wrong standard. Rather than asking whether Thompson’s actions were objectively reasonable, the court asked whether Thompson acted ‘knowingly or with deliberate indifference that a constitutional violation would occur.’ Despite this error, because the court found that there was a genuine issue of material fact whether he acted with deliberate indifference, there is also a genuine issue of material fact whether he acted with objective reasonableness. Thus, Thompson is not entitled to qualified immunity on this claim.”)

*Cox v. Glanz*, 800 F.3d 1231, 1248-54 (10th Cir. 2015) (“The requisite showing of an ‘affirmative link’ between a supervisor and the alleged constitutional injury has [come] to have three related prongs: (1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind.’ . . . Admittedly, ‘[t]he contours of . . . supervisory liability are still somewhat unclear after [the Supreme Court decided] *Iqbal*, which “articulated a stricter liability standard for . . . personal involvement.”’ . . . Our clearly-established-law analysis centers on whether the controlling cases ‘show that [Sheriff Glanz] took the alleged actions with the requisite state of mind.’ . . . This state of mind “can be no less than the *mens rea* required” of [any of his] subordinates [i.e., Jail employees] to commit the underlying constitutional violation.’ . . . Importantly, as our discussion of the pertinent governing caselaw . . . demonstrates, this is a *particularized* state of mind: actual knowledge by a prison official of an individual inmate’s substantial risk of suicide. . . . Our review of relevant caselaw postdating *Hocker* and *Barrie* indicates that the foregoing state of the law in our circuit—which required prison officials to possess knowledge that a specific inmate presents a substantial risk of suicide—had not changed in material respects by July 2009. We are not aware of any controlling Supreme Court or Tenth Circuit decisions that directly answer this clearly-established-law inquiry. However, our view of the requirements of the clearly established law extant when Mr. Jernegan committed suicide (July 2009) does find some support in the Supreme Court’s recent decision in *Taylor v. Barkes*, — U.S. —, 135 S.Ct. 2042 (2015) (per curiam),

where the Court resolved a deliberate-indifference dispute on the clearly-established-law prong of the qualified-immunity standard. There, the Court held that, as of November 2004, there was no clearly established ‘right’ of an inmate to be adequately screened for suicide. . . The *Taylor* Court emphatically stated that ‘[n]o decision of this Court even discusses suicide screening or prevention protocols.’ . . *Taylor* teaches us that, as of November 2004, there was no constitutional right to such screening or protocols. . . Consequently, in November 2004, a jail’s nonexistent or deficient suicide-screening measures would not have necessarily indicated that an individual prisoner’s suicide was the product of deliberate indifference in violation of the Eighth Amendment. In light of *Taylor*, our reading of the contours of the law a short five years later should not be surprising. That is, irrespective of the alleged deficiencies in the Jail’s suicide-screening protocols, in order for any defendant, including Sheriff Glanz, to be found to have acted with deliberate indifference, he needed to first have knowledge that the specific inmate at issue presented a substantial risk of suicide. Moreover, though not dispositive, our limited corpus of nonprecedential jail-suicide decisions supports our reading of the state of the law when Mr. Jernegan committed suicide. . . . At bottom, when confronting individual-capacity § 1983 claims, our ‘focus must always be on the *defendant*—on the ... injury *he* inflicted or caused to be inflicted, and on *his* motives. This is because § 1983 isn’t a strict liability offense.’ . . As noted, Sheriff Glanz had no personal interaction with Mr. Jernegan or direct and contemporaneous knowledge of his treatment in July 2009. Therefore, insofar as he had knowledge sufficient to form the requisite mental state, it would have had to necessarily come from his subordinates, notably Ms. Taylor or Ms. Sampson. Because they did not possess such knowledge, the conclusion inexorably follows that Sheriff Glanz could not have possessed such knowledge. Accordingly, though we have not ignored Ms. Cox’s strong assertions regarding the systemic failings of the Jail’s mental-health screening and treatment protocols, which quite understandably troubled the district court, we conclude that Ms. Cox has nevertheless failed to establish that Sheriff Glanz acted as to Mr. Jernegan with the requisite mental state to constitute deliberate indifference. In other words, she has not carried her burden regarding the essential subjective component of the deliberate-indifference standard. In sum, for the reasons stated, we cannot conclude that Sheriff Glanz’s conduct constituted an Eighth Amendment violation under the law that was clearly established at the time of Mr. Jernegan’s death. Therefore, Ms. Cox cannot satisfy the clearly-established-law component of the qualified-immunity standard. We must accordingly reverse the district court’s denial of qualified immunity to the Sheriff on Ms. Cox’s individual-capacity claim under § 1983.”)

*Attocknie v. Smith*, 798 F.3d 1252, 1258, 1259-60 (10th Cir. 2015) (“Cherry’s entry of Aaron’s home was clearly contrary to well-established law. He is not entitled to qualified immunity on the claim of unlawful entry. And because a reasonable jury could determine that the unlawful entry was the proximate cause of the fatal shooting of Aaron, . . . [W]e need not decide whether Cherry used excessive force when he confronted Aaron. . . . The important procedural failure in this case is not Plaintiff’s or the district court’s but Smith’s. His motion for summary judgment did not raise any ground on which we can reverse. The argument section of the motion devotes four pages to Plaintiff’s § 1983 claim against him in his individual capacity. It notes, correctly, that because he was not personally involved in the August 25, 2012 incident until after the shooting, his liability

could only be as a supervisor. Next it summarizes his view of the law of supervisory liability and argues that he is not liable under that law because (1) Cherry did not violate the Constitution and (2) even if he did, ‘Cherry was not an employee or officer of Sheriff Smith.’ . . . It then summarizes his view of the law of qualified immunity but concludes that ‘[t]he second stage of qualified immunity analysis, whether a right was “clearly established” need not even be performed, as Defendant Smith did not personally violate Plaintiff’s constitutional rights in any way whatsoever.’ . . . Smith raised no argument below that he would be entitled to qualified immunity even if Cherry was his employee. Yet given his concession that he cannot challenge on appeal the district court’s determination that Cherry was his employee, this foregone argument would be his only path to reversal. Because he does not argue on appeal that the district court committed plain error, we do not address that possibility. . . . We affirm the denial of qualified immunity.”)

*Castillo v. Day*, 790 F.3d 1013, 1020 (10th Cir. 2015) (“This court’s precedent confirms Plaintiffs’ position that a prison guard’s failure to take reasonable steps to protect an inmate from a known risk of sexual abuse by another prison guard. . . . can be a violation of the Eighth Amendment. . . . Accordingly, we reject Pavliska’s argument that a prison guard who knows of, yet fails to reasonably respond to, a risk of harm created by another guard can only be liable if the perpetrator is a subordinate.”)

*Estate of Booker v. Gomez*, 745 F.3d 405, 435, 436 (10th Cir. 2014) (“To establish supervisory liability, the Plaintiffs must show Sergeant Rodriguez’s (1) personal involvement, (2) causation, and (3) the requisite state of mind with respect to either the excessive force or failure to provide medical care claims. . . . Our earlier conclusions that a reasonable jury could find Sergeant Rodriguez actively participated in—and failed to intervene and prevent—the use of excessive force . . . satisfies the first and second elements. Similarly, our earlier conclusion that a reasonable jury could find Sergeant Rodriguez exhibited excessive zeal—by using the taser on Mr. Booker for 60 percent longer than the recommended time period when he was no longer resisting and fully subdued by handcuffs, Deputy Robinette’s weight, and Deputy Grimes’s carotid neck hold. . . . satisfies the third element. Finally, our conclusion regarding clearly established law . . . also precludes summary judgment on this claim. *See* Schwartz, § 7.19[E] (“Under the holding in *Iqbal* that a supervisory official may be held liable under § 1983 only for his or her unconstitutional conduct, there is no longer any need to contemplate whether qualified immunity as applied to supervisory officials requires special or separate consideration.”).”)

*Pahls v. Thomas*, 718 F.3d 1210, 1225, 1226 & n.6, 1230, 1231 (10th Cir. 2013) (“[P]ersonal-involvement requirement does not mean. . . . that direct participation is necessary. As we recently recognized in *Dodds*, government officials may be held responsible for constitutional violations under a theory of supervisory liability. ‘A plaintiff may therefore succeed in a § 1983 suit’—and, we may add, a *Bivens* action—‘against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.’ . . . Because § 1983 and *Bivens* are

vehicles for imposing personal liability on government officials, we have stressed the need for careful attention to particulars, especially in lawsuits involving multiple defendants. “[I]t is particularly important’ that plaintiffs ‘make clear exactly *who* is alleged to have done *what* to *whom*, ... as distinguished from collective allegations.’. . . When various officials have taken different actions with respect to a plaintiff, the plaintiff’s facile, passive-voice showing that his rights ‘were violated’ will not suffice. Likewise insufficient is a plaintiff’s more active-voice yet undifferentiated contention that ‘defendants’ infringed his rights. . . Rather, it is incumbent upon a plaintiff to ‘identify *specific* actions taken by *particular* defendants’ in order to make out a viable § 1983 or *Bivens* claim. . . The same particularized approach applies with full force when a plaintiff proceeds under a theory of supervisory liability. Various officials often have ‘different powers and duties.’. . . A plaintiff must therefore identify the specific policies over which particular defendants possessed responsibility and that led to the alleged constitutional violation. . . Of course, in all cases, a plaintiff must show that each defendant acted with the requisite state of mind. . . . We pause here to note a critical distinction between *Bivens* and § 1983. The latter is a statutorily conferred cause of action. The former is a cause of action implied directly under the Constitution. The Supreme Court ‘has been reluctant to extend *Bivens* liability to any new context or new category of defendants.’. . . And the Court has never held that a *Bivens* action is available against federal officials for a claim based upon the First Amendment. . . No argument was presented to us on the availability of a *Bivens* action for a First Amendment viewpoint-discrimination claim against a Secret Service officer actively engaged in protecting the President. We therefore need not and do not decide whether *Bivens* is available in these circumstances. We assume, for purposes of this case only, that it is. . . . [A]lthough the requirement of personal participation, including the question of supervisory liability, is a component of liability under § 1983 and *Bivens*, we also incorporate it into our qualified-immunity analysis, where we ask whether a clearly established constitutional right has been violated. . . . To make out viable § 1983 and *Bivens* claims *and* to overcome defendants’ assertions of qualified immunity, plaintiffs here must establish that each defendant—whether by direct participation or by virtue of a policy over which he possessed supervisory responsibility—caused a violation of plaintiffs’ clearly established constitutional rights, and that each defendant acted with the constitutionally requisite state of mind. . . . [Plaintiffs] must identify specific actions taken by particular defendants, or specific policies over which particular defendants possessed supervisory responsibility, that violated their clearly established constitutional rights. . . Failure to make this showing both dooms plaintiffs’ § 1983 and *Bivens* claims and entitles defendants to qualified immunity. . . . In § 1983 and *Bivens* actions, a claim of viewpoint discrimination in contravention of the First Amendment requires a plaintiff to show that the defendant acted with a viewpoint-discriminatory purpose. . . . In this case, for plaintiffs to prevail as to each defendant, they must show that the defendant’s individual actions caused viewpoint discrimination to occur, and that those actions were taken ‘*because of*,] not merely in spite of, [plaintiffs’] anti-Bush message.’. . . Under plaintiffs’ supervisory-liability theory, they must show that each defendant adopted and implemented the security policies at issue, not for viewpoint-neutral reasons, ‘but for the purpose of discriminating on account of’ the particular message plaintiffs wished to convey. . . . We determine that the evidence, at most, shows that each defendant was aware of the disparate treatment to which plaintiffs were subjected. This evidence

is insufficient as a matter of law to show that any defendant promulgated the policies at issue or acted for a discriminatory purpose. Each defendant is therefore entitled to qualified immunity.”)

***Schneider v. City of Grand Junction Police Dept.***, 717 F.3d 760, 768-71 & n.5 (10th Cir. 2013) (“[W]e have not yet had occasion to determine what allegations of personal involvement ... meet *Iqbal*’s stricter liability standard.’ . . . [citing cases] None of those cases, however, presented us with the occasion to address the precise contours of this standard. And neither does this case. None of the claims against the individual defendants turns on the question of personal involvement. The district court’s summary judgment conclusions were based on the second and third elements, causation and state of mind, and the parties’ arguments also are focused on these latter elements. We therefore assume without deciding that Ms. Schneider has presented sufficient evidence of the individual defendants’ personal involvement under *Iqbal*’s stricter liability standard. . . . On appeal, no one challenges the use of the deliberate-indifference standard. We therefore assume without deciding that deliberate indifference is the applicable state of mind. This is consistent with our approach in *Dodds*, which also concerned a substantive due process § 1983 claim, where we declined to consider whether deliberate indifference was the correct standard because neither party challenged the district court’s use of that standard. . . . We assumed without deciding, as we do here, that deliberate indifference is the standard for a claim of violation of substantive due process. . . . As with the personal involvement element of the claims against the individual defendants, we do not rely on the element of a municipal policy or custom to resolve Ms. Schneider’s claims against the City. The district court assumed without deciding that this element was met, and based its summary judgment decisions in favor of the City on the second and/or third elements—causation and state of mind. We similarly assume without deciding that Ms. Schneider has presented sufficient evidence of a municipal policy or custom for her claims against the City. . . . In the present case, the state-of-mind element is deliberate indifference for both the individual defendants and the City. This may not always be the case. For individual defendants, the applicable state of mind will depend on the type of constitutional violation at issue. . . . In contrast, the prevailing state-of-mind standard for a municipality is deliberate indifference regardless of the nature of the underlying constitutional violation.”)

***Wilson v. Montano***, 715 F.3d 847, 857, 858 (10th Cir. 2013) (“[U]nder New Mexico law both Warden Chavez and Sheriff Rivera were responsible for the policies or customs that operated and were enforced by their subordinates at the VCDC and VCSO and for any failure to adequately train their subordinates. We therefore consider the allegations against each supervisory defendant to determine whether they meet the *Dodds* requirements for imposing individual liability under § 1983. . . . The complaint alleges Warden Chavez ‘established a policy or custom of holding citizens without pending criminal charges until the court filed orders of release sua sponte.’ Allegedly, these policies or customs were ‘a significant moving force behind Plaintiff’s illegal detention.’ The complaint further alleges Warden Chavez’s policy of holding citizens without court orders caused the violation of Wilson’s Fourth Amendment right to a prompt probable cause determination. That is, because Warden Chavez failed to require the filing of written complaints, detainees, including Wilson, were held at the VCDC without receiving prompt probable cause

determinations. The complaint also alleges Warden Chavez inappropriately trained his employees, which led to the violation of Wilson's right to a prompt probable cause determination. Indeed, the complaint alleges there were numerous occasions where the VCDC and the VCSO held individuals for days and, on some occasions, weeks, without law enforcement taking those individuals before a magistrate judge. These allegations, taken as true, sufficiently establish Warden Chavez promulgated policies which caused the constitutional harm of which Wilson complains, i.e., his prolonged detention without a probable cause hearing. . . That Wilson has not alleged he had any direct contact with Warden Chavez or that Warden Chavez actually knew of Wilson's specific circumstances is of no consequence. . . Finally, the complaint alleges sufficient facts to establish Warden Chavez acted with the requisite mental state. To establish a violation of § 1983 by a defendant-supervisor, the plaintiff must establish, at minimum, a deliberate and intentional act on the part of the supervisor to violate the plaintiff's legal rights. *Porro v. Barnes*, 624 F.3d 1322, 1327–28 (10th Cir.2010). The complaint alleges Warden Chavez acted with deliberate indifference to routine constitutional violations occurring at the VCDC. This allegation is supported by Wilson's assertions that there were numerous prior occasions in which individuals at the VCDC and VCSO were subject to prolonged warrantless detention. . . Appellants do not challenge the district court's conclusion that deliberate indifference is a sufficiently culpable mental state to impose supervisory liability under § 1983. The complaint's allegations against Warden Chavez therefore state a plausible claim for relief under *Dodds*, and the district court did not err in denying the motion to dismiss as to Warden Chavez.”)

***Keith v. Koerner***, 707 F.3d 1185, 1188, 1189 (10th Cir. 2013) (“As an initial matter, it is clearly established that a prison official's deliberate indifference to sexual abuse by prison employees violates the Eighth Amendment. . . Such a violation occurs where ‘the official knows of and disregards an excessive risk to inmate health or safety,’ and there is an affirmative link between the constitutional deprivation and the supervisor's actions. . . This ‘affirmative link’ has had three related, indistinct prongs in our case law: ‘(1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind.’ *Dodds*, 614 F.3d at 1195, 1199. We have held that a plaintiff may establish the first prong with evidence that ‘the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy’ that caused the constitutional harm. *Id.* at 1199. The question here, then, is whether Ms. Keith has alleged facts sufficient to support such a deliberate indifference violation by Mr. Koerner. To state a claim, a plaintiff must only allege enough factual matter in her complaint to make her ‘claim to relief ... plausible on its face’ and provide fair notice to a defendant. . . The district court found that Ms. Keith did so. . . In particular, it noted that she alleged facts that could tend to establish that Mr. Koerner ‘was responsible for managing TCF and knew about multiple instances of sexual misconduct at TCF over a period of years, inconsistently disciplined corrections officers who engaged in prohibited sexual conduct with inmates and thus purportedly tolerated at least an informal policy which permitted sexual contact between prison staff and inmates.’ . . . We have reviewed the complaint and conclude that on a motion to dismiss, Ms. Keith has provided notice and nudged her claims beyond the conceivable to the plausible given that we must accept well-pleaded allegations as true. First, Ms. Keith's complaint refers to facts, primarily from the Audit

Report, that could support a conclusion that Mr. Koerner was aware of multiple incidents of unlawful sexual conduct at TCF. . . . Second, Ms. Keith alleges facts indicating that discipline in response to complaints of sexual misconduct and undue familiarity at TCF was inconsistent. . . . Third, Ms. Keith alleges facts that tend to show the existence of structural policy problems that contributed to the unlawful sexual conduct here. . . . Fourth, Ms. Keith alleges that the lack of training programs tailored to the all-female population of TCF contributed to the misconduct here. . . . These allegations go beyond formulaic labels and conclusions and meet our intermediate pleading standard. . . . Mr. Koerner’s arguments to the contrary do not carry the day. He argues that although he may have had knowledge of other incidents of sexual misconduct, he had no indication of potential harm to Ms. Keith specifically. . . . But an ‘official’s knowledge of the risk need not be knowledge of a substantial risk to a *particular* inmate, or knowledge of the particular manner in which injury might occur.’”)

***Stewart v. Beach***, 701 F.3d 1322, 1328 (10th Cir. 2012) (“A § 1983 claim requires ‘personal involvement in the alleged constitutional violation.’ *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009). The ‘denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983.’ . . . Whatever knowledge Roberts may have had when he denied the appeal, his only involvement was to deny the grievance appeal, which is insufficient for § 1983 liability.”)

***Brown v. Montoya***, 662 F.3d 1152, 1163-66 (10th Cir. 2011) (“A § 1983 defendant sued in an individual capacity may be subject to personal liability and/or supervisory liability. . . . Personal liability ‘under § 1983 must be based on personal involvement in the alleged constitutional violation.’ . . . Supervisory liability ‘allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, [or] implements ... a policy ... which subjects, or causes to be subjected that plaintiff to the deprivation of any rights ... secured by the Constitution.’ [citing *Dodds v. Richardson*] Section 1983 does not authorize liability under a theory of respondeat superior. . . . Instead, to establish supervisory liability, a plaintiff must show that ‘(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.’ *Dodds*, 614 F.3d at 1199. . . . To overcome Secretary Williams’s defense of qualified immunity, Mr. Brown must allege facts showing that Secretary Williams, either through his personal participation in Mr. Brown’s treatment or the promulgation of a policy, violated a clearly established constitutional right. He has not done so in his Complaint. Personal liability under § 1983 must be based on Secretary Williams’s personal involvement, and supervisory liability must be based on his Policy. The Complaint alleges neither. . . . Mr. Brown’s Complaint cannot be the basis for personal liability because it does not specifically allege how Secretary Williams acted in Mr. Brown’s case or even that he knew about it. Although the Complaint alleges that Secretary Williams was ‘charged with notifying sex offenders of their duty to register,’ it does not specifically allege that Secretary Williams told Mr. Brown to register or directed anyone else to make Mr. Brown register. Instead, it alleges that Officer Montoya and Deputy Sherriff Aguilar directed Mr. Brown to register. . . . Mr.

Brown argues in his brief that Secretary Williams is liable as a supervisor because he signed the Policy on which Officer Montoya allegedly relied to classify Mr. Brown as a sex offender. . . . But the allegations in Mr. Brown's Complaint do not meet the standard for supervisory liability. To establish supervisory liability, Mr. Brown would have to show that (1) Secretary Williams promulgated or was responsible for a policy that (2) caused the constitutional harm and (3) acted with the state of mind required to establish the alleged constitutional deprivation. . . . The Complaint fails on the first step because it does not even mention the Policy. Mr. Brown only attached the Policy to his memorandum in response to Secretary Williams's motion to dismiss and asked the district court to take judicial notice of the Policy. . . . Without specifically alleging Secretary Williams's personal involvement or anything about the Policy, Mr. Brown has alleged no connection between Secretary Williams and any constitutional violation.")

***Martinez v. Milyard***, 440 F. App'x 637, 2011 WL 4537786, at \*1 n.1 (10th Cir. Oct. 3, 2011) ("In *Ashcroft v. Iqbal*, the Supreme Court reiterated that '[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior,' 129 S.Ct. at 1948, and explained that a government official 'is only liable for his or her own misconduct.' *Id.* at 1949. While *Iqbal* has 'generated significant debate about the continuing vitality and scope of supervisory liability' in § 1983 cases, *Lewis v. Tripp*, 604 F.3d 1221, 1227 n. 3 (10th Cir.2010), this circuit has not yet determined the full extent of *Iqbal's* impact on our case law. We need not resolve this debate here, however, because Martinez's claims fail even under our preexisting standard.")

***J.W. v. Utah***, 647 F.3d 1006, 1012 (10th Cir. 2011) ("As for the caseworker's supervisor, the district court correctly concluded that Plaintiffs' claim was essentially one of negligent supervision, which is insufficient to support a § 1983 claim. *See Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir.1992). The undisputed evidence in the summary judgment record reflects that the supervisor was not responsible for the placement decision on which Plaintiffs' claim is premised. Plaintiffs have cited to no evidence that the supervisor personally participated or knowingly acquiesced in the alleged deprivations of Plaintiffs' constitutional rights, and thus the district court correctly held that Plaintiffs have not set forth a valid basis for finding the supervisor liable under § 1983.")

***Lobozzo v. Colorado Dept. of Corrections***, No. 10-1396, 2011 WL 2663548, at \*5 (10th Cir. July 8, 2011) ("Prisoners are sometimes victims of sexual abuse at the hands of staff and other inmates alike – a tragic fact demanding the attention of prison administrators. But despite Lobozzo's characterization of the record, there is no evidence any of the CDOC Defendants failed to take seriously their responsibility for the safety of inmates. She failed to make a record equal to her rhetoric. The record simply does not support her allegations that the CDOC Defendants knew of and disregarded an excessive risk that she would be sexually victimized by Martinez.")

***Porro v. Barnes***, 624 F.3d 1322, 1327, 1328 (10th Cir. 2010) ("Just as § 1983's plain language doesn't authorize strict liability, it doesn't authorize *respondeat superior* liability. The plain

language of the statute, again, asks simply whether the defendant at issue ‘*subject[ed], or cause[d] to be subjected*’ a plaintiff to a deprivation of his legal rights. . .To establish a violation of § 1983 by a supervisor, as with everyone else, then, ‘the plaintiff must establish a deliberate, intentional act’ on the part of the defendant ‘to violate [the plaintiff’s legal] rights.’ . . . In the due process context, this means the focus is on the force the *supervisor* used or caused to be used, the resulting injury attributable to his conduct, and the *mens rea* required of him to be held liable, which can be no less than the *mens rea* required of anyone else. [citing *Iqbal* and *Dodds*]Simply put, there’s no special rule of liability for supervisors. The test for them is the same as the test for everyone else. And as we’ve already explained, Mr. Porro’s claim against Mr. Barnes fails that test.”)

***Dodds v. Richardson***, 614 F.3d 1185, 1194-1206 (10th Cir. 2010) (“[D]etermining whether a plaintiff has demonstrated a defendant-supervisor violated his constitutional rights and whether § 1983 allows a plaintiff to hold a defendant-supervisor liable for that violation may depend on whether that defendant-supervisor, rather than only his subordinates, violated the plaintiff’s constitutional rights. For this reason, we properly address this question of supervisory liability now as part of the qualified immunity analysis. . . . Defendant maintains that in order to show he violated Plaintiff’s clearly established constitutional rights, and therefore overcome his assertion of qualified immunity as well as hold him liable under § 1983, Plaintiff must demonstrate that he personally participated in such a violation with a sufficiently culpable state of mind. Defendant points out that Plaintiff does not allege Defendant was one of the jail employees who told him and the individuals who inquired about posting bail on his behalf that he could not post the bail set in his arrest warrant until he had been arraigned by a judge. Nor does Plaintiff contend Defendant personally instructed those employees to refuse to accept bail from Plaintiff the weekend of Friday, April 6, 2007. According to Defendant in his opening brief, the ‘policy of the court clerk’s office, and no action’ by him deprived Plaintiff of his federally protected rights. Defendant argues, as a result, Plaintiff has not shown he committed any act which violated Plaintiff’s rights or that he acted with deliberate indifference to Plaintiff’s rights. Defendant’s argument implicates important questions about the continuing vitality of supervisory liability under § 1983 after the Supreme Court’s recent decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). . . .Personal involvement does not require direct participation because § 1983 states “[a]ny official who ‘causes’ a citizen to be deprived of her constitutional rights can also be held liable.’ “ *Buck v. City of Albuquerque*, 549 F.3d 1269, 1279 (10th Cir.2008) (quoting *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir.1990)). Even before *Iqbal*, it was not enough in our circuit ‘for a plaintiff merely to show defendant was in charge of other state actors who actually committed the violation. Instead, ... the plaintiff must establish a deliberate, intentional act by the supervisor to violate constitutional rights.’ . . . In sum, to impose § 1983 liability the plaintiff first had to establish ‘the supervisor’s subordinates violated the [C]onstitution.’ . . . Then, the plaintiff must demonstrate ‘an “affirmative link” between the supervisor and the violation....’ . . . Over time, this ‘affirmative link’ requirement came to have three related prongs: (1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind. A plaintiff could establish the defendant-supervisor’s personal involvement by demonstrating his ‘ “personal participation, his exercise of control or direction, or his failure to supervise,”’ . . . or his ‘knowledge of the violation and acquiesce[nce] in its continuance.’ . . . A

defendant supervisor's promulgation, creation, implementation, or utilization of a policy that caused a deprivation of plaintiff's rights also could have constituted sufficient personal involvement. . . A plaintiff then had to establish the "requisite causal connection" "by showing" "the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights." . . . And, finally, the plaintiff also had to show the supervisor had a culpable state of mind, meaning "the supervisor acted knowingly or with "deliberate indifference" that a constitutional violation would occur." . . . We did not view these requirements as necessarily distinct. Proof of a supervisor's personal direction or knowledge of and acquiescence in a constitutional violation often sufficed to meet the personal involvement, causal connection, and deliberate indifference prongs of the affirmative link requirement for § 1983 supervisory liability. . . . But then, as the saying will surely go, came *Iqbal*. . . . We have already acknowledged that *Iqbal* may have changed the § 1983 supervisory liability landscape. [citing *Lewis*] But because our cases since *Iqbal* have thus far only presented allegations that do not satisfy our pre-*Iqbal* liability standard, we have not yet had occasion to determine what allegations of personal involvement and mental state do meet *Iqbal*'s stricter liability standard. . . . Whatever else can be said about *Iqbal*, and certainly much can be said, we conclude the following basis of § 1983 liability survived it and ultimately resolves this case: § 1983 allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor or her subordinates) of which 'subjects, or causes to be subjected' that plaintiff 'to the deprivation of any rights ... secured by the Constitution ....' . . . . A plaintiff may therefore succeed in a § 1983 suit against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation. . . . *Monell* and its progeny clearly stand for the proposition that the very language of § 1983 provides for the imposition of liability where there exists an 'affirmative' or 'direct causal' link between a municipal person's adoption or implementation of a policy and a deprivation of federally protected rights, and that imposing liability upon such a basis does not implicate *respondeat superior* . Nothing in *Iqbal* contradicts this longstanding interpretation of § 1983's language. . . . [T]he facts, taken in the light most favorable to Plaintiff, show Defendant may have played more than a passive role in the alleged constitutional violation – he may have deliberately enforced or actively maintained the policies in question at the jail. Plaintiff has thereby presented facts that establish personal involvement by Defendant in the alleged constitutional violation sufficient to satisfy § 1983. By Defendant's own admission, the policies' enforcement caused the constitutional violation before us. As a result, the facts show Defendant's maintaining these policies at the jail caused Plaintiff to be deprived of his due process rights. . . . Now that we have concluded Plaintiff has shown facts that, if proven at trial, suffice to establish Defendant's personal involvement caused the misconduct complained of, we address whether the facts show Defendant acted with the state of mind required to establish Defendant committed a constitutional violation. The Court in *Iqbal* explained that the factors necessary to establish a § 1983 violation depend upon the constitutional provision at issue, including the state of mind required to establish a violation of that provision. . . . We therefore

conclude that after *Iqbal*, Plaintiff can no longer succeed on a § 1983 claim against Defendant by showing that as a supervisor he behaved ‘knowingly or with “deliberate indifference” that a constitutional violation would occur’ at the hands of his subordinates, unless that is the same state of mind required for the constitutional deprivation he alleges. . . . But given Plaintiff alleges a substantive due process violation, it appears Plaintiff must establish that Defendant acted with deliberate indifference to Plaintiff’s due process right to post preset bail. . . . So, let us be clear: We do not pass judgment at this time on the state of mind required to establish a substantive due process violation based upon preventing an arrestee from posting preset bail. We assume, without deciding, deliberate indifference constitutes the required state of mind. Plaintiff has shown facts from which a reasonable jury could infer Defendant knowingly created a substantial risk of constitutional injury to people like Plaintiff. Oklahoma law made Defendant, rather than the clerk or district judges, responsible for controlling the jail and accepting bail from arrestees like Plaintiff. Defendant admits that while he served as the sheriff he maintained policies that prevented felony arrestees whose bail had been set from posting bail after hours and before arraignment. Plaintiff had a liberty interest in being released once his bail had been set. Defendant does not suggest any ‘legitimate goal’ behind preventing felony arrestees whose bail had been set from posting bail. We therefore agree with the district court that Plaintiff has shown facts that taken in the light most favorable to him establish that Defendant acted with deliberate indifference and thereby violated his Fourteenth Amendment due process rights. . . . Plaintiff’s right to be free from unjustified detention after his bail was set was clearly established such that a reasonable official in Defendant’s position in April 2007 would have understood that his deliberately indifferent maintenance of the policies that prevented arrestees from posting preset bail for no legitimate reason violated the Constitution.”)

***Dodds v. Richardson***, 614 F.3d 1185, 1208-13 (10th Cir. 2010) (Tymkovich, J., concurring) (“I fully agree with the majority that the complaint sufficiently alleges former Sheriff Richardson violated clearly established law when he implemented the county court’s unconstitutional bail policy. . . I write separately to further note the lack of clarity in the law of supervisory liability, and my view of how this may have been affected by the Supreme Court’s recent decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Federal law provides that ‘[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or *causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.’ 42 U.S.C. § 1983 (emphasis added). The phrase ‘causes to be subjected’ suggests that liability exists for officials who did not directly violate constitutional rights, but, as the majority illustrates, the standard for demonstrating that a supervisory official has caused a violation is far from clear. [discussing *Pembaur*, *City of Canton*] These examples – official policy, decisions of high-ranking officials, and failure to adequately train employees – are not rightfully regarded as theories of *liability* but should instead be viewed as theories of *causation*. As to supervisory liability, the added level of removal between the violation and the supervisor makes questions of causation even more difficult. The Supreme Court has yet to speak with much clarity on the theories of causation that could demonstrate a

supervisory official's liability for the constitutional violations carried out by a subordinate. Whether a supervisor has violated the plaintiff's rights is dependent on whether the subordinate violated the Constitution – the supervisor cannot be liable if there was no violation. . . . And in some cases, the determination of whether a violation occurred turns on the subordinate's state of mind. . . . What remains unclear is the state of mind that the *supervisor* must possess to be liable for causing such a violation. As the majority points out, the Supreme Court recently muddied further these already cloudy waters. . . . *Iqbal* unfortunately did not provide a unified theory for the variety of supervisory liability cases we face. We do know supervisory liability under § 1983 is still only appropriate where the plaintiff can prove that the supervisor *caused* the violation. And in a case like *Iqbal*, where the constitutional violation requires discriminatory intent, a supervisor does not *cause* a violation unless he or she actually intended for his or her subordinates to invidiously discriminate. Mere knowledge and acquiescence of, or even 'deliberate indifference' towards, the discriminatory actions of employees now appears insufficient to prove causation, and thereby prove liability. . . . But *Iqbal* does not address constitutional violations that are based on a state of mind other than specific intent – for instance, a procedural due process violation, or an Eighth Amendment violation based on an official's deliberate indifference. A supervisor is liable for these actions only when the supervisor can be fairly said to have caused the violation, but determining when this is the case can be tricky, to say the least. . . . The exact method of demonstrating a causal link depends on the actions of the supervisor in relation to the subordinate that led to the violation. Supervisors sometimes directly order their subordinates to take an action, either in a specific case, or by establishing some sort of policy. They may also learn of conduct taken by their subordinates and acquiesce in it after the fact or simply ignore it. Some supervisors may never learn of the unconstitutional actions of their subordinates, not because their subordinates were successful in hiding their behavior, but because the supervisor was 'willfully blind' or deliberately indifferent. And supervisors may have a responsibility, as do municipalities, to ensure that their subordinates are properly trained – failure to carry out this duty may in some cases result in a violation. Just as there are various ways in which a supervisor can be said to have caused a violation, as outlined above, there are different levels of fault associated with these actions. We consider some of these actions to be blame-worthy enough that the supervisor should be liable. . . . In sum, our precedent has established, with varying levels of clarity, that a supervisor is only liable for violations that he caused, and that causation requires at least some degree of fault on the supervisor's part. Exactly how this causation can be shown varies depending on the type of violation and the facts of the case. . . . [S]everal theories of liability are possible. First, a supervisor may directly order a subordinate to violate the plaintiff's rights. . . . Next, some cases say a supervisor may cause violations when he or she has actual knowledge of past constitutional violations being carried out by a subordinate, and does nothing to stop future occurrences. . . . Finally, a series of cases requires a standard of deliberate indifference. Those types of cases include the failure to train, the failure to supervise, and potentially other supervisory shortcomings. . . . In those cases, we may find that a supervisor has somehow caused the violation to occur by an egregious failure to act. . . . In sum, our decisions hold that supervisors are liable for constitutional violations they cause. The exact contours of causation – especially regarding an official's state of mind sufficient for liability – are uncertain in light of *Iqbal*. But for purposes of this case, Dodds alleges the sheriff deliberately

implemented an unconstitutional bail policy that violated his clearly established rights as a pretrial detainee and thereby caused him injury. As the majority ably demonstrates, his allegations are enough to survive summary judgment.”).

*Nelson v. Skehan*, 386 F. App’x 783, 2010 WL 2748808, at \*2 n.2 (10th Cir. July 13, 2010) (“Whether the “acquiescence” component of supervisory liability has survived *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), is an open question in this Circuit.”).

*Lewis v. Tripp*, 604 F.3d 1221, 1226, 1227 & n.3 (10th Cir. 2010) (“In this case, the district court failed to set forth the facts it believed a reasonable jury could find with respect to the critical question before us – the nature of Dr. Tripp’s involvement, if any, in an unlawful search and seizure. Instead, the court merely stated that Dr. Tripp phoned the Board’s office on May 16 and sent two emails to the Board’s legal counsel. The court then immediately and summarily concluded that

[t]his and other [unspecified] evidence proffered by the plaintiff creates a jury question as to whether Dr. Tripp personally directed, or had actual knowledge of and acquiesced in, the asserted [but unspecified] constitutional violation. *See Poolaw v. Marcantel*, 565 F.3d 721, \_\_\_, 2009 WL 1176466, at \*7 (10th Cir.2009) (“For liability under section 1983, direct participation is not necessary. Any official who ‘causes’ a citizen to be deprived of her constitutional rights can also be held liable. The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights.”) (internal quotation omitted).

D. Ct. Op. at 7-8. The problem with this discussion is that it doesn’t tell us what Dr. Tripp did or where, when, or why he took any action that might have violated Dr. Lewis’s Fourth Amendment rights. In other words, it does not ‘set forth with specificity the facts ... that support a finding that the defendant violated a clearly established right.’ *Armijo*, 159 F.3d at 1259. Instead, the opinion merely advances the *legal* conclusion that Dr. Tripp did so, paraphrasing the legal standard for ‘supervisory liability’ under 42 U.S.C. § 1983 we set forth in *Poolaw* and then holding the standard satisfied. Such a ‘conclusory legal ruling’ does not constitute findings of fact to which we can defer. . . . In *Ashcroft v. Iqbal*, the Supreme Court recently held that ‘purpose rather than knowledge is required to impose *Bivens* liability on ... an official charged with violations arising from his or her superintendent responsibilities.’ . . . This announcement has generated significant debate about the continuing vitality and scope of supervisory liability not only in *Bivens* actions, but also in § 1983 suits like the one before us. At one end of the spectrum, the *Iqbal* dissenters seemed to believe that the majority opinion ‘eliminates ... supervisory liability entirely,’ overruling cases like *Poolaw*. *Id.* at 1957 (Souter, J., dissenting). At the other end of the spectrum, the Ninth Circuit has read *Iqbal* as possibly holding that ‘purpose ... is required’ merely in cases of alleged racial discrimination by governmental officials, given that *Iqbal* itself involved allegations of racial

discrimination and such discrimination only violates the Constitution when it is intentional. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 976 n. 25 (9th Cir.2009). Many intermediate positions are also surely plausible. *See, e.g.,* Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability after Iqbal*, 14 Lewis & Clark L.Rev. 279, 294-98 (2010) (discussing some alternatives). We need not stake out a position in this debate today because, as will become clear, Dr. Lewis’s claims fail even under our preexisting *Poolaw* standard.”)

***Christensen v. Big Horn County Bd. of County Com’rs***, 374 F. App’x 821, 2010 WL 1627833, at \*4 (10th Cir. Apr. 15, 2010) (“The primary thrust of Mr. Christensen’s claims against these parties, who did not directly participate in the operative events recounted in the complaint, is that they are formally responsible for operations, conditions, and the conduct of staff at the Big Horn County Jail. He also refers in conclusory terms to their culpability for inadequate supervision and training of jail staff. The short answer to these claims is that, in light of the inadequacy of the underlying constitutional allegations against the actual participants – which we confirm on this appeal – there is nothing for which these defendants may be held derivatively accountable. . . .The slightly longer answer, explained by the district court, is that the allegations for the derivative liability of these defendants are themselves facially deficient. Repeating that analysis here is unnecessary. Suffice it to say that Mr. Christensen’s pleadings in this respect reflect the ‘formulaic recitation’ of ‘bare assertions’ deemed categorically deficient by the Supreme Court in *Iqbal*.”).

***Arocho v. Nafziger***, 367 F. App’x 942, 2010 WL 681679, at \*3 n.4, \*11 (10th Cir. Mar. 1, 2010) (“[G]iven a recent Supreme Court pronouncement, the basic concept of § 1983 or *Bivens* supervisory liability itself may no longer be tenable. . . . After *Iqbal*, circuits that had held supervisors liable when they knew of and acquiesced in the unconstitutional conduct of subordinates have expressed some doubt over the continuing validity of even that limited form of liability. *See Bayer v. Monroe County Children & Youth Servs.*, 577 F.3d 186, 190 n. 5 (3d Cir.2009); *Maldonado v. Fontanes*, 568 F.3d 263, 274 n. 7 (1st Cir.2009). . . . The traditional standard for supervisory liability in this circuit ‘requires allegations of personal direction or of actual knowledge and acquiescence’ in a subordinate’s unconstitutional conduct. . . . As alluded to earlier, the Supreme Court’s recent discussion of supervisory liability casts doubt on the continuing vitality of even this limited formulation of such liability. . . . In any event, Mr. Arocho’s allegations do not satisfy our extant standard. His claim here is that ‘warden [Wiley] was in the position to correct plaintiff[‘s] rights violation and fail[ed] to do so.’. . . To the extent the rights violation was a function of BOP Director Lappin’s decision, Lappin is obviously not Wiley’s subordinate and any allegation that Wiley was in a position to ‘correct’ Lappin’s decision would be facially implausible.”).

***Gallagher v. Shelton***, 587 F.3d 1063, 1069 (10th Cir. 2009) (“Gallagher’s only allegation involving these defendants relates to their denials of his grievances, namely that they ‘rubber-stamped’ his various grievances. . . . We agree with the reasoning in our previous unpublished decisions that a denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983. . .

Because Gallagher’s only allegations involving these defendants relate to the denial of his grievances, he has not adequately alleged any factual basis to support an ‘affirmative link’ between these defendants and any alleged constitutional violation. Accordingly, the claims against Werholtz, Shelton, and Purdue were properly dismissed.”).

*Green v. Padilla*, No. CIV 19-0751 JB\JFR, 2020 WL 5350175, at \*35–36 (D.N.M. Sept. 4, 2020) (“As a preliminary matter, the Court notes that there are significant differences between *Ashcroft v. Iqbal* and cases like this one. First, unlike the common law *Bivens* actions that were at issue in *Ashcroft v. Iqbal*, § 1983’s language -- imposing liability on ‘every person who ... subjects, *or causes to be subjected*, any citizen of the United States ... to the deprivation of any rights ...,’ 42 U.S.C. § 1983 (emphasis added), provides for supervisory liability. Second, unlike the Equal Protection claim at issue in *Ashcroft v. Iqbal*, the Female Inmates need not allege discriminatory purpose to state an Eighth Amendment claim. . . . Last, the plaintiff in *Ashcroft v. Iqbal* asserted common-law discrimination claims against the two of the highest ranking officials in the United States government -- the Attorney General and the Director of the Federal Bureau of Investigation, officials ‘whom the [Supreme] Court has historically afforded the highest level of protection from suit.’ Karen M. Blum, *Supervisory Liability after Iqbal: Misunderstood but Not Misnamed*, 43 Urb. Law. 541, 543 (2011). The defendants in *Ashcroft v. Iqbal* thus were many more levels removed from the constitutional violations at issue in that case than are the Supervisory Defendants here, who are mid- and upper-level administrators at a state correctional facility. Nonetheless, confusion exists regarding the extent to which *Farmer v. Brennan* supplies the operative standard for a prison supervisor’s mental state. In that case, the Supreme Court, acknowledging that ‘considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a government official,’ distinguished the objective deliberate indifference standard that it used in *City of Canton v. Harris*, 489 U.S. 378 (1989). . . . The Supreme Court then further clarified that an official’s deliberate indifference entails subjective awareness of a risk of constitutional harm. . . . The Supreme Court acknowledged, however, that a plaintiff can prove actual knowledge through circumstantial evidence. . . . Tenth Circuit caselaw since *Ashcroft v. Iqbal* suggests that this standard is still operative in supervisory liability cases under the Eighth Amendment. In *Dodds v. Richardson*, the Tenth Circuit confirmed that plaintiffs state a claim for supervisory liability where the defendant possesses the constitutionally required state of mind, which varies with the constitutional violation’s nature. . . . Accordingly, the Tenth Circuit’s pre-*Ashcroft v. Iqbal* test for Eighth Amendment supervisory liability remains operative. . . . The Supervisory Defendants nonetheless contend that the Court may discount the Female Inmates’ allegations regarding the Supervisory Defendants’ state of mind. The Court subjects the Female Inmates’ claims to *Ashcroft v. Iqbal*’s procedural prescriptions -- it separates the Female Inmates’ legal conclusions and screened the remaining factual contentions for plausibility. . . . The Supreme Court in *Ashcroft v. Iqbal* construed as a legal conclusion the plaintiff’s allegations that Ashcroft and Mueller ‘each knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff]’ to unconstitutional confinement conditions ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin for no legitimate penological interest,’ and that Ashcroft was this policy’s ‘principal architect’ while Mueller was ‘instrumental’ in implementing

the policy. . . The Supreme Court characterized these allegations as ‘bare assertions,’ that ‘amount to nothing more than a “formulaic recitation of the elements” of a constitutional discrimination claim,’ and so were legal conclusions couched as factual allegations. . . The Tenth Circuit has since made clear, however, that not all allegations which include legal characterizations are conclusory, and that *Ashcroft v. Iqbal* does not abolish the basic principles of notice pleading. . . . Green’s allegations regarding Sanchez’ role in Padilla’s abuse are more than formulaic legal conclusions couched as factual allegations, and so are entitled to a presumption of truth under rule 12(b)(6). As the Court discusses below, Green alleges sufficient factual allegations regarding her and other inmates’ reporting about Padilla’s abusive behavior to support that Sanchez knew about the risk. She alleges that she and other inmates reported Padilla’s abuse to prison administrators, NM State Police, and PREA auditors, and that Sanchez was aware of this reporting. She details interacting with Springer Correctional administrators regarding her grievance and alleges that Padilla’s abuse continued after this reporting. Sanchez’ awareness here is not implausible. Unlike in *Ashcroft v. Iqbal*, where the plaintiff alleged that the highest-ranking officials in the United States knew about unconstitutional practices and so designed or implemented those practices, Sanchez is not far removed from the alleged constitutional violations -- he runs a mid-sized state prison facility. As the Tenth Circuit has made clear since *Ashcroft v. Iqbal*, a plaintiff’s factual allegations are still entitled to reasonable inferences for the legal conclusions that they support. . . . *Ashcroft v. Iqbal*’s procedural holding[s] thus do not compel the Court to construe as implausible Green’s factual allegations about Sanchez’ state of mind.”)

***Derosier v. Balltrip***, 149 F. Supp. 3d 1286, 1297 (D. Colo. 2016) (“Plaintiff’s allegations concerning Commander Sanchez are that he and Officer Balltrip discussed Plaintiff’s phone call to the Greeley Tribune and ‘agreed between themselves that there was probable cause’ for Plaintiff’s arrest and that Commander Sanchez ‘authorized Officer Balltrip to act on his desire to effect a warrantless arrest of [Plaintiff] at his home.’. . . Because Plaintiff has alleged that Commander Sanchez participated directly in the probable cause determination and directly authorized the warrantless arrest of Plaintiff inside his home, I find that the first two elements of supervisory liability are satisfied. . . . Given my conclusion that the law regarding the alleged constitutional violations was clearly established, and Plaintiff’s allegations that Commander Sanchez directly participated in the probable cause determination and authorized the warrantless arrest, I conclude that Plaintiff has sufficiently alleged the state of mind element. *See Schneider*, 717 F.3d at 769 (deliberate indifference state of mind demonstrated where defendant ‘knowingly created a substantial risk of constitutional injury’).

***Mahaffey v. City of Vernal***, No. 2:13-CV-4 DN, 2014 WL 7369837, at \*10 (D. Utah Dec. 29, 2014) (“Defendants assert that a court must find personal participation in the constitutional violation before supervisory liability can be found. They argue that, because Defendants Bassett and Campbell were not physically present during the alleged constitutional violations, they did not participate personally and are entitled to summary judgment. . . . However, personal participation does not require ‘the sort of on-the-ground, moment-to-moment control that defendants appear to suggest.’. . . As discussed, if a defendant ‘promulgated, created, implemented or possessed

responsibility for the continued operation of a policy’ . . . through which a constitutional violation occurred, the first prong of the test is satisfied.”)

**Shapiro v. Falk**, No. 13-CV-3086-WJM-KMT, 2014 WL 4651952, \*7, \*8 (D. Colo. Sept. 18, 2014) (“Notwithstanding the lack of clarity with respect to supervisory liability after *Iqbal*, the court finds that Plaintiff’s allegations fails to establish that Defendant Bilderaya and Falk were personally involved in the alleged violation of his constitutional rights. First, Plaintiff alleges that both Defendant Bilderaya and Defendant Falk ‘consented to’ and were ‘aware’ that mass strip searches—in general, not in this particular instance—were being conducted at SCF. . . The court need not accept Plaintiff’s label that Defendants Bilderaya and Falk ‘consented to’ strip searches at SCF in general—particularly where Plaintiff does not allege any facts to support this conclusion. Further, *Iqbal* clearly forecloses liability based on the fact that Defendants Bilderaya and Falk were ‘aware’ that mass strip searches were being conducted, even assuming that allegation is true. . . Second, Plaintiff appears to allege that Defendant Bilderaya failed to properly train his subordinates in the SCF Receiving Unit regarding the proper methods for conducting strip searches. . . However, even prior to *Iqbal*, § 1983 liability for a failure to train arises only ‘where there is essentially a complete failure to train, or training is so reckless or grossly negligent that future misconduct is almost inevitable.’. . Here, Plaintiff’s Amended Complaint does not outline any specific deficiencies in the training provided to the SCF Receiving Unit, much less how those deficiencies rendered the alleged violation of his Fourth Amendment rights inevitable. . . Accordingly, the court finds that Plaintiff has failed to demonstrate that Defendants Bilderaya and Falk were personally involved in the alleged violation of his constitutional rights. As such, Defendants Bilderaya and Falk are properly dismissed as Defendants.”)

**Poore v. Glanz**, 46 F.Supp.3d 1191, 1203 (N.D. Okla. 2014) (“From all of the evidence, a jury could infer that (1) the manner in which the juvenile female inmates were housed in the north wing of the medical unit was such that they were at risk of sexual abuse by a staff member, (2) as a result of inadequate staffing, supervision, monitoring, and detention of juvenile females, a detention officer could (and did) enter Poore’s cell and do as he pleased with her, uninhibited and undetected by any other officer or staff, (3) the risk of harm was so obvious to the female inmates housed in that manner that Glanz realized it, and (4) Glanz failed to take reasonable steps to alleviate that obvious risk. Thus, ‘a jury might reasonably infer that [Glanz] was actually aware of a constitutionally infirm condition,’ which is all that is required to establish deliberate indifference at the summary judgment stage. *See Tafoya*, 516 F.3d at 922. Hence, Glanz’s motion for summary judgment on the § 1983 claim against him in his individual capacity is denied.”)

**Castillo v. Bobelu**, 1 F.Supp.3d 1190, 1203, 1204 (W.D. Okla. 2014) (“Defendants essentially argue that they can be held liable as supervisors only if they ‘ “purposefully” or “intentionally” (*Iqbal* ) under[took] a course of conduct to sexually harass, sexually assault, or rape the Plaintiffs or possess[ed] the same “state of mind” (*Serna/Dodds* ) to intentionally sexually harass, sexually assault, or rape the Plaintiffs.’. . While the court disagrees with defendants’ stated standards of supervisory liability, it concludes plaintiffs have not offered evidence from which a reasonable

jury could find that Jones–Cooper or Bud Dolan or Larsen acted with the required intent. The test for a ‘deliberate indifference’ claim under the Eighth Amendment has both an objective and a subjective component. The objective component of the test is met if the harm suffered is sufficiently serious to implicate the Cruel and Unusual Punishment Clause. The subjective component is met if a prison official knows of and disregards an excessive risk to inmate health or safety. . . It is clear enough that Bobelu and Humphries’ alleged conduct satisfies the objective component of an Eighth Amendment claim. The stumbling block for plaintiffs is the subjective component, which requires ‘that the official actually be “aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”’. . . The court must therefore evaluate plaintiffs’ evidence pertinent to their assertion that each defendant acted with a ‘culpable state of mind.’. . .The court agrees with plaintiffs that if a supervisor knows about misconduct and fails to act or is aware of a significant risk and does not alleviate it, she can be held liable under § 1983. The court does not, though, agree that *Smith* alerted Jones–Cooper to a substantial risk of harm to the Hillside inmates. A case involving one incident of sexual assault more than ten years earlier at a different work site in a different city under different circumstances was not enough to alert Jones–Cooper to risks faced by female inmates participating in the prisoner works program at the Governor’s Mansion. . .While prior sexual assaults at the same site have been found sufficient to put a supervisor ‘on notice of the dangerous conditions,’. . . plaintiffs have offered no evidence that there had been earlier incidents involving sexual misconduct at the Governor’s Mansion or, with one exception (the *Smith* case), with female inmates working elsewhere in Oklahoma pursuant to a prisoner public works project contract. They also did not substantiate their assertion that Jones–Cooper was aware of Bobelu or Humphries’ behavior before May 29, 2009 with any evidence.”)

***Pena v. Greffet***, 922 F.Supp.2d 1187, 1244, 1245 (D.N.M. 2013) (“Peña’s allegations, taken as true and reasonably construed in a light most favorable to her, plead sufficient facts from which the Court can plausibly infer that both CCA and Hickson deliberately ‘engaged’ in a custom of suppressing reporting of and disregarding incidents of prison rape that caused the constitutional violations of which she complains. Peña alleges that CCA and Hickson engaged in the practices of placing inmates who reported sexual abuse in segregation or otherwise retaliating against them, violating its own and NMCD’s written policies by failing to report allegations of prison rape to outside law enforcement, failing to conduct adequate internal investigations regarding rape allegations, and offering financial incentives to CCA employees for non-reporting of rape allegations. . . Judge Kern in *Henderson v. Glanz* noted that the plaintiff alleged that the defendant was aware of past sexual assaults and continued to understaff the alleged spots where they took place, and Judge Fitzpatrick reasoned in *Brown v. Smith* that allegations of the defendant’s failure to train employees and to adequately investigate allegations of past sexual assaults was sufficient to make plausible the defendant’s liability; both cases exhibit the defendants’ failure to use past incidences of sexual assault to implement policies or to train their staff to prevent the same instances from occurring in the future. Here, although Peña does not specifically allege that there were past instances of sexual assaults at the NMCWF, her allegations imply the existence of past instances of sexual assault by alleging the defendants’ response to past reports of such conduct.

Whereas the defendants' failures to address such situations in *Henderson v. Glanz* and *Brown v. Smith* were sufficient to make a claim for supervisory liability for the plaintiffs' sexual assaults, Peña goes beyond alleging that CCA and Hickson merely failed to train the staff to prevent further sexual assault or implement policies for the same; Peña's allegations contend that CCA and Hickson affirmatively did the opposite. Her allegations of retaliation against the inmates for sexual assault reports, and that it is a practice or custom not to report such alleged instances to outside law enforcement, in violation of CCA's and NMCD policies, make plausible that CCA's and Hickson's policies and customs not only failed to address the prevention of further sexual assaults, but created an environment that likely led to an environment in which sexual assaults of inmates increased. Whereas Judge Kern concluded that the defendant's failure to affirmatively place more staff on duty 'despite his awareness of frequent sexual assaults ... occurring in [known] spots,' *Henderson v. Glanz*, 2012 WL 5931546, at \*4, was sufficient to make a plausible claim for § 1983 liability for the plaintiff's alleged sexual assault, Peña's allegations make plausible that CCA and Hickson not only failed to take action to prevent further sexual assaults despite alleged awareness of past instances, but that they 'engaged in' policies suppressing reporting of the instances by inmates and staff alike. . . . While Peña probably should have pled some specific facts about particular past instances, the Court concludes that these allegations nudge her claim across the line to plausible. Although Peña's Complaint may be criticized as lacking in specific factual allegations connecting CCA's or Hickson's personal involvement to these practices or policies, Peña's allegation that a practice was to place inmates in segregation for reporting sexual assault, combined with her allegation that she was placed in segregation 'following her reporting of Defendant Greffet's rapes,' . . . gives sufficient specific factual background to nudge such a claim against Hickson from speculative to plausible. Moreover, the allegation that there was in place a policy or custom of providing incentives for non-reporting of sexual assaults is troubling for CCA particularly. That there was a policy in place in which CCA employees were given bonuses or other financial incentives for their attempt to suppress the amount of sexual assault reports leads to the inference that both the CCA, as the employer, and Hickson, as the Warden in charge of the NMWCF, engaged in the provision of such bonuses. While Peña fails to differentiate and refer specifically in her allegations to CCA's conduct versus Hickson's conduct, the allegation that incentives were provided for non-reporting supports the conclusion that CCA not only knew about the practice and custom of suppressing reports of sexual assaults at NMWCF, but affirmatively encouraged and engaged in the custom. CCA's and Hickson's custom and practice of suppressing inmates' and staff members' reporting of sexual assaults leads to the conclusion that sexual assaults at NMCWF, such as Greffet's sexual assault of Peña in July/August, 2009, were more prevalent and occurred more frequently than they would have without CCA's and Hickson's engaging in these practices. Peña's allegations are thus sufficient to make plausible that CCA and Hickson engaging in the alleged practices and thereby suppressing sexual assault reports created an environment, without which, Peña's alleged sexual assault by Greffet at NMWCF would not have occurred. Because Peña alleges sufficient factual allegations to state a plausible claim for CCA's and Hickson's liability for violation of her constitutional rights in violation of § 1983, the Court will deny CCA's and Hickson's request to dismiss Count III.")

*Shaver v. Glanz*, No. 12–CV–0234–CVE–PJC, 2012 WL 3061498, \*4 (N.D. Okla. July 26, 2012) (“The Court finds that plaintiff has stated a claim against Glanz in his individual capacity. Plaintiff alleges that she was repeatedly assaulted by Bowers while she was detained in the medical unit of the Tulsa County Jail, and this is a sufficiently serious injury to satisfy the objective component of a deliberate indifference claim. Plaintiff also claims that Glanz was aware of blind spots in the Tulsa County Jail, and that he knew that jail personnel and inmates were engaging in illegal conduct in these blind spots. In particular, she claims that Glanz knew that jail personnel were engaging in sexual acts with inmates and used the blind spots to avoid detection. . . . When Glanz learned of Bowers’ conduct, plaintiff alleges that Glanz failed to take any disciplinary action against Bowers or refer Bowers to the Tulsa County District Attorney for possible criminal charges. . . . She claims that Glanz showed deliberate indifference to the needs of female inmates by failing to take steps to monitor the blind spots and properly staff the north wing of the medical unit with at least one female detention officer. These allegations are sufficient to support an inference that Glanz was aware of a substantial risk of harm to female inmates and that he acted with deliberate indifference by failing to abate the risk. Glanz argues that plaintiff’s factual allegations do not specifically and conclusively show that he acted with deliberate indifference, but he disregards the well-pleaded allegations of the complaint and his arguments are more appropriate for consideration on a motion for summary judgment.”)

*Kirtman v. U.S.*, No. CIV–12–504–HE, 2012 WL 2258339, at \*3, \*4 (W.D. Okla. May 8, 2012) (“Plaintiff’s allegations concerning Defendant Ledezma are that he ‘allowed medical staff and officers to knowingly cuff Plaintiff behind his back against standing medical orders’ and that Plaintiff ‘did not make any movements or actions to justify the use of force.’ . . . Plaintiff has alleged only that Defendant Ledezma had knowledge that other prison officials or medical staff handcuffed Plaintiff behind his back. Plaintiff’s allegation that Defendant Ledezma is liable to him solely because of his supervisory position at FCI El Reno or solely because he had knowledge of the actions of other medical staff or prison officials does not state a plausible claim for relief under *Bivens*. Plaintiff has not alleged that Defendant Ledezma personally participated in placing handcuffs on Plaintiff behind his back, personally participated in the medical treatment provided or not provided to Plaintiff, or that Defendant Ledezma implemented a policy showing his authorization or approval of this action. . . . Thus, Plaintiff has failed to state a plausible claim upon which relief may be granted, and this claim should be dismissed pursuant to 28 U.S.C. § 1915A(b).”)

*Busby v. City of Tulsa*, No. 11–cv–447–GKF–PJC, 2012 WL 1867167, at \*4, \*5 (N.D. Okla. May 22, 2012) (“Busby alleges in Paragraph 11 of the First Amended Complaint that Larsen was ‘responsible for creating, adopting, approving, ratifying, and enforcing the rules, regulations, policies, practices, procedures, and/or customs of the TPD, including the policies, practices, procedures, and/or customs that violated Plaintiff’s constitutional rights as set forth in this Complaint.’ However, Busby fails to identify any particular policy that (1) Larsen promulgated, created or implemented, or possessed responsibility for continued operation; that (2) caused the

complained of constitutional harm. . . Rather, as more specifically set forth below, Busby’s claims against Larsen are that Larsen ‘ratified’ certain unconstitutional acts taken by Larsen’s subordinate, Major Evans. . . . Busby alleges that ‘[b]y denying Captain Busby’s appeal, the City, Chief Jordan and Deputy Chief Larsen approved of and ratified the retaliatory performance evaluation.’ Here, as was the case with Busby’s previous allegations, Busby alleges Larsen had knowledge of Major Evans’ allegedly discriminatory purpose. Knowledge, however, is not a sufficient basis upon which to state a claim of individual liability against a government official for the unconstitutional conduct of his subordinate. . . . Moreover, Busby’s allegation that Larsen denied Busby’s appeal of Major Evans’ allegedly retaliatory performance evaluation does not sufficiently allege purposeful misconduct on the part of Deputy Chief Larson. The alleged misconduct was the retaliatory performance evaluation rendered by Larsen’s subordinate. Upon review of the allegations contained in Paragraph 31 of the First Amended Complaint, the Court concludes that Busby has failed to plausibly plead that Larsen, by virtue of his own conduct and state of mind, violated the Constitution.”)

***Harris v. Denver Health Medical Center***, No. 11–cv–01868–REB–MEH, 2012 WL 1676590, at \*5, \*6 (D. Colo. May 10, 2012) (“Supervisory status alone does not create § 1983 liability. . . . Rather, liability of a supervisor under § 1983 requires ‘allegations of personal direction or of actual knowledge and acquiescence.’. . . For Claim One, Plaintiff alleges that Defendant Stob, representative for Denver Health, ‘is the individual who is responsible, through actual or constructive knowledge, for enforcing a *policy and custom, (pull teeth only)*, that caused plaintiff’s injuries.’. . . For Claim Two, Plaintiff alleges the same against Defendant Wilson, D.D.C. Administrator. . . . Construing the Amended Complaint liberally and taking Plaintiff’s allegations as true, the Plaintiff alleges that he suffers ongoing physical ailments resulting from a lack of dental care and treatment, the lack of which stems from medical staff refusing to provide such care and treatment pursuant to a policy allowing only tooth extractions, which Defendant Stob has knowingly enforced at the medical center and which Defendant Wilson has knowingly enforced at the detention center. The Plaintiff need not allege that the Defendants ‘personally played any part in his treatment’ . . . nor that they ‘participat[ed] ... in Plaintiff’s ongoing dental care.’. . . Whether a policy of “tooth extractions only” exists or whether these Defendants actually implemented, promulgated or enforced such policy are not proper considerations in a Rule 12(b)(6) analysis. Rather, the Plaintiff may overcome a Rule 12(b)(6) challenge to his Amended Complaint by alleging: ‘(1) the [Defendants] promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.’. . . Plaintiff’s allegations concerning both Defendant Stob and Defendant Wilson meet *Dodds*’ requirements.”)

***Keith v. Werholtz***, No. 11–2281–KHV, 2012 WL 1059858, at \*7 (D. Kan. March 28, 2012) (“Here, the Court finds that plaintiff has alleged facts sufficient to state a plausible claim against defendant Koerner, who was responsible for managing TCF and knew about multiple instances of sexual misconduct at TCF over a period of years, inconsistently disciplined corrections officers

who engaged in prohibited sexual conduct with inmates and thus purportedly tolerated at least an informal policy which permitted sexual contact between prison staff and inmates.”)

**Poore v. Glanz**, No. 11–CV–0797–CVE–TLW, 2012 WL 728199, at \*4 (N.D. Okla. Mar. 6, 2012) (“The Court finds that plaintiff has stated a claim against Glanz in his individual capacity. Plaintiff alleges that she was repeatedly raped by Bowers while she was detained in the medical unit of the Tulsa County Jail, and this is a sufficiently serious injury to satisfy the objective component of a deliberate indifference claim. Plaintiff also claims that Glanz was aware of blind spots in the Tulsa County Jail, and that he knew that jail personnel and inmates were engaging in illegal conduct in these blind spots. In particular, she claims that Glanz knew that jail personnel were engaging in sexual acts with inmates and used the blind spots to avoid detection. . . . When Glanz learned of Bowers’ conduct, plaintiff alleges that Glanz failed to take any disciplinary action against Bowers or refer Bowers to the Tulsa County District Attorney for possible criminal charges. . . . She claims that Glanz showed deliberate indifference to the needs of female inmates by failing to take steps to monitor the blind spots and properly staff the north wing of the medical unit with at least one female detention officer. These allegations are sufficient to support an inference that Glanz was aware of a substantial risk of harm to female inmates and that he acted with deliberate indifference by failing to abate the risk. Glanz argues that plaintiff’s factual allegations do not specifically and conclusively show that he acted with deliberate indifference, but he disregards the well-pleaded allegations of the complaint and his arguments are more appropriate for consideration on a motion for summary judgment.”)

**Shaw v. Glanz**, No. 11–CV–518–GKF–FHM, 2012 WL 405151, at \*6, \*7 (N.D. Okla. Feb. 8, 2012) (“Accepting as true plaintiff’s allegations that Glanz was aware of discriminatory practices by his subordinates, plaintiff has arguably met the first requirement for pleading a cognizable § 1983 claim against Glanz for supervisory liability, i.e., that Glanz promulgated, created, or implemented or possessed responsibility for the continued operation of a policy. Further, by alleging she has been treated differently than her Caucasian coworkers with regard to promotions, raises and discipline, and recounting specific instances of such treatment, plaintiff has asserted facts which, if proven, would establish the second element of a § 1983 claim, i.e., that she has suffered constitutional harm. With respect to the third element—the defendant’s state of mind—*Iqbal* instructs that discriminatory intent is required to establish a claim for supervisory liability for racial discrimination. . . . Plaintiff has alleged Glanz acted ‘intentionally or with reckless indifference.’ ‘Reckless indifference’ clearly does not suffice to establish the required *mens rea* under *Iqbal*. Further, while the complaint makes the conclusory allegation that Glanz acted ‘intentionally,’ plaintiff has failed to allege any facts supporting the allegation. The only allegation of *any* personal involvement by Glanz is that she complained to Glanz and Undersheriff Edwards about the defendant’s policies and their negative effect upon her as an African American, and she received a letter in response from Edwards finding the claim of discrimination was not corroborated. . . . This allegation, taken as true, might establish ‘knowledge and acquiescence’ on the part of Glanz, but does not suffice to establish the ‘discriminatory intent’ state of mind required by *Iqbal*. . . . Thus, plaintiff has failed to meet the pleading requirements set out in *Dodds*.”)

*Kemp v. Lawyer*, 846 F.Supp.2d 1170, \_\_\_ (D. Colo. 2012) (“A defendant sued in his individual capacity under § 1983, may be subject to personal liability and/or supervisory liability. . . . While personal liability under § 1983 must be based on personal involvement in the alleged constitutional violation, . . . supervisory liability under § 1983 ‘allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant supervisor or [his] subordinates) of which subjects, or causes to be subjected that plaintiff to the deprivation of any rights secured by the Constitution.’ . . . Plaintiffs contend that Defendant Dunlap personally directed, had actual knowledge of, and acquiesced in both the forced entry and the use of excessive force. Specifically, they assert in their complaint that Dunlap ‘failed to intervene or remedy the violation of Plaintiff’s constitutional rights, and instead chose to supervise, directly participate in, and/or acquiesce in the constitutional violations . . . with the same purpose and state of mind as Defendant Lawyer—to gain entry into the apartment regardless of the risk to the safety of those inside in order to gather chemical evidence, even though a reasonable officer in [his] position would have known that Jason would not have voluntarily submitted to a chemical test and that they had no right to forcibly require Jason to submit to such a test under the circumstances.’ . . . In support of these claims, Plaintiffs allege that: Defendant Dunlap actively participated in escalating the tension and level of force used at the scene, laying the groundwork for Jason’s death. As the supervising sergeant on the scene, it was Defendant Dunlap’s duty to supervise Lawyer and Firko and to take all reasonable actions to prevent violations of constitutional rights. Yet, rather than directing Lawyer and Firko to cease trying to violently force their way into the home without a warrant, Dunlap condoned, ratified and approved of Lawyer and Firko’s actions, and then provided support for their attempts at entry by guarding the back exit from the house. Defendant Dunlap provided support as Defendants Lawyer and Firko escalated the tension and level of force used on the scene, laying the groundwork for Jason’s death. Dunlap watched as Firko and Lawyer attempted to kick down the door with their guns drawn, knowing they were seeking entry without a warrant solely to further a fruitless quest for chemical evidence. Dunlap knew that even if Firko and Lawyer gained entry into the residence, Jason would not have voluntarily submitted to a chemical test and that Firko and Lawyer had no right to forcibly require Jason to submit to such a test under the circumstances. Thus, Dunlap knew that the quest for chemical evidence by forcibly entering the residence was likely to be fruitless as well as illegal. Dunlap was present on the scene and, as the supervising officer, was likely informed that Lawyer and/or Firko had ripped a part of the door frame off and shoved it into the open door to prop it open [and . . . ] that Lawyer and/or Firko had pepper sprayed Jason. . . . When these allegations are taken as true, I conclude that Plaintiffs have alleged facts to support a claim of individual supervisory liability against Dunlap related to the warrantless search based on his failure to stop the entry—which he is alleged to have witnessed and presumptively knew to involve only a minimal traffic accident and/or possible DUI—and where there was no indication that Jason was armed or a flight risk. Failing to stop Defendant Lawyer and Firko’s attempt, with guns drawn, to kick their way into the residence without a warrant, and then supporting their ultimate entry by guarding the back exit, constituted implicit approval sufficient to state a plausible § 1983 claim of supervisor liability for a

constitutional violation based on the warrantless search. A defendant in a supervisory position can be personally involved in an alleged constitutional violation by his subordinates when he ‘personally directed his subordinates to take the action resulting in the alleged constitutional violation’ or ‘when he had actual knowledge that his subordinates were committing the alleged constitutional violation and he acquiesced in its commission.’ . . . Plaintiffs also allege sufficient facts of supervisory liability related to the use of excessive force because they have alleged that Defendant Dunlap, as the supervising officer on the scene, had the ability, opportunity and, indeed, the duty to prevent the deadly shooting from occurring. . . . Plaintiffs allege that Dunlap was aware that Defendants Lawyer and Firko were attempting armed, forced entry into Jason’s residence without permission. Plaintiffs argue that his failure to stop the entry, coupled with his assisting at the rear of the residence, are facts that make out a plausible claim for supervisory liability in the ultimate use of excessive force by Defendant Lawyer. I agree. While Defendant Dunlap was not present at the front of the house, his acts and failures to act as alleged, are not too attenuated to support a plausible claim that he caused the constitutional deprivation of deadly force. As such, I conclude that Plaintiffs have alleged facts that, if proven at trial, suffice to establish a plausible claim that Defendant Dunlap’s personal involvement caused the excessive force violation. . . . Finally, I address whether the facts alleged show Defendant Dunlap acted with the state of mind required to establish he committed the constitutional violations. . . . Under the Fourth Amendment, an action is ‘reasonable,’ regardless of the individual officer’s state of mind, ‘as long as the circumstances, viewed *objectively*, justify [the] action.’ . . . In addition, to establish a violation of § 1983 by a supervisor, the plaintiff must, at minimum, demonstrate a deliberate, intentional act on the part of the defendant to violate the plaintiff’s legal rights. . . . Plaintiffs have alleged that Defendant Dunlap acted with ‘deliberate indifference’ to Jason’s constitutional rights when he failed to act to stop, control and diffuse the situation and instead assisted by guarding the rear. They have alleged that Defendant Dunlap witnessed the armed attempts to enter without a warrant, chose not to intervene to stop, control or diffuse the encounter while knowing the underlying circumstances, and then provided support for the continued escalation of the events. These facts and the inferences therefrom, when taken as true, are sufficient to support a plausible claim that his actions and failures to act constituted deliberate indifference, and such conduct was objectively unreasonable under the totality of the circumstances alleged.”)

***Kemp v. Lawyer***, 846 F.Supp.2d 1170, 1175-77 (D. Colo. 2012) (“[T]o demonstrate that a supervisor-defendant has violated the plaintiff’s constitutional right in failing to train—in order to establish individual liability under § 1983—a plaintiff must show: 1) an *underlying violation* of his constitutional rights; 2) that the supervisor-defendant’s personal involvement *caused* the misconduct complained of; and 3) that the supervisor-defendant acted with the state of mind or *intent* required to establish he committed a constitutional violation; specifically, at minimum, establish a deliberate and intentional act on the part of the defendant to violate the plaintiff’s legal rights. . . . I conclude that Plaintiffs’ complaint alleges insufficient factual matter to support that Defendant Turano’s acts in failing to create policies for CPS officers and/or either failing or inadequately training the CPS officers related to the legalities of search and seizures under the circumstances presented here, demonstrate that his personal involvement ultimately *caused* the

misconduct complained of, and that his *intent* was to deliberately and intentionally fail to act (in implementing adequate policies and training) in order to violate Jason’s legal rights. . . . I conclude that the factual allegations in Plaintiffs’ complaint, even when viewed as true, are insufficient to establish that Defendant Turano’s personal involvement caused the underlying constitutional violations and that his intent, in so doing, was to deliberately and intentionally fail to implement policies and train CSP officers in order to violate Jason’s legal rights. As such, Plaintiffs’ complaint does not establish a plausible claim for individual supervisory liability under § 1983 against Defendant Turano for failure to train.”)

*Coffey v. U.S.*, Nos. CIV 08-0588 JB/LFG, CIV 09-0028 JB/LFG, 2011 WL 6013611, at \*37-40 (D.N.M. Nov. 28, 2011) (“McKinley County argues that Coffey has not responded to its argument that *Ashcroft v. Iqbal* has changed or abolished the standard for supervisory liability under 42 U.S.C. § 1983. . . . The Tenth Circuit has recognized that *Ashcroft v. Iqbal* limited, and may have even eliminated, supervisory liability for government officials based on an employee’s or subordinate’s constitutional violations. *See Dodds v. Richardson*, 614 F.3d 1185 (10th Cir.2010). The language that may have altered the landscape for supervisory liability in *Ashcroft v. Iqbal* is as follows: ‘Because 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.’ . . . The Tenth Circuit in *Dodds v. Richardson* did not resolve completely how *Ashcroft v. Iqbal* affected supervisory liability. . . . The Supreme Court’s and the Tenth Circuit’s decisions bind the Court. . . . The Tenth Circuit has recognized that *Ashcroft v. Iqbal* may create a conflict with its prior precedent on supervisory liability and has not yet decided to resolve that Supreme Court decision with its prior precedent. *See Dodds v. Richardson*, 614 F.3d at 1199. . . . The Tenth Circuit recognized before *Ashcroft v. Iqbal* that supervisory liability was a valid theory on which a plaintiff could hold a government official liable, at least under some circumstances, for conduct in which his or her subordinates engaged. . . . District courts within the Tenth Circuit are bound to follow the Tenth Circuit’s decisions. . . . There is some confusion among courts as to the effect *Ashcroft v. Iqbal* had on supervisory liability. The dissent in *Ashcroft v. Iqbal*, written by Justice Souter and joined by three other Justices, concluded that the majority had eliminated supervisory liability in its entirety. . . . The United States Court of Appeals for the Ninth Circuit has, on the other hand, opined that the decision may have only required purposeful conduct by supervisors in racial discrimination cases, as those were the facts in *Ashcroft v. Iqbal*. . . . The Tenth Circuit has recognized, besides these two positions, ‘[m]any intermediate positions are also surely plausible.’ *Lewis v. Tripp*, 604 F.3d 1221, 1227 n. 3 (10th Cir.2010). Given that the Tenth Circuit has not yet determine whether *Ashcroft v. Iqbal* has overruled its prior opinions on supervisory liability, including *Serna v. Colorado Department of Corrections* and *Jenkins v. Wood*, given that a district court is bound by Tenth Circuit law until the Tenth Circuit overrules a prior panel’s decision, given that the Tenth Circuit has recognized this conflict that *Ashcroft v. Iqbal* has created with supervisory liability but has not yet decided the scope of the conflict, given that the parties have not briefed this issue in detail, given that Coffey may not even be asserting a supervisory liability claim, and given that anything the Court would say would be dicta, the Court declines to address the effect *Ashcroft v. Iqbal* had on supervisory liability. As the Court previously

concluded, no McKinley County policy was the moving force behind any violation that may have occurred, and there is no affirmative link between McKinley County's conduct and any of its employees' constitutional violations. Thus, as those grounds resolve Coffey's claims, it is not necessary to address *Ashcroft v. Iqbal*'s effect on supervisory liability." [footnotes omitted])

***Carbajal v. Seventh Judicial Dist.***, No. 10-cv-02862-REB-KLM, 2011 WL 3471237, at \*19, \*20 & n.8 (D. Colo. Aug. 8, 2011) ("The Supreme Court has recently called into question the notion of personal involvement by knowing acquiescence. In *Ashcroft v. Iqbal*, 129 S.Ct. at 1949, the Court suggested that the simple fact that a supervisor knew of and acquiesced in a constitutional violation committed by his subordinates does not establish that he was personally involved in the violation. . . . *Iqbal* has been interpreted by at least two Courts of Appeals as narrowing the scope of what constitutes 'personal involvement' by a supervisor in an alleged constitutional violation committed by his subordinates [citing *Bayer* and *Maldonado*] Accordingly, to establish that a defendant in a supervisory position was personally involved in an alleged constitutional violation committed by his subordinates, a plaintiff must show that the defendant did more than simply acquiesce in the violation. . . . The Courts of Appeals have not provided clear guidance regarding precisely what a plaintiff must show to demonstrate more than mere acquiescence by the defendant. But *Iqbal* and *Serna* indicate that the defendant's state of mind is the linchpin of the analysis. In *Iqbal*, the Supreme Court suggested that a defendant who acquiesced in a constitutional violation committed by his subordinates was personally involved in the violation only if his acquiescence was motivated by a 'purpose' to allow or further the violation. . . In *Serna*, the Court of Appeals for the Tenth Circuit suggested that a defendant supervisor who acquiesced in a constitutional violation was personally involved in that violation only if he shared the same 'state of mind' with his subordinates who actually committed the violation.")

***Fleetwood v. Werholtz***, No. 10-2480-RDR, 2011 WL 2938106, at \*5, \*6 (D. Kan. July 19, 2011) ("Defendants argue that there is no allegation in the second amended complaint concerning what the supervisor defendants actually did, only conclusory allegations, such as allowing a culture of sexual misconduct. . . The supervisor defendants contend that there is no allegation that the supervisor defendants ignored an officer's known history of sexual contact with prisoners. . . The supervisor defendants further argue that the second amended complaint lacks a plausible allegation that the supervisor defendants knew of any risk of harm to plaintiff which they then ignored. . . Finally, the supervisor defendants contend that plaintiff's claims that defendants failed to properly discipline staff for undue familiarity or for failing to monitor the movement of staff and inmates, are not specific to any defendant and are not specific to the alleged incident between plaintiff and defendant VanDyke. Therefore, they argue that there is no sufficient affirmative link alleged between that incident and the supervisor defendants. . . As previously stated, the court's role is to examine the factual allegations in the complaint (as opposed to the legal conclusions) and determine whether they plausibly could lead to an entitlement to relief. It is undisputed that plaintiff has alleged a constitutional violation committed by defendant VanDyke who was a subordinate to the supervisor defendants. The question is whether plaintiff has plausibly alleged an affirmative link between the alleged actions or omissions of the supervisor defendants and the

alleged constitutional violation.

As the court has stated, an affirmative link has three elements: personal involvement; a causal connection; and a culpable state of mind. Personal involvement can be alleged by claiming that a supervisor's failure to exercise control or direction caused the alleged illegal acts or that the supervisor promulgated, created, implemented or utilized a policy that caused the alleged deprivation of constitutional rights. There are allegations in the second amended complaint that defendant VanDyke boasted to others about his sexual contacts with inmates and others at TCF. There is also an allegation of one inmate complaint and an affidavit alleging improper sexual contact by defendant VanDyke. It is plausible that plaintiff could prove that these boasts and the written complaints and affidavits were known to the supervisor defendants. There are allegations in the second amended complaint that defendant VanDyke and other TCF officers engaged in a seemingly large amount of improper sexual activity of various kinds, from 'undue familiarity' to sexual intercourse. The second amended complaint alleges that the supervisor defendants reacted mildly and inconsistently to reports of such activity and thus fostered a culture of sexual misconduct. While a claim that defendants 'personally participated in the allowance of a culture of sexual misconduct' is a broad allegation, it is a broad *factual* allegation, not a legal conclusion. Thus, the court is obliged to consider whether it is a plausible allegation which may demonstrate the supervisor defendants' personal involvement (via a failure to supervise) in the alleged deprivation of constitutional rights. After considering the mass of factual allegations contained in the lengthy second amended complaint, the court does not believe that this claim is implausible. It is plausible to think plaintiff may be able to establish that the alleged failure to supervise defendant VanDyke and others set into motion a series of events which a reasonable supervisor should have known would lead to the alleged constitutional violation. It is also plausible to think that the failure to react to the alleged incidents of sexual misconduct by officers at TCF is evidence that the supervisor defendants were aware of and failed to take reasonable steps to alleviate a substantial risk of harm to female inmates who might come into contact with defendant VanDyke or other officers at TCF. The court rejects the argument that plaintiff does not allege how any of the supervisor defendants knew of the risk of harm to her. The second amended complaint contains numerous allegations of: 1) supervisory authority over defendant VanDyke and TCF; 2) widespread problems of sexual misconduct by defendant VanDyke and other officers at TCF; and 3) other complaints and claims regarding VanDyke and TCF. This is sufficient to make a plausible claim that each of the supervisor defendants was aware of a substantial risk of harm. Finally, the court also rejects the argument that plaintiff's allegations are too general to properly allege an affirmative link between a specific supervisor defendant to the sexual contact between plaintiff and defendant VanDyke. As the court has already noted, in *Tafoya* the Tenth Circuit stated that an official's knowledge of the risk need not be knowledge of a substantial risk to a *particular* inmate, or knowledge of the particular manner in which the injury might occur. Furthermore, there are specific allegations regarding defendant VanDyke which plaintiff may prove were known to the supervisor defendants.")

***Mason v. Hartley***, 2011 WL 7429431, at \*4, \*5 & n.2 (D. Colo. July 14, 2011) ("Iqbal has been interpreted by at least two Courts of Appeals as narrowing the scope of what constitutes 'personal

involvement’ by a supervisor in an alleged constitutional violation committed by his subordinates [citing *Bayer* (3d Cir. 2009) and *Maldonado* (1st Cir. 2009)] Accordingly, to establish that a defendant in a supervisory position was personally involved in an alleged constitutional violation committed by his subordinates, a plaintiff must show that the defendant did more than simply acquiesce in the violation. . . . The Courts of Appeals have not provided clear guidance regarding precisely what a plaintiff must show to demonstrate more than mere acquiescence by the defendant. But *Iqbal* and *Serna* indicate that the defendant’s state of mind is the linchpin of the analysis. In *Iqbal*, the Supreme Court suggested that a defendant who acquiesced in a constitutional violation committed by his subordinates was personally involved in the violation only if his acquiescence was motivated by a ‘purpose’ to allow or further the violation. . . In *Serna*, the Court of Appeals for the Tenth Circuit suggested that a defendant supervisor who acquiesced in a constitutional violation was personally involved in that violation only if he shared the same ‘state of mind’ with his subordinates who actually committed the violation.”)

*Nelson v. Glanz*, No. 11-CV-189-CVE-PJC, 2011 WL 2144660, at \*4, \*5 (N.D. Okla. May 31, 2011) (“Although the Tenth Circuit did not expressly abrogate any of its precedent on supervisory liability, it recognized that *Iqbal* ‘may very well have abrogated § 1983 supervisory liability as we previously understood it in this circuit...’. . . Considering all of the allegations of plaintiff’s petition, the Court finds that plaintiff has not stated a § 1983 claim against Glanz in his official or individual capacities. The petition alleges that plaintiff’s immediate supervisors, not Glanz, discriminated against plaintiff in terms of promotion, pay increases, and discipline, and she claims that Glanz was ultimately responsible for these actions. Taking plaintiff’s factual allegations as true, they are insufficient to establish an ‘affirmative link’ between the adoption of an unconstitutional policy by Glanz and the conduct of his subordinates. . . The allegations of the petition would be sufficient to show that plaintiff’s immediate supervisors may have engaged in racial discrimination, but plaintiff does not allege that the Sheriff’s Office actually adopted a policy or custom authorizing or encouraging racial discrimination. Plaintiff alleges that the Sheriff’s Office adopted employment practices with a disparate impact on African Americans. . . However, § 1983 requires that a plaintiff prove an intentional deprivation of constitutional rights and ‘[d]isparate impact claims that do not “raise a presumption of discriminatory purpose” are “insufficient to sustain a cause of action under ... [§ 1983 ].”’. . Plaintiff’s allegations that the Sheriff’s Office adopted policies that had a disparate impact on minorities do not raise a presumption of discriminatory purpose. Plaintiff will be granted leave to file an amended complaint if she can allege sufficient facts to state a § 1983 claim against Glanz. Specifically, plaintiff must be able to identify a specific policy adopted or promulgated by Glanz or the Sheriff’s Office that deprived her of a constitutional right, and she must also have a sufficient basis to allege that Glanz acted to deliberately and intentionally violate plaintiff’s constitutional rights.”)

*Gatrell v. City and County of Denver*, No. 10-cv-02311-REB-KLM, 2011 WL 2185793, at \*4 (D. Colo. May 26, 2011) (“*Iqbal* has been interpreted by at least two Courts of Appeals as narrowing the scope of what constitutes ‘personal involvement’ by a supervisor in an alleged constitutional violation committed by his subordinates[.] [citing *Bayer* and *Maldonado*] Accordingly, to establish

that a defendant in a supervisory position was personally involved in an alleged constitutional violation committed by his subordinates, a plaintiff must show that the defendant did more than simply acquiesce in the violation. . . . The Courts of Appeals have not provided clear guidance regarding precisely what a plaintiff must show to demonstrate more than mere acquiescence by the defendant. But *Iqbal* and *Serna* indicate that the defendant's state of mind is the linchpin of the analysis. In *Iqbal*, the Supreme Court suggested that a defendant who acquiesced in a constitutional violation committed by his subordinates was personally involved in the violation only if his acquiescence was motivated by a 'purpose' to allow or further the violation. . . In *Serna*, the Court of Appeals for the Tenth Circuit suggested that a defendant supervisor who acquiesced in a constitutional violation was personally involved in that violation only if he shared the same 'state of mind' with his subordinates who actually committed the violation.”).

***Mallory v. Jones***, No. 10-cv-02564-CMA-KMT, 2011 WL 1750234, at \*11 (D. Colo. May 3, 2011) (“In the instant case, the Court finds that Plaintiff has alleged facts that set forth an affirmative link between the Supervisory Defendants and the alleged Eighth Amendment violation. Plaintiff has alleged that each of the Supervisory Defendants were notified of CDOC’s excessive use of NSAIDs and failure to ensure the adequate monitoring of prisoners for NSAID-induced side effects such as ulcers and gastrointestinal bleeding, from which Plaintiff suffered. Plaintiff further alleges that, despite knowledge of these problems, the Supervisory Defendants did not take adequate remedial action within the CCF and, as a result, Defendants disregarded Plaintiff’s serious medical condition and medical needs. Accordingly, the Court finds that denial of Defendants’ Motion to Dismiss Plaintiff’s claim against the Supervisory Defendants is warranted.”)

***Handy v. Diggins***, No. 10-cv-02022-WYD-KMT, 2011 WL 1743394, at \*1, \*6, \*7 (D. Colo. Mar. 23, 2011) (“In this prisoner civil rights suit, Plaintiff alleges that Defendants, Chief Diggins, Major Connors and Chaplain Scott, violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the First and Fourteenth Amendments by refusing to provide him with a kosher diet in accordance with his religious beliefs. . . . Defendants contend that Plaintiff’s complaint contains no allegations that Chief Diggins was personally involved in the alleged violations. In response, Plaintiff argues that he submitted numerous kites and grievances to Chief Diggins complaining that his subordinates were subjecting Plaintiff to constitutional violations. Plaintiff contends that Chief Diggins is not being sued for his supervisory powers at the DCJ, ‘but for his involvement, knowledge, and his failure to stop a subordinate’s constitutional violation of which he was aware.’ . . In his Complaint, Plaintiff alleges that he submitted a kite to Chief Diggins on April 10, 2010, explaining that he had been requesting a kosher meal since February 2010 and had submitted a grievance on March 19, 2010 to which he had not yet received a response. He further stated that he believed that Chaplain Scott was depriving him of his right to practice his religion and asked Chief Diggins to resolve the issue. . . Plaintiff further alleges that on May 7, 2010, he submitted a grievance to Chief Diggins chronicling his efforts to obtain a kosher meal and noting that he had been denied a kosher meal for nearly ninety days, effectively depriving him of his right to practice his religion and asking Chief Diggins to intervene. . . Plaintiff also contends that,

according to DCJ grievance procedures, the grievance he submitted to Major Connors on April 27, 2010 would have been forwarded to Chief Diggins because it was the second grievance. . . Plaintiff argues that these allegations show that Chief Diggins ‘had actual knowledge of the misconduct, approved of it, acquiesced in it or failed to stop it.’ . . In this case, whether Plaintiff has alleged personal participation sufficient to withstand a motion to dismiss is a close question. Plaintiff has alleged facts to suggest that Chief Diggins was aware of a potential constitutional violation, and that he failed to respond to Plaintiff’s grievances or intervene on Plaintiff’s behalf. The question is whether knowledge of alleged misconduct, approval of it, acquiescence in it, or failure to stop it, amounts to the personal participation necessary to state a claim against a supervisor since the Supreme Court’s decision in *Ashcroft v. Iqbal*. . . In *Iqbal*, the Supreme Court held that the alleged deliberate indifference to or knowledge and acquiescence of Defendants Ashcroft and Mueller in their subordinates’ unconstitutional conduct or discriminatory animus, alone, did not amount to the state of mind required to establish purposeful discrimination. . . . In *Dodds*, the Tenth Circuit held that ‘§ 1983 allows a plaintiff to impose liability upon a defendant- supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement of which subjects, or causes to be subjected that plaintiff to the deprivation of any rights secured by the constitution.’ . . However, the court still has not determined whether allegations of a supervisor’s knowledge of and acquiescence in a constitutional violation, such as those made by Plaintiff in this case, are sufficient to state a claim, post-*Iqbal*. Given the lack of clarity in the law, the court finds that Plaintiff has alleged sufficient facts to suggest personal participation on the part of Chief Diggins and therefore recommends that Defendants’ motion to dismiss Plaintiff’s claims against Chief Diggins be denied.”)

***Twitchell v. Hutton***, No. 10-cv-01939-WYD-KMT, 2011 WL 318827, at \*6, \*7 (D. Colo. Jan. 28, 2011) (“[I]n a recent decision interpreting *Iqbal*, the Tenth Circuit noted that the Supreme Court narrowed the scope of supervisory liability under § 1983. *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir.2010). Thus, after *Iqbal*, the *Dodds* Court instructed that a supervisor can be held liable under § 1983 only if ‘(1) [he] promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.’ . . Turning to Plaintiff’s Complaint, I find that it fails to plausibly plead that Chief Hays – while possessing the required state of mind – acted in such a way that caused Plaintiff’s alleged constitutional harm. I agree with Defendants that Plaintiff’s allegations focus on Chief Hays’ supervisory status in alleging his liability. For example, Plaintiff alleges that Chief Hays, as the commanding officer for the Defendants, was responsible for the Defendants’ training, supervision, conduct and for enforcing the regulations of the Steamboat Police Department. . . Plaintiff also makes a conclusory allegation that Chief Hays ‘adopted, authorized, and ratified and/or condoned policies and/or customs of the use of excessive force and deliberate indifference ...’ that deprived the Plaintiff of her constitutional rights. . . However, Plaintiff offers no supporting facts in connection with her conclusory allegations. Accordingly, I find that Plaintiff’s allegations fail to contain sufficient factual matter, accepted as true, to state a plausible claim.”)

*Garcia v. Webster*, No. 09-cv-03024-CMA-KLM, 2010 WL 5572503, at \*10 & n.3, \*11 (D. Colo. Dec. 20, 2010) (“*Iqbal* has been interpreted by at least two Courts of Appeals as narrowing the scope of what constitutes ‘personal involvement’ by a supervisor in an alleged constitutional violation committed by his subordinates . . . . Accordingly, to establish that a defendant in a supervisory position was personally involved in an alleged constitutional violation committed by his subordinates, a plaintiff must show that the defendant did more than simply acquiesce in the violation. [FN3 : The Courts of Appeals have not provided clear guidance regarding precisely what a plaintiff must show to demonstrate more than mere acquiescence by the defendant. But *Iqbal* and *Serna* indicate that the defendant’s state of mind is the linchpin of the analysis. In *Iqbal*, the Supreme Court suggested that a defendant who acquiesces in a constitutional violation committed by his subordinates is personally involved in the violation only if his acquiescence was motivated by a ‘purpose’ to allow or further the violation. *See* 129 S.Ct. at 1949. In *Serna*, the Court of Appeals for the Tenth Circuit suggested that a defendant supervisor who acquiesces in a constitutional violation is personally involved in that violation only if he shares the same ‘state of mind’ with his subordinates who actually commit the violation.] In this case, Plaintiff has failed to allege any personal involvement by Defendant Milyard in denying him medical care beyond simple acquiescence to the actions of medical staff at Sterling. Plaintiff’s Complaint does not contain factual allegations sufficient to plausibly suggest that Defendant Milyard had either a ‘purpose’ to deny Plaintiff proper medical care, *see Iqbal*, 129 S.Ct. at 1949, or a ‘state of mind’ similar to that of his subordinates who allegedly were deliberately indifferent to Plaintiff’s medical needs . . . . Plaintiff has merely alleged that (1) Defendant Milyard knew that he was complaining about the quality of his medical treatment, and (2) Defendant Milyard did not do ‘anything to help.’ . . These allegations are insufficient to state a claim against Defendant Milyard.”)

## ELEVENTH CIRCUIT

*Quinette v. Reed*, 805 F. App’x 696, \_\_\_ (11th Cir. 2020) (“Here, to deny the Supervisor Defendants qualified immunity, we must conclude that they were on notice that a failure to punish a subordinate’s misconduct with sufficient severity (or anything besides termination)—as opposed to a failure to investigate or provide discipline at all—was a violation of clearly established law that could expose them to personal liability. We cannot reach this conclusion. In this Circuit, the published excessive-force cases imposing supervisory liability appear to all involve supervisors who took *no* action when aware of their subordinate’s unlawful conduct. . . Here though, the supervisors *did* investigate and act when they became aware of Reed’s misconduct. While reasonable minds may disagree about the level of discipline necessary to prevent further misconduct, the sanctions imposed here were real—up to and including suspension. Thus, even in the light most favorable to Quinette, his claim bears distinct differences from the circumstances present in *Danley*, *Valdes*, and *Fundiller*.”)

*Quinette v. Reed*, 805 F. App’x 696, \_\_\_ (11th Cir. 2020) (Wilson, J., concurring in part and dissenting in part) (“I concur in the affirmance of the district court’s denial of qualified and official immunity to Reed. However, I would affirm the district court’s denial

of qualified immunity based on supervisory liability. Accepting Quinette’s allegations as true, Reed’s extensive history of using excessive force toward inmates was sufficient to put the supervisors on notice of his misconduct, and was sufficiently blatant to require them to act. . . . Reed’s history of ‘obvious, flagrant, [and] rampant’ use of excessive force and related conduct, such as using racial epithets, profanity, and threats, and losing his temper with inmates provided meaningful notice to the supervisors that they needed to correct a constitutional violation. . . . Indeed, of the three prior, separate investigations into Reed’s excessive use of force, two involved pushing an inmate to the floor. Three of those internal affairs investigations were for using excessive force against restrained inmates. Quinette has sufficiently alleged that each of the supervisors was aware of Reed’s history of using excessive force, yet they failed to do anything to ‘remedy the situation.’ . . . Accepting the complaint’s well-pleaded allegations as true and construing them in the light most favorable to Quinette, the supervisors knew of the danger that Reed presented and took no action to appropriately supervise or discipline him. The district court correctly determined that they were involved in internal affairs investigations involving Reed in varying capacities, and each of them failed to adequately discipline, supervise, or train Reed. Since Quinette has sufficiently alleged that the supervisors violated his clearly established constitutional rights, I would conclude that they are not entitled to qualified immunity.”)

*Bryant v. Buck*, No. 19-11913, 2019 WL 6609698, at \*4 (11th Cir. Dec. 5, 2019) (not reported) (“The district court also denied Dr. Buck qualified immunity because there ‘remain[ed] material questions of fact as to whether, as a supervisor, [Dr.] Buck’s policies and customs resulted in deliberate indifference.’ . . . Specifically, the district court concluded that Dr. Buck could be liable based on two of the infirmary’s policies or customs: (a) the treatment policy made little distinction between nurses and doctors; and (b) the infirmary was severely understaffed. . . . The district court’s analysis seems to conflate the municipal liability claim that was initially pled against Orange County with the supervisory liability claim pled against Dr. Buck. The plaintiffs initially alleged that Orange County’s policies and practices—including its failure to properly fund, train, and staff the Orange County Corrections infirmary—resulted in deliberate indifference. That claim was dismissed because the plaintiffs did not plausibly allege that such policies or customs existed. The supervisory liability claim against Dr. Buck, in contrast, asserted that he failed to properly supervise Mr. Gracia’s treatment and care. . . . A supervisor cannot be liable under § 1983 based on vicarious liability or respondeat superior. . . . But a supervisor may be liable if he ‘personally participates in the alleged unconstitutional conduct or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation.’ . . . Dr. Buck did not personally participate in the unconstitutional conduct, as discussed above. The plaintiffs assert, however, that Dr. Buck caused the constitutional violation by failing to adequately train his nursing staff in recognizing the onset of sepsis. He may be liable for failure to train if he had ‘actual or constructive notice that a particular omission in the[ ] training program cause[d] [his] employees to violate citizens’ constitutional rights, and ‘armed with that knowledge,’ chose to retain the training program. . . . Actual or constructive notice may be established by showing a pattern of similar constitutional violations by untrained employees. . . . There is no evidence that, prior to this incident, Dr. Buck had reason to believe the nurses on his staff lacked adequate training to

recognize sepsis. Although the plaintiffs alleged that there had been other incidents of deliberate indifference by medical staff at Orange County Corrections, none of them involved sepsis. Accordingly, Dr. Buck cannot be liable for failure to train.”)

***Piazza v. Jefferson County, Alabama***, 923 F.3d 947, 957-58 (11th Cir. 2019) (“The standard by which a supervisor can be held liable for the actions of a subordinate is ‘extremely rigorous.’ . . . Supervisory officials cannot be held liable under § 1983 for unconstitutional acts by their subordinates based on respondeat-superior or vicarious-liability principles. . . . Instead, absent allegations of personal participation—of which there are none here concerning Hale or Eddings—supervisory liability is permissible only if there is a ‘causal connection’ between a supervisor’s actions and the alleged constitutional violation. . . . One way that a plaintiff can show the requisite causal connection is by demonstrating that a supervisor’s policy or custom resulted in ‘deliberate indifference to constitutional rights.’ . . . A plaintiff can also show that the *absence* of a policy led to a violation of constitutional rights. . . . Either way, though, to prove that a policy or its absence caused a constitutional harm, a plaintiff must point to multiple incidents, . . . or multiple reports of prior misconduct by a particular employee[.] . . . Hunter has not made the requisite showing with respect to either of the two theories that underlie his supervisory-liability claims against Hale and Eddings. . . . Because Hunter’s excessive-force claim focuses solely on Hinkle’s episode—‘a single incident of unconstitutional activity’—it does not, as a matter of law, state a claim against Hale and Eddings for supervisory liability. . . . The same goes for the supervisory-liability claims predicated on an alleged deliberate indifference to Hinkle’s serious medical needs. Hunter asserts that Hinkle was an alcoholic who was neither treated for his alcoholism nor provided his prescription medication upon admission to the jail. Hunter does not, though, point to other instances of inadequate medical screening or delayed medical care at the Birmingham City Jail, nor does he allege any facts indicating that Hale or Eddings were on notice of the officers’ alleged deliberate indifference. . . . Because Hunter’s complaint contains only conclusory assertions that jail officers were indifferent to Hinkle’s needs pursuant to certain policies or customs—without alleging any facts concerning those policies or customs—he has not stated a claim for supervisory liability for deliberate indifference to serious medical needs. . . . Accordingly, we hold that Hunter has failed to plead facts sufficient to sustain supervisory-liability claims against Sheriff Hale or Captain Eddings and that the district court therefore erred in rejecting the officers’ qualified-immunity defenses to those claims.”)

***Johnson v. Conway***, No. 16-12129, 2017 WL 2080251, at \*9 (11th Cir. May 15, 2017) (not reported) (“Because Johnson has not shown that the Sheriff was subjectively aware of a substantial risk that excessive force would be used against inmates simply for exercising their right to refuse medical treatment, he has not established that the Sheriff was deliberately indifferent to his constitutional rights. . . . Accordingly, Sheriff Conway is not liable as a supervisor under § 1983, and we affirm the grant of summary judgment in his favor.”)

***Shuford v. Conway***, 666 F. App’x 811, 818-19 (11th Cir. 2016) (per curiam) (“The plaintiffs have established a material question of fact as to whether Sheriff Conway and Lt. Col. Sims were on

notice of a history of widespread abuse, and also whether Sheriff Conway's custom or policy resulted in deliberate indifference to their constitutional rights. However, neither method of proving the necessary causal connection for supervisory liability can be established for Col. Pinkard in this case. First, deprivations constituting 'widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.' . . . Plaintiffs provided eight video discs full of RRT [Rapid Response Team] incidents over the years. They submitted affidavits from seven other pretrial detainees who say they were subjected to excessive force by the RRT. Sheriff Conway testified in his deposition that he viewed many RRT videos, including at least fifty that involved the use of a restraint chair. Sheriff Conway also acknowledged he received 'very vocal ... criticism' from Lt. Cofer about the RRT's actions before Lt. Cofer took charge of the RRT. With regard to Lt. Col. Sims, he reviewed and signed off on every single written report of an RRT entry and use of force. He reviewed hundreds of RRT videos over the last five years, referring some for further investigation. He was also a direct overseer of the RRT, selected the RRT staff, and trained them. This raises a material issue of fact whether Lt. Col. Sims was on notice of continued occurrences that violated detainees' constitutional rights. The district court ruling that there is 'no evidence in the record' putting Sheriff Conway or Lt. Col. Sims on notice is simply not borne out by our examination of the record. There is also an issue of material fact about whether Sheriff Conway's policies resulted in deliberate indifference to plaintiffs' constitutional rights. 'Deliberate indifference requires the following: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than gross negligence.' . . . Again, there is evidence that Sheriff Conway received criticisms of the RRT and watched many videos of RRT incidents. Lt. Cofer, the former head of the RRT, warned Sheriff Conway that he believed unnecessary force was being used. And Sheriff Conway said that at least some others in the Sheriff's office had raised these concerns as well. There is therefore a material question of fact about whether Sheriff Conway was on notice of a risk of serious harm, disregarded it, and did so by conduct that is more than gross negligence. On the other hand, the record establishes that Lt. Col. Sims referred many incidents of RRT force for further investigation by the Professional Standards Unit of the Sheriff's Department. Therefore, plaintiffs have failed to make a sufficient showing of grossly negligent conduct as to Lt. Col. Sims. We affirm the district court in its finding that Lt. Col. Sims did not have supervisory liability under this method of proving a causal connection. There are material questions of fact about whether Sheriff Conway or Lt. Col. Sims were on notice about a history of widespread abuse and whether Sheriff Conway had subjective knowledge of a risk of serious harm, disregarded that risk, and did so by conduct constituting more than gross negligence. As a result, we reverse the district court's grant of summary judgment on these issues. For Col. Pinkard, we affirm the district court finding that he has no supervisory liability under either method of proof. Col. Pinkard did have command and oversight responsibilities for the RRT, but there is no evidence he took any role in overseeing the RRT's use of force, had any notice of the alleged widespread abuse, or was grossly negligent in ignoring a risk of serious harm. Instead, he largely delegated these duties to the RRT Commander. We also affirm the district court finding that Lt. Col. Sims has no supervisory liability under the deliberate indifference standard, because there is no evidence that he had subjective

knowledge of any serious risk that he disregarded by conduct that was more than grossly negligent.”)

*Smith v. LePage*, 834 F.3d 1285, 1298-99 (11th Cir. 2016) (“First, no supervisory liability can arise from the second tasing of Mr. Smith because we have concluded it was not a constitutional violation. . . . Second, the plaintiffs’ § 1983 supervisory liability claim related to the shooting fails because Sgt. Gamble neither participated in the shooting nor had a legally sufficient causal connection to it. The District Court properly rejected the plaintiffs’ argument, based on the out-of-circuit case of *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), that Sgt. Gamble personally participated by escalating the situation. Under this Circuit’s law, Sgt. Gamble did not personally participate because he did not shoot at Mr. Smith or order any of the officers to do so, and his mere presence at the scene was not enough. . . . Whether Sgt. Gamble’s actions were causally connected to the shooting, however, is a closer call. As the District Court noted, Sgt. Gamble may have made ‘a tragic mistake of judgment’ by not calling in the Special Weapons and Tactics (“SWAT”) team. The DeKalb County Police Department Manual states that the SWAT team handles ‘barricaded suspects,’ in order to ‘contain the situation and attempt to negotiate a peaceful end to the situation.’ Once Mr. Smith closed himself in his bathroom and refused to come out, there may have been a so-called barricade situation. . . . Nevertheless, Sgt. Gamble’s possible mistake of judgment does not rise to the level of creating a causal connection between his acts and the shooting, because there are no facts suggesting that he either directed the officers to act unlawfully or knew they would.”)

*Estate of Owens v. GEO Group, Inc.*, 660 F. App’x 763, 773-74 (11th Cir. 2016) (“[W]e cannot find any support in the record for Leeper’s claim that uninterrupted supervision was required on the basis that the facility had mixed medium-security and close-custody inmates in the same classroom. First, Graceville was designed to house close-custody inmates; close-custody inmates were not interspersed in a medium-security facility. Second, courts have generally declined to impose liability where the complained-of danger resulted from mixing inmate custody classifications. . . . And in any event, Leeper has not shown that GEO’s practice of allowing mixed-custody classes in this penal institution resulted in wide-spread abuses such that prison officials must have known about the palpable danger of serious injury. Finally, Leeper raises still other claims against Warden Henry and Assistant Warden Stewart. The law by now is clear that a supervisor may be held liable for the actions of his subordinates under § 1983 if he personally participates in the act that causes the constitutional violation or where there is a causal connection between his actions and the constitutional violation that his subordinates commit. . . . On this largely barren record, however, Leeper’s supervisory liability claims against Warden Henry and Assistant Warden Stewart fail. First, as we’ve already observed, there was no Eighth Amendment constitutional violation on the part of their subordinates. Second, Leeper has offered no record evidence that Henry or Stewart had personally participated in any way in the events surrounding the attack, or that they had any knowledge of prior attacks under remotely similar circumstances, or had any specific knowledge about the events involved in Owens’s attack. Nor does her claim that Stewart was negligent in his training of security staff fare any better. Notably, a supervisory

official is not liable under § 1983 for failure to train unless: (1) his failure to train amounts to deliberate indifference of the rights of persons his subordinates come into contact with; and (2) the failure has actually caused the injury of which the plaintiff complains. . . Thus, Leeper must demonstrate that Stewart had ‘actual or constructive notice that a particular omission in [GEO’s] training program cause[d] [GEO] employees to violate citizens’ constitutional rights’ and, despite that notice, Stewart chose to retain the deficient training program. . . To establish that a supervisor had actual or constructive notice of the deficiency of training, ‘[a] pattern of similar constitutional violations by untrained employees is ordinarily necessary.’. . Leeper has not made this showing. Even assuming Stewart’s training program was deficient and even if that failure to adequately train or supervise did cause Owens’ death, the record forecloses the conclusion that Stewart had actual or constructive notice of the deficiency of the training. There is no evidence that any inmate at Graceville had suffered any harm as a result of an instructor leaving a classroom; therefore, the single incident involving Owens can hardly be termed the result of ‘a pattern of similar constitutional violations.’. . Absent any evidence that his subordinates were engaged in behavior that violated the inmates’ Eighth Amendment right to be protected from violence at the hands of other inmates, Stewart had no constitutional obligation to train security guard Strickland or anyone else in some discernibly-different way. Thus, on this record, Leeper cannot establish a constitutional violation grounded in the failure to train or supervise personnel to adequately handle the situation in which an instructor needed to leave the classroom.”)

***Magwood v. Sec’y, Florida Dep’t of Corr.***, 652 F. App’x 841, 844-45 (11th Cir. June 15, 2016) (“Supervisors are only liable if there is a causal connection between their actions and the injury, and nothing in Magwood’s complaint alleges that they personally participated in his medical care. . . Additionally, although Magwood’s complaint links several of these defendants to the grievances he submitted, his complaint does not explain how many grievances were sent, what the grievances stated, or why attending the jail’s sick-call was an inadequate remedy. Therefore, because Magwood did not show, beyond a speculative level, a causal connection between these defendants and his allegedly inadequate medical care, the district court did not err in granting a motion to dismiss regarding them.”)

***Bowen v. Warden Baldwin State Prison***, 826 F.3d 1312, 1324-25 (11th Cir. 2016) (“[T]he administrator alleges that Deputy Warden Underwood and Officer Davis were *actually aware* of a substantial and seemingly conspicuous risk posed to Mr. Bowen by allowing him to remain in the small cell with Merkerson. . . Even assuming that these defendant officials were unaware of Mr. Bowen’s removal request or Merkerson’s mother’s warning, this lack of awareness does not serve to negate or even to discount the facts they allegedly did know. We conclude, therefore, that the administrator has set forth in his second amended complaint sufficient facts showing that Deputy Warden Underwood and Officer Davis were both ‘aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and ... also dr[e]w the inference.’. . Because this was the sole disputed element of his claims against these defendants, dismissal was inappropriate. . . Deputy Warden Underwood and Officer Davis were therefore on notice in March 2010 that ‘the law of this Circuit, as expressed in *Cottone*, clearly established that the defendants’

total failure to investigate—or take any other action to mitigate—the substantial risk of serious harm that [Merkerson] posed to [Mr. Bowen] constituted unconstitutional deliberate indifference to [Mr. Bowen’s] Eighth Amendment rights.’ . . . These defendants therefore are not entitled to qualified immunity at this stage of the proceedings.”)

*McNeeley v. Wilson*, No. 15-14023, 2016 WL 1730651, at \*6 (11th Cir. May 2, 2016) (not published) (“Here, there is evidence in the record that both Bertuzzi and Wilson knew McNeeley had been sprayed with pepper spray; both were present an hour later when he was put in the four-point restraints chair, and complaining about the effects of pepper spray; and neither did anything to allow him proper decontamination. The Defendants also admit in the reply brief that Lieutenant Wilson knew McNeeley was being held in the chair without a decontamination shower for several hours after being sprayed with chemical agents. *Danley* clearly established that these allegations articulate an Eighth Amendment violation, and thus Lieutenant Wilson and Corporal Bertuzzi were not entitled to summary judgment on the supervisory liability claim.”)

*Smith v. Owens*, 625 F.3d 924, 928 (11th Cir. 2015) (“As to Supervisory Defendant Bruton, Plaintiff alleged in his complaint that Bruton acted with deliberate indifference to his safety by failing to protect him from the violent cellmate who stabbed him. By asserting that Bruton had sole authority to determine cell assignments and that he used this authority to personally ensure that all of Plaintiff’s cellmates were gang members, Plaintiff sufficiently alleged a causal connection for § 1983 purposes. . . . Moreover, Plaintiff adequately alleged that Bruton knew of the danger and had the means to cure it. . . . Specifically, Plaintiff alleged that his cellmate was ‘known for stabbing incidents,’ and that Bruton knew or should have known of this fact. Accordingly, when viewed in the light most favorable to Plaintiff, he alleged that there was a substantial risk of serious harm to him from attack by this cellmate. . . . Moreover, by asserting that Bruton controlled cell assignment, Plaintiff sufficiently alleged that Bruton had the means of preventing the danger. Accordingly, the district court erred by dismissing Plaintiff’s § 1983 deliberate indifference claim against Bruton, and we vacate and remand for further proceedings as to this claim.”)

*Smith v. City of Sumiton*, 13-13416, 2014 WL 4211070, \*2-\*4 (11th Cir. Aug. 27, 2014) (unpublished) (“Our *Franklin* decision is binding precedent that Smith’s ‘knew or should have known’ allegation ‘falls short of [the] standard’ for deliberate indifference. . . . To state a claim for deliberate indifference, a plaintiff must show: ‘(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than gross negligence.’ . . . Absent an allegation that the supervisor or city ‘*actually knew* of the serious risk [the offending corrections officer] posed,’ . . . there is no claim. We note that a paragraph of Smith’s second amended complaint does allege that: ‘Defendants and its officials knew, should have known, or participated in acts of sexual harassment and abuse inside the City of Sumiton Jail or by Sumiton Police Officers or employees in the past and *were aware* of previous misconduct of [Daughter], but failed to correct those actions.’ . . . Another paragraph alleges that ‘Defendants *had knowledge* of these acts and the potential for this kind of action taken by . . . Daughter based on previous similar acts he had committed.’ . . . Smith seems to have abandoned those allegations in her brief, which argues that

‘knew or should have known’ is enough. . . Even if she has not abandoned any argument based on those allegations, her second amended complaint is still due to be dismissed because those allegations are too conclusory to state a claim. . . There is no allegation that connects Daughtery’s alleged earlier misconduct with the defendants’ alleged knowledge of it. . . Disregarding, as our two-prong approach requires us to do, Smith’s conclusory allegations about the City and Chief Burnett’s awareness or knowledge of Daughtery’s past misconduct, paragraph nos. 12–15 give us the following properly pleaded facts: (1) in mid-October 2010, Smith was arrested by the City’s police department for unpaid traffic tickets and taken to the City’s jail; (2) on her first night in jail, Daughtery, a City police officer, threatened and sexually assaulted her; (3) some unspecified time before assaulting Smith, Daughtery had ‘committed sexual harassment and/or sexual assault against individuals arrested or incarcerated by the City.’ While those allegations are enough to plead that Smith was assaulted, they do not support a plausible claim that the City or Chief Burnett was aware of or knew about Daughtery’s alleged prior sexual harassment or assaults. . . Nor has Smith provided factual matter that would support a plausible claim for supervisory or municipal liability on a ground other than the City’s or Chief Burnett’s alleged knowledge of Daughtery’s prior misconduct. For these reasons, the district court’s judgment dismissing Smith’s second amended complaint is **AFFIRMED.**”)

*Hatcher ex rel. Hatcher v. Fusco*, 570 F. App’x 874, 877-78 (11th Cir. 2014) (“In this case, the well-pled factual allegations support a reasonable inference that Fusco personally attempted to dissuade Hatcher from participating in ‘Day of Silence.’ According to the complaint, Fusco repeatedly threatened Hatcher and her parents with ‘consequences’ for Hatcher’s participation. We reject Fusco’s argument that the only reasonable inference is that she was following the superintendent’s orders. . . The allegations also support a reasonable inference that Fusco either directed that Hatcher be disciplined or actually knew that she would be and failed to intervene. The complaint indicates that Fusco directed teachers to report on students who were participating in ‘Day of Silence.’ Hatcher was one such student. Hatcher was summoned to the dean’s office and informed that she was being punished because Fusco had ‘told [her] not to do this.’ The next business day, Fusco reported on Hatcher’s discipline to the superintendent. It is reasonable to infer that Fusco may have caused or knowingly failed to prevent Hatcher’s in-school suspension.”)

*Key v. Lundy*, 563 F. App’x 758, 760 (11th Cir. 2014) (“As in our recent decision in *Franklin*, the Defendants here argue that a claim of deliberate indifference is no longer sufficient after *Ashcroft v. Iqbal*. . . . Instead they argue that Key must allege a purposeful and intentional violation of her constitutional rights. However, we rejected that argument in *Franklin*, another Eighth Amendment case. . . As we noted in *Franklin*, the factors necessary to establish a § 1983 claim will vary with the constitutional provision at issue. . . We also distinguished *Iqbal*—which involved claims of invidious discrimination—from the Eighth Amendment deliberate indifference claim at issue in *Franklin*. . . Similarly, Key’s § 1983 claims against the Defendants for violations of the Eighth Amendment can survive without allegations of purposeful and intentional conduct as long as she meets this Circuit’s standard for deliberate indifference. *Franklin* also addressed the sufficiency of allegations of supervisory liability under the deliberate indifference standard in a factual

scenario strikingly similar to that alleged by Key. . . Because the parties and the district court did not have the benefit of our decision in *Franklin*, we remand with instructions that the district court give Key an opportunity to amend her complaint in accordance with that decision. . . The Defendants may then renew their motion to dismiss if warranted.”)

*Keith v. DeKalb County, Ga.*, 749 F.3d 1034, 1048 & n.46, 1050, 1053 & n.56 (11th Cir. 2014) (“[I]n order to prove that Sheriff Brown violated Cook’s constitutional rights, Keith must show that the Sheriff Brown had subjective knowledge of a risk of serious harm to Cook and that he recklessly disregarded that risk. . . Keith does not allege that Sheriff Brown personally participated in the alleged constitutional violations. Therefore, if Sheriff Brown is to be held liable, he must have failed to correct a widespread pattern of constitutional violations or he must [have] adopted a custom or policy that deprived Cook of his constitutional rights. . . Keith does not allege that Sheriff Brown directed his subordinates to act unlawfully or that he knew that his subordinates would act unlawfully and that he failed to stop them from doing so. . . .Distilled to its essence, Keith’s main allegation is that Sheriff Brown created a substantial risk of harm by relying on MHM staff’s determination—that an inmate did not pose a substantial risk of harm to other inmates—in housing the inmate. Of course, Keith does not overtly make this claim; to do so would reveal that Keith’s actual complaint is with MHM staff’s independent (and, in retrospect, possibly mistaken) determination that Adan did not pose a risk of harm to other inmates. Instead, Keith argues that Sheriff Brown created a substantial risk of serious harm by ‘failing’ to segregate mental health inmates with violent histories from those with nonviolent histories and by ‘failing’ to separate mental health inmates charged with a violent crime from those charged with a nonviolent crime. . . . In effect, Keith aims to hold Sheriff Brown liable for not disregarding the expert medical opinions of MHM staff. That is, because MHM staff could mistakenly determine that a mental health inmate does not pose a risk of harm to other inmates when in fact he does, Sheriff Brown must take affirmative steps to avoid the mistake. . . .Keith’s theory of liability does not square with the law. Simply put, the law does not require that Sheriff Brown ignore the determination and recommendation of MHM staff. A sheriff cannot be held liable for failing to segregate mental health inmates whom trained medical personnel have concluded do not present a risk of harm to themselves or others. . . Moreover, even if we assume that Sheriff Brown violated Cook’s constitutional rights, Keith has not demonstrated that it is ‘clearly established’ that a sheriff has a constitutional obligation to disregard the medical expertise of the very contractors he has hired to ensure that the inmates’ mental health is tended to. . . . Although the Supreme Court has left open the possibility that a single incident may prove sufficient to hold a supervisor liable for a failure to train, [citing *City of Canton*] we decline to use this case as the vehicle for flushing out the Supreme Court’s hypothetical basis for § 1983 relief. In *Canton*, the Supreme Court hypothesized a police force that gives officers firearms but fails to provide any training regarding the constitutional limitations on the use of deadly force, concluding that the need to provide such training would be ‘so obvious’ that the failure to do so could amount to deliberate indifference. . . It is not similarly obvious that the ‘failure to train’ at issue in this case amounts to deliberate indifference. . . .As the Supreme Court has indicated, ‘[a] [supervisor’s] culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.’ *Connick*, — U.S at —, 131 S.Ct. at 1359.

Keith’s claim that Sheriff Brown violated Cook’s constitutional rights by failing to adequately train detention officers is especially tenuous because not only does she fail to demonstrate that Sheriff Brown was on notice, she also fails to demonstrate how ‘better training’ would have prevented the incident leading to Cook’s death. Therefore, like her claims discussed in subpart A, her failure to train claim must also fail.”)

**Harrison v. Culliver**, 746 F.3d 1288, 1299, 1300 (11th Cir. 2014) (“The evidence demonstrates that Warden Culliver was on notice that inmate-on-inmate assaults occurred on the back hallway; his signature is on each of the incident reports detailing assaults that occurred on the back hallway from 2005 until August 6, 2008. However, the incident reports indicate that only four assaults occurred on the back hallway from 2005 until the day Harrison was assaulted. . . Although assaults did occur throughout Holman, and some did involve weapons fashioned out of a utility knife, box cutter, or razor, . . .the evidence of inmate-on-inmate assault involving weapons does not indicate that inmates were ‘exposed to something even approaching the constant threat of violence.’ . . Holman is a large institution—according to the District Court’s undisputed finding, Holman housed between 830 and 990 inmates during the relevant time period—and the thirty-three incidents involving weapons, only four of which occurred on the back hallway, are hardly sufficient to demonstrate that Holman was a prison ‘where violence and terror reign.’ . . Similarly, Holman’s policies for monitoring the back hallway did not create a substantial risk of serious harm. The evidence shows that, although a detention officer was not permanently stationed on the back hallway, at least one was assigned as a rover with responsibility for monitoring the back hallway. In addition, a camera monitored the back hallway, and although it did not record, it provided a live stream that a detention officer monitored twenty-four hours a day. . .Additionally, Warden Culliver took reasonable steps to reduce the inmate traffic on the back hallway, relocating the Masjid . . .and library to other areas of Holman. The limited number of inmate-on-inmate assaults on the back hallway from 2005 until August 2008 indicates that the area was fairly secure already. Although placing a detention officer on the back hallway to monitor inmates may have improved the security at Holman, Warden Culliver’s decision not to do so did not create a substantial risk of harm. . . The limited number of assaults involving weapons fashioned from box cutters or razor blades—around eleven of a total thirty-three assaults involving weapons over a three year period—is insufficient to establish that Warden Culliver was constructively aware of a pattern of detention officers failing to follow the Standard Operating Procedures. Although we are unable to pin down precisely how many assaults involved box cutters procured through the hobby shop—five incident reports indicate that a box cutter was used, but they do not indicate from where the inmate obtained the box cutter. . .the record fails to demonstrate that any lapses in oversight of cutting instruments created a substantial risk of excessive inmate-on-inmate violence.”)

**Franklin v. Curry**, 738 F.3d 1246, 1250, 1251, 1252 n.7 (11th Cir. 2013) (per curiam) [Note Judge Ripple from 7th Cir. sitting by designation] (“In analyzing Franklin’s claims against the Supervisory Defendants, the district court erred by finding allegations that they ‘knew or should have known’ of a substantial risk of serious harm sufficient to state a deliberate indifference claim.

Deliberate indifference requires more than constructive knowledge. The district court began its analysis correctly, stating that, ‘to establish supervisory liability under § 1983, a plaintiff must allege that the supervisor personally participated in the alleged unconstitutional conduct or that there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation.’ . . . The district court then explained that a plaintiff can show a causal connection, *inter alia*, when ‘the supervisor’s policy or custom resulted in deliberate indifference.’ . . . To this point, the district court’s analysis was sound. However, the court then went astray when it concluded that Franklin had alleged a causal connection, stating: Franklin alleges that a causal connection exists because Sheriff Curry was *on notice* of Officer Gay’s alleged conduct and the need to correct this practice, but failed to do so, and because Sheriff Curry’s policy or custom resulted in deliberate indifference, and [w]ith respect to Officers Samaniego, Burchfield, Fondren, Corbell and George, Franklin alleges that they too *knew or should have known* of Officer Gay’s pattern of inappropriate conduct with female detainees and inmates but ‘were deliberately indifferent...’ . . . In reaching these conclusions, the district court neglected to analyze whether Franklin had properly alleged deliberate indifference. In fact, the elements of deliberate indifference do not appear anywhere in the district court’s order. . . Its first step should have been to identify the precise constitutional violation charged—in this case, deliberate indifference—and to explain what the violation requires. . . Had the district court done so, Franklin’s failure to allege the required elements would have been apparent. Deliberate indifference requires the following: ‘(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than gross negligence.’ . . . Franklin’s allegations that the Supervisory Defendants ‘knew or should have known’ of a substantial risk clearly fall short of this standard. . . . Franklin failed to allege the Supervisory Defendants *actually knew* of the serious risk Gay posed even in the most conclusory fashion. . . . As part of their appeal, Appellants argue that under *Iqbal* supervisors can only be liable for constitutional violations if a plaintiff alleges purposeful and intentional conduct. We reject this argument. Appellants ignore the *Iqbal* Court’s caution that ‘[t]he factors necessary to establish a [claim] will vary with the constitutional provision at issue.’ . . . The discussion of purposeful intent in *Iqbal* pertained to claims of invidious discrimination, not deliberate indifference. . . Nothing in *Iqbal* suggests that supervisors cannot be held liable for deliberate indifference toward risks posed by their subordinates or that such liability requires a higher *mens rea* than any other deliberate indifference claim. So long as a supervisor’s own conduct—and not that of his subordinate—constitutes deliberate indifference, his status as a supervisor changes nothing.”)

***Estate of Bearden ex rel. Bearden v. Anglin***, No. 12–15572, 2013 WL 5788569, \*2-\*4 (11th Cir. Oct. 29, 2013) (not published) (“As a supervisor, Anglin can be liable for either his personal participation in the alleged constitutional violation or his actions as a supervisor in creating a custom or policy that caused his subordinates to commit the constitutional violation. . . ‘The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so.’ . . . ‘The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.’ . . Under this

standard, perfect efforts are not required of jailers, and where the jail has standard operating procedures to protect at-risk detainees, these usually will be sufficient to confer qualified immunity, even when aspects of the system are imperfect. . . Additionally, the lack of a written suicide policy, in and of itself, does not impose liability automatically. . . In this case, there are no substantiated allegations that Anglin was present at the time that Bearden committed suicide or that he was involved personally in her care at the jail. . . As a result, the only possible basis for liability as to Anglin is in his role as a supervisor and jail administrator, establishing the anti-suicide procedures at the jail and overseeing their implementation. The Estate faults Anglin for failing to create a suicide policy, changing the medical staffing plan to eliminate some off-site treatment, and maintaining cells with anchor points. To establish knowledge of serious risk, the Estate points to Anglin's knowledge of the previous suicides at the Bay County Jail, all of which were prior to Anglin's assumption of control of the jail. This was the key fact relied upon by the district court in altering its judgment. There is no evidence on the record, however, as to whether the suicide rate was unusually high or whether the suicides were the result of the failure of a common aspect of the jail's anti-suicide program. Without this type of information, Anglin could not have possessed personal knowledge of a serious risk to suicidal prisoners that was created by the jail's medical program so that he could be held to have purposefully or recklessly disregarded such risk. Additionally, these prior suicides occurred under the private administrator's system, portions of which had been adjusted. Under the new policies, no suicides occurred that could have put Anglin on notice of serious risks. Although it appears that Anglin was familiar with these incidents, at least somewhat, based on his role in overseeing the county's contract and planning the jail's transition, no evidence suggests that he had particular knowledge about how those inmates committed suicide so as to alert him of serious problems with the cells. In fact, out of the three cases of suicides executed by a ligature device, at least one of them occurred in a manner substantially different from Bearden's suicide, namely in a bathroom rather than in a cell. As a result, the district court and the Estate both misjudged the value of this knowledge in bolstering the Estate's claim. These facts do not suggest that Anglin was aware of the potential suicide risk associated with the mesh door being used as an anchor point. The Estate's position would impose a duty to suicide-proof virtually all cells, a duty not required by the Constitution. Without knowledge of the particular serious risk at issue, Anglin could not have been deliberately indifferent, and therefore no § 1983 action can be maintained.”)

***Hendrix v. Tucker***, No. 13–10050, 2013 WL 4504595, \*1, \*2 (11th Cir. Aug. 26, 2013) (not published) (“After careful consideration, we conclude that the district court did not err in dismissing Hendrix’s claim under § 1915(e)(2)(B)(ii) because the complaint did not ‘contain sufficient factual matter, accepted as true, to state a claim to relief’ against the defendants, based on a theory of supervisory liability. Supervisors can be held ‘liable under ... § 1983, for the unconstitutional acts of [their] subordinates if [they] personally participated in the allegedly unconstitutional conduct or if there is a causal connection between [their] actions ... and the alleged constitutional deprivation.’ . . A plaintiff may establish a causal connection by showing that: (1) ‘a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation and he fail[ed] to do so’; (2) ‘the supervisor’s improper custom or policy le[d]

to deliberate indifference to constitutional rights’; or (3) ‘facts support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so.’. . . Even if Hendrix’s complaint is construed liberally, . . . it was insufficient to support supervisory liability. . . . Hendrix’s amended complaint alleges two potential grounds for supervisory liability. First, Hendrix attempts to establish a causal connection by arguing that the defendants were ‘on notice of the need to correct the alleged deprivation and [they] fail[ed] to do so.’. . . Hendrix asserts that the defendants were on notice because they were aware of his administrative grievances and state court litigation. However, ‘[t]he deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.’. . . And, as demonstrated by, for example, the outcome of the state court litigation, which determined that Hendrix’s claims had no merit, there was not ‘obvious, flagrant, [and] rampant’ abuse here, sufficient to support supervisory liability. Second, Hendrix’s complaint states there is ‘a long standing policy, practice, and custom of treating similarly situated prisoners differently in this application of gain time.’. . . However, Hendrix does not plead any specific facts to support this conclusory statement. Hendrix’s ‘vague and conclusory’ statements are insufficient to support supervisory liability.”)

*Goodman v. Kimbrough*, 718 F.3d 1325, 1334 (11th Cir. 2013) (“Goodman has adduced no evidence that either Boland or Feemster was subjectively aware of the peril to which Goodman was exposed on the night in question, and that failure is fatal to his claim. And though Goodman points to the officers’ failure to conduct head counts and cell checks and their disengagement of the emergency call buttons in support of his assertions, the fact that the officers deviated from policy or were unreasonable in their actions—even grossly so—does not relieve Goodman of the burden of showing that the officers were subjectively aware of the risk; in other words, he cannot say, ‘Well, they should have known.’ Were we to accept that theory of liability, the deliberate indifference standard would be silently metamorphosed into a font of tort law—a brand of negligence redux—which the Supreme Court has made abundantly clear it is not. . . . Our decision in this case should not be taken to condone Boland and Feemster’s actions. To the contrary, we are disturbed by the dereliction of duty that facilitated the violence visited upon Goodman while he was under the officers’ charge. But we are federal judges, not prison administrators, and the standards for coloring a constitutional claim in this area of the law are exacting for the very purpose of preventing federal judges like us from meddling, even by our best lights, in the administration of our nation’s prisons. . . . As we see it, the fact that jailers in Clayton County did not enter every cell in accordance with policy and commonly deactivated emergency call buttons is simply insufficient to meet the ‘extremely rigorous standard for supervisory liability’ that our cases demand in cases such as these. . . . We are unable to conclude that these policy violations are sufficient to create a genuine issue of fact as to the existence of a custom, so settled and permanent as to have the force of law, that ultimately resulted in deliberate indifference to a substantial risk of serious harm to Goodman. . . . That is especially so in light of the undisputed evidence that Officers Boland and Feemster were disciplined—and in fact recommended for termination—following their violations of Sheriff’s Department policy on the night Goodman was injured. . .

And all of that says nothing about the remarkable fact that Goodman’s complaint is bereft of any allegation that Sheriff’s Department policy or custom actually caused Goodman’s injuries. The district court did not err in granting summary judgment for Sheriff Kimbrough.”)

*McCreary v. Parker*, 456 F. App’x 790, \_\_\_ (11th Cir. 2012) (“[S]upervisors can be held liable for subordinates’ use of excessive force against inmates in violation of the Eighth Amendment on the basis of supervisory liability under 42 U.S.C. § 1983. Supervisory liability under § 1983 occurs when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation.’ *Valdes v. Crosby*, 450 F.3d 1231, 1236 (11th Cir.2006) (quotations and citations omitted). There is no allegation that Parker himself directly took part in the decision to place McCreary in Evans’s cell. As for the other method by which Parker could be responsible for his subordinates’ actions, a ‘causal connection may be established when: 1) a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he or she fails to do so; 2) a supervisor’s custom or policy results in deliberate indifference to constitutional rights; or 3) facts support an inference that the supervisor directed subordinates to act unlawfully or knew that subordinates would act unlawfully and failed to stop them from doing so.’ . . . Parker argues that he is being denied immunity simply because a death occurred in an overcrowded jail. However, Plaintiff has alleged plausible facts indicating that Parker met two of the *Valdes* factors. . . .Plaintiff alleged that Parker instituted a policy of double-celling inmates who were in disciplinary or administrative holding. Here, due to Parker’s double-celling policy, Evans was not allowed to be quartered by himself, and this ultimately resulted in McCreary—who had not yet been convicted of any crime—being celled with an inmate who had threatened to cause serious injury to any young black men who were quartered with him. Plaintiff also alleges that Parker had publically admitted that the jail was dangerous due to the overcrowding. Parker had received an inmate Self Report Survey that indicated dangerous conditions, but Plaintiff alleges that Parker’s response was merely to complain about inmates being allowed to participate in a survey. Plaintiff also alleged that Parker himself had been informed by inmates that staff members were placing certain inmates together in order to increase the likelihood of violence—the same thing that Plaintiff alleges happened to McCreary. Given Parker’s alleged knowledge of the increasing frequency of inmate-on-inmate violence, Judge Edelstein’s report, and allegations that inmates had repeatedly complained to Parker about being quartered with dangerous inmates and Parker’s failure to correct same notwithstanding his ability to do so, as well as the operation of Parker’s own policy of double-celling in the face of these circumstances, Plaintiff has pleaded sufficient facts to state a claim against Parker that is plausible on its face.”)

*AFL-CIO v. City of Miami*, 637 F.3d 1178, 1190 (11th Cir. 2011) (“A supervisor can be held liable for the actions of his subordinates under § 1983 if he personally participates in the act that causes the constitutional violation or where there is a causal connection between his actions and the constitutional violation that his subordinates commit. . . . A causal connection can be established if a supervisor has the ability to prevent or stop a known constitutional violation by exercising his supervisory authority and he fails to do so. . . . The district court concluded that the plaintiffs failed

to bring forward any evidence that the defendants directly violated the plaintiffs' constitutional rights or that they directed that the plaintiffs' constitutional rights be violated. The district court also concluded that the plaintiffs failed to adduce any evidence that the defendants knew that the plaintiffs' constitutional rights were being violated and failed to intervene. We agree.”)

*Doe v. School Bd. of Broward County, Fla.*, 604 F.3d 1248, 1266, 1267 (11th Cir. 2010) (“Scavella did not personally participate in Hoever’s sexual assault of Doe. Therefore to impose liability on Scavella for Hoever’s constitutional violation, Doe must establish Scavella’s liability in a supervisory capacity. . . . She cannot do so. ‘It is well established in this circuit that supervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates’ unless the ‘supervisor personally participates in the alleged constitutional violation’ or ‘there is a causal connection between actions of the supervising official and the alleged constitutional deprivation.’. This requisite causal connection can be established in the following circumstances: (1) when a ‘history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so’ or (2) when a supervisor’s ‘improper custom or policy results in deliberate indifference to constitutional rights.’. For a history of abuse to be sufficiently widespread to put a supervisor on notice, the abuse must be ‘obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.’. We agree with the district court that Doe cannot show the requisite causal connection between Scavella’s actions and Hoever’s sexual assault of Doe based on his notice of Hoever’s ‘history of widespread abuse’ or his ‘custom or policy’ of deliberate indifference. ‘The standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate is extremely rigorous.’. Here, there is no basis for claiming that the two complaints against Hoever prior to Doe’s sexual assault rose to the level of sexual harassment similarly ‘obvious, flagrant, rampant and of continued duration.’. Also insufficient is Doe’s conclusory assertion of a custom or policy resulting in deliberate indifference to Doe’s constitutional right to be free from sexual assault. . . . Accordingly, in the absence of evidence that Scavella personally participated in Doe’s sexual assault, was on notice of a history of Hoever’s widespread abuse of female students, or had a policy in place permitting such assaults, Doe cannot show that Scavella has supervisory liability for Hoever’s deprivation of her constitutional right to be free from sexual abuse.”).

*Keating v. City of Miami*, 598 F.3d 753, 763-65 (11th Cir. 2010) (“Timoney, Fernandez, Cannon, and Burden argue that the Protesters failed to allege sufficient facts to establish a causal connection between their supervisory actions and the alleged constitutional violations by the subordinate officers. Therefore, we first review whether the Protesters’ complaint sufficiently alleges violations of the First Amendment under a theory of supervisory liability. . . . Specifically, the Protesters allege that Timoney, who is the Chief of the Miami Police Department, approved orders permitting the police line to advance while beating unarmed demonstrators and discharging projectiles and tear gas. . . The Protesters allege that Fernandez, Deputy Chief of the Miami Police Department and second in command to Timoney, made the decision to utilize ‘herding techniques’ to corral the demonstrators by personally directing the police lines to march northward. . . The Protesters allege that Cannon, a Captain in the Miami Police Department, directed the police lines

to begin discharging weapons at the unarmed demonstrators. . . . In light of the Protesters' allegations, we find that they satisfied the heightened pleading requirement for a § 1983 claim under a supervisory liability theory by alleging a causal connection established by facts that support an inference that Timoney, Fernandez, and Cannon directed the subordinate officers to act unlawfully. . . . The Protesters allege that Timoney, Fernandez, and Cannon committed a violation of the Protesters' First Amendment rights because their commands caused the subordinate police officers to disperse a crowd of peaceful demonstrators, including the Protesters, who were exercising their freedom of expression. . . . Because Timoney, Fernandez, and Cannon had the authority, and exercised that authority, to direct the subordinate officers to engage in unlawful acts to violate the Protesters' First Amendment rights, they likewise had the authority to stop the subordinate officers from exercising such unlawful acts. Therefore, because Timoney, Fernandez, and Cannon knew that the subordinate officers would engage in unlawful conduct in violation of the Protesters' First Amendment rights by directing such unlawful acts, they also violated the Protesters' First Amendment rights by failing to stop such action in their supervisory capacity. . . . However, Burden's alleged failure to stop the subordinate officers' unlawful activity did not *cause* the violations of the First Amendment because Burden did not have the authority to stop the subordinate officers from violating the Protesters' First Amendment rights, even though he was an authorized decisionmaker. Burden did not direct the subordinate officers to engage in unlawful conduct that violated the Protesters' First Amendment rights. Burden's ranking as a Major in the Miami Police Department is subordinate to that of Chief Timoney, and Chief Timoney directed the subordinate officers to engage in unlawful conduct. Burden and Timoney stood next to each other during the demonstration. It would be unreasonable to have expected Burden to stop the subordinate officers' conduct after Timoney directed the subordinate officers to engage in unlawful acts because Burden did not have any authority to contravene Timoney's orders. Additionally, the Protesters only allege that Burden was present when the subordinate officers engaged in the unlawful activity. Therefore, Burden did not violate the Protesters' First Amendment rights by failing to stop the subordinate officers from conducting such unlawful activity because his inaction did not cause the constitutional violations. The Protesters failed to allege a constitutional violation against Burden, and thus, Burden is entitled to qualified immunity.”).

*Edwards v. Fulton County*, No. 09-13591, 2010 WL 346383, at \*1 (11th Cir. Jan. 29, 2010) (not published) (“Ronald Edwards, an African-American male employed as a Community Development Specialist in Fulton County’s Department of Housing and Community Development, filed a § 1983 complaint against Fulton County and defendant-appellant Thomas Andrews, individually, alleging pay discrepancies. In the complaint, Edwards specifically alleged that he was paid less than women and white employees who performed the same duties, and that Andrews, as the County Manager, ignored memoranda notifying him of the discrepancies and continued the discriminatory practice. According to the complaint, Andrews’s actions constituted violations of the Equal Protection and Due Process Clauses.. . . Here, Edwards alleged that Andrews personally made the decision to continue discriminatory pay practices after these practices were repeatedly brought to his attention. Taking this allegation as true, which we must

at this stage of the proceedings, the complaint sufficiently alleges that Andrews's actions violated Edwards's clearly established constitutional right to equal protection and equal pay. Moreover, we disagree with Andrews's argument that the complaint failed to meet the heightened pleading requirement. The complaint contains 'a claim for relief that is plausible on its face,' and not merely 'an unadorned, the-defendant-unlawfully-harmed-me accusation.' [citing *Twombly* and *Iqbal*"]).

***Harper v. Lawrence County, Ala.***, 592 F.3d 1227, 1236, 1237 (11th Cir. 2010) ("Supervisory liability lies where the defendant personally participates in the unconstitutional conduct or there is a causal connection between such conduct and the defendant's actions. There are three ways to establish such a causal connection:

when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. Alternatively, the causal connection may be established when a supervisor's custom or policy ... result[s] in deliberate indifference to constitutional rights or when facts support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so.

*Cottone*, 326 F.3d at 1360-61 (internal quotations omitted) Here, because there are no allegations in the Complaint regarding the supervisors' personal participation in the denial of Harper's Fourteenth Amendment rights, we look to whether Plaintiff has alleged a 'causal connection.' Although Plaintiff does mention 'widespread' constitutional rights deprivations (*see* Compl. at 16), it seems that the bulk of her facts against Gene Mitchell, Kenneth Mitchell, and Brown allege 'causal connection' based on their customs or policies that resulted in harm to Harper. Specifically, Plaintiff alleges that those Defendants, who were responsible for the management and administration or oversight of the jail, had customs or policies of improperly screening inmates for alcohol withdrawal, improperly handling inmates addicted to alcohol or drugs, delaying medical treatment and restricting access to outside medical providers in order to save money, primarily using emergency medical treatment for physical injuries only, and also failing to train jailers in identifying inmates with alcohol dependency. . . . In sum, given the Complaint's factual detail about Harper's incident and the similar incident involving Parker just one month before, as well as the specific allegations regarding the customs or policies put in place by the supervisors, Plaintiff met both the Rule 8 and heightened pleading standards. . . Accordingly, we hold that Plaintiff sufficiently alleged that the supervisory Defendants violated Harper's Fourteenth Amendment rights based on their customs or policies.").

***Bryant v. Jones***, 575 F.3d 1281, 1299, 1300 (11th Cir. 2009) ("It is well established that liability in § 1983 cases cannot be premised solely upon a theory of *respondeat superior*. . . In *Brown v. Crawford*, 906 F.2d 667 (11th Cir.1990), we observed that supervisory liability occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official

must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences. . . . The evidence before the district court established that Jones contrived a broad plan to eliminate white managers and replace them with black managers so as to create a ‘darker administration.’ As a means of implementing this scheme, Jones and his administration would ‘eliminate’ the white managers’ positions rather than simply firing the white managers. His discriminatory intent was further made plain by his open expressions of racial animus, calling Bryant a ‘white bastard’ and declaring that he wanted to terminate Kelley because he felt she let ‘whites’ control the parks. . . . In sum, this evidence showed compellingly that Jones, as the CEO, was the architect of a racially discriminatory scheme, a scheme that was designed to produce the overt discrimination the plaintiffs suffered. Unquestionably, he spawned the claims the plaintiffs have brought against him.”).

**Gross v. White**, 340 F. App’x 527, 2009 WL 2074234, at \*2 (11th Cir. July 17, 2009) (“‘The standard by which a supervisor is held liable in his individual capacity for the actions of a subordinate is extremely rigorous.’ *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir.2003) (quotation marks and alteration omitted). A claim based on supervisory liability must allege that the supervisor: (1) instituted a custom or policy which resulted in a violation of the plaintiff’s constitutional rights; (2) directed his subordinates to act unlawfully; or (3) failed to stop his subordinates from acting unlawfully when he knew they would. *See Goebert v. Lee County*, 510 F.3d 1312, 1331 (11th Cir.2007). Gross alleged just the opposite. He stated that the jail’s rules and regulations required ‘Red Dot,’ violence-prone inmates to be separated from the general inmate population. He asserted that unnamed deputies broke those rules by placing him in a cell with a Red Dot inmate who was known to escape from his restraints and to be violent. Gross did not allege that White directed anyone to break the rules or that White knew anyone would do so. Gross’ allegations fail to meet the ‘extremely rigorous standard’ for supervisory liability under § 1983. *Cottone*, 326 F.3d at 1360. . . . ‘[S]upervisors can be held personally liable when either (1) the supervisor personally participates in the alleged constitutional violation, or (2) there is a causal connection between the actions of the supervisor and the alleged constitutional violation.’ *Id.* Gross did not assert that White personally violated his constitutional rights or caused the alleged violation to occur. He did not allege that there was any custom or policy of holding violence-prone, Red Dot inmates in jail cells with other inmates. He merely alleges that the deputies ‘knew about’ rules and regulations requiring these inmates to be kept separate from the general population and that they ‘ignored them’ by placing him in a cell with a Red Dot inmate who later attacked him. An allegation about an isolated occurrence is not enough to state a claim for deliberate indifference against White.”).

**Mathis v. Corizon Health Inc.**, No. 3:14CV469/MCR/EMT, 2015 WL 3651088, at \*4 (N.D. Fla. June 11, 2015) (“The factual allegations of the complaint must plausibly show that the supervisory official acted with the same mental state required to establish a constitutional violation against his subordinate; therefore, the court must first identify the precise constitutional violation charged and explain what the violation requires. . . . For example, in the Eighth Amendment context, a violation

requires deliberate indifference; therefore, the plaintiff's factual allegations must show that the supervisory defendants actually knew that the subordinate posed a risk of serious harm.”)

***Kendall v. Sutherland***, No. 1:13-CV-04263-RWS, 2014 WL 5782533, at \*13-14 (N.D. Ga. Nov. 5, 2014) (“[U]nlike the plaintiff in *Franklin*, Plaintiffs here allege facts beyond conclusory statements. By alleging that Jackson reported abuse to deputies and filed formal complaints, the Court finds—construing all reasonable inferences in favor of Plaintiffs—that Sheriff Warren knew about the abuse because it was reported through a formal grievance process. While Plaintiffs use ‘knew or should have known’ language like in *Franklin*, at the motion-to-dismiss stage Plaintiffs’ factual allegations about Jackson’s formal reports provide a plausible basis to infer Sheriff Warren’s subjective knowledge of Sutherland’s actions. At this point—September 2012—Sheriff Warren knew that Sutherland posed a serious risk to McLaughlin and others. Sutherland then continued to abuse McLaughlin until January 2013. Apparently, ‘[n]o action was taken to avoid further contact between Sergeant Sutherland and Plaintiff Kimberly McLaughlin after [Jackson’s complaints].’ . . . Further, after Sheriff Warren became aware of this risk, Sutherland victimized Plaintiff Brooks in December 2012 or January 2013 and then raped Plaintiff Kendall in January 2013. In view of the facts in the Second Amended Complaint, Plaintiffs plausibly allege that Sheriff Warren knew Sutherland was going to act unlawfully but failed to stop him. Consequently, the Court finds that Plaintiffs have stated a claim against Sheriff Warren for deliberate indifference.”)

***Pozdol v. City of Miami***, 996 F. Supp. 2d 1290, 1300 (S.D. Fla. 2014) (“The Court finds that the history of widespread use of excessive force by the Miami Police Department during the three year period preceding decedent’s shooting was sufficient to put Defendant Exposito on notice of widespread constitutional deprivations, which were not corrected. Moreover, the Court finds that the Complaint’s allegations, supported by the findings of the Department of Justice investigation and the Miami Police Department’s own finding of a 13% unjustified shooting rate for the 2008 to 2011 period, sufficiently pled the existence of a causal connection between Defendant Exposito’s failure to act and decedent’s constitutional deprivation. As the Court has determined, Defendant Exposito was put on notice and failed to act, it must next determine whether the right that he failed to protect was clearly established at the time of the challenged conduct. . . . At the time of decedent’s killing, the law clearly established that supervisory officials could be held liable under section 1983 for their subordinates’ constitutional violations where a causal connection exists between the supervisor’s failure to act and the constitutional violations. *Cottone*, 326 F.3d at 1360–61. Moreover, the Supreme Court determined long ago that ‘a police officer may not seize an unarmed, nondangerous suspect by shooting him dead.’ . . . Having found that Plaintiff has met her burden of alleging sufficient facts to defeat Defendant Borroto’s claim to qualified immunity, Defendants’ Motion to Dismiss Count II, to the extent that it asserts qualified immunity from civil liability and that Plaintiff failed to state a cause of action demonstrating entitlement to relief, is denied.”)

***Tolbert v. Trammell***, 2:13-CV-02108-WMA, 2014 WL 3892115, \*8, \*9 (N.D. Ala. Aug. 4, 2014) (“Supervisors can violate federal law and be held individually liable for the conduct of their subordinates under § 1983 ‘when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation.’ . . . Such a causal connection exists (1) when ‘a history of widespread abuse’ put the supervisor on notice of the need to correct the constitutional deprivation, and he failed to do so; (2) when the supervisor’s custom or policy resulted in deliberate indifference to constitutional rights; or (3) when facts support the inference that the supervisor directed his subordinates to act unlawfully or knew that they would and failed to stop them. . . . Plaintiff’s amended complaint uses buzzwords for supervisory liability but contains few supporting factual allegations. Plaintiff claims that ‘Defendant Trammell and other officers’ obvious, flagrant, and rampant behavior, has continued across a lengthy period of time and in doing so is sufficient to put Defendant Roper . . . on notice of the widespread abuse and deprivations which resulted in the violation of citizens’ constitutional rights....’ . . . The amended complaint also claims that Roper acted with ‘deliberate indifference’ and ‘as a matter of custom and practice.’ . . . This language clearly mirrors the first two categories of causal connections for supervisory liability above, but the court is not required to accept as true ‘legal conclusions[ ] couched as factual allegation[s].’ . . . Plaintiff’s bare assertions that Roper had notice and knowledge do not suffice; the ‘conclusory nature’ of such assertions ‘disentitles them to the presumption of truth.’ . . . Without Roper having notice or knowledge, plaintiff cannot demonstrate the causal connection required for supervisory liability under the first two categories. Plaintiff tacitly acknowledges the lack of factual support by stating, ‘that is what discovery is for,’ emphasizing the pleading standard, and arguing for time to gather more details during discovery. . . . Rebutting qualified immunity imposes more of a burden than stating a claim, however, and even stating a claim ‘does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.’ . . . Pleadings that fail to state a claim are not entitled to discovery to improve their factual foundation. . . . Lacking factual allegations to support plaintiff’s bare assertions, the amended complaint does not plausibly show a causal connection between Roper’s actions and Trammell’s alleged misconduct or satisfy the ‘extremely rigorous’ standard for § 1983 supervisory liability. . . . Therefore, the court concludes that Roper is entitled to qualified immunity, and plaintiff’s § 1983 claim as against Roper in his individual capacity based on the Fourth Amendment will be dismissed.”)

***Fitzgerald v. Corrections Corp. of America***, No. 5:13-cv-261-RS-EMT, 2014 WL 1687109, \*5, \*6 (N.D. Fla. Apr. 29, 2014) (“The factual allegations of the complaint must plausibly show that the supervisory official acted with the same mental state required to establish a constitutional violation against his subordinate. *See Franklin v. Curry*, 738 F.3d 1246, 1249–51 & n. 7 (11th Cir.2013) (in analyzing plaintiff’s claims against supervisory defendants, district court must first identify the precise constitutional violation charged and explain the elements of that particular violation, for example, deliberate indifference or other mens rea; second, the district court must weed out conclusory allegations and determine whether the facts alleged enable the court to draw the reasonable inference that the supervisor is liable for the alleged misconduct); *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1097 (9th Cir.2013) (“To bring a § 1983 action against a supervisor, the plaintiff must show: (1) the supervisor breached a legal duty to the plaintiff; (2) the breach of

duty was ‘the proximate cause’ of the plaintiff’s constitutional injury, and (3) the supervisor had at least the same level of mens rea in carrying out his superintendent responsibilities as would be required for a direct violation of the plaintiff’s constitutional rights ...”) (citing *Iqbal*, 129 S.Ct. at 1949); *Dodds v. Richardson*, 614 F.3d 1185, 1204 (10th Cir.2010) (after *Iqbal*, “[a] plaintiff may [ ] succeed in a § 1983 suit against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.”); *Whitson v. Stone Cnty. Jail*, 602 F.3d 920, 928 (8th Cir.2010) (after *Iqbal*, a supervisory defendant is liable only if he or she personally displayed the same mental state required to establish a constitutional violation by his or her subordinate). Filing a grievance with a supervisory person does not, alone, make the supervisor liable for the allegedly violative conduct brought to light by the grievance, even if the grievance is denied. *See Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir.2009); *Grinter v. Knight*, 532 F.3d 567, 576 (6th Cir.2008); *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir.1999); *see also Lomholt v. Holder*, 287 F.3d 683, 683 (8th Cir.2002) (defendants’ denial of plaintiff’s grievances did not state a substantive constitutional claim). . . . Plaintiff has not alleged facts suggesting Doyle actually knew of his serious medical need; nor has he alleged facts showing that Doyle personally participated in the delays in treatment, directed medical staff to delay, or knew that staff would delay and failed to stop them from doing so. Therefore, Plaintiff failed to state an Eighth Amendment claim against Defendant Doyle. The same is true with regard to Plaintiff’s claim against Defendant Warden Ellis. Plaintiff alleges Ellis failed to ‘fix the situation’ even after a CCA official directed him to do so. However, this vague allegation, devoid of any further factual enhancement, is insufficient to support an inference that Warden Ellis actually knew that his subordinates’ conduct posed a risk of serious harm, and that he disregarded that risk by conduct that was more than gross negligence.”)

***Higginbotham v. City of Pleasant Grove***, No. CV–12–BE–252–S, 2013 WL 5519577, \*47 (N.D. Ala. Sept. 30, 2013) (“The court notes that Defendants’ argument that a ‘knowledge and failure to stop’ cause of action is insufficient to state a cause of action after *Iqbal* is misplaced and ignores the discrimination context of *Iqbal*. Because the instant case does not allege discrimination based on race, religion, sex, or national origin, the requirement of ‘purposeful discrimination’ for supervisory liability that applied in *Iqbal* does not apply here.”)

***Smith v. City of Sumiton***, No. 6:12–cv–03521–RDP, 2013 WL 3357573, \*4 n. 11 (N.D. Ala. July 2, 2013) (“Defendant argues ‘[p]ost-*Iqbal*, there can be no § 1983 liability against a supervisor who did not personally participate in the alleged constitutional violation, and who took no affirmative action to directly cause the alleged constitutional violation.’ . . . However, in its post-*Iqbal* case law, the Eleventh Circuit has not limited supervisory liability to merely personal participation on the part of the supervisor, but instead has continued to allow liability with sufficient allegations of a ‘causal connection between supervisory actions and the alleged deprivation.’”)

***Powell v. Barrett***, No. 1:04–CV–1100–RWS, 2012 WL 567065, at \*4, \*5 (N.D. Ga. Feb. 17, 2012) (“Plaintiffs seek to establish deliberate indifference on the part of Defendant to Plaintiffs’ constitutional rights by showing that Defendant was on notice of the over-detentions and yet failed to take action to stop them. Specifically, Plaintiffs allege that Defendant ‘engaged in a pattern of continued inaction in the face of employees’ documented widespread abuse of [Plaintiffs’ constitutional rights] by failing to ensure their release on their Release Dates.’ . . . In support of her Motion for Summary Judgment, Defendant does not deny the problem of over-detentions; on the contrary, she admits that such a problem existed but argues that she ‘vigorously addressed [it] with a wide variety of actions’ and thus was ‘anything but deliberately indifferent’ to it. . . . In support of her argument that she was not deliberately indifferent to the problem of over-detentions, Defendant alleges that she took the following actions: ‘(1) request[ed] funding for additional staff; (2) [took] steps to increase the efficiency of existing staff; (3) work[ed] to improve the transfer of information from the courts to the Jail, so that releases could be processed more efficiently; and (4) hir[ed] a new Chief Jailer to study and improve Jail processes, particularly including the release process.’ . . . In this case, Plaintiffs argue that the aforementioned measures Defendant took were insufficient to address the problem of over-detentions and at times led to perverse results (i.e., longer delays). . . . However, the question the Court must answer is not whether Defendant approached the problem in the best way or achieved the best results, but whether she was ‘deliberately indifferent’—that is, whether she failed to take corrective action. As stated above, this is an ‘extremely rigorous’ standard to meet. . . . In spite of the evidence of negligence on the part of Defendant, under the rationale of *West*, the Court cannot conclude, based on the conduct set forth above, that Defendant acted with deliberate indifference to the problem of over-detentions at the Jail. Accordingly, the Court finds that Plaintiffs have failed to satisfy the standard for supervisory liability.”), *aff’d in part by Powell v. Sheriff, Fulton County Georgia*, 511 F. App’x 957 (11th Cir. 2013).

***McDaniel v. Yearwood***, No. 2:11–CV–00165–RWS, 2012 WL 526078, at \*16 (N.D. Ga. Feb. 16, 2012) (“In this case, the Court concludes that Plaintiff has failed to establish supervisory liability on the part of Sheriff Smith based on any failure to properly train or supervise the deputies. As a threshold matter, while Plaintiff makes vague and conclusory allegations of failure to train and supervise, Plaintiff has failed to allege facts making a plausible showing that Sheriff Smith in actuality failed to train or supervise the deputies in this case. Plaintiff does not allege what training or supervision the deputies did receive, if any, or what training or supervision was lacking and needed. Furthermore, and more importantly, Plaintiff has not alleged, much less with plausibility, that Sheriff Smith knew of a need for further training or supervision. Indeed, Plaintiff fails to allege even a single other incident in which a BCSO sheriff’s deputy conducted an unlawful arrest or used excessive force. By failing to allege any other incident of abuse, much less a history of widespread abuse, Plaintiff has failed to show that Sheriff Smith was on notice of a need to further train or supervise. Plaintiff has thus failed to show ‘the necessary causal connection between [Sheriff Smith] and the unconstitutional conduct at issue for supervisory liability to be imposed.’”)

*C.C. ex rel. Andrews v. Monroe County Bd. of Educ.*, No. 00-753-CG-M, 2011 WL 6029758, at \*2, \*3 (S.D. Ala. Dec. 5, 2011) (“On this second appeal, the Eleventh Circuit vacated and remanded the court’s order in light of the fact that the United States Supreme Court’s decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), was issued after briefing in this case had closed but before the court entered its summary judgment order. (Doc. 123, p. 8). The Eleventh Circuit instructed this court to reconsider the summary judgment order on the equal protection claim in light of *Iqbal*. . . . The court finds that this evidence is not sufficient for a reasonable jury to conclude that Payne purposefully discriminated against the plaintiffs because they are female. As Payne points out, one of the four students allegedly molested by Floyd, JH, was male. . . . Yet there is no allegation, nor any evidence, that Payne acted any more diligently or decisively with regard to JH’s allegation of abuse than with regard to the plaintiffs’ allegations. This is an admittedly low bar by which to judge Payne’s conduct. But, where *Iqbal* requires “purpose rather than knowledge” in order to overcome qualified immunity, . . . the court finds the converse: knowledge, but no purpose. This want of factual allegations as to Payne’s purposeful, discriminatory intent against female students based upon their gender compels the court to find that Payne is entitled to qualified immunity with regard to the § 1983 equal protection claim only.”)

*Howell v. Houston County, Ga.*, No. 5:09-CV-402 (CAR), 2011 WL 3813291, at \*25 n. \*13 (M.D. Ga. Aug. 26, 2011) (“In *Ashcroft v. Iqbal*, the Supreme Court noted that in the context of section 1983 suits ‘the term “supervisory liability” is a misnomer’ because ‘each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.’. . . The Supreme Court’s statement in *Iqbal* suggests that some of the Eleventh Circuit’s language regarding supervisory liability – for instance, the statement in *Gonzalez* regarding ‘[t]he standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate’ – is perhaps no longer technically accurate. Nonetheless, the Eleventh Circuit’s actual standards for ‘supervisory liability’ appear to only impose liability on a supervisor for his own misconduct. Indeed, the Eleventh Circuit has continued to quote its pre-*Iqbal* ‘supervisory liability’ standards after *Iqbal*, See *Bryant*, 575 F.3d at 1299.”)

*Steen v. City of Pensacola*, 809 F.Supp.2d 1342, 1346-48 (N.D. Fla. 2011) (“In short, the plaintiff may pursue the same claims against the City of Pensacola (official claim) and Chief Mathis (individual claim). The real question is whether, following the Supreme Court’s *Iqbal* decision in 2009, there is still such thing as a claim for individual supervisory liability under the factual circumstances in this case and, if so, whether Chief Mathis is entitled to the defense of qualified immunity on the facts presented. . . . Based on the plaintiff’s briefing and pleadings, the substantial amount of time spent discussing it during oral argument, and the language of Count III itself, the gravamen of the plaintiff’s claim against Chief Mathis is that he failed his ‘duty to create, adopt, and implement rules, regulations, practices and procedures which clearly direct police officers as to the appropriate use of *Tasers*’ (emphasis added); his failure to do so, the plaintiff maintains, constituted a ‘de facto’ custom, policy and practice that led to ‘the blatant use of excessive force’ by Officer Ard, which included ‘two high voltage [taser] darts’ that ‘intruded upon Steen’s physiological functions and physical integrity, and caused Steen extreme pain and death.’. . . The

claim against Chief Mathis, as noted, is premised on a theory of supervisor liability, since the allegation is not that Chief Mathis used excessive force (he was not even there), but that his policies brought about Officer Ard's use of excessive force. As will be shown, individual supervisory liability in Section 1983 cases is muddled and unsettled. . . . [T]he Supreme Court fomented disagreement on the availability of individual supervisory liability when it issued its split 5-4 decision in *Iqbal, supra*. . . . The courts have thus arrived at differing interpretations following the decision in *Iqbal*. . . . Despite uncertainty among academics and in some circuits, in the Eleventh Circuit, supervisory liability appears to have survived *Iqbal* – at least for the time being. *See, e.g., Harper v. Lawrence County, Ala.*, 592 F.3d 1227, 1236 (11th Cir.2010) (referencing without discussion the same, pre-*Iqbal* standard for supervisory liability); *Gross v. White*, 340 F. App'x 527, 531 (11th Cir.2009) (same). While the Eleventh Circuit has recognized that, 'in a § 1983 action, a plaintiff must [now] plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution,' . . . it appears that the court continues to allow supervisory liability when a causal connection is established (even when no 'individual actions' are present), for example, when the supervisor merely knows of a constitutional violation, has the authority to stop it, and fails to do so. . . . The plaintiff alleges in Count III that Chief Mathis '*knew* that his officers were using [tasers]' in such a way that posed 'a serious risk of personal injury,' and, in particular, that he was '*allowing* his police officers to use excessive and unreasonable force by ... fir[ing] Tasers into moving vehicles or at persons in operation of moving vehicles, in reckless disregard and deliberate indifference to the health and welfare of suspects [including Steen].' This would appear to be an allegation of 'knowledge,' not 'purpose,' and would therefore seem to fall within the *Iqbal* supervisory liability limitation. However, despite uncertainty concerning the viability of individual supervisory liability in some circuits and academia, this allegation would appear sufficient to state a claim under the 'causal connection' prong of individual supervisory liability and survive dismissal under Rule 12(b)(6) in the Eleventh Circuit.”)

***Brandon v. Williams***, No. CV410-183, 2011 WL 1984619, at \*4 (S.D. Ga. May 19, 2011) (“The pivotal allegation here, however, is that the gym-herding was routine (discovery may reveal if it was routine enough to impute notice to him) *and* that Williams himself saw the exposed baseball bats. '[W]hen facts support an inference that the supervisor ... knew that the subordinates would act unlawfully and failed to stop them from doing so,' *Harper*, 592 F.3d at 1236, the pleading threshold has been crossed. Brandon has just barely alleged that here, so Williams shall also remain in this case.”)

***Drury v. Volusia County***, No. 6:10-cv-1176-Orl-28DAB, 2011 WL 1625042, at \*6 (M.D. Fla. Apr. 28, 2011) (“Sweat argues that he is not alleged to have directly participated in the underlying sexual activity and that a basis for supervisory liability against him has not been sufficiently set forth. Sweat notes that 'the Plaintiff attempts to establish a causal connection by alleging widespread abuse of which Defendant Sweat either knew or should have know[n].' . . . Sweat's assertion that the Complaint's allegations are insufficient to overcome qualified immunity at this stage of the case is not well-taken. . . . Plaintiff has described widespread abuse and has set forth a

factual basis for Sweat’s knowledge or reason to know and his failure to take corrective action. She has sufficiently alleged a constitutional violation by Sweat, and Sweat will not be granted qualified immunity at this stage of the case.”)

***Allen v. City of Grovetown***, No. CV 110-022, 2010 WL 5330563, at \*8 (S.D. Ga. Dec. 20, 2010) (“The crux of Plaintiff’s claim against Defendant Robinson, individually, is that he failed to properly train or supervise Defendants Harden and Freeman in the methods of suicide prevention and thus directly contributed to Love’s death. . . . Plaintiff neither alleges facts showing that the need for more or different training or supervision was ‘obvious’ nor facts that could be reasonably construed as putting Defendant Robinson on any kind of notice as to a need for corrective measures. For instance, Plaintiff has not cited to prior instances of suicide or suicide attempts at the Grovetown facility. Likewise, Plaintiff has not set forth any facts indicating that Defendant Robinson had any actual knowledge with regard to the nature of Love’s risk of suicide.”)

***CC v. Monroe County Bd. of Educ.***, No. 00-0753-CG-M, 2009 WL 4456356, at \*7 (S.D. Ala. Nov. 25, 2009) (“[A] principal can be found to have violated a student’s right to be free from sexual harassment under supervisory liability theory. Supervisory liability under § 1983 ‘occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between action of the supervising official and the alleged constitutional deprivation.’ This causal connection ‘may be established and supervisory liability imposed where the supervisor ... [has a] deliberate indifference to constitutional rights.’ *Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir.1999); *see also Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452-3 (5th Cir .1994)(“a supervisor can be liable for ‘gross negligence’ or ‘deliberate indifference’ to violations of their subordinates.”); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir .1988); *Howard v. Bd. of Educ. of Sycamore Cmty. Unit Sch. Dist.*, 893 F.Supp. 808, 817-8 (N.D.Ill.1995)(holding that the plaintiffs asserted an adequate equal protection claim against a principal because the plaintiff asserted the principal was notified of harassment and intentionally took no action to stop the harassment.).”).

***Diaz-Martinez v. Miami-Dade County***, No. 07-20914-CIV, 2009 WL 2970468, at \*15 (S.D. Fla. Sept. 10, 2009) (“Defendants Calvert and Keller argue that *Iqbal* eliminates ‘supervisory liability’ claims, thereby foreclosing Plaintiff’s claim in Count VI. Defendants Calvert and Keller further contend that they are not being sued for any action taken as a supervisor (such as an order or instruction to the line officers), but, instead, are being sued for their own personal conduct as police officers. As they are already been sued in Counts I-IV for this alleged conduct, their argument continues, Plaintiff should not be permitted to maintain a redundant count for supervisory liability, when he is not suing Defendants Calvert and Keller for any supervisory actions, and when such a count is no longer recognized by the Supreme Court. The Court rejects Defendants Calvert and Keller’s reading of *Iqbal* as overbroad. The above-quoted passage from *Iqbal* stands for the proposition that a supervisor cannot be vicariously liable solely for the acts of a subordinate. However, there is no indication that the Supreme Court intended to wipe out the well-developed body of law surrounding supervisory liability, and Eleventh Circuit decisions post-*Iqbal* have

given no indication that § 1983 supervisory liability claims are now barred. *See Gross v. White*, 2009 U.S.App. Lexis 15939 (11th Cir. July 17, 2009) (citing *Iqbal* and, in another part of the opinion, summarizing Eleventh Circuit case law on supervisory liability claims). Additionally, regarding Defendants' argument that Plaintiff's supervisory liability claim against Defendants Calvert and Keller is redundant because it realleges conduct that they are already being sued for in Counts I through IV, this argument fails because Plaintiff is 'the master of the complaint,' *Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 831 (2002), and therefore he has the right to assert multiple and alternative theories of liability and have each considered on its own merits.").

***Young v. Holmes***, No. CV409-118, 2009 WL 2914188, at \*2 (S.D. Ga. Sept. 3, 2009) ("Here, Young names Ms. Miles, the head of the medical staff, and McArthur Holmes, the jail's administrator, as defendants. Nowhere in the complaint, however, does he offer any facts showing that they were directly involved in or caused any of the deprivations or injuries Young complains of. His only contact with Holmes was in a letter complaining of the incident, and he sat down with Miles to discuss it. . . Their knowledge of the incidents, standing alone, is an insufficient basis for § 1983 liability. *See Iqbal*, 129 S.Ct. at 1949. Nor does his statement that such 'incidents like the ones stated have become a classic routine practice at' the jail cure the supervisory problem. . . As discussed below, such conclusory statements, unsupported by factual allegations, are simply insufficient to show deliberate indifference on the part of the supervisory staff. *See Iqbal*, at 1949-50. Thus, Miles and Holmes should be dismissed from this suit." )

***Morales v. Palm Beach County Sheriff's Office***, No. 09-80636-CIV, 2009 WL 2589489, at \*3 (S.D. Fla. Aug. 19, 2009) ("Under appropriate circumstances the failure to adequately train may give rise to a claim cognizable under § 1983, *see City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). Mere conclusory allegations of failure to train, however, are not enough; and the courts have generally held that there is no affirmative constitutional duty on the part of a supervising public official to train, supervise, or discipline subordinates so as to prevent constitutional torts, except where the supervisor has contemporaneous knowledge of an offending incident or knowledge of a prior pattern of similar incidents, and circumstances under which the supervisor's inaction could be found to have communicated a message of approval to the offending subordinate. . . The Eleventh Circuit has held that nothing less than a showing of gross negligence is required to establish liability for inadequate training. *Cannon v. Taylor*, 782 F.2d 947, 951 (11 Cir.1986).").

***Sutherland v. St. Lawrence***, No. CV407-096, 2009 WL 2900270, at \*4 n.9 (S.D. Ga. Aug. 17, 2009) (" In *Iqbal*, the Supreme Court held that 'the term Asupervisory liability' is a misnomer.... Because 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.' . . Thus, it rejected the plaintiffs claim that a supervisory official can be liable for *purposeful* discrimination based only upon his knowledge and acquiescence in the conduct (i.e., something less than purpose). . . The dissent characterized the majority holding as a major break from prior precedent that will severely limit a litigant's ability to maintain a § 1983 or *Bivens*

action against supervisory officials. . . Indeed, it states that the Court has done away with supervisory liability entirely. . . This Court, however, is not convinced that *Iqbal* presents such a sea change; instead, it is a clarification. Plaintiffs must offer facts showing that defending supervisory officials acted with the same level of culpability as their subordinates when they and their subordinates are charged with violating the same constitutional right. That holding is entirely consistent with past precedent. After all, the deliberate indifference framework has always required more than a supervisor’s ‘mere knowledge’ that a constitutional violation has occurred in order to state a viable claim against that official. The plaintiff must allege some facts showing that the supervisory official was, like his subordinate, deliberately indifferent to the plaintiff’s constitutional rights. The *Iqbal* dissent, on the other hand, seeks to impose a new rule. It would mix the culpability standards, allowing a supervisory claim based upon a lesser showing of culpability. Viewed in that light, this Court will continue to rely upon past precedent in making its supervisory liability inquiry.”).

***Russell v. Douglas County***, No. 1:09-CV-20-RWS, 2009 WL 2240387, at \*1 n.2 (N.D. Ga. July 27, 2009) (“The principles of supervisory liability that apply in § 1983 cases parallel the principles applied in *Bivens* actions. . . Writing in dissent, Justice Souter stated that the Supreme Court ‘eliminat[ed] *Bivens* supervisory liability entirely’ this past Term. *Ashcroft v. Iqbal*, \_\_U.S. \_\_, \_\_, 129 S.Ct. 1937, 1957, 173 L.Ed.2d 868 (Souter, J., dissenting). If Justice Souter fairly characterized the scope of the majority opinion in *Iqbal*, then it follows that supervisory liability under § 1983 has been ‘eliminated’ as well, and Russell’s claim fails for that reason.”).

#### **G. No Qualified Immunity From Compensatory Damages for Local Entities; Absolute Immunity From Punitive Damages**

Although an official sued in his or her individual capacity may raise qualified immunity in a suit brought against the individual for damages, *see generally Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court has held that a local government defendant has no qualified immunity from compensatory damages liability. *Owen v. City of Independence*, 445 U.S. 622 (1980).

*See also Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, 877 F.3d 136, 142-43, 148-50 (3d Cir. 2017) (“Barna cites to no case of controlling authority from the Supreme Court or our Court supporting his position, and we have found none. To the contrary, we have twice upheld the temporary removal of a disruptive participant from a limited public forum like a school board meeting. . . .Notwithstanding the absence of precedential authority, Barna urges us to recognize that the right to participate in school board meetings despite engaging in a pattern of threatening and disruptive behavior was clearly established based on a handful of district court decisions, only some of which predate the defendants’ institution of the ban. . . .Turning to that inquiry, we believe that the circumstances of this case compel our review here. The District Court’s legally incorrect holding granting ‘judgment in favor of the Defendants on the basis of qualified immunity,’. . . directly contravenes the Supreme Court’s holding in *Owen*. The

availability of qualified immunity for a municipal entity is thus precisely the type of ‘pure question of law’ that commands our attention. . . . Holding otherwise would problematically permit the District Court’s pure legal error to stand uncorrected. . . . [W]e conclude that there are exceptional circumstances permitting review of the otherwise forfeited issue of the Board’s entitlement to immunity. Because the District Court erred in awarding qualified immunity to the Board, we will vacate with respect to the grant of summary judgment in the Board’s favor.”); ***Manning v. Cotton***, 862 F.3d 663, 671 (8th Cir. 2017) (“Deciding to uphold the district court’s denial of qualified immunity for the Officers does not resolve whether the City is entitled to summary judgment on the municipal liability claims. Moreover, this circuit has explicitly held that the question of whether a city ‘is liable under 42 U.S.C. § 1983 for failing to train its police force is not “coterminous with, or subsumed in” the question of whether a city’s officers are entitled to qualified immunity because ‘resolution of these two issues requires entirely different analyses.’”); ***Soto v. Gaudett***, 862 F.3d 148, 162-63 (2d Cir. 2017) (“The defense of qualified immunity protects a government official, sued for actions he took under color of state law, from claims for damages against him in his individual capacity. That defense does not belong to the governmental entity; the entity itself is not allowed to assert that defense. . . . And since a suit against a government official in his official capacity is the equivalent of a suit against the government entity, *see generally Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), the defense of qualified immunity is also unavailable to the individual sued in his official capacity[.]”); ***Mendiola-Martinez v. Arpaio***, 836 F.3d 1239, 1249-50 (9th Cir. 2016) (“The district court never determined whether the County Defendants’ policies led to a violation of Mendiola-Martinez’s rights under *Monell*. Instead, it ruled that Maricopa County and Sheriff Arpaio were entitled to qualified immunity on the shackling claims and granted summary judgment on that basis. The district court erred in doing so. . . . As permitted under *Pearson*, . . . the district court began with the second part of this inquiry and found that the constitutional right Mendiola-Martinez was seeking to enforce—to be completely free of restraints during labor and postpartum recovery—was not clearly established when she was in MCSO custody. But as a threshold matter, Maricopa County is not eligible for qualified immunity because counties ‘do not enjoy immunity from suit—either absolute or qualified—under § 1983.’ . . . Sheriff Arpaio is likewise not eligible for qualified immunity. When a county official like Sheriff Arpaio is sued in his official capacity, the claims against him are claims against the county. . . . Mendiola-Martinez brought this action against Sheriff Arpaio in his official capacity as the person who ‘oversees the operations of the Maricopa County jails and is responsible for and accountable for ultimate decisions of the Office.’ She does not contend that Sheriff Arpaio is personally liable for the alleged constitutional violations, nor does she allege that he is liable as a supervisor under a vicarious liability theory. . . . Accordingly, Sheriff Arpaio, like Maricopa County, is not eligible for qualified immunity and awarding summary judgment on that basis was improper”); ***Capra v. Cook County Bd. of Review***, 733 F.3d 705, 712 (7th Cir. 2013) (“Given *Monell* and the history of the Civil Rights Act, extending absolute immunity to the Board here would be a dramatic expansion of immunity that would severely limit the scope of section 1983 further than Congress intended and further than the Supreme Court ever has. Insulating municipalities from suit on a theory of quasi-judicial immunity when a policy, custom, or policymaker has violated the Constitution would, as the Supreme Court noted in *Monell*, drain that

important decision of its meaning. . . The Board is not protected by quasi-judicial absolute immunity [for decision revoking property tax reduction.]; **Beedle v. Wilson**, 422 F.3d 1059, 1068 (10th Cir. 2005) (“The Hospital nonetheless contends it is not liable because at the time it filed its state suit and opposed Mr. Beedle’s various motions to dismiss, the Hospital had a good-faith basis for believing it was not a governmental entity for § 1983 purposes and thus was not precluded from bringing a libel action. . . This contention approximates a qualified immunity defense in that the Hospital claims a reasonable official would not have known its actions violated a clearly established federal right. . . Such an argument is misplaced because a governmental entity may not assert qualified immunity from a suit for damages. . . A qualified immunity defense is only available to parties sued in their individual capacity.”); **Langford v. City of Atlantic City**, 235 F.3d 845, 850 (3d Cir. 2000) (“[W]e are satisfied and accordingly hold, as do *Monell* and *Carver*, that a municipality (in this case, Atlantic City) can be held liable for its unconstitutional acts in formulating and passing its annual budget.”); **Berkley v. Common Council of City of Charleston**, 63 F.3d 295, 302 (4th Cir. 1995) (en banc) (holding “that a municipality is not entitled to an absolute immunity for the actions of its legislature in suits brought under 42 U.S.C. § 1983.”). *Accord* **Carver v. Foerster**, 102 F.3d 96, 105 (3d Cir. 1996) (“We know of no circuit that currently accepts the doctrine of municipal legislative immunity under Section 1983.”); **Goldberg v. Town of Rocky Hill**, 973 F.2d 70, 74 (2d Cir.1992); **Woodall v. County of Wayne**, No. 17-13707, 2020 WL 373073, at \*6, \*8 (E.D. Mich. Jan. 23, 2020) (“[I]f Defendants continue to defend individual suits by invoking qualified immunity, plaintiffs may never even be able to reach the question of whether an underlying constitutional violation occurred unless they also prove *Monell* liability. . . The Wayne County Sherriff’s alleged *Monell* liability may very well be the lynch pin of all potential Wayne County illegal strip search cases. Answering the question once, for everyone, is the most efficient course of action. . . . Plaintiffs’ proposed class, and their four proposed subclasses, will be certified as for allegations against Wayne County and the Wayne County Sherriff under *Monell*.”); **Kessler v. City of Providence**, 167 F. Supp.2d 482, 490, 491 (D.R.I. 2001) (“In this case, Plaintiff is not seeking damages against Defendants Prignano and Partington; instead she seeks one day’s wages from the Police Department that she lost from the suspension. Therefore, Defendants can not assert the doctrine of qualified immunity as an affirmative defense. For this reason, the individual Defendants’ motion for summary judgment is denied; and therefore, the Defendant City of Providence’s motion to dismiss, which is inexorably tied to Prignano and Parrington’s motion for summary judgment, is also denied.”).

*See also* **Campos v. Fresno Deputy Sheriff’s Association**, No. 1:18-CV-1660 AWI EPG, 2021 WL 1577816, at \*4, \*8, \*10 & n.7 (E.D. Cal. Apr. 22, 2021) (“Together, *Owen*, *Leatherman*, and *Evers* can be read as standing for the proposition that, in order to redress constitutional wrongs, a municipality will be held liable for constitutional injuries caused by its practice, policy, or custom, irrespective of its officers’ ability to assert qualified immunity and irrespective of any good faith reliance on state statutes. This proposition would seem to undercut application of a good faith affirmative defense to a municipality. Recognizing the good faith defense for a municipality could negate *Owen*’s balancing and goal of ensuring the availability of compensation for injuries caused by municipal policies and practices. To the Court’s knowledge, and as confirmed by the

parties' briefing, no court in a reasoned decision has extended the good faith affirmative defense to municipalities. In light of *Owen*, *Leatherman*, and *Evers*, until the Supreme Court or the Ninth Circuit holds otherwise, this Court cannot hold that the County is entitled to assert the good faith affirmative defense. . . . In sum, after applying *Harper*, the Court concludes that *Janus* is to be applied retroactively. . . .The parties have been unable to find any cases post-*Janus* in which a municipality like the County has been held liable for pre-*Janus* conduct. . . . [T]he law is unsettled in the Ninth Circuit with respect to a municipality's liability under § 1983 when the municipality is following or acting in accordance with state law. Some courts find that there is no liability when the municipality follows a non-discretionary mandatory state law because the municipality did not make a policy decision. [citing cases] Some courts find or suggest that following state law, even if a non-discretionary, mandatory, state law duty is involved, does not relieve a municipality of liability. [citing cases] Other courts have noted that the issue has not been definitively settled. . . . Within the Ninth Circuit, at least, part of the disagreement involves how to interpret *Evers*. Given the divide, the Court will not decide the issue without more in depth briefing from the parties. . . . [U]ntil further proceedings occur, the Court cannot hold that the fact that Chandavong and Her are challenging the taking of vacation hours is immaterial. In sum, this appears to be a unique case. The ultimate resolution of the County's liability (if any) will have to await further proceedings. . . . In light of the arguments made in connection with the FDSA's motion to dismiss the SAC and the supplemental briefing received, the Court will not dismiss the third cause of action against the County for vacation hours involuntarily taken from Chandavong and Her pre-*Janus* when they were not members of the FDSA. . . .The Court at this time is not resolving the question of whether the County was under a mandatory duty, or what the effect of a non-discretionary mandatory duty on the County would be for purposes of § 1983. The Court is only noting the potential issues surrounding the proper classification of the vacation hours taken.”)

On the other hand, while punitive damages may be awarded against individual defendants under § 1983, *see Smith v. Wade*, 461 U.S. 30 (1983), local governments are immune from punitive damages. *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981). Note, however, that “*City of Newport* does not establish a federal policy prohibiting a city from paying punitive damages when the city finds its employees to have acted without malice and when the city deems it in its own best interest to pay.” *Cornwell v. City of Riverside*, 896 F.2d 398, 399 (9th Cir. 1990), *cert. denied*, 497 U.S. 1026 (1990).. *See also Trevino v. Gates*, 99 F.3d 911, 921 (9th Cir. 1996) (“Councilmembers’ vote to pay punitive damages does not amount to ratification [of constitutional violation].”).

*See also City of Hartford v. Edwards*, No. 17-3150, 2020 WL 110798, at \*5 (2d Cir. Jan. 10, 2020) (“*Edwards* also argues that, because excessive force is not a specific intent based claim, *see Graham v. Connor*, 490 U.S. 386, 397 (1989), the jury did not need to determine whether Officer May’s conduct was wilful or wanton in order to award compensatory damages. This highlights the fatal defect in *Edwards*’s reading of the statute. The problem is not what the jury needed to find to award compensatory damages; the problem is that the jury expressly found that Officer May’s conduct was ‘done maliciously or wantonly or [in] reckless disregard or

indifference to the rights' of Edwards. . . Such a finding is all that is necessary to trigger section 7-465's exception for wilful or wanton conduct under the facts of this case. Finally, Edwards argues that excusing municipalities from paying any damages on behalf of their employees when punitive damages are awarded would be an absurd result. This is an argument better directed to the Connecticut legislature, which has the authority to draft and amend statutes. But even as a policy matter, Edwards's argument is unpersuasive. Edwards himself recognizes that not all excessive force claims are predicated on wilful or wanton conduct. . . Moreover, there remains a multitude of situations in which plaintiffs can seek assumption of liability under section 7-465. For example, had the jury *not* awarded punitive damages, had Edwards not sought punitive damages, or had Edwards brought multiple claims against Officer May and the jury awarded punitive damages for one claim and not for another, this would have been a different case. Edwards exercised his right to seek punitive damages, which necessarily put the wilful or wanton nature of Officer May's actions at issue. The jury agreed with Edwards that Officer May's conduct caused him personal injury for which it awarded compensatory damages and that the nature of that same conduct required a punitive damages award. It is for this reason that Hartford need not pay on behalf of Officer May."); ***Chestnut v. City of Lowell***, 305 F.3d 18, 21, 22 (1st Cir. 2002) (en banc) (vacating award of punitive damages against City, remanding and giving plaintiff option of having new trial on issue of actual damages against City); ***Schultzen v. Woodbury Central Community School District***, 187 F. Supp.2d 1099, 1128 (N.D. Iowa 2002) (After an exhaustive survey of the case law and a comprehensive discussion of the issue, the court concludes : 'In light of the well-settled presumption of municipal immunity from punitive damages and the absence of any indicia of congressional intent to the contrary, the court finds that punitive damages are unavailable against local governmental entities under Title IX.');" ***Saldana-Sanchez v. Lopez-Gerena***, 256 F.3d 1, 12, 13 (1st Cir. 2001) (discussing cases where waiver of *City of Newport* immunity has been found).

*But see* ***Revilla v. Glanz***, 8 F.Supp.3d 1336, 1342, 1343 (N.D. Okla. 2014) ("The specific question presented by CHC's argument is whether the Court's holding in *City of Newport* should be extended to preclude recovery of punitive damages against a private entity such as CHC. As noted, CHC has presented no legal authority directly on point, and plaintiffs cite a few authorities in which district courts determined that punitive damages may be recovered against a private entity in a § 1983 suit. [collecting cases] Based upon all of these authorities, the Court is unable to apply the punitive damages immunity afforded municipalities under the *City of Newport* case to CHC, which is a private corporation. The reasoning of *City of Newport* seems largely hinged upon the fact that the traditional purposes of punitive damages (punishment and deterrence) would not be served by imposing punitive damages upon local governments, because taxpayers would foot the bill, governments would likely have to increase taxes or reduce public services, and such an award would place the local government's financial integrity in serious risk. . . Those same purposes do not apply to a private corporation. Accordingly, CHC's motion to dismiss the punitive damages claim is denied at this time.")

The Supreme Court had granted certiorari to address the following question: “Whether, when a decedent’s death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, Section 6-5-410 (“la. 1975), governs the recovery by the representative of the decedent’s estate under 42 U.S.C. Section 1983?” In *City of Tarrant v. Jefferson*, 682 So.2d 29 (“la. 1996), cert. dismissed, 118 S. Ct. 481 (1997), plaintiff sued individually and as a personal representative for the estate of his mother, alleging that Tarrant firefighters, based upon a policy of selectively denying fire protection to minorities, purposefully refused to attempt to rescue and revive his mother. On appeal from an interlocutory order in which the trial court held that the question of the survivability of Ms. Jefferson’s cause of action for compensatory damages under section 1983 was governed by federal common law rather than by Alabama’s Wrongful Death Act, the Supreme Court of Alabama reversed, holding that Alabama law governed plaintiff’s claim. Under the Alabama wrongful death statute, compensatory damages are not available. The statute allows only punitive damages.

Compare *Estate of Gilliam ex rel. Waldroup v. City of Prattville*, 639 F.3d 1041, 1048 (11th Cir. 2011) (“Gilliam, who died seven hours after the use of force, could not file a § 1983 claim that would have survived under Ala.Code § 6-5-462. At the same time, Gilliam’s estate could not assert a § 1983 claim through the wrongful death statute, Ala.Code. § 6-5-410, because it could not produce admissible evidence that the use of force caused Gilliam’s death. This case is, therefore, an unusual one, where application of Alabama law does not provide for survivorship. But, just because applying Alabama law causes the Estate to lose in this unusual case does not mean Alabama law is generally inconsistent with federal law. . . . And, with no inconsistency between Alabama law and federal law, we cannot, as the dissent proposes, craft a highly specific federal common law rule of survivorship that applies to the unique facts of this case. . . . Because the Alabama survivorship statute is not inconsistent with federal law, we must apply the statute as written to the facts of this case.”) with *Estate of Gilliam ex rel. Waldroup v. City of Prattville*, 639 F.3d 1041, 1050 (11th Cir. 2011) (Martin, J., dissenting) (“I respectfully dissent from the Majority’s opinion because I cannot agree that there is ‘no inconsistency between Ala.Code § 6-5-462 and federal law.’ To the contrary, I would conclude that the Alabama survivorship statute, to the extent that it permits the abatement of tort actions for wrongful conduct that immediately contributes to a person’s death, is inconsistent with both the abuse prevention and compensation goals underlying and embodied in 42 U.S.C. § 1983.”).

A municipality may still be subject to *Monell* liability where the individual officer is able to invoke qualified immunity. See, e.g., *Palmerin v. City of Riverside*, 794 F.2d 1409, 1415 (9th Cir. 1986).

Courts sometimes confuse the consequences that flow from two very different determinations. If the court or jury concludes that there is no underlying constitutional violation, then *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), would dictate no liability on the part of any defendant. (See discussion of “Derivative Nature of Liability,” *infra*) If, however, the determination is that there is no liability on the part of the individual official because of the

applicability of the second prong of qualified immunity, the law was not clearly established, it does not necessarily follow that there has been no constitutional violation and that the municipality cannot be liable.

*See, e.g., Meier v. City of St. Louis, Missouri*, 934 F.3d 824, 829 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2566 (2020) (“St. Louis also argues that regardless of its policy, it cannot be held liable because Meier has not brought claims against any individual SLMPD employee. It relies on *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018), in which we stated that ‘absent a constitutional violation by a city employee, there can be no § 1983 or *Monell* liability for the City.’. . . This argument misreads *Whitney*. Municipal liability requires a *constitutional violation* by a municipal employee, but it does not require the plaintiff to bring suit against the individual employee. *See Webb v. City of Maplewood*, 889 F.3d 483, 487–88 (8th Cir.) (“[O]ur case law has been clear . . . that although there must be an unconstitutional act by a municipal employee before a municipality can be held liable, there need not be a finding that a municipal employee is liable in his or her individual capacity.” (cleaned up)), *cert. denied*, — U.S. —, 139 S. Ct. 389, 202 L.Ed.2d 289 (2018). Assuming that the seizure of Meier’s truck violated her constitutional rights—an assumption that St. Louis does not dispute at this juncture—Meier has adduced evidence sufficient to establish St. Louis’s liability for that violation.”); *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 603 (9th Cir. 2019) (“When a municipal defendant’s motion for summary judgment is ‘inextricably intertwined’ with issues presented in the individual officers’ qualified immunity appeal, this court may exercise pendent party appellate jurisdiction. . . . In this context, the ‘inextricably intertwined’ concept is a narrow one. . . . Here, appellate resolution of the collateral appeal does not ‘necessarily’ resolve the pendent claim, for several reasons. . . . First, as we have explained, our qualified immunity determination with respect to Officer Brice rests solely on the ‘clearly established’ law prong; we do not reach the question of whether Officer Brice’s actions gave rise to a constitutional violation.”); *Evans v. City of Helena-West Helena, Arkansas*, 912 F.3d 1145, 1146 (8th Cir. 2019) (“While a municipality cannot be held liable without an unconstitutional act by a municipal employee, there is no requirement that the plaintiff establish that an employee who acted unconstitutionally is personally liable. . . . So even if the clerk personally has absolute or qualified immunity from suit and damages, that immunity does not foreclose an action against the City if the complaint adequately alleges an unconstitutional policy or custom and an unconstitutional act by the clerk as a city employee.”); *Bustillos v. El Paso Cty. Hosp. Dist.*, 891 F.3d 214, 222 n.6 (5th Cir. 2018) (“In dismissing the county liability claims, the district court stated that it had found the Doctors and Nurses ‘did not violate the constitution.’ This is not our understanding of the district court’s qualified immunity analysis, which found ‘the second qualified immunity prong dispositive.’ Granting of qualified immunity on the ‘clearly-established’ prong is not the same as holding that no constitutional violation occurred. That would conflate the two prongs of qualified immunity. Thus, a grant of qualified immunity based on the ‘clearly-established’ prong does not necessarily negate the constitutional violation element of a county liability claim, as the district court erroneously assumed.”); *Webb v. City of Maplewood*, 889 F.3d 483, 486-87 (8th Cir. 2018) (“[E]ven if we accepted the City’s premise that its officials all enjoy personal immunity from suit, it hardly

follows that they did not engage in any unlawful acts or that the City is thereby immune as well. Whether the challenged acts occurred, whether they were unlawful, and whether the City is liable for them under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), would still be open questions. . . . We have not always been as clear as we could have in discussing the relationship between individual and municipal liability. As the City notes, we have stated in the past that it is ‘a general rule’ that ‘for municipal liability to attach, individual liability first must be found on an underlying substantive claim.’ See *McCoy v. City of Monticello*, 411 F.3d 920, 922 (8th Cir. 2005). But in *McCoy* we used that language to explain why a city could not be held liable ‘on either an unconstitutional policy or custom theory or on a failure to train or supervise theory’ once it has been determined that the underlying official conduct was ‘objectively reasonable’ and thus did not violate the plaintiff’s rights. . . . In *McCoy* we cited six cases that allegedly applied the ‘general rule’; in five of them we simply held that because the challenged official conduct was not unconstitutional, the municipality had nothing to be liable for. . . . [I]t is now clear that the absolute immunity of its policymakers does not shield a city from liability for its policies. . . . [D]espite our occasional use of overbroad language, our case law has been clear since *Praprotnik* that although ‘there must be an unconstitutional act by a municipal employee’ before a municipality can be held liable, . . . there ‘need not be a finding that a municipal employee is liable in his or her individual capacity.’”); *Moya v. Garcia*, 895 F.3d 1229, 1240 (10th Cir. 2018) (McHugh, J., concurring in the result in part and dissenting in part), (*amended opinion on denial of rehearing en banc*), *cert. denied*, 139 S. Ct. 1323 (2019) (“I would reverse the district court’s order dismissing Plaintiffs’ claims against the County. But because the Defendants did not violate clearly established law, I would hold that the individual defendants are entitled to qualified immunity and, on that basis alone, partially affirm the district court’s order.”); *Groden v. City of Dallas, Texas*, 826 F.3d 280, 283 n.2 (5th Cir. 2016) (“The city argues we need not reach the merits of Groden’s appeal because the jury verdict in favor of Officer Gorka blocks Groden from appealing the dismissal of his suit against Dallas for the same constitutional violation. The city points out that, according to Groden’s complaint, Gorka was the only officer who carried out Dallas’ allegedly unconstitutional policy. Thus, if a jury found that Gorka did not violate the Constitution, then Dallas could not have violated the Constitution through Gorka. Under the city’s reasoning, the jury verdict renders the dismissal of Groden’s claims against the city correct—even if the dismissal had been erroneous when it occurred. See *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam). As we have said above, the city’s argument is flawed: we do not know whether the jury found that Gorka acted constitutionally when arresting Groden. The jury was charged on both the constitutional issue and on qualified immunity and subsequently rendered a general verdict. We cannot know which issue the jury found to be decisive. *Heller*’s holding applies only when ‘no issue of qualified immunity was presented to the jury.’ . . . Accordingly, the jury’s verdict for Gorka does not prevent Groden from appealing the dismissal of his claims against Dallas.”); *Askins v. Doe No. 1*, 727 F.3d 248, 253-55 (2d Cir. 2013) (“In dismissing Askins’s claim against the City, the district court relied on the proposition ‘that the City cannot be liable under *Monell* where Plaintiff cannot establish a violation of his constitutional rights.’ . . . The court explained: ‘All of the alleged constitutional violations in this case are either time-barred or barred by the doctrine of qualified immunity. Therefore, it cannot be said that any allegedly illegal City

policy caused Plaintiff a constitutional remediable injury, and no *Monell* claim lies against the City.’ . . . This conclusion reflects a misunderstanding of the relationship between the liability of individual actors and municipal liability for purposes of *Monell*. The court was entirely correct in stating that the City ‘cannot be liable under *Monell* where Plaintiff cannot establish a violation of his constitutional rights.’ . . . Unless a plaintiff shows that he has been the victim of a federal law tort committed by persons for whose conduct the municipality can be responsible, there is no basis for holding the municipality liable. *Monell* does not create a stand-alone cause of action under which a plaintiff may sue over a governmental policy, regardless of whether he suffered the infliction of a tort resulting from the policy. Liability under section 1983 is imposed on the municipality when it has promulgated a custom or policy that violates federal law and, pursuant to that policy, a municipal actor has tortiously [sic] injured the plaintiff. . . . Establishing the liability of the municipality requires a showing that the plaintiff suffered a tort in violation of federal law committed by the municipal actors and, in addition, that their commission of the tort resulted from a custom or policy of the municipality. . . . It does not follow, however, that the plaintiff must obtain a *judgment* against the individual tortfeasors in order to establish the liability of the municipality. It suffices to plead and prove against the municipality that municipal actors committed the tort against the plaintiff and that the tort resulted from a policy or custom of the municipality. In fact, the plaintiff need not sue the individual tortfeasors at all, but may proceed solely against the municipality. . . . Where the plaintiff does proceed against both the municipal actors alleged to have inflicted the tort and the municipality that promulgated the offensive policy, the plaintiff’s failure to secure a judgment against the individual actors would, indeed, preclude a judgment against the municipality *if* the ruling in favor of the individual defendants resulted from the plaintiff’s failure to show that they committed the alleged tort. But where the plaintiff has brought a timely suit against the municipality and has properly pleaded and proved that he was the victim of the federal law tort committed by municipal actors and that the tort resulted from an illegal policy or custom of the municipality, the fact that the suit against the municipal actors was untimely, or that the plaintiff settled with them, or abandoned the suit against them, is irrelevant to the liability of the municipality. By the same token, the entitlement of the individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is also irrelevant to the liability of the municipality. . . . The doctrine that confers qualified immunity on individual state or municipal actors is designed to ensure that the persons carrying out governmental responsibilities will perform their duties boldly and energetically without having to worry that their actions, which they reasonably believed to be lawful at the time, will later subject them to liability on the basis of subsequently developed legal doctrine. . . . That policy, however, has no bearing on the liability of municipalities. Municipalities are held liable if they adopt customs or policies that violate federal law and result in tortious violation of a plaintiff’s rights, regardless of whether it was clear at the time of the adoption of the policy or at the time of the tortious conduct that such conduct would violate the plaintiff’s rights. . . . To rule, as the district court did, that the City of New York escapes liability for the tortious conduct of its police officers because the individual officers are entitled to qualified immunity would effectively extend the defense of qualified immunity to municipalities, contravening the Supreme Court’s holding in *Owen*. The district court did not rule that Askins

failed in his amended complaint to allege that he was the victim of a constitutional tort committed by municipal actors, or that he failed to allege that the tort resulted from an unconstitutional custom or policy of the City, or that the suit against the City was untimely or otherwise defective. So far as the court has ruled up to now with respect to the suit against the City, the court has identified no deficiency in the plaintiff's amended pleading. . . Accordingly, there was no basis for dismissing the complaint against the City.”); *International Ground Transportation v. Mayor and City Council of Ocean City*, 475 F.3d 214, 220 (4th Cir. 2007) (“In this case, the verdict form shows that the jury found that the City deprived IGT of procedural and substantive due process but that the individual defendants did not. The City argues that these findings trigger application of the *Heller* rule and require that judgment as a matter of law be entered in its favor. However, the jury was instructed that it could find the individual defendants not liable based on qualified immunity. Thus, the jury could have found that constitutional violations were committed but that the individual defendants were entitled to immunity. Indeed, this is the only way the jury's verdict may be read consistently, and we must ‘harmonize seemingly inconsistent verdicts if there is any reasonable way to do so.’ . . The jury was specifically instructed that it could find the individual defendants not liable based on qualified immunity. However, the verdict form submitted to the jury allowed the jury to find that the individual defendants committed constitutional violations but were entitled to qualified immunity only by checking the ‘No’ answers to the questions asked regarding the individual defendants (e.g. ‘Do you find that the following persons deprived White’s Taxi of procedural due process?’). The City, in fact, conceded at oral argument that there was no way for the jury to find that qualified immunity applied except by answering ‘No’ to the questions asking whether the individual defendants had committed constitutional violations. Moreover, because the jury made specific findings that the City had committed constitutional violations, the only way to read the jury’s verdict consistently is to read the questions asked of the individual defendants as encompassing qualified immunity. As we are required ‘to determine whether a jury verdict can be sustained, on any reasonable theory,’ . . . we must conclude that the language of the verdict form permitted the jury to find that the individual defendants committed constitutional violations but were entitled to qualified immunity.”); *Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005) (“Plaintiffs allege that Chief Prator failed to train Officer Rivet sufficiently. Chief Prator responds that this issue is foreclosed in his favor because the jury verdict in Officer Rivet’s trial found Rivet’s conduct objectively reasonable. Chief Prator is incorrect. The jury, after all, found that Officer Rivet violated Carter’s constitutional rights, even though it also accepted Officer Rivet’s defense that his conduct was objectively reasonable. Under such circumstances, Chief Prator remains vulnerable to a failure to train claim because the plaintiffs may be able to demonstrate that by his failure to train or supervise adequately, he both caused Carter’s injuries and acted deliberately indifferent to violations of Fourth Amendment rights by Shreveport police officers, including Officer Rivet. . . . Nevertheless, even assuming that lack of training ‘caused’ Carter’s injuries, the plaintiffs have not provided sufficient evidence of either Prator’s failure to train (the first requirement) or his deliberate indifference to Carter’s constitutional rights (the third requirement) to create a triable fact issue. . . A plaintiff seeking recovery under a failure to train or supervise rationale must prove that the police chief failed to control an officer’s ‘known propensity for the improper use of force.’ . . Moreover, to prove deliberate indifference, a plaintiff must

demonstrate ‘at least a pattern of similar violations arising from training that is so clearly inadequate as to be obviously likely to result in a constitutional violation.’”); **Scott v. Clay County, Tenn.**, 205 F.3d 867, 879 (6th Cir.2000) (“[I]f the legal requirements of *municipal* or *county* civil rights liability are satisfied, qualified immunity will *not* automatically excuse a municipality or county from constitutional liability, even where the municipal or county actors were personally absolved by qualified immunity, *if* those agents *in fact* had invaded the plaintiff’s constitutional rights.”[emphasis in original, footnote omitted]); **Myers v. Oklahoma County Board of County Commissioners**, 151 F.3d 1313, 1317-18 (10th Cir. 1998) (“[I]f a jury returns a general verdict for an individual officer premised on qualified immunity, there is no inherent inconsistency in allowing suit against the municipality to proceed since the jury’s verdict has not answered the question whether the officer actually committed the alleged constitutional violation. . . In this case, the defendants moved for summary judgment on the basis of qualified immunity, but the district court denied that motion. . . The defendants may have attempted to raise the issue at trial as well. . . On the record before us, we are unable to determine the grounds for the jury’s decision. The jury verdict form was a general one. The form instructed the jury only to declare the defendants ‘liable’ or ‘not liable’ on the use of excessive force claim. In addition, neither party placed a copy of the jury instruction in the record. Therefore, it is possible that the jury based its decision on qualified immunity. With that ambiguity lurking, the *Heller* rule does not foreclose the suit against the County.”); **Hinton v. City of Elwood**, 997 F.2d 774, 783 (10th Cir. 1993) (“An individual municipal officer may . . . be entitled to qualified immunity . . . because the officer’s conduct did not violate the law. When a finding of qualified immunity is predicated on this latter basis, such a finding is equivalent to a decision on the merits of the plaintiff’s claim. . . In such a case, a finding of qualified immunity may preclude the imposition of any municipal liability.”); **Doe v. Sullivan County, Tenn.**, 956 F.2d 545, 554 (6th Cir. 1992) (“To read *Heller* as implying that a municipality is immune from liability regardless of whether the plaintiff suffered a constitutional deprivation simply because an officer was entitled to qualified immunity would . . . represent a misconstruction of its holding and rationale.”). **Adkins v. City of New York**, 143 F.Supp.3d 134, 141-42 (S.D.N.Y. 2015) (“The defense of qualified immunity is, however, unavailable to one defendant in this case, the City of New York (the ‘City’). . . . Qualified immunity of individual actors is irrelevant to *Monell* liability. *Askins v. Doe No. 1*, 727 F.3d 248, 254 (2d Cir.2013). *Monell* liability does require that plaintiff adequately allege a policy or pattern of misconduct. . . . Plaintiff has alleged that both eyewitness accounts and internal police documents show the existence of a specific pattern of misconduct, *viz.*, handcuffing transgender detainees to railings, and further show official inaction in the face of this pattern. Plaintiff claims that an internal NYPD recommendation called for changes in the department’s treatment of transgender people, but the NYPD chain of command took no steps in response to it. . . . The Court does not and need not take any position on the admissibility or ultimate sufficiency of plaintiff’s possible evidence. It asks only whether plaintiff has ‘nudged [his] claims across the line from conceivable to plausible.’ . . He has done so.”); **Bell v. City of New York**, No. 13–CV–5317 (JG)(VMS), 2013 WL 6268083, \*3 n.1 (E.D.N.Y. Dec. 4, 2013) (“It appears that, in addition to asserting qualified immunity on behalf of the officers, the City may also be arguing that because the officers should be afforded qualified immunity, the claims against the City should also be dismissed. If the City is indeed making that argument, it is

mistaken. It is true that a municipality cannot be liable under *Monell* unless the plaintiff is harmed by the illegal act of a municipal employee. But a municipality may be liable for adopting an illegal policy or custom even though the individuals implementing that policy or custom are immune because none of them violated *clearly established* law. See generally *Askins v. Doe No. 1*, 727 F.3d 248, 253–54 (2d Cir.2013). A contrary rule would effectively extend qualified immunity from individuals to municipalities.”); *Pinter v. City of New York*, 976 F.Supp.2d 539, 552-70 (S.D.N.Y. 2013) (“The Second Circuit held in *Pinter II* that the individual defendants are entitled to qualified immunity from Pinter’s false arrest and malicious prosecution claims because even according to Pinter’s allegations, ‘the officers had *arguable* probable cause to arrest Pinter’ for prostitution. . . .The Second Circuit left open the question, however, of whether the individual defendants had *actual* probable cause. . . .Drawing all reasonable inferences in favor of Pinter, a jury could find that Pinter’s arrest was not based on probable cause. This is not to question the Second Circuit’s conclusion that ‘UC 31107 could have reasonably believed that Pinter had agreed to be compensated in exchange for allowing UC 31107 to act on his desire to perform oral sex on Pinter.’ . . . Rather, the facts of this case, viewed in the light most favorable to Pinter, illustrate the distinction between arguable probable cause and actual probable cause. On the one hand, applying the standard for qualified immunity as settled by the Second Circuit’s Summary Order, it would be inaccurate to say that UC 31107 was ‘plainly incompetent’ or must have ‘knowingly violate[d] the law’” in concluding that Pinter had agreed to engage in prostitution. . . .Because UC 31107 had arguable probable cause for an arrest, he is entitled to qualified immunity. . . .On the other hand, declaring Pinter’s arrest—according to his version of events—to be based on actual probable cause would dilute the Fourth Amendment’s protection of individual liberty from unreasonable government intrusion. An officer does not have probable cause to believe a person is a prostitute simply because the person remained silent after being inexplicably offered a fee for what he expected to be consensual, gratuitous sex. . . .To allow the police to arrest such a person for prostitution—moments later, and without so much as an attempt at confirmation—would invite abuses. . . . Because a reasonable jury could find that UC 31107 lacked probable cause for Pinter’s arrest, Pinter could establish at trial that he was subject to a violation of his constitutional right to be free from unreasonable seizure under the Fourth Amendment. This conclusion leads to a dilemma. The Second Circuit held in its Summary Order that ‘Pinter’s *Monell* claims are derivative of his claims against the individual defendants, and therefore any claims dismissed as against the individual defendants must also be dismissed as against the City.’ . . . Accordingly, the Second Circuit ordered that this Court ‘shall not permit the plaintiff to pursue *Monell* claims derived from either the false arrest or malicious prosecution claims.’ . . . In a subsequent, published opinion, *Askins v. Doe No. 1*, however, the Second Circuit held that ‘the entitlement of ... individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is ... irrelevant to the liability of the municipality.’ . . . *Askins* conflicts with *Pinter II*. The latter holds that where a plaintiff has suffered a constitutional tort at the hands of an officer who is entitled to qualified immunity, the City is immune from a *Monell* claim based on the tort; the former holds the opposite. . . . Defendants attempt to reconcile the holdings of *Askins* and *Pinter II* by arguing that *Pinter II* held not only that the arresting officers had arguable probable cause, but that they had actual

probable cause, and thus that Pinter suffered no constitutional injury. . . Defendants' interpretation is not plausible. If the Second Circuit had intended to make a holding that the arresting officers had probable cause—a holding with significant implications for the Fourth Amendment—it would have done so explicitly, rather than through a debatable inference. In addition, the Second Circuit would have analyzed probable cause, not *arguable* probable cause, and would not have used the redundant qualifier 'arguable' when characterizing its holding. . . . Because of the conflict between *Pinter II* and *Askins*, this Court cannot proceed without violating one of the two Second Circuit authorities. Either this Court must disregard the law of the case as articulated in the *Pinter II*, as well as the explicit directions with which *Pinter II* concludes, or this Court must disregard *Askins*. While this Court is extremely wary of failing to comply with an explicit directive of the Second Circuit, it is equally wary of failing to adhere to a subsequent and more authoritative statement of Second Circuit law. *Askins* is a published opinion that extensively analyzed this issue, while the unpublished decision in *Pinter II* has no precedential effect beyond this immediate case. . . . Because *Askins* provides a thorough, binding, directly on-point analysis that conflicts with the unpublished decision in *Pinter II*, I follow *Askins* and conclude that the Second Circuit's grant of qualified immunity to the individual defendants does not bar Pinter from bringing *Monell* claims against the City that derive from his arrest having lacked probable cause. . . . In particular, the Second Circuit's qualified immunity finding does not by itself bar Pinter's false arrest and malicious prosecution claims against the City. A reasonable jury could find based on the record evidence that the City had a custom of carrying out arrests like Pinter's, and that the City was deliberately indifferent to the obvious risk of arresting gay men for prostitution without probable cause. . . . Pinter offers evidence that could support a finding that the NYPD engaged in a pattern of arresting gay men without probable cause for prostitution at video stores, and especially at the Blue Door. . . . Pinter also cites numerous excerpts from depositions and other evidence tending to show that the NYPD failed to train undercover officers to avoid arresting gay men for prostitution without probable cause based on a misunderstanding of the circumstances. . . . A reasonable jury could find that the City was deliberately indifferent to the obvious risk of false arrests like Pinter's, as discussed above. A reasonable jury could also find that the City abused the criminal process for illegitimate ends by carrying out prostitution arrests not in order to obtain convictions but in order to improve its position in nuisance abatement negotiations, as discussed below. This scenario provides sufficient support for the conclusion that Pinter's arrest resulted from a municipal custom of commencing criminal proceedings such as his not with a desire to see the ends of justice served, but based on the improper motive of seeking leverage in nuisance abatement negotiations. This conclusion would be sufficient to establish 'actual malice' in the limited sense required for a malicious prosecution claim . . . . Finally, the City is not entitled to summary judgment on Pinter's excessive force claim. A reasonable jury could find that the officers in the van acted in accordance with an unconstitutional policy or custom of the City to leave arrestees in unduly tight handcuffs for hours at a time in police vans while other prisoners were collected, without training NYPD officers concerning the proper use of 'double locked' handcuffs or how to respond to complaints regarding pain caused by handcuffs. . . . Drawing all reasonable inferences in favor of Pinter, there is also sufficient evidence in the record for a jury to find that the City had a custom of arresting gay men for prostitution without probable cause in order to obtain the collateral objective of

commencing nuisance abatement proceedings against video stores frequented largely, although not entirely, by members of the gay, lesbian, bisexual, and transgender communities. . . . In light of the above, a reasonable jury could conclude that the custom of prostitution arrests that resulted in Pinter's arrest constituted an abuse of criminal process. . . Pinter has a triable abuse of process claim under Section 1983 against the City. However, the Second Circuit's conclusion that the individual defendants had arguable probable cause forecloses Pinter's abuse of process claims against them."); *Sunn v. City & County of Honolulu*, 852 F. Supp. 903, 907 (D. Haw. 1994) ("[T]he circuits which have considered the issue have held that *Heller* is inapplicable to cases where police officers are exempt from suit on qualified immunity grounds." citing cases); *Munz v. Ryan*, 752 F. Supp. 1537, 1551 (D. Kan. 1990) (no inconsistency in granting official qualified immunity, while holding municipality liable for constitutional violations if caused by final policymaker).

*See also Taylor v. Las Vegas Metropolitan Police Department*, No. 219CV995JCMNJK, 2019 WL 5839255, at \*14–15 (D. Nev. Nov. 7, 2019) ("[A]n officer who acts in reliance on a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity." *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994). . . . In *Grossman*, an individual officer arrested plaintiff pursuant to an unconstitutional ordinance. . . The Ninth Circuit held that the individual officer was entitled to qualified immunity, but the city remained liable. . . . Here, as in *Grossman*, determining chapter 16's constitutionality as applied to plaintiff is dispositive of claims 7, 9, and 12. Officers Young, Ferguson, and Albright acted in reliance on chapter 16 of the CCC which, as this court noted, is a facially constitutional regulation aimed at addressing pedestrian congestion on public walkways. Plaintiff displayed his table on the sidewalk, which necessarily means that it was in plain view and in a public place. In furtherance of chapter 16's policy of preventing obstructive uses of sidewalks, Officers Young, Ferguson, and Albright cited plaintiff for his expressive conduct and seized his table. However, § 16.11.020 of the CCC specifically exempts tables used in furtherance of First Amendment activity from the definition of an 'obstructive use' unless the table is 'actually obstructing' the sidewalk. Plaintiff has alleged that, because of his positioning on the sidewalk, he did not actually obstruct the walkway. Further, plaintiff has clearly demonstrated that his table was essential to his live drawing. For that reason, the court, as discussed above, finds that plaintiff has stated a colorable as-applied constitutional challenge to chapter 16 of the CCC. Consequently, Officers Young, Ferguson, and Albright either relied on an unconstitutional interpretation of chapter 16 or unconstitutionally applied chapter 16 to plaintiff's expression. Thus, these erroneous applications of chapter 16 stymied plaintiff's First Amendment rights. Further, plaintiff's First-Amendment-protected expression cannot support probable cause. . . . But the individual officers were relying on the policy and interpretation promulgated by LVMPD. . . . One way a plaintiff may demonstrate municipal liability for a constitutional violation is by showing that the violation occurred as a result of inadequate training on the part of the municipality. . . . Therefore, plaintiff has sufficiently pleaded a *Monell* claim against LVMPD for promulgating the policy of citing street performers for obstruction *per se* when they use a table or other object for First Amendment expression. On the other hand, the individual officers are entitled to qualified immunity for their good faith reliance on the duly-enacted statute as interpreted by

LVMPD. Accordingly, the LVMPD defendants’ motion to dismiss is granted in part and denied in part as to claims 7, 9, and 12. The individual officers are dismissed as defendants. LVMPD itself is not.”)

*See also Pinter v. City of New York*, 976 F.Supp.2d 539, 575 (S.D.N.Y. 2013) (“Section 1292(b) of Title 28 of the United States Code allows a district judge to certify a question or order to the appellate court when it is ‘not otherwise appealable under this section’ if she is ‘of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.’ The instant case involves a controlling question of law where two panels of the Second Circuit have reached conflicting conclusions. Furthermore, immediate appeal would materially advance the ultimate termination of the litigation. If the Second Circuit holds that its prior ruling in *Pinter* controls despite the more recent conflicting holding in *Askins*, it may find that any claim where lack of probable cause is an element must be dismissed—that is, the false arrest, malicious prosecution and abuse of process claims against the City. This would leave only Pinter’s excessive force claim for trial, which is a claim based on a much narrower and more limited set of facts than the other three. I am sympathetic to plaintiff’s argument that this case already has a lengthy and complicated history and that this will be the second interlocutory appeal to the Second Circuit. However, proceeding with trial before the Second Circuit rules on this issue puts the Court at risk of expending scarce judicial resources by trying what may be unviable claims. For the foregoing reasons, the following question is certified for appeal to the United States Court of Appeals for the Second Circuit: Is the Second Circuit’s decision in *Pinter v. City of New York*, 448 F. App’x 99 (2d Cir.2011) overruled by its decision in *Askins v. Doe No. 1*, 727 F.3d 248 (2d Cir.2013)?”). (*certification denied*, Nov. 25, 2013.)

*But see Jiron v. City of Lakewood*, 392 F.3d 410, 419 n.8 (10th Cir. 2004) (“Plaintiff argues that dismissal of the claims against the remaining defendants was improper because summary judgment was granted to Officer Halpin on the basis of qualified immunity. Plaintiff is correct that some dismissals against the officer on the basis of qualified immunity do not preclude a suit against the municipality. . . . However, when a finding of qualified immunity is based on a conclusion that the officer has committed no constitutional violation – i.e., the first step of the qualified immunity analysis – a finding of qualified immunity *does* preclude the imposition of municipal liability.”); *Turpin v. County of Rock*, 262 F.3d 789, 794 (8th Cir. 2001) (“Having concluded that the district court properly granted Officer Svoboda and Deputy Anderson summary judgment on qualified-immunity grounds, we likewise conclude that the county was entitled to summary judgment. *See Abbott v. City of Crocker*, 30 F.3d 994, 998 (8th Cir.1994) (municipality cannot be liable unless officer is found liable on underlying substantive claim).”); *Mattox v. City of Forest Park*, 183 F.3d 515, 523 (6th Cir. 1999) (exercising pendent appellate jurisdiction over City’s interlocutory appeal on grounds that “[i]f the plaintiffs have failed to state a claim for violation of a constitutional right at all, then the City of Forest Park cannot be held liable for violating that right any more than the individual defendants can.”).

See also *Grim v. Baltimore Police Department*, No. CV ELH-18-3864, 2020 WL 1063091, at \*4 (D. Md. Mar. 5, 2020) (“To be sure, ‘*Monell*...and its progeny do not require that a jury must first find an individual defendant *liable* before imposing liability on [a] local government.’ . . . Thus, although an individual defendant may be entitled to qualified immunity, the local government entity can be liable under § 1983. . . . However, in such a scenario, the plaintiff still must establish that the individual defendant committed constitutional violations in order for the entity defendant to be held liable under § 1983.”); *Glenn v. City of Columbus*, No. 4:07-CV-52 (CDL), 2010 WL 2600718, at \*2 (M.D. Ga. June 23, 2010) (“Although this Court finds the holding and rationale of the Court of Appeals to be remarkably charitable to law enforcement officers who used deadly force against an unarmed man under dubious circumstances, the Court of Appeals’s holding and rationale lead to the inescapable, albeit perhaps puzzling, result that if the Court of Appeals had to decide the remaining claims in this case, it would find that they fail as a matter of law. Duty bound to follow the dictates of the Court of Appeals, the Court therefore finds in favor of Defendants on the remaining claims for the following reasons. First, regarding the federal law claims against the City of Columbus, although the holding of the Eleventh Circuit’s opinion focused upon the qualified immunity issue, the opinion suggests in much broader terms that the Eleventh Circuit found the use of force was reasonable under the circumstances and, therefore, no constitutional violation occurred. Second, the Eleventh Circuit’s opinion contemplates that, even if a constitutional violation occurred, the beanbag munition policy cannot be a basis for municipal liability because the Eleventh Circuit concluded that the policymaker was entitled to qualified immunity on Plaintiffs’ claims against him, suggesting that the training could not amount to a deliberate indifference to the rights of persons with whom the officers using the beanbag munition come into contact.”); *Strain v. Borough of Sharpsburg, Pa.*, 2007 WL 1630363, at \*7 n.9 (W.D. Pa. June 4, 2007) (“The Supreme Court has held that qualified immunity section 1983 does not extend to municipalities. . . . This is true even where the individual officers of the municipality are entitled to qualified immunity because the law that they are alleged to have violated was not clearly established at the time. . . . Where, however, qualified immunity is granted to individual officers on the ground that there was no constitutional violation, the grant of qualified immunity precludes municipal liability.”); *Martin v. City of Oceanside*, 205 F. Supp.2d 1142, 1154, 1155 (S.D. Cal. 2002) (“If a court finds the officers acted constitutionally, the city has no liability under § 1983. Here, the Court has already concluded that the officers’ conduct was not unconstitutional. It is true that the Court has answered the first *Saucier* question, whether plaintiff alleges facts that show a constitutional violation by the officers, in the affirmative. However, it is equally clear from the Court’s analysis above that in answering the second *Saucier* question, in the course of which the Court is permitted to review both parties’ summary judgment papers, rather than just plaintiff’s complaint, the Court has determined that the uncontradicted facts show the officers did not violate plaintiff’s constitutional rights. First, the Court has determined that the officers’ entry into plaintiff’s home was justified by the ‘emergency aid’ exception to the Fourth Amendment’s warrant requirement. Second, the Court has found that the officers’ alleged failure to announce their presence and purpose, even if true, did not make their search of plaintiff’s home unreasonable under the Fourth Amendment. Third, the Court has determined that the officers’ pointing guns at plaintiff did not constitute excessive force under the circumstances. Therefore, because the

officers' conduct did not violate plaintiff's constitutional rights, there is no unconstitutional action which can be charged against the City, and plaintiff's *Monell* claim against the City fails.”), *aff'd*, 360 F.3d 1078 (9th Cir. 2004); *VanVorous v. Burmeister*, No. 2:01-CV-02, 2001 WL 1699200, at \*10 (W.D. Mich. Dec. 26, 2001) (not reported) (“The Court has determined that the Individual Defendants, including Burmeister, are entitled to qualified immunity. Unlike the court in *Doe v. Sullivan County*, however, this conclusion was not based solely on the reasonableness of the officers' belief that their conduct was lawful. Under *Saucier*, the Court was first required to determine whether VanVorous suffered a constitutional violation at all before asking whether that right was clearly established. The Court concluded that the Individual Defendants acted reasonably in using deadly force and did not violate VanVorous' Fourth Amendment rights. More recent Sixth Circuit opinions have made clear that a determination that the individual defendants committed no constitutional violation, whether by a court on summary judgment or by a jury, precludes municipal liability under § 1983. [citing cases] When there is no underlying constitutional violation by individual officers, there can be no municipal liability either. Therefore, the Court will grant the City of Menominee's motion for summary judgment of Plaintiff's claims.”).

In *Hegarty v. Somerset County*, 53 F.3d 1367, 1380 (1st Cir. 1995), the court noted:

The determination that a subordinate law enforcement officer is entitled to qualified immunity from suit under section 1983 is not necessarily dispositive of the supervisor's immunity claim. Nevertheless, it does increase the weight of the burden plaintiff must bear in demonstrating not only a deficiency in supervision but also the essential causal connection or “affirmative linkage” between any such deficiency in supervision and the alleged deprivation of rights.

#### **H. No Eleventh Amendment Immunity for Local Entities/State Immunities Not Applicable**

Political subdivisions of the state have no Eleventh Amendment protection from suit in federal court. *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973). *See also Northern Ins. Co. of New York v. Chatham County, Ga.*, 126 S. Ct. 1689, 1693 (2006) (“A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law. . . Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties. [citing *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979); *Workman v. New York City*, 179 U.S. 552, 565 (1900); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890)] *See also Jinks v. Richland County*, 538 U.S. 456, 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) (“[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit”). This is true even when, as respondent alleges here, ‘such entities exercise a slice of state power.’” *Lake Country Estates, supra*, at 401, 99 S.Ct. 1171.”).

See also *Peart v. Seneca County*, 808 F.Supp.2d 1028, 1034 (N.D. Ohio 2011) (“Defendants argue that I should follow those district courts holding “counties, as political entities, are not sui juris; they are held accountable through their elected representatives, to wit, their commissioners.” *McGuire v. Ameritech Servs., Inc.*, 253 F.Supp.2d 988, 1015 (S.D. Ohio 2003). . . . Ohio courts have treated the question of a county’s capacity to be sued as turning on the extent to which a county is an instrumentality of the state. . . . Defendants assert that Ohio counties thus lack capacity for the same reason counties in the past asserted sovereign immunity – Ohio law treats them as an arm of the state. But the Supreme Court has held that a political subdivision is not ‘the State’ and cannot enjoy sovereign immunity from a § 1983 suit. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977). . . . Moreover, in the special context of § 1983 actions, ‘a state law that immunizes government conduct otherwise subject to suit under 1983 is pre-empted ... because the application of state immunity law would thwart the congressional remedy.’ *Felder v. Casey*, 487 U.S. 131, 139 (1988). Section 1983 preempts Ohio law where it imposes a barrier to bringing an otherwise valid claim, and therefore Rule 17(b) does not bar this suit against the county.”); *Stack v. Karnes*, 750 F.Supp.2d 892, 894-99 (S.D. Ohio 2010) (“[T]he issue before the Court is whether a county’s lack of capacity to sue or be sued under Section 301.22 precludes the ability of such county to become amenable to a § 1983 claim pursuant to *Monell*. Ohio federal courts have dealt with this issue inconsistently. [collecting cases] Moreover, the Sixth Circuit has not directly dealt with this issue. . . . Because of the inconsistent manner in which Ohio district courts have dealt with this issue and because the Sixth Circuit has not squarely addressed the issue, this Court will consider it in depth. . . . [T]he Court must determine the applicability of the Eleventh Amendment to local governments, such as Franklin County, and the effect, if any, of the immunity from suit provided to such counties under Ohio Revised Code Section 301.22 on a § 1983 claim. . . . [T]he Eleventh Amendment does not apply to local governments unless they are considered an arm of the state. . . . In that regard, the Supreme Court has consistently refused to apply Eleventh Amendment protection to counties because they are not arms of the state. . . . With the immunity afforded by the Eleventh Amendment being inapplicable to Franklin County, the Court turns to the effect of Section 301.22 on Franklin County’s amenability to suit on a § 1983 claim. . . . While Ohio law is free to define and set forth the ability of political subdivisions, like Franklin County, to retain and ultimately waive immunity *under state law*, the Eleventh Amendment is controll[ing] as a matter of *federal law*. . . . Ohio counties are precluded from claiming protection to suit on grounds of lack of capacity pursuant to Section 301.22. . . . The fact that Ohio counties, absent application of Section 301.22, are not ‘bodies politic and corporate’ for *purposes of Ohio law* is not the appropriate inquiry. . . . Rather, the meaning of ‘person’ for purposes of § 1983 focuses on the intent of Congress, not that of the individual states. . . . Thus, pursuant to Plaintiff’s *Monell* claim, Franklin County is considered a ‘person’ for purposes of § 1983 and the immunity afforded under Sections 301.22 and 2743.01, respectively, is inapplicable.”)

Furthermore, a state court may not refuse to entertain a § 1983 action against a school board on the ground that common law sovereign immunity barred the suit. *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430 (1990). See also *Martinez v. California*, 444 U.S. 277, 284 (1980)

(“Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 ... cannot be immunized by state law.”); *Rodriguez v. City of Camden*, No. 12–2652 (JEI/AMD), 2013 WL 530863, \*2 n.3 (D.N.J. Feb. 11, 2013) (“In light of the disposition of the Motion, the Court does not reach Defendants’ alternative argument concerning qualified immunity pursuant to N.J.S.A. § 59:3–3. However, the Court notes that no state statute can provide a qualified immunity defense to a federal cause of action pursuant to 28 U.S.C. § 1983. Moreover, even under federal law, qualified immunity applies to individual government officials, not municipalities.”); *Turner v. City of Toledo*, 671 F.Supp.2d 967, 971, 972 (N.D. Ohio 2009) (“Courts have generally treated questions of whether a § 1983 suit may be brought against a ‘political subdivision’ of a state, as this Court did in its two previous opinions on this matter, under the rubric of Eleventh Amendment sovereign immunity analysis, and have looked to whether the governmental entity in question shares the state’s own immunity from suit. Thus, the Sixth Circuit has expressly permitted suits under § 1983 to proceed against Ohio counties, on the ground that counties do not enjoy sovereign immunity. . . . So too, the Supreme Court has reasoned that a municipality, unlike a state, is a ‘person’ under § 1983 because a state enjoys sovereign immunity, while a municipality does not. . . . [A] governmental entity’s status under state law is not conclusive of whether that entity may be sued under federal law, though state law does provide evidence of whether a given entity is, in fact, ‘the State.’ In the present case, there is no question that Lucas County, like the school board in *Mt. Healthy*, is a ‘political subdivision’ of the State of Ohio, see Ohio Rev.Code ‘ 2743.01(B). Thus, *Mt. Healthy* (as the Court has noted in both of its previous decisions on this issue) precludes the argument that Lucas County cannot be sued under § 1983. An additional problem with Lucas County’s position is that, in the special context of § 1983 actions, ‘a state law that immunizes government conduct otherwise subject to suit under 1983 is pre-empted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy.’ *Felder v. Casey*, 487 U.S. 131, 139 (1988). . . . Therefore, under *Felder*, Ohio law is pre-empted insofar as it would impose any barrier to bringing an otherwise-valid § 1983 action, and there is thus no Rule 17(b) problem with Lucas County’s status as a party to this case. But even assuming that all of the preceding discussion is incorrect and Lucas County cannot, in fact, be made a party to *any* action, even a § 1983 action in federal court, there is no question that the Board of Commissioners could nonetheless be sued on the County’s behalf.”).

*See also Haywood v. Drown*, 129 S. Ct. 2108, 2115-18 (2009) (“Correction Law ‘ 24 violates the Supremacy Clause. In passing Correction Law ‘ 24, New York made the judgment that correction officers should not be burdened with suits for damages arising out of conduct performed in the scope of their employment. Because it regards these suits as too numerous or too frivolous (or both), the State’s longstanding policy has been to shield this narrow class of defendants from liability when sued for damages. [footnote omitted] The State’s policy, whatever its merits, is contrary to Congress’ judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages. . . . That New York strongly favors a rule shielding correction officers from personal damages liability and substituting the State as the party responsible for compensating individual victims is irrelevant. The State cannot condition its

enforcement of federal law on the demand that those individuals whose conduct federal law seeks to regulate must nevertheless escape liability. . . . While our cases have uniformly applied the principle that a State cannot simply refuse to entertain a federal claim based on a policy disagreement, we have yet to confront a statute like New York’s that registers its dissent by divesting its courts of jurisdiction over a disfavored federal claim in addition to an identical state claim. The New York Court of Appeals’ holding was based on the misunderstanding that this equal treatment of federal and state claims rendered Correction Law ‘ 24 constitutional. . . . To the extent our cases have created this misperception, we now make clear that equality of treatment does not ensure that a state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action. . . . We therefore hold that, having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy. [footnote omitted] A State’s authority to organize its courts, while considerable, remains subject to the strictures of the Constitution. . . . We have never treated a State’s invocation of ‘jurisdiction’ as a trump that ends the Supremacy Clause inquiry, see *Howlett*, 496 U.S., at 382-383, and we decline to do so in this case. . . . [T]he dissent’s fear that ‘no state jurisdictional rule will be upheld as constitutional’ is entirely unfounded. . . . Our holding addresses only the unique scheme adopted by the State of New York—a law designed to shield a particular class of defendants (correction officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners). Based on the belief that damages suits against correction officers are frivolous and vexatious, . . . Correction Law § 24 is effectively an immunity statute cloaked in jurisdictional garb. Finding this scheme unconstitutional merely confirms that the Supremacy Clause cannot be evaded by formalism.”)

***Haywood v. Drown***, 129 S. Ct. 2108, 2135, 2136, 2138 (2009) (Thomas, J., with whom Roberts, C.J., Scalia, J., and Alito, J., join as to Part III, dissenting) (“Unlike the Florida immunity rule in *Howlett*, NYCLA ‘ 24 is not a defense to a federal claim and the dismissal it authorizes is without prejudice. . . . For this reason, NYCLA ‘ 24 is not merely ‘denominated’ as jurisdictional—it actually is jurisdictional. . . . It cannot be that New York has forsaken the right to withdraw a particular class of claims from its courts’ purview simply because it has created courts of general jurisdiction that would otherwise have the power to hear suits for damages against correction officers. The Supremacy Clause does not fossilize the jurisdiction of state courts in their original form. Under this Court’s precedent, States remain free to alter the structure of their judicial system even if that means certain federal causes of action will no longer be heard in state court, so long as States do so on nondiscriminatory terms. . . . By imposing on state courts a duty to accept subject-matter jurisdiction over federal § 1983 actions, the Court has stretched the Supremacy Clause beyond all reasonable bounds and upended a compromise struck by the Framers in Article III of the Constitution. Furthermore, by declaring unconstitutional even those laws that divest state courts of jurisdiction over federal claims on a non-discriminatory basis, the majority has silently overturned this Court’s unbroken line of decisions upholding state statutes that are materially indistinguishable from the New York law under review. And it has transformed a single exception

to the rule of state judicial autonomy into a virtually ironclad obligation to entertain federal business. I respectfully dissent.”)

*But see Winston v. County of Franklin*, No. 2:10-CV-1005, 2011 WL 2601562, at \*4 (S.D. Ohio June 30, 2011) (“[T]he Board in this case was under no duty to provide a safe detention space in the Franklin County Juvenile Detention Center because the Board lacks the statutory authority to create policies related to the safety and protection of detainees. Rather, it is the juvenile judge who submits an annual written request for an appropriation to the board of county commissioners that includes reasonably necessary expenses for the maintenance and operation of the detention facility, and the care, maintenance, education, and support of detainees. . . . The Board’s statutory authority is essentially limited to funding the detention center’s budget, and constructing, leasing and/or purchasing juvenile detention centers. . . . Thus, pursuant to *Pembaur*, because the Board did not have any final policymaking authority related to the maintenance of safety for detainees of the creation of the standards of safety, it cannot be held vicariously liable for actions of employees at the juvenile detention center in allegedly failing to meet safety standards through different policies and customs. . . . Franklin County is not *sui juris* and, therefore, lacks the capacity to sue or be sued except where specially authorized by statute. . . . The Ohio Revised Code establishes the capacity of a county to sue or be sued. *See* O.R.C. §§ 301.22. That section provides that only a county that adopts a ‘charter or an alternative form of government’ may be considered ‘a body politic and corporate for the purpose of enjoying and exercising the rights and privileges conveyed under it by the constitution and the laws of this state’ and is ‘capable of suing and being sued, pleading and being impleaded.’ Franklin County has not adopted a charter or an alternative form of government and, therefore, is not a body corporate and politic amenable to suit as provided by O.R.C. §§ 301.22. Thus, Franklin County cannot be sued, and the Plaintiffs’ claim against this Defendant fails.”)

*See also Tafari v. McCarthy*, No. 9:07-CV-0654 (DNH/GHL), 2010 WL 2044710, at \*48 (N.D.N.Y. Mar. 31, 2010) (“In 2009, the United States Supreme Court held that § 24 is unconstitutional to the extent that it precludes inmates from pursuing § 1983 actions. *Haywood v. Drown*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009). However, at least two judges in this District have observed that because *Haywood*’s focus is on concerns about civil rights claims and the Supremacy Clause, the decision ‘does not affect the question of whether this Court has proper jurisdiction to hear [a] pendent state law claim.’ *Crump v. Ekpe*, No. 9:07-CV-1331, 2010 U.S. Dist. LEXIS 10799, 2010 WL 502762, at \* 18 (N.D.N.Y. Feb.8, 2010) (Kahn, J. and Peebles, M.J.); *May v. Donneli*, No. 9:06-CV-437, 2009 U.S. Dist. LEXIS 85495, 2009 WL 3049613, at \*5 (N.D.N.Y. Sept.18, 2009) (Sharpe, J. and Treece, M.J .). . . Therefore, I recommend that Defendants’ motion for summary judgment be granted with respect to Plaintiff’s pendent state claims.”).

In *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), the Court held that injured railroad workers could assert a federal statutory right, under the FELA, to recover damages

against the Port Authority and that concerns underlying the Eleventh Amendment- “the States’ solvency and dignity”- were not touched. The Court explained, *id.* at 406:

The proper focus is not on the use of profits or surplus, but rather is on losses and debts. If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is “No” . . . then the Eleventh Amendment’s core concern is not implicated.

See also *Guertin v. State of Michigan*, 912 F.3d 907, 936, 941 (6th Cir. 2019), *reh’g and reh’g en banc denied*, 924 F.3d 309 (2019), *cert. denied sub nom. City of Flint v. Guertin*, 140 S. Ct. 933 (2020) and *cert. denied sub nom. Busch v. Guertin*, 140 S. Ct. 933 (2020) (“Flint readily concedes municipalities do not enjoy sovereign immunity. That would normally end our analysis, but this is not a typical case. At the time of the crisis, Flint was so financially distressed that the State of Michigan had taken over its day-to-day local government operations by way of a statutory mechanism enacted to deal with municipal insolvency—gubernatorial-appointed individuals who ‘act for and in the place and stead of the governing body and the office of chief administrative officer of the local government.’ . . Flint contends it became an arm of the state because of the State of Michigan’s takeover. We thus find it more appropriate to resolve whether this extraordinary factor dictates a different outcome. . . On de novo review, . . . we agree with the district court that the City of Flint is not entitled to Eleventh Amendment immunity. . . . In sum, Flint has not met its burden to show that when under emergency management, it was an ‘arm of the state’ protected by the Eleventh Amendment. The foremost consideration—the state’s potential liability for judgment—counsels against a finding of Eleventh Amendment immunity, and the remaining factors do not ‘far outweigh’ this factor.”); *Brent v. Wayne County Dep’t of Human Servs.*, 901 F.3d 656, 681-82 (6th Cir. 2018) (“ ‘The state’s potential legal liability for a judgment against the defendant “is the foremost factor” to consider in our sovereign immunity analysis.’ . . Here, state law strongly suggests, although perhaps does not conclusively establish, that the State of Michigan would be responsible for judgments entered against Wayne County DHS. To start, the Michigan legislature abolished county departments of social services in 1975 and replaced them with a single statewide Department of Human Services (formerly called the Family Independence Agency). . . Numerous district courts have thereby concluded that county-level ‘child protective services offices are therefore not county agencies, but are merely local offices of the state DHS.’ . . Given that county DHS offices are merely local subdivisions of the state DHS, and given that state agencies are required to pay for court judgments, it follows that the State of Michigan—and not Wayne County—is liable for judgments against Wayne County DHS.”); *Karns v. Shanahan*, 879 F.3d 504, 518-19 (3d Cir. 2018) (“After giving equal consideration to all three factors, we weigh and balance them. We no longer adhere to the balancing analysis conducted in *Fitchik* in light of intervening changes in Eleventh Amendment immunity analysis articulated by the Supreme Court. Applying the revised analysis, we determine that while the state-treasury factor counsels against awarding Eleventh Amendment immunity, the state law and autonomy factors both tilt in favor of immunity. Indeed, in the intervening years since our decision in *Fitchik*, it has become apparent that the state law

factor weighs heavily in favor of a finding of immunity. Weighing and balancing the qualitative strength of each factor in the context of the circumstances presented, we hold that NJ Transit is an arm of the state. We therefore conclude that NJ Transit is entitled to claim the protections of Eleventh Amendment immunity, which in turn functions as an absolute bar to any claims in this case against NJ Transit and the officers in their official capacities.”); ***Maliandi v. Montclair State University***, 845 F.3d 77, 85-86, 99 (3d Cir. 2016) (“[W]e are mindful of the near unanimity among the Courts of Appeals that the factors relevant to an Eleventh Amendment inquiry typically favor immunity in the state college setting. However, because the particulars of our *Fitchik* test differ from analogous tests in other Circuits and because each entity seeking immunity warrants an individualized analysis, these cases do not dictate the answer to the question of first impression with which we are presented today. That question has bedeviled district judges in our Circuit, who are divided in their application of the *Fitchik* test to MSU. . . . We now resolve this dispute by concluding that MSU is an arm of the State, and in the process, we seek to synthesize our jurisprudence regarding the *Fitchik* factors for the benefit of district courts in future Eleventh Amendment cases. . . . After undertaking our own analysis of MSU’s Eleventh Amendment immunity, we cannot agree with the District Court’s determination that all three *Fitchik* factors counsel against immunity. For the reasons set forth below, we conclude that the funding factor counsels against immunity, but that the status under state law and autonomy factors—while close—tilt in favor of extending MSU immunity from suit. On balance, because two of the three coequal factors support MSU’s claim for immunity, we hold that MSU is an arm of the State that enjoys the protections afforded by the Eleventh Amendment. . . . The upshot of our review is that *Fitchik*’s funding factor weighs against immunity, but its status under state law and autonomy factors both favor immunity. Thus, on balance, the *Fitchik* factors favor MSU’s claim to Eleventh Amendment protection. . . . We recognize that, absent recourse to the federal courts, Maliandi may have limited and unsatisfying avenues to obtain relief for the alleged discrimination she suffered. Yet, comity and state sovereignty are constitutional precepts and lynchpins of our federalist system of government, and where, as here, the State creates an entity that functions on balance as an arm of the State, the Eleventh Amendment’s protection must carry the day. Accordingly, the constitutional right of the State of New Jersey to be free from private suit in federal court must be respected, and, unless the District Court determines on remand that New Jersey has waived its immunity for Maliandi’s NJLAD claim, the suit against MSU must be dismissed.”); ***Lowe v. Hamilton County Dept. of Job & Family Services***, 610 F.3d 321, 325, 326 (6th Cir. 2010) (setting out four-part test for determining whether entity is political subdivision or arm of state and concluding that the fact that “the state may reimburse HCJFS for these damages does not change the fact that HCJFS is the party legally liable for the judgment. The question of legal liability is paramount because it is ‘an indicator of the relationship’ between the state and the entity asserting sovereign immunity.”); ***Cash v. Hamilton County Dept. of Adult Probation***, 388 F.3d 539, 545 (6th Cir. 2004) (“The County argues that it is entitled to Eleventh Amendment immunity from suit because the Hamilton County Department of Adult Probation is an arm of the common pleas and municipal courts of the state of Ohio. To support this contention, the County cites a number of Ohio statutes. . . . The bald assertion that the Department is an arm of the common pleas and municipal courts is insufficient by itself to garner Eleventh Amendment immunity. . . . Rather, this

argument is one of many factors that must be considered by the district court. We have recognized that the most important factor is ‘will a State pay if the defendant loses?’ . . . The County raised the issue of Eleventh Amendment immunity in its motion for summary judgment. Although the district court granted the County’s motion, the order provides no findings or analysis pertaining to the Eleventh Amendment. A final resolution of this issue will turn on factual findings regarding whether the Department of Adult Probation is part of the Ohio court system and whether the State or the County would pay damages for a constitutional violation perpetrated by the Department. We therefore remand this issue to the district court for further development.”); **Manders v. Lee**, 338 F.3d 1304, 1328 n.51 (11th Cir. 2003) (en banc) (“*Hess* says that the state treasury factor is a ‘core concern’ of Eleventh Amendment jurisprudence. . . . It is true that the presence of a state treasury drain alone may trigger Eleventh Amendment immunity and make consideration of the other factors unnecessary. Thus, this is why some decisions focus on the treasury factor. If the State footed the entire bill here, there would be no issue to decide. The Eleventh Amendment, however, does not turn a blind eye to the state’s sovereignty simply because the state treasury is not directly affected. Moreover, the United States Supreme Court has never said that the absence of the treasury factor alone defeats immunity and precludes consideration of other factors, such as how state law defines the entity or what degree of control the State has over the entity. As mentioned earlier, although the state treasury was not affected, the *Hess* Court spent considerable time pointing out how that lawsuit in federal court did not affect the dignity of the two States because they had ceded a part of their sovereignty to the federal government as one of the creator-controllers of the Compact Clause entity in issue. If the state-treasury-drain element were always determinative in itself, this discussion, as well as the other control discussion, would have been unnecessary.”); **Endres v. Indiana State Police**, 334 F.3d 618, 627 (7th Cir. 2003) (“Sharing of authority among units of government complicates both practical administration and legal characterization. Even if as a matter of state law the counties act as agents of the state in raising and remitting revenues, it remains a matter of federal law whether this makes each county’s department part of the state. . . The dispositive question is more ‘who pays?’ than ‘who raised the money?’. . . . The combination of *J.A.W.* and the 2000 legislation leads us to conclude that county offices of family and children in Indiana now must be classified as part of the state for purposes of the eleventh amendment. This does not require the overruling of *Baxter*, which dealt with superseded legislation. It is enough to say that the statutes now in force make county offices part of the state, as *J.A.W.* held and as the formal organization chart now shows them.”); **Alkire v. Irving**, 330 F.3d 802, 813 (6th Cir. 2003) (“Unfortunately, we find ourselves with virtually no evidence on the most important point – who is responsible for a monetary judgment against the Holmes County Court – as it was not briefed by the parties, who assumed *Mumford v. Basinski*, 105 F.3d 264, 268 (6th Cir.), *cert. denied*, 522 U.S. 914 (1997)] was binding precedent. As we shall hold that a remand is in order in any event, we choose to remand this issue to the district court. The district court can make the initial determination whether Ohio would be legally liable for a judgment against the Holmes County Court, as well as an evaluation of the other factors that may bear on whether the Holmes County Court should receive sovereign immunity.”); **Hudson v. City of New Orleans**, 174 F.3d 677, 683 (5th Cir. 1999) (“Ultimately we are most persuaded by the fact that the state treasury will in all likelihood be left untouched if damages were to be levied

against the Orleans Parish District Attorney’s office. It is well established that this . . . factor is crucial to our Eleventh Amendment arm of the state analysis. . . . In sum, we conclude that the Orleans Parish District Attorney’s office is not protected from suit in federal court by the Eleventh Amendment.”); *Harter v. Vernon*, 101 F.3d 334, 340 (4th Cir. 1996) (“In sum, when determining if an officer or entity enjoys Eleventh Amendment immunity a court must first establish whether the state treasury will be affected by the law suit. If the answer is yes, the officer or entity is immune under the Eleventh Amendment.”). *But see Sales v. Grant*, 224 F.3d 293, 298 (4th Cir. 2000) (concluding that a promise of indemnification does not alter the non-immune status of state officers sued in their individual capacities).

*See also Harvey v. Cty. of Hudson*, No. 14-3670 (KM), 2015 WL 9687862, at \*6-7 (D.N.J. Nov. 25, 2015) (“I find that training and supervision of a detective as to the permissible use of deadly force is no mere administrative or personnel matter. It lies at the core of the HCPO’s law enforcement functions. For claims arising from that training, the HCPO would be entitled to indemnification under the NJTCA. . . . Accordingly, because (1) the state will, in fact, be responsible for any judgment against the HPCO, and (2) the HCPO’s supervision and training of officers is a law enforcement function, the first *Fitchik* factor weighs strongly in favor of sovereign immunity with respect to these allegations. . . . Because all three of the *Fitchik* factors weigh in favor of sovereign immunity, I find that the HCPO must be treated as an arm of the State for purposes of these claims, which arise from the training and supervision of investigative officers. Accordingly, these claims are barred by the Eleventh Amendment and are dismissed with prejudice for lack of subject matter jurisdiction. . . . Administrative tasks concerning personnel—hiring, firing, promotion, demotion—are to be distinguished from law enforcement functions. . . . When performing such administrative functions, the HCPO has more autonomy; it acts more as a component of county government, rather than as an arm of the State. . . . As to a judgment arising from claims involving these administrative functions, the NJTCA would not mandate indemnification by the State. . . . Therefore, as to the claims of negligent hiring or failure to discipline, the first *Fitchik* factor weighs against sovereign immunity. For the same reason, the second and third *Fitchik* factors also lean against the application of sovereign immunity. The HCPO points to no statutory or *de facto* domination of its administrative or personnel functions by the State. Administrative tasks are not part of the HCPO’s core law enforcement function, and therefore would not be regarded as state functions under *Wright*. The *Fitchik* factors therefore work against the application of sovereign immunity with respect to claims arising from the HCPO’s ordinary administrative or personnel decisions. Accordingly, I will not dismiss on jurisdictional grounds the Complaint’s allegations of negligent hiring and failure to discipline.”)

*See also Walker v. Jefferson Cnty. Bd. of Educ.*, 771 F.3d 748, 757 (11th Cir. 2014) (“Whether [an entity] is an ‘arm of the [s]tate’ must be assessed in light of the particular function in which the [entity] was engaged when taking the actions out of which liability is asserted to arise.” *Manders*, 338 F.3d at 1308. Both of the cases before us concern employment-related decisions (i.e., hiring, assignment, and compensation), and under *Stewart*, 908 F.2d at 1509–11, local school boards in Alabama are not arms of the state with respect to such decisions.

Accordingly, the Jefferson County Board of Education and the Madison City Board of Education are not immune under the Eleventh Amendment from suits challenging those decisions under federal law.”); *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 226, 227 (4th Cir. 2001) (“[W]e conclude that upon our consideration of each of the factors identified for determining whether a governmental entity is an arm of the State and therefore one of the United States within the meaning of the Eleventh Amendment, the Granville County Board of Education appears much more akin to a county in North Carolina than to an arm of the State. . . . In reaching our conclusion in this case, we continue to follow our jurisprudence, as stated in *Harter, Gray, Bockes*, and *Ram Ditta*, and in doing so, we believe that we are faithfully applying the relevant Eleventh Amendment jurisprudence announced by the Supreme Court in *Regents, Hess, Lake Country Estates*, and *Mt. Healthy*. We therefore reject the district court’s view that the Supreme Court’s recent decisions in *Regents* and *McMillian* overruled our decisions in *Harter, Gray, Bockes*, and *Ram Ditta*.”); *Belanger v. Madera Unified School District*, 963 F.2d 248, 251 (9th Cir. 1992) (holding school districts in California are state agencies for purposes of the Eleventh Amendment). *See generally Eason v. Clark County School Dist.*, 303 F.3d 1137, 1141 n.2, 1144 (9th Cir. 2002) (holding school district in Nevada is local or county agency, not state agency and collecting cases from circuits); *Doe v. Montgomery County Board of Education*, No. CV 21-0356 PJM, 2021 WL 6072813, at \*8 (D. Md. Dec. 23, 2021) (“Defendants correctly point out that members of this Court have consistently held that county boards of education in Maryland, including the Board at bar, are state agencies and thus immune from suit under § 1983.”); *Dennis v. Bd. of Educ. of Talbot Cnty.*, 21 F.Supp.3d 497, 501-02 (D. Md. 2014) (“County school boards and their officials are considered state agencies and state officials. . . Because the Board and individually named Defendants in their official capacities are a county school board and school officials, they are not ‘persons’ and cannot be sued under § 1983. The Fourth and Fourteenth Amendment claims will be dismissed against them accordingly.”); *Weaver v. Madison City Bd. of Educ.*, No. 5:11-cv-03558-TMP, 2013 WL 2350181, \*9 (N.D. Ala. May 29, 2013) (“Since *Stewart*, courts in the Eleventh Circuit, and particularly district courts in Alabama, have consistently found that local boards of education are not protected by the Eleventh Amendment as ‘arms of the State.’ Rather, there is a consistent line of authority holding them to be local political subdivisions, comparable to counties and municipalities.”); *Stevenson v. Owens State Community College*, 562 F.Supp.2d 965, 968 (N.D. Ohio 2008) (“With regard to how the state courts treat the entity for state sovereign immunity purposes, Ohio courts have held that state community colleges organized under Ohio Rev.Code Chapter 3358, like Owens, are state entities protected by Ohio’s sovereign immunity.[collecting cases] This Court agrees with that analysis and accepts these cases as authority that Ohio courts treat community colleges as arms of the state.”).

In *Regents of the University of California v. Doe*, 117 S. Ct. 900, 905 (1997), the Court held that “[t]he Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party.”

## **I. States: Section 1983 Does Not Abrogate 11th Amendment Immunity and States Are Not “Persons” Under Section 1983**

In the absence of consent to suit or waiver of immunity, a state is shielded from suit in federal court by virtue of the Eleventh Amendment. The state may raise sovereign immunity as a defense to a federal claim in state court as well. *See Alden v. Maine*, 527 U.S. 706 (1999). A damages action against a state official, in her official capacity, is tantamount to a suit against the state itself and, absent waiver or consent, would be barred by the Eleventh Amendment. A state may waive its 11th Amendment immunity by *removing* to federal court state law claims as to which it has surrendered its sovereign immunity in state courts. *See Lapidés v. Bd. of Regents*, 535 U.S. 613 (2002). Congress may expressly abrogate a state’s sovereign immunity pursuant to its enforcement power under the Fourteenth Amendment. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98-100 (1984). *See also United States v. Georgia*, 126 S. Ct. 877 (2006); *Tennessee v. Lane*, 124 S. Ct. 1978 (2004); *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003). The Court has held that Section 1983 does not abrogate Eleventh Amendment immunity of state governments. *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

*See also Wisconsin Dep’t of Corrections v. Schacht*, 118 S. Ct. 2047, 2051-52 (1998) (“We now conclude, contrary to the Seventh Circuit, that the presence in an otherwise removable case of a claim that the Eleventh Amendment may bar does not destroy removal jurisdiction that would otherwise exist. . . . The Eleventh Amendment. . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. . . Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.”); *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 482 (4th Cir. 2005) (noting that Eleventh Amendment immunity is not strictly an issue of subject-matter jurisdiction but that court should address issue promptly once the State asserts its immunity); *Parella v. Retirement Board of the Rhode Island Employees’ Retirement System*, 173 F.3d 46, 55 (1st Cir. 1999) (“[T]he Supreme Court has now clearly stated that courts are free to ignore possible Eleventh Amendment concerns if a defendant chooses not to press them.”). *Compare David B. v. McDonald*, 156 F.3d 780, 783 (7th Cir. 1998) (With no reference to *Schacht*, holding “the eleventh amendment, extended in *Hans v. Louisiana* . . . to federal-question cases, deprives the court of jurisdiction.”) with *Endres v. Indiana State Police*, 334 F.3d 618, 623 (7th Cir. 2003) (“Because the eleventh amendment does not curtail subject-matter jurisdiction (if it did, states could not consent to litigate in federal court, as *Lapidés* holds that they may), a court is free to tackle the issues in this order, when it makes sense to do so, without violating the rule that jurisdictional issues must be resolved ahead of the merits.”).

*See also Stevenson v. City of Chicago*, No. 17 CV 4839, 2018 WL 1784142, at \*12 (N.D. Ill. Apr. 13, 2018) (“Here, the ISP Defendants did not consent to removal because Plaintiffs had not served the ISP Defendants until after the City of Chicago Defendants removed this action to federal court. With this in mind, it is well-settled that the waiver of Eleventh Amendment immunity

must be clear. . . Thus, Plaintiffs’ contention that ISP’s failure to move to remand under 28 U.S.C. § 1447(c)—assuming that the ISP Defendants had a legal basis to do so—was a clear declaration of Eleventh Amendment immunity waiver is simply too attenuated under the circumstances. To clarify, the Supreme Court in *Lapides* and the Seventh Circuit in *Board of Regents* focused on the voluntary, active nature of the state’s consent to proceed in federal court. . . As discussed, ISP did not make a voluntary, active decision to litigate this action in federal court nor are the ISP Defendants taking advantage of the federal forum for any unfair purpose or advantage as contemplated by *Lapides* and its progeny. . . As such, ISP has not waived its Eleventh Amendment protection under the circumstances[.]”)

In *Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989), the Court held that neither a state nor a state official in his official capacity is a “person” for purposes of a section 1983 damages action. Thus, even if a state is found to have waived its Eleventh Amendment immunity in federal court, or even if a § 1983 action is brought in state court, where the Eleventh Amendment has no applicability, *Will* precludes a damages action against the state governmental entity. This holding does not apply when a state official is sued in his official capacity for injunctive relief. 491 U.S. at 71 n. 10. See also *Lane v. Cent. Alabama Cmty. Coll.*, 772 F.3d 1349,1351-52 (11th Cir. 2014) (“Here, Lane seeks equitable relief in the form of reinstatement of his employment. We have determined previously that requests for reinstatement constitute prospective injunctive relief that fall within the scope of the *Ex parte Young* exception and, thus, are not barred by the Eleventh Amendment. . . .In the light of our reinstatement precedents, we conclude that the district court erred in dismissing Lane’s official-capacity claim against Franks as barred by the Eleventh Amendment. We affirm in part and vacate in part; and we remand the case for further proceedings consistent with this opinion and with the Supreme Court’s decision in *Lane v. Franks*, 134 S.Ct. 2369 (2014).”)

See also *Laborers’ Int’l Union of N. Am., Loc. 860 v. Neff*, No. 21-3653, 2022 WL 853231, at \*6 (6th Cir. Mar. 23, 2022) ((concluding that the [Cuyahoga County, Ohio] Juvenile Court is an arm of the State); *Jones v. Cummings*, 998 F.3d 782, 786-87 (7th Cir. 2021) (“Our sister courts routinely have held that prosecutors and district attorneys in states with comparable laws are state officials. . . . Likewise, this court and the District Court for the Southern District of Indiana have held that Indiana’s county prosecutors are state officials when they are prosecuting criminal cases. . . . Recognizing this, he asks this court to hold that ‘unlawful rogue actions of a prosecutor are not “a decision, a duty, an obligation, a privilege, or a responsibility of the prosecuting attorney’s office[ ]” and thus his suit against Cummings would not be captured by Ind. Code § 33-39-9-4 (requiring the state to pay expenses incurred by an action against a prosecuting attorney). But any such exception would sweep away the rule—immunity would mean nothing if it existed only when the prosecutor would win on the merits. Jones has sued Cummings for performing his duty to bring charges against criminal defendants. He took that action as an officer of the state, and that, under *Will*, is the end of it.”); *McLean v. Gordon*, 548 F.3d 613, 618 (8th Cir. 2008) (“We need not address the question of whether the State waived its Eleventh Amendment immunity by voluntarily removing this matter to federal court. Section 1983 provides

for an action against a ‘person’ for a violation, under color of law, of another’s civil rights. As the Supreme Court reminded us, ‘a State is not a person’ against whom a § 1983 claim for money damages might be asserted.’ [citing *Lapides* and *Will*] Thus, the district court erred in failing to grant summary judgment for DSS, an agency or ‘arm [ ] of the State,’ on the section 1983 claim brought by McLean.”); ***Harper v. Colorado State Bd. of Land Commissioners***, 2007 WL 2430122, at \*4 (10th Cir. Aug. 29, 2007) (not published) (“The Harpers maintain that ‘[t]he reason a state agency (or a state itself) is generally not a ‘person’ for purposes of a suit for damages under [§ 1983] is because of the 11th Amendment ..., which immunizes states from federal court suits for damages.’. . . This argument is not persuasive. The Supreme Court has recognized a distinction between the immunity afforded by the Eleventh Amendment and the limitations in the scope of § 1983 arising from the terms of the statute. . . Accordingly, because the § 1983 claims at issue in this appeal are asserted against the Land Board, an entity that is not a ‘person’ under that statute, the district court’s grant of summary judgment was proper.”); ***Manders v. Lee***, 338 F.3d 1304, 1328 n.53 (11th Cir. 2003) (en banc) (“If sheriffs in their official capacity are arms of the state when exercising certain functions, then an issue arises whether Manders’s § 1983 suit is subject to dismissal on the independent ground that they are not ‘persons’ for purposes of § 1983. [citing *Will*] This statutory issue, however, is not before us as it was neither briefed nor argued on appeal.”); ***Gean v. Hattaway***, 330 F.3d 758, 766 (6th Cir. 2003) (“[T]he need for this court to undertake a broad sovereign immunity analysis with respect to the § 1983 claims is obviated by the fact that the defendants in their official capacities are not recognized as ‘persons’ under § 1983. Even if Tennessee’s sovereign immunity has been properly waived or abrogated for the purposes of the federal statute the defendants allegedly violated, a § 1983 claim against the defendants in their official capacities cannot proceed because, by definition, those officials are not persons under the terms of § 1983.”); ***Garrett v. Talladega County Drug and Violent Crime Task Force***, 983 F.Supp.2d 1369, 1376, 1377 (N.D. Ala. 2013) (“In this case, the evidence clearly shows that the Task Force is created by, and controlled by, the office of the Talladega County District Attorney. It is a subdivision of that office. All District Attorney’s offices are deemed to be agencies of the State of Alabama. . . Accordingly Eleventh Amendment immunity applies to deprive this court of jurisdiction over the claims against the Task Force. . . .As an agency of the Talladega County District Attorney, the Task Force ‘is not a legal entity subject to being sued’ under 42 U.S.C. § 1983. . . Accordingly, the section 1983 claims are due to be dismissed for this alternative reason as well.”); ***Tower v. Leslie-Brown***, 167 F. Supp.2d 399, 403 (D. Me. 2001) (“Defendants Peary and Leslie-Brown therefore enjoy the same immunity from suit in their official capacities that their employing agencies do.”).

*See also Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 123 S. Ct. 1887, 1892 (2003) (“Although this case does not squarely present the question, the parties agree, and we will assume for purposes of this opinion, that Native American tribes, like States of the Union, are not subject to suit under § 1983.”) and *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 123 S. Ct. 1887, 1894 (2003) (“[W]e hold that the Tribe may not sue under § 1983 to vindicate the sovereign right it here claims.”); ***Pistor v. Garcia***, 791 F.3d 1104, 1112-14 (9th Cir. 2015) (“Although ‘[t]ribal sovereign

immunity “extends to tribal officials when acting in their *official* capacity and within the scope of their authority.” . . . tribal defendants sued in their *individual* capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties. . . . The principles reiterated in *Maxwell* foreclose the tribal defendants’ claim to tribal sovereign immunity in this case. The gamblers have not sued the Tribe. The district court correctly determined that the gamblers are seeking to hold the tribal defendants liable in their individual rather than in their official capacities. . . . Even if the Tribe agrees to pay for the tribal defendants’ liability, that does not entitle them to sovereign immunity: ‘The unilateral decision to insure a government officer against liability does not make the officer immune from that liability.’”).

A state official sued in her individual capacity for damages is a “person” under § 1983. *See Hafer v. Melo*, 502 U.S. 21 (1991). *Hafer* eliminates any ambiguity *Will* may have created by clarifying that “[T]he phrase ‘acting in their official capacities’ is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury.” *Id.* at 26.

*See also State Emp. Bargaining Agent Coalition v. Rowland*, 718 F.3d 126, 137 (2d Cir. 2013) (“While acknowledging that the Eleventh Amendment generally does not bar claims for monetary damages against state officials in their individual capacities, the district court nonetheless held that plaintiffs’ claims were barred because the action, ‘though nominally against the Governor and the Secretary of OPM,’ was in reality a suit against the State, as a damages award would cause ‘the loss of substantial public resources.’ . . . The district court erred. Where a complaint ‘specifically seeks damages from [ ] defendants in their individual capacities[,] ... the mere fact that the state may reimburse them does not make the state the real party in interest.’ . . . That is true even if the award is quite large, as we noted in *Huang v. Johnson*, where the plaintiffs sought a \$50 million award. 251 F.3d 65, 70 (2d Cir.2001) (holding that the fact that defendants ‘might not be able to pay [the award] on their own [did] not transform the claim into one against [defendants] in their official capacities’). We therefore hold that the claims for monetary damages against the defendants in their individual capacities are not barred by the Eleventh Amendment.”); *Ritchie v. Wickstrom*, 938 F.2d 689, 692 (6th Cir. 1991) (Eleventh Amendment did not bar suit against individual sued as policymaker for state institution, even “[i]f the State should voluntarily pay the judgment or commit itself to pay as a result of a negotiated collective bargaining agreement....”); *Kroll v. Bd. of Trustees of Univ. of Ill.*, 934 F.2d 904, 907 (7th Cir. 1991) (“Personal capacity suits raise no eleventh amendment issues.”), *cert. denied*, 112 S. Ct. 377 (1991).

*See also Sossamon v. Lone Star State of Texas*, 131 S. Ct. 1651, 1659, 1660 (2011) (Provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) creating private cause of action for violations of the RLUIPA, and authorizing person to assert such violations as claim or defense to obtain “appropriate relief” against government, did not clearly and unequivocally notify states that, by accepting federal funds, they were waiving their sovereign immunity to suits for money damages under the RLUIPA, and did not result in waiver of state’s

immunity from damages suit by prisoner whose free exercise rights were allegedly burdened; Congress, by using phrase “appropriate relief,” did not clearly manifest its intent to include damages remedy.”). *But see Taznin v. Tanvir*, 141 S. Ct. 486, 492-93 (2020) (“A damages remedy is not just ‘appropriate’ relief as viewed through the lens of suits against Government employees. It is also the *only* form of relief that can remedy some RFRA violations. For certain injuries, such as respondents’ wasted plane tickets, effective relief consists of damages, not an injunction. . . . Given the textual cues just noted, it would be odd to construe RFRA in a manner that prevents courts from awarding such relief. Had Congress wished to limit the remedy to that degree, it knew how to do so. . . . Our opinion in *Sossamon* does not change this analysis. *Sossamon* held that a State’s acceptance of federal funding did not waive sovereign immunity to suits for damages under a related statute—the Religious Land Use and Institutionalized Persons Act of 2000—which also permits “‘appropriate relief.’” . . . The obvious difference is that this case features a suit against individuals, who do not enjoy sovereign immunity. . . . We conclude that RFRA’s express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities. The judgment of the United States Court of Appeals for the Second Circuit is affirmed.”)

*Compare Haight v. Thompson*, 763 F.3d 554, 568-70 (6th Cir. 2014) (“In the face of *Sossamon*, the inmates make a thought-provoking, but in the end unconvincing, argument. For all of the similarities between this case and that one, they note, one thing is missing: *Sossamon* considered lawsuits against prison officials in their official capacity, not a claim against the prison officials in their individual capacity. Because lawsuits against state officials in their official capacity amount to lawsuits against the State for purposes of Eleventh Amendment (and other constitutional) immunities, and because lawsuits against state officials in their individual capacity do not, they insist that the clear-statement rule does not apply to this claim for monetary relief. Put another way, even if *Sossamon* establishes that the phrase ‘appropriate relief’ fails to satisfy the clear-statement rule, it does not establish that the clear-statement rule applies to this claim for relief. In making this argument, the inmates understate the coverage of the clear-statement rule. Clarity is demanded *whenever* Congress legislates through the spending power, whether related to waivers of sovereign immunity or not. . . . One of the distinguishing features of the spending power is that it allows Congress to exceed its otherwise limited and enumerated powers by regulating in areas that the vertical structural protections of the Constitution would not otherwise permit. . . . So long as States consent to the bargain—receiving federal funds in return for allowing Congress to regulate where it otherwise could not—the Constitution permits the arrangement. This feature of the spending power requires clarity throughout, not just in money-damages actions against state officials sued in their official capacity. . . . Because the imperative of clarity applies in all of these settings and because *Sossamon* establishes that the phrase ‘appropriate relief’ does not clearly entitle a claimant to money damages, the claimants’ request for money damages must fail. . . . We have considerable company in reaching this conclusion. Every circuit to consider the question, whether before *Sossamon* or after, has held that RLUIPA does not permit money damages against state prison officials, even when the lawsuit targets the defendants in their individual capacities. *See Washington v. Gonyea*, 731 F.3d 143, 145–46 (2d Cir.2013); *Stewart v. Beach*, 701 F.3d 1322,

1334–35 (10th Cir.2012); *Sharp v. Johnson*, 669 F.3d 144, 153 (3d Cir.2012); *Nelson v. Miller*, 570 F.3d 868, 886–89 (7th Cir.2009); *Rendelman v. Rouse*, 569 F.3d 182, 186–89 (4th Cir.2009); *Sossamon v. Texas*, 560 F.3d 316, 327–29 (5th Cir.2009); *Smith v. Allen*, 502 F.3d 1255, 1271–75 (11th Cir.2007). Some of these cases, it is true, chart a different path. Some hold that because spending-power legislation is in the nature of a contract and because the State, not the defendant prison officials, receives money under the federal legislation, it would be inappropriate to impose a money-damages remedy on local prison officials. . . With respect, this approach proves too much. If accepted, it would mean that even an eminently clear statute—say, that ‘plaintiffs could obtain money damages in actions against state and local prison officials, whether sued in their official or individual capacity’—would not permit money damages. That is not consistent with *Dole* or *Arlington Central* or *Pennhurst* itself.”) with *Haight v. Thompson*, 763 F.3d 554, 570-72 (6th Cir. 2014) (Cole, J., concurring) (“Although I agree that the plaintiffs cannot recover from the prison officials in their individual capacities, I respectfully depart from the majority’s analysis. I do so for two reasons: first, to explain why *Sossamon v. Texas*, 131 S.Ct. 1651 (2011), does not resolve the money-damages claim, and second, to express my view that we do not need to reach the plaintiffs’ argument that RLUIPA’s Commerce Clause basis authorizes money damages. There can be no question that *Sossamon* was decided on narrow grounds specific to the legal framework at issue in that case—namely, sovereign immunity. Indeed, the Court noted that ‘the word “appropriate” is inherently context-dependent,’ and then went on to conclude that ‘[t]he context here—where the defendant is a sovereign—suggests ... that monetary damages are not “suitable” or “proper.”’. . *Sossamon* does not establish that RLUIPA’s provision for ‘appropriate relief’ categorically excludes monetary damages. It establishes only that the term ‘does not so clearly and unambiguously waive sovereign immunity to private suits for damages that we can be certain that the State in fact consents to such a suit.’. . The majority’s reliance on *Sossamon* has the virtue of simplicity, but it ignores the fact that courts operate under different presumptions when encountering a request for monetary relief from a state, as opposed to a request for monetary relief from an officer sued in his or her individual capacity. When a plaintiff sues the state, we presume that money damages are unavailable, unless the state has consented to an express waiver of its immunity. . . In contrast, we regularly grant monetary relief to plaintiffs who successfully sue officers in their personal capacities. . . It is therefore fair to assume that a provision for ‘appropriate relief’ would not authorize money damages from the state absent the state’s waiver, but would authorize them from personal-capacity defendants absent some other legal principle limiting the scope of the term ‘appropriate.’ That other legal principle can be found in *Arlington Central*—a case that should be central to our Spending Clause analysis. There, the Court extended *Pennhurst*’s clear-statement principle to apply not only to the *conditions* a Spending Clause enactment places on participating states, but also to the *remedies* the enactment makes available when a state fails to comply. . . Thus, the Court concluded that a provision allowing plaintiffs to collect ‘reasonable attorneys’ fees as part of the costs’ of bringing suit did not encompass expert fees because the statute had failed to put the states on notice that they could be liable for this expense. . . *Arlington Central* controls here and requires that RLUIPA ‘furnish[ ] clear notice regarding the liability at issue.’. . In my view, RLUIPA’s provision for ‘appropriate relief’ does not ‘unambiguously authorize’ prisoners to recover money damages from prison officials. . . I therefore agree with my

colleagues that the relief the plaintiffs seek is not available.”)

*See also Davila v. Gladden*, 777 F.3d 1198, 1209-12 (11th Cir. 2015) (“After careful consideration, we conclude that Congress did not clearly waive sovereign immunity to authorize suits for money damages against officers in their official capacities under RFRA. Also, even if we were to assume the statute authorizes suits for money damages against officers in their individual capacities, we hold that the Defendants here would be entitled to qualified immunity. . . .In *Sossamon v. Texas*, . . . the Supreme Court held that identical ‘appropriate relief’ language in the related statute RLUIPA did *not* waive states’ sovereign immunity from money damages. . . .The only two circuit courts to address whether RFRA waived the federal government’s sovereign immunity have held that it did not. [citing *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 841 (9th Cir.2012) and *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C.Cir.2006)]. . . . We recognize that in *Sossamon*, the Court was addressing the sovereign immunity of the states. . . . However, the Court’s analysis in addressing the ambiguity of ‘appropriate relief’ applies equally to issues of federal sovereign immunity. Congress did not unequivocally waive its sovereign immunity in passing RFRA. RFRA does not therefore authorize suits for money damages against officers in their official capacities. . . . Second, we decline to address whether RFRA authorizes suits against officers in their individual capacities. Even if RFRA did authorize individual-capacity suits for money damages, these Defendants would be entitled to qualified immunity. . . . Whether or not the District Court concludes that the Defendants violated Mr. Davila’s rights under RFRA at trial, the law preexisting the Defendants’ conduct did not *compel the conclusion* that their actions violated RFRA. . . . Officers are entitled to clear notice about how their actions violate federal rights. In order to do away with qualified immunity for these offices, it must have been clearly established under RFRA that a prisoner can get religious property from outside sources when the religious items available through authorized means are not sufficient to meet the prisoner’s religious needs. Mr. Davila has offered no prior case clearly establishing that proposition. . . . So even if Mr. Davila is successful at trial in proving a RFRA violation, these Defendants would be protected from paying money damages in their individual capacities.”)

*See also McNeil v. Community Probation Services, LLC*, 803 F. App’x 846, \_\_\_ (6th Cir. 2020) (“All factors considered, Tennessee private probation companies do not act for the State and thus may not invoke Tennessee’s sovereign immunity in this lawsuit. Reinforcing this conclusion is a more concrete reality: We know of no case in which a private probation company has successfully invoked sovereign immunity.”); *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 775 (6th Cir. 2015) (“Which test we should apply to determine whether WSU is a state agency and therefore not a ‘person’ under the FCA is a matter of first impression in this Circuit. The circuits that have considered this issue have unanimously held that courts should apply the same test used to determine whether an entity is an ‘arm of the state’ entitled to sovereign immunity under the Eleventh Amendment. *See U.S. ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir.2014) (joining the Fourth, Fifth, Ninth, and Tenth Circuits in adopting the ‘arm of the state’ analysis under the Eleventh Amendment for purposes of the FCA). These other circuits

reached this conclusion based, in part, on the Supreme Court’s observation in *Stevens* that the scope of the inquiry into whether an entity is a ‘person’ under the FCA is virtually identical to the sovereign immunity inquiry under the Eleventh Amendment. . . Indeed, the Supreme Court has since underscored ‘the virtual coincidence of scope’ between the two inquiries, *Stevens*, 529 U.S. at 780, by holding that, in contrast to states and state agencies, the term ‘person’ under the FCA includes local governments and municipalities. . .The definition of a ‘person’ under the FCA therefore parallels the limitations on sovereign immunity under the Eleventh Amendment, as Eleventh Amendment immunity extends to state and state agencies, but not to local governments and municipalities. In light of this similarity and consistent with the Supreme Court’s guidance in *Stevens*, we also adopt the arm-of-the-state analysis under the Eleventh Amendment to determine whether an entity is a state agency excluded from liability under the FCA.”)

#### **J. 28 U.S.C. § 1367(a): Supplemental Jurisdiction**

28 U.S.C. § 1367(a) states that:

Except as provided in subsection (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The statute applies to actions commenced on or after the date of its enactment, December 1, 1990, and responds to the Supreme Court’s refusal to acknowledge pendent party jurisdiction without a clear indication of Congressional intent to create such jurisdiction. *See Finley v. United States*, 490 U.S. 545 (1989).

By expanding the scope of the federal court’s power to hear claims that previously would have kept the litigation in state court, ‘ 1367(a) will no doubt serve to increase the number of section 1983 suits filed in the federal forum.

1. With respect to local government defendants, § 1367(a) permits plaintiffs to include the governmental entity as a pendent party defendant when no policy or custom claim may exist under § 1983, but where state law might allow recovery on a *respondeat superior* basis. Given § 1367(a), the rationale of *Aldinger v. Howard*, 427 U.S. 1 (1976), rejecting pendent party jurisdiction in such a setting, would no longer be controlling. *See, e.g., Cameron v. Craig*, 713 F.3d 1012, 1023-24 (9th Cir. 2013) (“Because California has rejected the *Monell* rule, *see* Cal. Gov’t Code § 815.2, state law ‘imposes liability on counties under the doctrine of respondeat superior for acts of county employees; it grants immunity to counties only where the public employee would also be immune.’ *Robinson*, 278 F.3d at 1016. The defendants do not raise any

state statutory immunities. Thus, should Cameron prevail on her excessive force claim, liability could extend to the County.”)

2. Supplemental jurisdiction would also allow retention of state law claims against individual officials who might be dismissed from the § 1983 action on grounds of qualified immunity, assuming that the § 1983 action remains alive against the local government unit.

3. Section 1367(a) would provide supplemental jurisdiction for claims against purely private actors, where those claims are appropriately related to the § 1983 claims against the state actors.

4. Where a state has waived its Eleventh Amendment immunity and consented to suit, a state may be named as a defendant on a state law claim, where that claim is part of the same “case or controversy” as the § 1983 claim(s) against the state actors. *Rosen v. Chang*, 758 F. Supp. 799, 803-04 (D.R.I. 1991).

**NOTE:** Section 1367(d) provides in part that “[t]he period of limitations for any claim asserted under subsection (a) ... shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.’ The Supreme Court has rejected a constitutional challenge to that section. *See Jinks v. Richland County*, 123 S. Ct. 1667, 1673 (2003) (“Section 1367(d) tolls the limitations period with respect to *state-law* causes of action brought against municipalities, but we see no reason why that represents a greater intrusion on ‘state sovereignty’ than the undisputed power of Congress to override state-law immunity when subjecting a municipality to suit under a federal cause of action. In either case, a State’s authority to set the conditions upon which its political subdivisions are subject to suit in its own courts must yield to the enactments of Congress. This is not an encroachment on ‘state sovereignty,’ but merely the consequence of those cases. . . which hold that municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit.”).

#### **K. Pre-*Iqbal*: No Heightened Pleading Requirement For *Monell* Claims**

Although Fed. R. Civ. P. 8 requires only “notice pleading,” plaintiffs attempting to impose *Monell* liability upon a governmental unit had been required, in some circuits, to plead with particularity the existence of an official policy or custom which could be causally linked to the claimed underlying violation. *See, e.g., Strauss v. City of Chicago*, 760 F.2d 765 (7th Cir. 1985).

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160 (1993), the Supreme Court unanimously rejected the “heightened pleading standard” in cases alleging municipal liability. While leaving open the question of “whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials,” [See **Blum’s Qualified Immunity Outline**] the Supreme Court refused to equate a municipality’s freedom from *respondeat superior* liability with immunity from suit. 113 S.Ct. at 1162.

Finding it “impossible to square the ‘heightened pleading requirement’ . . . with the liberal system of ‘notice pleading’ set up by the Federal Rules[.]” the Court suggested that Federal Rules 8 and 9(b) would have to be rewritten to incorporate such a “heightened pleading standard.” *Id.* at 1163. The Court concluded by noting that “[i]n the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.” *Id.*

In *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998), the Court addressed the “broad question [of] whether the courts of appeals may craft special procedural rules” for cases in which a plaintiff’s substantive constitutional claim requires proof of improper motive and “the more specific question [of] whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive in order to defeat a motion for summary judgment.” *Id.* at 1587. In striking down the D.C. Circuit’s “clear and convincing” burden of proof requirement in such cases, a five-member majority of the Court, in an opinion written by Justice Stevens, clarified that the Court’s holding in *Harlow v. Fitzgerald*, 457 U.S. 731 (1982), that “bare allegations of malice” cannot overcome the qualified immunity defense, “did not implicate the elements of the plaintiff’s initial burden of proving a constitutional violation.” 118 S. Ct. at 1592. The Court noted that “although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff’s affirmative case. Our holding in *Harlow*, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff’s burden of proving a constitutional violation.” *Id.* The Court explained that the subjective component of the qualified immunity defense that was jettisoned in *Harlow* “permitted an open-ended inquiry into subjective motivation [with the] primary focus . . . on any possible animus directed at the plaintiff.” *Id.* at 1594. Such an open-ended inquiry precluded summary judgment in many cases where officials had not violated clearly established constitutional rights. “When intent is an element of a constitutional violation, however, the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff . . . or to deter public comment on a specific issue of public importance.” *Id.*

Sensitive to the concerns about subjecting public officials to discovery and trial in cases involving insubstantial claims, the Court noted that existing substantive law “already prevents this more narrow element of unconstitutional motive from automatically carrying a plaintiff to trial[.]” and “various procedural mechanisms already enable trial judges to weed out baseless claims that feature a subjective element . . .” *Id.*

First, under the substantive law on which plaintiff relies, there may be some doubt as to the whether the defendant’s conduct was unlawful. The Court gave as an example the question of whether the plaintiff’s speech was on a matter of public concern. Second, where plaintiff must establish both motive and causation, a defendant may still prevail at summary judgment by, for

example, showing that defendant would have made the same decision in the absence of the protected conduct. *Id.*

The Court noted two procedural devices available to trial judges that could be used prior to any discovery. First, the district court may order a reply under Fed. R. Civ. P. 7(a), or grant a defendant's motion for a more definite statement under Rule 12(e). As the Court noted, this option of ordering the plaintiff to come forward with "specific, nonconclusory factual allegations" of improper motive exists whether or not the defendant raises the qualified immunity defense. 118 S. Ct. at 1596-97. Second, where the defendant does raise qualified immunity, the district court should resolve the threshold question before discovery.

To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law. [footnote omitted] Because the former option of demanding more specific allegations of intent places no burden on the defendant-official, the district judge may choose that alternative before resolving the immunity question, which sometimes requires complicated analysis of legal issues. If the plaintiff's action survives these initial hurdles and is otherwise viable, the plaintiff ordinarily will be entitled to some discovery. Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.

*Id.* at 1597.

The majority opinion concluded that "[n]either the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself." *Id.* at 1595. Instead of the categorical rule established by the Court of Appeals, the Court endorsed broad discretion on the part of trial judges in the management of the factfinding process. *Id.* at 1598.

Chief Justice Rehnquist dissented, and formulated the following test for motive-based constitutional claims:

[W]hen a plaintiff alleges that an official's action was taken with an unconstitutional or otherwise unlawful motive, the defendant will be entitled to immunity and immediate dismissal of the suit if he can offer a lawful reason for his action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext.

*Id.* at 1600 (Rehnquist, C.J., joined by O'Connor, J., dissenting).

Justice Scalia, joined by Justice Thomas, dissented and proposed the adoption of a test that would impose “a more severe restriction upon ‘intent-based’ constitutional torts.” *Id.* at 1604. (Scalia, J., joined by Thomas, J., dissenting). Under Justice Scalia’s proposed test,

[O]nce the trial court finds that the asserted grounds for the official action were objectively valid (e.g., the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (e.g., the incompetent person fired was a Republican).

*Id.*

For the Court’s most recent reinforcement of the proposition that heightened pleading is not required unless specified by the Rules, *see Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (“It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered ‘a cognizable independent harm’ as a result of his removal from the hepatitis C treatment program. . . . The complaint stated that Dr. Bloor’s decision to remove petitioner from his prescribed hepatitis C medication was ‘endangering [his] life.’ . . . It alleged this medication was withheld ‘shortly after’ petitioner had commenced a treatment program that would take one year, that he was ‘still in need of treatment for this disease,’ and that the prison officials were in the meantime refusing to provide treatment. . . . This alone was enough to satisfy Rule 8(a)(2). Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings. The Court of Appeals’ departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation’s outset, without counsel.”); *Hill v. McDonough*, 126 S. Ct. 2096, 2103 (2006) (“Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.”); *Swierkiewicz v. Sorema*, 122 S. Ct. 992, 998 (2002) (“Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. [footnote omitted] This Court, however, has declined to extend such exceptions to other contexts. . . . Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. ‘1979, 42 U.S.C. § 1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).”).

*See also Jones v. Bock*, 127 S. Ct. 910, 918, 919, 921, 926 (2007) (“There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court. . . . What is less clear is whether it falls to the prisoner to plead and demonstrate exhaustion in the complaint, or to the defendant to raise lack of exhaustion as an affirmative defense. The minority rule, adopted by the Sixth Circuit, places the burden of pleading exhaustion in a case

covered by the PLRA on the prisoner; most courts view failure to exhaust as an affirmative defense. . . We think petitioners, and the majority of courts to consider the question, have the better of the argument. Federal Rule of Civil Procedure 8(a) requires simply a ‘short and plain statement of the claim’ in a complaint, while Rule 8(c) identifies a nonexhaustive list of affirmative defenses that must be pleaded in response. The PLRA itself is not a source of a prisoner’s claim; claims covered by the PLRA are typically brought under 42 U. S. C. § 1983, which does not require exhaustion at all, see *Patsy v. Board of Regents of Fla.*, 457 U. S. 496, 516 (1982). Petitioners assert that courts typically regard exhaustion as an affirmative defense in other contexts. . . and respondents do not seriously dispute the general proposition. . . The PLRA dealt extensively with the subject of exhaustion, see 42 U. S. C. “1997e(a), (c)(2), but is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense. This is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense. In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns. [citing *Leatherman, Swierkiewicz* and *Hill*] . . . . We think that the PLRA’s screening requirement does not – explicitly or implicitly – justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself . . . . We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints. We understand the reasons behind the decisions of some lower courts to impose a pleading requirement on plaintiffs in this context, but that effort cannot fairly be viewed as an interpretation of the PLRA. ‘Whatever temptations the statesmanship of policy-making might wisely suggest,’ the judge’s job is to construe the statute – not to make it better.’ . . . We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks. We once again reiterate, however – as we did unanimously in *Leatherman, Swierkiewicz*, and *Hill* – that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.”); *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc) (“First, although it may be more a matter of a change of nomenclature than of practical operation, we overrule *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir.2003), in which we held that a failure to exhaust under § 1997e(a) should be raised by a defendant as an ‘unenumerated Rule 12(b) motion.’ We conclude that a failure to exhaust is more appropriately handled under the framework of the existing rules than under an ‘unenumerated’ (that is, non-existent) rule. Failure to exhaust under the PLRA is ‘an affirmative defense the defendant must plead and prove.’ *Jones v. Bock*, 549 U.S. 199, 204, 216 (2007). In the rare event that a failure to exhaust is clear on the face of the complaint, a defendant may move for dismissal under Rule 12(b)(6). Otherwise, defendants must produce evidence proving failure to exhaust in order to carry their burden. If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts. Second, we hold that Albino has satisfied the exhaustion requirement of § 1997e(a). Defendants have failed to prove that administrative remedies were

available at the jail where Albino was confined. Because no administrative remedies were available, he is excused from any obligation to exhaust under § 1997e(a). We therefore direct the district court to grant summary judgment to Albino on the issue of exhaustion.”).

On exhaustion requirements under the PLRA, compare *Garrett v. Wexford Health*, 938 F.3d 69, 84 & n.21, 86-91 (3d Cir. 2019), *cert. denied*, 140 S. Ct. \_\_\_ (2020) (“When he filed the TAC, Garrett was no longer a prisoner and therefore was not subject to the PLRA’s administrative exhaustion requirement. . . Thus, because it relates back to the original complaint, the TAC cures the original filing defect. . . . A recent decision by the Tenth Circuit, *May v. Segovia*, 929 F.3d 1223 (10th Cir. 2019), takes a contrary view of the operation of Rule 15. In *May*, the Court decided that Rule 15 relates back to the original complaint for purposes of the PLRA’s exhaustion requirement, concluding that an amended complaint ‘supersedes the original complaint’s *allegations* but not its *timing*.’ . . In addition, the *May* Court took the view that relation back for purposes of cure is only permissible when the pleading flaw is jurisdictional in nature and is therefore an affirmative pleading requirement. . . The Tenth Circuit’s approach is at odds with our decision in *T Mobile*. We therefore decline to adopt it. . . . We acknowledged the Commonwealth’s concession that Ahmed would not have been barred from filing a *new* § 1983 complaint following his release, and that any new matter would not have been subject to the PLRA’s strictures. But we declared that Ahmed was ‘bound by the PLRA because his suit was filed . . . almost three years before he was released from prison.’ . . In applying *Ahmed* to Garrett’s case, the District Court concluded that the filing of the initial complaint was the unalterable starting point from which to consider a plaintiff’s status as a prisoner. This over-reads *Ahmed*, the post-judgment posture of which renders it inapposite to Garrett’s case. Ahmed was a prisoner subject to the PLRA when he filed his complaint, and he remained a prisoner subject to the PLRA when the District Court entered its final judgment. Because he sought to reopen a final judgment, the policy favoring the finality of judgments was implicated. The permissive policy favoring amendment under Rule 15 was simply not relevant. . . In the post-judgment context, the narrow grounds for relief set forth in Rules 59 and 60 must guide a District Court’s decision about whether an otherwise-final judgment should be disturbed. . . . Thus, a different set of rules emphasizing vastly different policies pertained to the motion in *Ahmed*, and those rules do not apply to Garrett’s case. . . . *Bock* teaches, then, that the usual procedural rules apply to PLRA cases unless the PLRA specifies otherwise, and that a decision about whether to apply the usual procedural rules should not be guided by ‘perceived policy concerns.’ . . Applying these important principles, we conclude that the PLRA does not override the usual operation of Rule 15 here. Accordingly, Garrett’s status as a non-prisoner at the time he filed the TAC is determinative of the Medical Defendants’ administrative exhaustion defense. . . . Looking beyond our own case law, a sister Circuit has applied *Bock* to circumstances similar to Garrett’s, and that Court reached a conclusion consistent with how we decide the instant matter. In *Jackson v. Fong*, 870 F.3d 928 (9th Cir. 2017), the Ninth Circuit considered whether Jackson, a prisoner who filed an initial complaint before administratively exhausting his claims, and who was granted leave to amend his complaint after his release, continued to be subject to the PLRA’s exhaustion requirement. As the Ninth Circuit summed up the matter, Jackson’s case turned on ‘whether the court should look to the initiation of the suit (when Jackson was a prisoner, and had not exhausted his remedies), or to

Jackson’s operative third amended complaint (filed when Jackson was not a prisoner, and the exhaustion requirement did not apply).’ . . The Ninth Circuit observed that the operative complaint ‘completely supersedes’ any earlier complaints, and that *Bock* directs that an exhaustion defense under the PLRA should be considered within the framework of the Federal Rules of Civil Procedure. . . Applying these principles, the Court concluded that Jackson’s ‘amended complaint, filed when he was no longer a prisoner, obviates an exhaustion defense.’ . . In reaching its decision, the Ninth Circuit explicitly chose not to follow our opinion in *Ahmed*, both because *Ahmed* pre-dates *Bock* and because it did not apply Rule 15. . . The *Jackson* Court dismissed several of the defendants’ policy concerns about the potential for its holding to lead to litigation abuse by prisoners. It observed, for instance, that Rule 15 permits a District Court discretion to deny leave to amend, particularly where a prisoner appears to be ‘gaming the courts’ in some manner. . . In addition, the Court observed that an administrative exhaustion requirement after a prisoner’s release would not serve the purpose of permitting officials to address problems internally because, after release, ‘there is no internal [grievance] process left to undermine.’ . . Because Jackson could have chosen to file a new suit but did not do so, his decision to amend promoted judicial economy. *Id.* Finally—and most importantly—the Ninth Circuit observed that, under *Bock*, it did not have license to rely on policy concerns in carving out exceptions to the Federal Rules in any event. . . Here, the Medical Defendants contend that we should not follow *Jackson*. . . . The[ir] arguments are unpersuasive. The decision of whether to permit a plaintiff to file an amended or supplemental complaint under Rule 15 is within a District Court’s discretion and is guided by Rule 15’s liberal standards. . . . The problem with [defendants’] arguments is that they are the sort of ‘perceived policy concerns’ that the Supreme Court has directed cannot dictate whether we apply the usual pleading rules. . . . We decline to adopt the Eleventh Circuit’s analysis. *Harris*, which was decided prior to the Supreme Court’s decision in *Bock*, purports to rely on the ‘plain and ordinary meaning’ of the language of the PLRA—namely, the ‘[n]o ... action may be brought’ language. . . In *Bock*, the Supreme Court described the nearly identical language of the PLRA’s exhaustion provision as ‘boilerplate language’ that should not ‘lead to the dismissal of an entire action if a single claim fails to meet the pertinent standards.’ . . Applying *Bock*, as we must, we cannot agree with the Eleventh Circuit’s interpretation. The PLRA is not sufficiently plain in its meaning to override the usual operation of Rule 15. . . In sum, we conclude that there is nothing in the PLRA to indicate that a plaintiff cannot employ Rule 15 to file a supplemental pleading to cure an initial filing defect. Because Garrett filed the TAC as a non-prisoner, administrative exhaustion was not an appropriate basis for its dismissal. We will therefore vacate the District Court’s dismissal of Garrett’s claims against the Medical Defendants for failure to exhaust administrative remedies.”) with *May v. Segovia*, 929 F.3d 1223, 1228-29, 1231-34 (10th Cir. 2019) (“According to Mr. May, the SAC superseded his previous complaints when it was deemed filed in January 2016. Because the filing occurred after his release, he argues that, for the purposes of the exhaustion requirement, his prisoner status must be determined at that point. . . . The amended complaint, as the operative complaint, supersedes the original complaint’s *allegations* but not its *timing*. . . . Mr. May relies on the Ninth Circuit’s opinion in *Jackson v. Fong*, 870 F.3d 928 (9th Cir. 2017), for the proposition that we look only to the timing of the SAC when determining the applicability of the PLRA. *Fong* presents a factual scenario similar to Mr. May’s. The plaintiff

in *Fong*—Mr. Jackson—was a prisoner in the midst of his final administrative appeal when he filed his original complaint. . . . Shortly after filing his suit, Mr. Jackson moved to amend his complaint. But before that motion was granted, as with Mr. May, he was released from custody. . . . Relying on *Jones* and circuit caselaw, the [Ninth Circuit] determined that to require Mr. Jackson to exhaust would ‘ignore[ ] the general rule’ that ‘a supplemental complaint “completely super[s]edes any earlier complaint, rendering the original complaint non-existent and, thus, its filing date irrelevant.”’. . . . Despite the similar facts, *Fong* is distinguishable. There, the operative complaint was ‘a supplemental complaint within the meaning of Rule 15(d)’. . . . Under Rule 15(d), a plaintiff may amend his complaint to account for ‘any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.’. . . . It is axiomatic that a supplemental complaint, filed after the plaintiff has been released from prison and raising claims that ‘happened after the date of the pleadings to be supplemented,’ would not be subject to the exhaustion requirement. Such claims would have been ‘brought’ for purpose of the PLRA by a non-prisoner. As *Jones* implies, the district court reviewing an amended complaint filed under Rule 15(d) would have the responsibility, when the exhaustion defense is raised, to differentiate between claims that are exhausted—or to which the exhaustion requirement does not apply because they were first brought after the plaintiff was released from prison—and claims that are unexhausted, dismissing the latter and allowing the former to proceed. . . . But that is not this case. The SAC was not filed under Rule 15(d) because Mr. May’s *Bivens* claim did not arise from transactions or events that occurred after the First Amended Complaint. Indeed, it is undisputed that his only claim on appeal was first raised, at the latest, in the First Amended Complaint, which was filed eight months prior to his release. But even if we were to agree that *Fong* is on point, Mr. Segovia contends the PLRA would still require Mr. May to exhaust his administrative remedies. *Fong* cited another Ninth Circuit case—*Rhodes v. Robinson*—approvingly, and there the Ninth Circuit held that new claims were ‘brought’ for purposes of the PLRA exhaustion requirement when the supplemental complaint was ‘tendered’ to the court for filing, not when the court deemed it filed. . . . We have not yet adopted this approach in the Tenth Circuit. Mr. Segovia argues, for the first time on appeal, that we should do so now. . . . Mr. May contends that a combination of *Jones* and our circuit precedents forecloses adoption of the tender rule. . . . The timing of the claims, as opposed to the sufficiency of the allegations, was not before us in *Murray*, and our opinion there should not be construed as addressing the timing-allegation distinction. Thus, *Murray* does not preclude us from adopting the tender rule and we do so now. . . . In summary, we conclude that Mr. May was a prisoner within the meaning of the PLRA when he brought his due-process claim, irrespective of which complaint first introduced his due process claim, and thus, he was required to exhaust any available administrative remedies as to that claim.”)

*See also Hayes v. Dahlke*, 976 F.3d 259, 270-71 (2d Cir. 2020) (“We therefore hold that, because the DOCCS Inmate Grievance Procedure imposes a mandatory deadline for the CORC to respond, an inmate exhausts administrative remedies when he follows the procedure in its entirety but the CORC fails to respond within the 30 days it is allocated under the regulations. We decline to impose a ‘reasonableness’ requirement found nowhere in the text, which would leave inmates – and courts – to blindly speculate how long one must wait before filing suit. . . . In reaching this

decision, we join six other circuits that have considered state prison procedures with similar mandatory deadlines and found that the administrative remedies were either exhausted or ‘unavailable’ when the prison did not respond within the allotted time. . . . Because we rule on exhaustion alone, we decline to consider whether the administrative procedures here were so ‘opaque’ that they are ‘unavailable’ under *Ross*. In doing so, we avoid wading into the often complex and highly fact-specific inquiries of the unavailability exception.”)

#### **L. *Twombly*, *Iqbal*, and Post-*Iqbal* Cases Asserting *Monell* Claims**

*Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1968, 1969, 1974 (2007) (“Justice Black’s opinion for the Court in *Conley v. Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of ‘the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’ . . . This ‘no set of facts’ language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard . . . . On such a focused and literal reading of *Conley*’s ‘no set of facts,’ a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. . . . [A] good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. [citing cases and commentators] We could go on, but there is no need to pile up further citations to show that *Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough. . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. . . . *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival. . . . [W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942, 1943, 1949-54 (2009) (“This case . . . turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent’s pleadings are insufficient. . . . Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of

action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not ‘show[n]’-that the pleader is entitled to relief.’ . . . In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. . . . We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners ‘knew of, condoned, and willfully and maliciously agreed to subject [him]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.’ . . . The complaint alleges that Ashcroft was the ‘principal architect’ of this invidious policy. . . . and that Mueller was ‘instrumental’ in adopting and executing it. . . . These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim. . . . namely, that petitioners adopted a policy ‘Abecause of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.’ . . . As such, the allegations are conclusory and not entitled to be assumed true. . . . It is important to recall that respondent’s complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent’s constitutional claims against petitioners rest solely on their ostensible ‘policy of holding post-September-11 detainees’ in the ADMAX SHU once they were categorized as ‘of high interest.’ . . . To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as ‘of high interest’ because of their race, religion, or national origin. This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person of ‘of high interest’ for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving ‘restrictive conditions of confinement’ for post-September-11 detainees until they were ‘“cleared” by the FBI.’ . . . Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners’ constitutional obligations. He would need to allege more by way of factual content to ‘nudg[e]’ his claim of purposeful discrimination ‘across the line from conceivable to plausible.’ . . . [R]espondent’s complaint does not contain any factual allegation sufficient to plausibly suggest

petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8. It is important to note, however, that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners. . . . Our decision in *Twombly* expounded the pleading standard for 'all civil actions'. . .and it applies to antitrust and discrimination suits alike. . . . Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise. . . .It is true that Rule 9(b) requires particularity when pleading 'fraud or mistake,' while allowing '[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally.' But 'generally' is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid-though still operative-strictures of Rule 8. . . . And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.")

*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1959-61 (Souter, J., joined by Stevens, J., Ginsburg, J., Breyer, J., dissenting) ("The complaint . . . alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it. Ashcroft and Mueller argue that these allegations fail to satisfy the 'plausibility standard' of *Twombly*. They contend that Iqbal's claims are implausible because such high-ranking officials 'tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command.' . . . But this response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here. . . . Iqbal's claim is not that Ashcroft and Mueller 'knew of, condoned, and willfully and maliciously agreed to subject' him to a discriminatory practice that is left undefined; his allegation is that 'they knew of, condoned, and willfully and maliciously agreed to subject' him to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described. Taking the complaint as a whole, it gives Ashcroft and Mueller 'A fair notice of what the Y claim is and the grounds upon which it rests.'")

*Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 346-47(2014) (“We summarily reverse. Federal pleading rules call for ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted. . . . In particular, no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (a federal court may not apply a standard ‘more stringent than the usual pleading requirements of Rule 8(a)’ in ‘civil rights cases alleging municipal liability’); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (imposing a ‘heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)’). The Fifth Circuit defended its requirement that complaints expressly invoke § 1983 as ‘not a mere pleading formality.’. . . The requirement serves a notice function, the Fifth Circuit said, because ‘[c]ertain consequences flow from claims under § 1983, such as the unavailability of *respondeat superior* liability, which bears on the qualified immunity analysis.’. . . This statement displays some confusion in the Fifth Circuit’s perception of petitioners’ suit. No ‘qualified immunity analysis’ is implicated here, as petitioners asserted a constitutional claim against the city only, not against any municipal officer. . . . 34 Our decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), are not in point, for they concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff, they instruct, must plead facts sufficient to show that her claim has substantive plausibility. Petitioners’ complaint was not deficient in that regard. Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim. . . . For clarification and to ward off further insistence on a punctiliously stated ‘theory of the pleadings,’ petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to § 1983. . . . For the reasons stated, the petition for certiorari is granted, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.”)

## CASES IN THE CIRCUITS

### D.C. CIRCUIT

*Bell v. D.C.*, 82 F.Supp.3d 151, 159 (D.D.C. 2015) (“Unlike *Singh* and *Muhammad*, Plaintiff’s complaint in this case lacks the kind of ‘factual content’ to support her allegation of an ‘increasing number of complaints ... claiming racial profiling, harassment and continuous violations of the constitutional rights of African Americans.’. . . The complaint does not, for instance, state the number, nature, and timing of the complaints of police misconduct; the identity of the officers who were the subject of the complaints; or even whether complaints were made against Officer John Doe. Absent such facts, Plaintiff’s generalized assertion of ignored and unanswered complaints of

harassment and police misconduct amount to little more than ‘an unadorned, the-defendant-unlawfully-harmed-me accusation’ that does not pass muster under *Iqbal* . . . . Because Plaintiff’s complaint fails to plead sufficient ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,’ the court must grant the District’s motion to dismiss Count II.”)

***Robinson v. District of Columbia***, 736 F.Supp.2d 254, 265 (D.D.C. 2010) (“Taking these allegations together, the Court finds plaintiff has alleged a specific form of misconduct: intimidating and harassing motorcyclists by, *inter alia*, swerving into their lanes of traffic and causing them to fall or lose control of their vehicles. She alleges the District should have known about this misconduct because it was ‘commonplace’ and reported, but the District refused to investigate or otherwise pursue the reports. Finally, she presents a plausible causal connection between the District’s alleged failure to train, supervise, or discipline officers regarding the alleged misconduct and the constitutional deprivation Mr. Robinson allegedly suffered. . . Plaintiff has alleged enough facts to suggest she may be entitled to relief against the District; accordingly, it would be inappropriate to dismiss her claim at this stage of the proceedings.”)

***Robertson v. District of Columbia***, No. 09-1188 (RMU), 2010 WL 3238996, at \*7, \*8 (D.D.C. Aug. 16, 2010) (“Relying on *Atchinson*, the plaintiff asserts that she has stated a § 1983 claim against the District, noting that she has alleged an instance of misconduct, inadequate training and ‘deliberate indifference’ on the part of the District. . . Yet the portion of *Atchinson* holding that a plaintiff adequately pleads ‘deliberate indifference’ simply by invoking the phrase in his or her complaint appears to have been superseded by the Supreme Court’s ruling in *Ashcroft v. Iqbal*. . . Although the plaintiff in this case alleges that the District acted with deliberate indifference in failing to train its officers, the complaint contains no facts suggesting that the District knew or should have known of any deficiencies in the training of its officers with respect to potentially suicidal detainees. . .Accordingly, the complaint fails to state a § 1983 claim against the District based on improper training of MPD officers. The plaintiff’s more general claim that the District maintained a policy or custom of failing to provide adequate care to potentially suicidal detainees suffers from the same defect. As with the failure to train claim, the complaint contains no facts indicating that the District knew or should have known of any deficiencies in the treatment or care provided to potentially suicidal detainees like the decedent. . .These deficiencies require dismissal of the plaintiff’s § 1983 claim against the District.”)

***Matthews v. District of Columbia***, 730 F. Supp.2d 33, 37, 38 (D.D.C. 2010) (“Here, plaintiffs allege that five different individuals were subjected to invasive public strip searches by numerous MPD officers on six different occasions and in six different locations in 2006 and 2007. . . These searches occurred even though the MPD has issued a general order detailing when strip searches are permissible, and indicating that strip searches are prohibited in public areas. . . Based on the number of instances of alleged unlawful misconduct, and the number of officers involved, it is ‘plausible,’ *Iqbal*, 129 S.Ct. at 1949, that the officers’ behavior resulted from the District’s failure to train or supervise its employees. Indeed, the Court can plausibly infer from the facts animating

plaintiffs' allegations that the strip searches were not the result of rogue officers acting contrary to their training. . . . In denying the District's motion to dismiss, the Court is not ruling on whether plaintiffs' allegations, if proven, would be sufficient to establish that the District actually failed to train or supervise its employees. . . . At this stage of the litigation, and drawing all 'reasonable inference[s]' in plaintiffs' favor, the Court merely concludes that plaintiffs have 'state[d] a claim to relief that is plausible on its face.'")

***Martin v. District of Columbia***, 720 F.Supp.2d 19, 23, 24 (D.D.C. 2010) ("Plaintiff's conclusory statements – unsupported by additional factual allegations – are simply insufficient to state a claim under § 1983 against the District. . . Accordingly, because plaintiff has provided only "formulaic recitation" of the elements of a § 1983 failure-to-train claim, the Court GRANTS defendant's motion to dismiss as to plaintiff's municipal liability claim. This claim is hereby dismissed without prejudice. . . . In the event that plaintiff seeks leave of the Court to file an amended complaint reasserting municipal liability, plaintiff should be mindful that he must assert a factual basis for his municipal liability claim sufficient to overcome the more stringent pleading standards imposed by the Supreme Court's decisions in *Twombly* . . . and *Iqbal*. . . . Specifically, plaintiff must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,' not mere conclusory statements regarding the District's alleged liability.")

***Smith v. District of Columbia***, 674 F.Supp.2d 209, 212-14 & n.2 (D.D.C. 2009) ("Here, Ms. Smith adopts the 'deliberate indifference' theory of municipal liability – where "the municipality knew or should have known of the risk of constitutional violations," but did not act.' . . Ms. Smith offers two allegations to support her claim that the District was deliberately indifferent. First, she contends that there were systemic problems associated with referrals for off-site medical treatment of inmates and specialists care that were known to defendant D.C. The defendant failed to take reasonable actions to ensure that systemic problems were addressed. . . Second, she asserts that defendant knew or should have known that there were unreasonable delays associated with the deceased's treatment and failed to take the steps necessary to correct systemic problems associated with such delays. . . In short, Ms. Smith alleges that the District knew or should have known about supposedly ongoing Eighth Amendment violations regarding Gilbert Smith's medical care. These allegations, however, cannot survive the District's motion to dismiss. They do nothing more than recite the requisite causal elements of custom or policy liability based on deliberate indifference – that is, that the District 'knew or should have known' about possible constitutional violations yet failed to act. . . But '[a] pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 129 S.Ct. at 1949 . . . . Ms. Smith's allegations regarding the District's knowledge therefore 'are conclusory and not entitled to be assumed true.' . . Ms. Smith's complaint, and indeed the entire record, is devoid of any facts or allegations that the District of Columbia knew or should have known about Gilbert Smith's supposed mistreatment. Nowhere does she allege that, for example, Gilbert Smith forwarded complaints or grievances about his treatment to the District of Columbia. . . Although she alleges that '[o]n almost a daily basis, the deceased made requests for medical care, treatment, and

attention,’ Compl. & 12, the Court cannot reasonably infer that these requests were made to or forwarded to the District. The District neither operated, nor provided medical care at, the Correctional Treatment Facility. . . Therefore, even if this allegation is true, it does not plausibly suggest that the District knew or should have known about Gilbert Smith’s medical treatment, but failed to act. . . . Ms. Smith’s allegations supporting her claim of custom or policy based on deliberate indifference, then, ‘amount to nothing more than a ‘formulaic recitation of the elements’ of’ the claim for liability . . . . To be sure, the D.C. Circuit previously held that a plaintiff need only plead that a municipality ‘knew or should have known’ about the ongoing constitutional violations’ to sustain a claim for *Monell* liability predicated on deliberate indifference. . . But *Warren* preceded *Iqbal*, and must now be interpreted in light of that subsequent Supreme Court decision. Under *Iqbal*, such conclusory pleadings are no longer sufficient to state a claim on which relief may be granted. . . This Court concludes that, notwithstanding *Warren*, the sufficiency of Ms. Smith’s allegations here must be assessed under the standard set by the Supreme Court in *Twombly* and *Iqbal*.”)

***Smith v. Corrections Corp. of America, Inc.***, 674 F.Supp.2d 201, 206, 207 (D.D.C. 2009) (“Ms. Smith offers two allegations to support her claim that CCA was deliberately indifferent. First, she contends that there were systemic problems associated with referrals for off-site medical treatment of inmates and specialists care that were known to defendant CCA and Unity. These defendants failed to take reasonable actions to ensure that systemic problems were addressed. . . Second, she asserts that defendants knew or should have known that there were unreasonable delays associated with the deceased’s treatment and failed to take the steps necessary to correct systemic problems associated with such delays. . . In short, Ms. Smith alleges that CCA knew or should have known about supposedly ongoing Eighth Amendment violations regarding Gilbert Smith’s medical care. These allegations, coupled with Ms. Smith’s specific factual allegations, are sufficient to survive CCA’s motion to dismiss. To be sure, the allegations in paragraphs fifteen and twenty-one of the complaint do not, by themselves, state a section 1983 claim based on deliberate indifference. Indeed, they do nothing more than recite the requisite causal elements of custom or policy liability based on deliberate indifference – that is, that [CCA] ‘knew or should have known’ about possible constitutional violations but failed to act. . . . The allegations in paragraphs fifteen and twenty-one, standing alone, ‘are conclusory and not entitled to be assumed true.’ . . But Ms. Smith bolsters these allegations with factual allegations that plausibly suggest she is entitled to relief. Ms. Smith alleges that ‘[o]n almost a daily basis, the deceased made requests for medical care, treatment, and attention including, but not limited to, providing medication ..., providing prompt and adequate dressing changes ..., providing of sanitary cell conditions ..., [and] providing of prompt transfers to medical facilities.’ . . Because CCA operated the Correctional Treatment Facility, the Court can reasonably infer that these complaints and grievances were made to CCA. Accordingly, Ms. Smith has properly pleaded that CCA knew of the supposed unconstitutional medical care and treatment Gilbert Smith received. And Ms. Smith’s allegation that CCA ‘failed to take reasonable actions to ensure that systemic problems were addressed,’ Compl. & 15, coupled with the absence of any indication that Gilbert Smith’s medical care and treatment improved during his incarceration, plausibly suggests that CCA failed to act in the face of its employees’ allegedly unconstitutional

behavior. Hence, Ms. Smith has sufficiently alleged that Gilbert Smith’s supposed unconstitutional medical treatment resulted from CCA’s deliberate indifference.”).

## FIRST CIRCUIT

*Abdisamad v. City of Lewiston*, 960 F.3d 56, 60-61 (1st Cir. 2020) (“Abdisamad argues that his claims fall into a ‘state-created danger’ exception discussed in *Irish*. But that is simply not accurate. Our opinion in *Irish* observed that other ‘circuits have recognized the existence of the state-created danger theory’ but that ‘[w]hile this circuit has discussed the possible existence of the state-created danger theory, we have never found it applicable to any specific set of facts.’. . . We also noted that ‘we “may elect first to address whether the governmental action at issue is sufficiently conscience shocking” before considering the state-created danger element,’. . . and that ‘mere negligence would be insufficient to maintain a claim of substantive due process violation[.]’ . . . The record in *Irish* contained no information about police protocol and training. Given the specific facts alleged as to the individual defendants, these were ‘relevant both to the substantive due process and qualified immunity inquiries,’. . . and we vacated the dismissal and remanded for discovery[.]. . . Abdisamad argues that *Irish* requires vacatur of the dismissal in this case to allow him to take discovery about what protocol and training might have been violated in the events that gave rise to this lawsuit. Not so. This case does not resemble *Irish* for many reasons, including that *Irish* dealt with the liability of individual police officers, not municipal liability, and that Abdisamad does not allege that the City Defendants’ policies caused R.I.’s death, but rather that R.I.’s death resulted from the City Defendants’ *failure* to follow those policies. ‘[A] different standard is used to determine liability for individual and municipal defendants.’. . . Individual government officials may be sued ‘for federal constitutional or statutory violations under § 1983,’ though ‘they are generally shielded from civil damages liability under the principle of qualified immunity.’. . . But ‘liability can be imposed on a local government only where that government’s policy or custom is responsible for causing the constitutional violation or injury.’. . . Municipal liability ‘cannot be based on respondeat superior but requires independent liability based on an unconstitutional policy or custom of the municipality itself.’. . . Although municipalities’ policies ‘not authorized by written law’ can nevertheless be actionable, they must be ‘so permanent and well settled as to constitute a “custom or usage” with the force of law.’. . . A ‘municipality’s failure to train or supervise ... only becomes a basis for liability when “action pursuant to official municipal policy of some nature caused a constitutional tort.”’ . . . Abdisamad’s amended complaint does not plausibly allege that a Lewiston policy or custom led to R.I.’s death. Its factual allegations do not support a plausible inference that the City Defendants’ actions resulted from an unconstitutional policy or custom. They include no facts whatsoever about a Lewiston policy that would be unconstitutional and create municipal liability. To the contrary, the amended complaint alleges that R.I.’s death resulted from defendants’ ‘failure ... to follow their protocols,’ rather than from defendants’ actions that were consistent with a Lewiston policy or custom. That allegation cannot serve as the basis for municipal liability and in fact precludes such liability.”)

***Saldivar v. Racine***, 818 F.3d 14, 20, 23 (1st Cir. 2016) (“Saldivar argues that she has stated a plausible *Monell* claim because her complaint alleges that Racine was acting as a final policymaker for the City when he made decisions regarding Pridgen’s retention, supervision, and training in response to Pridgen’s disciplinary violations. But even assuming that the allegation that Racine is a final policymaker is plausible, that allegation is not enough. A City is liable under *Monell* for the acts of a final policymaker only if those acts constitute deliberate indifference. See *Connick*, 563 U.S. at 61; *Young v. City of Providence*, 404 F.3d 4, 26 (1st Cir.2005). And so here, too, Saldivar’s § 1983 claim may survive the motion to dismiss only if the complaint plausibly alleges that Racine was deliberately indifferent to the grave risk of harm that Pridgen posed. But that claim is not plausible for the reasons we have just given regarding the limited allegations contained in the complaint. And thus here, too, we agree with the District Court that the claim cannot go forward. . . . We end by emphasizing that to survive a motion to dismiss a claim must merely be ‘plausible on its face.’ . . . Moreover, we have said that in cases ‘in which a material part of the information needed is likely to be within the defendant’s control,’ ‘some latitude may be appropriate’ in applying the plausibility standard.’ . . . In such cases, we have said that ‘it is reasonable to expect that “modest discovery may provide the missing link” that will allow the appellant to go to trial on her claim.’ . . . But the missing link that is common to the claims at issue in the case before us has not been alleged ‘upon information and belief,’ as it was in *Menard*, . . . and is not plausible simply by appeal to common sense, as in *García–Catalán*, see 734 F.3d at 103. Here, the gap between the allegations in the complaint and a plausible claim is wider than it was in those cases. Importantly, Saldivar was allowed modest discovery before she filed her amended complaint, namely access to Pridgen’s disciplinary record, upon which Saldivar’s allegations are based. There is no indication from that record, however, that any of the violations involved violent conduct. Simply put, the complaint alleges conduct by a member of the City police force that is shocking. But the complaint seeks to hold the officer’s supervisor and the City liable. Absent more facts than the complaint contains, we cannot discern a plausible claim for doing so under § 1983 or under the law of negligence in Massachusetts. Accordingly, the decision of the District Court dismissing Saldivar’s complaint is *affirmed*.”)

***Freeman v. Town of Hudson***, 714 F.3d 29, 38 (1st Cir. 2013) (“The Freemans have advanced only a ‘final authority’ theory of municipal liability. The complaint, however, references no state or local laws establishing the policymaking authority of any individual or group of individuals. The complaint alleges misconduct from many separate actors, but gives no guidance about which acts are properly attributable to the municipal authority. Absent this information, the complaint fails to state more than respondeat superior liability on the part of the Town and the Commission. This is not enough to support a section 1983 action against a municipality, *Monell*, 436 U.S. at 691, and the district court correctly dismissed the claims against the Town and the Commission.”)

***Haley v. City of Boston***, 657 F.3d 39, 52, 53 (1st Cir. 2011) (“The City also contends that both municipal liability claims fail as a matter of pleading to meet the Supreme Court’s recently elucidated ‘plausibility’ requirement. . . . This contention elevates hope over reason. The complaint alleges that the detectives’ withholding of the sisters’ statements occurred pursuant to a standing

BPD policy, under which Boston police officers regularly kept helpful evidence from criminal defendants. The complaint further alleges that this policy was designed to encourage successful prosecutorial outcomes despite the existence of evidence pointing to innocence. The complaint contrasts the BPD's policy with that of the district attorney's office, which it alleges had a standing policy to disclose all known exculpatory and impeachment evidence in full compliance with *Brady*. Haley argues that, in his case, the district attorney's office was unable to fulfill its salutary (and constitutionally mandated) disclosure policy because the BPD failed to apprise it of the sisters' statements. The end result was Haley's wrongful conviction. Haley's second municipal liability claim draws on many of these same facts. The difference is the allegation, made in the alternative, that the BPD's unconstitutional suppression of the sisters' statements, if not the result of a standing policy, was precipitated by poor training, to which the City was deliberately indifferent. For its part, the City vigorously disputes the accuracy of these allegations. It denies that the BPD either put in place an unconstitutional policy or turned a blind eye to the need for training. But this is neither the time nor the place to resolve the factual disputes between the parties. Whether Haley can prove what he has alleged is not the issue. At this stage of the proceedings, we must take the complaint's factual allegations as true, and those allegations paint an ugly but plausible picture. If proven, that picture will support a finding of municipal liability. We do not reach this conclusion lightly. Evaluating the plausibility of a pleaded scenario is a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.' . . . Disclosure abuses are a recurring problem in criminal cases, *see United States v. Osorio*, 929 F.2d 753, 755 (1st Cir.1991), and the BPD's failure to disclose the sisters' statements is wholly unexplained. Given the volume of cases involving nondisclosure of exculpatory information and the instant failure to disclose statements that clearly would have undermined the prosecution's theory of the case, we think that the municipal liability claims pleaded by Haley step past the line of possibility into the realm of plausibility. . . . Indeed, if the detectives intentionally suppressed the discoverable statements even when such activity was condemned by the courts (as Haley has alleged), it seems entirely plausible that their conduct was encouraged, or at least tolerated, by the BPD. Although couched in general terms, Haley's allegations contain sufficient factual content to survive a motion to dismiss and open a window for pretrial discovery. . . . Consequently, the district court erred in dismissing Haley's section 1983 claims against the City.")

***Palermo v. Town Of North Reading***, 370 F. App'x 128, 130 n.4 (1st Cir. 2010) ("The Palermos asserted at oral argument that Paragraph 26 of the amended complaint raised a sufficient *Monell* claim for purposes of a motion to dismiss. That paragraph alleged that 'the actions, decisions, and policies' of the Town 'deprived the Plaintiffs of all economically beneficial use of the Premises.' Under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), this allegation is not nearly sufficient to support a *Monell* claim because the complaint as a whole contained no factual assertions whatsoever regarding Town policy. *See Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to Astate a claim to relief that is plausible on its face.") (quoting *Twombly*, 550 U.S. at 570). As noted above, the factual premise

of the amended complaint was that the Palermos had been treated differently from other property owners, not similarly in accordance with Town policy.”)

***Bannon, for the Estate of Root v. Godin***, No. CV 20-11501-RGS, 2020 WL 7230902, at \*1–2 (D. Mass. Dec. 8, 2020) (“The City argues that plaintiff has failed to plead an actionable claim because the Complaint neither identifies with specificity the deficiency in training that led to Justin Root’s death nor sets out a pattern of unconstitutional conduct by Boston officers that would have placed the City on notice of a need for further training of its officers. The court agrees that the Complaint, while rich in generalities, is rather thin on detail. However, at this early stage of the litigation, to withstand a Rule 12(b)(6) attack, a Complaint need not be replete with factual allegations; rather a plaintiff’s burden is to set out ‘plausible grounds’ for an entitlement to relief. . . . While this standard ‘requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action’s elements will not do,’ . . . here the sparsity of the Complaint may be fairly attributed to the infancy of the litigation and the plaintiff’s lack of access to the discovery tools that are typically deployed to flesh out the factual underpinnings of a liability claim. That said, the court does not find the Complaint so devoid of factual detail as to leave the City clueless about the nature of the plaintiff’s claims. She identifies thirteen areas, albeit in general terms, in which she alleges that the City allegedly failed to provide adequate training as well as several specific policies which the City allegedly failed to enforce to insure officer compliance with constitutional mandates. . . . She also alleges that the City ‘knew or should have known that their police officers . . . might be in a position to consider the use of deadly force on a suspect such as Mr. Root that (a) did not pose any immediate danger to police officers or others, (b) did not have a firearm, (c) was severely injured and covered in blood, and (d) lying on the ground,’ and thus that the purported inadequate training and supervision ‘amount[ed] to deliberate indifference to clearly established constitutional rights of others, including Mr. Root, to be free from the use of excessive force and the deprivation of life without due process of law.’ . . . These allegations suffice, for present purposes, to withstand the motion to dismiss.”)

***Regis v. City of Boston***, No. 19-CV-10527-IT, 2020 WL 2838862, at \*3 (D. Mass. June 1, 2020) (“Here, Plaintiffs make a number of allegations as to why the City Defendants are liable under § 1983 for both the City Defendants’ policies and customs and for their failure to train its employees. Specifically, they allege the City Defendants have a policy that the warrant affiant is not to be present where and when the BPD deploys ‘SWAT’ teams to execute a no-knock raid, . . . an absence of a city policy requiring officers to check the names of individuals on a warrant with the names of individuals residing in a unit that is being raided before executing the raid, . . . an absence of a city policy requiring officers conducting a raid to double check the property address against the warrant address before executing the raid, . . . an absence of a policy requiring officers conducting the raid to survey the home the day before the raid so as to ensure that the activity in the home is consistent with that described in the warrant, . . . an absence of a policy requiring officers to immediately compare the names and described features of those individuals named in the warrant with those encountered in the property being raided, . . . and, a failure to train officers on how to interact with children encountered in a home that is being raided[.] . . . Plaintiffs *Amended*

*Complaint* [#20] sets forth short and plain statements of the claim for which they are seeking relief, and these statements are sufficient to provide the City Defendants with notice as to the basis for the claims. The City Defendants do not dispute this. Nevertheless, the City Defendants move for dismissal pursuant to Fed. R. Civ. P. 12(b)(6). The City Defendants argue that the complaint only describes an ‘isolated incident’ and that the City’s existing policies on executing no-knock raids, which the City attaches to its opposition, show ‘quite the opposite of “deliberate indifference” with regard to ensuring entries at correct addresses.’ . . . Maybe so, but these arguments go to the merits of Plaintiff’s claims that there is a direct causal link between the City’s policies and the alleged violation of the Regis’s family’s rights and that the City was deliberately indifferent to how their failure to train its officers caused the alleged violations under the federal Constitution. . . . They do not undermine the sufficiency of the pleadings.”)

*Cosenza v. City of Worcester, Massachusetts*, No. CV 18-10936-TSH, 2019 WL 78997, at \*5 (D. Mass. Jan. 2, 2019) (“In his Amended Complaint, Plaintiff alleges that the City of Worcester had policies, practices, and deficient training procedures that caused individuals suspected of criminal activity, such as Plaintiff, to be subjected to manipulated and distorted lineup procedures, deprived of exculpatory evidence, subjected to criminal proceedings based on false evidence, and deprived of their liberty without probable cause. . . . According to Plaintiff, these procedures were promoted by leaders, supervisors, and policy makers in Worcester. . . . Consequently, these ‘widespread practices ... were so well settled as to constitute the de facto policy of the City of Worcester.’ . . . In addition, ‘the constitutional violations committed against Plaintiff were committed with the knowledge or approval of persons with final policymaking authority for the City of Worcester and the Worcester Police Department, or were actually committed by persons with such final policymaking authority.’ . . . Finally, Plaintiff alleges that these ‘policies, practices, and customs ... were the moving force behind’ the violations of Plaintiff’s constitutional rights. . . . These allegations are sufficient to survive the motion to dismiss.”)

*Henriquez v. City of Lawrence*, No. 14-CV-14710-IT, 2015 WL 3913449, at \*3 (D. Mass. June 25, 2015) (“While admittedly a close question, this court finds that Henriquez’s allegations are sufficient at this stage to state a plausible claim for an unconstitutional policy or custom. Henriquez alleges that Officer Camacho and other officers in the Department engaged in prior incidents of excessive force and denial of medical care constituting a ‘history or pattern’ of such conduct, citizens complained about officers’ use of excessive force and denial of medical care, the City was on notice of such complaints, and the City failed to take any action in response to the complaints, including failing to investigate, supervise, discipline, and train the officers. Although Henriquez does not provide many factual details as to the prior incidence of misconduct and prior complaints, she provides more than legal conclusions or a recitation of the elements of the cause of action. . . . Henriquez alleges facts that, taken as true and taken together with the reasonable inferences from those facts, state a plausible claim.”)

*Bochart v. City of Lowell*, 989 F.Supp.2d 151, 155 (D. Mass. 2013) (“The Court acknowledges that there is an inherent difficulty in pleading a § 1983 action against a municipality. Under the

federal system of notice pleading, a complaint need only allege a ‘short and plain statement of the claim.’. . . Publicly-available information concerning similar constitutional violations may often exist only as allegations only, not facts. Early dismissal on that basis could inappropriately prevent or discourage plaintiffs from asserting their constitutional rights. On the other hand, a municipality can be held liable only if a policy or custom actually exists, and should not be forced to expend its limited resources conducting discovery in every case where a plaintiff makes a bare allegation of a ‘policy or custom.’. . . Moreover, what suffices to state a custom or practice varies from case to case. The size of the municipality, the frequency of the alleged violations, the length of time during which the alleged violations have occurred, and the similarity in character of the alleged violations are among the factors to be considered in determining whether a series of incidents has risen to the level of a ‘custom’ or ‘practice.’ There is no set formula for ascertaining the appropriate degree of specificity or plausibility in a complaint, and each case must be considered on its own merits.”)

*Comeau v. Town of Webster, Mass.*, No. 11-40208-TSH, 2012 WL 3042384, \*8 (D. Mass. July 24, 2012) (“Here, to survive the motion to dismiss, Plaintiffs must have pled facts to show it is plausible that the Board of Health adopted and implemented spoilage/storage/contamination policies, not for the purpose of a neutral health and safety reason, but for the purpose of violating Plaintiffs’ civil rights. . . In support of their § 1983 claim, Plaintiffs merely contend Webster’s Board of Health: (1) ‘has a duty and an obligation of reasonable care to administer, properly supervise, direct, and control those agents acting on its behalf . . .,’ *Compl.*, ¶ 161; and (2) had policies and customs in place for the purpose, including but not limited to administering, directing, supervising and controlling inspection and disposition of food products.’. . . None of Plaintiffs’ allegations identify a policy that caused a violation of their right to due process. Instead, Plaintiffs attempt to implicate the town by parroting the elements of a § 1983 claim. On such meager allegations, Plaintiffs’ claim for municipal liability cannot succeed. . . . Plaintiffs’ formulaic allegation that the Board of Health ‘had policies and customs in place’ is precisely the type of blanket, conclusory allegation that the Supreme Court has determined should not be given credit when standing alone.”)

*Chalifoux v. City of Lowell*, No. 10-11847-RGS, 2011 WL 841068, at \*1, \*2 (D. Mass. Mar. 8, 2011) (“[I]t is doubtful in this age of *Twombly-Iqbal* pleading that the Complaint as presently drafted would survive unscathed a well-crafted motion to dismiss. A post-*Twombly* complaint must allege ‘a plausible entitlement to relief.’. . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . Here, while the Complaint alleges plausible causes of action against Officer Panek and perhaps one or more of the unidentified officers, the claims against the City of Lowell are set out in a formulaic recitation of every theory of municipal and supervisory liability recognized by federal law. None of theories, however, is given any factual anchoring. For example, the failure by the City to properly train Officer Panek in the use of pepper spray is alleged in apparent obliviousness of the long-established rule that a single instance of employee incompetence will not support a recovery for a failure to train. . . . Similarly, supervisory liability is alleged without any identification of the

supervisor or the individual failures on that supervisor's part that are alleged to have caused a constitutional wrong. . . That said, this is not a well-crafted motion to dismiss. As plaintiff fairly points out, the bulk of the City's supporting memorandum appears to have been copied verbatim from an earlier and apparently successful pleading filed before Magistrate Judge Bowler in a separate case, including the inadvertent incorporation of factual references to that case. While there is nothing particularly wrong with boilerplate – it gets used because it is reusable – it is more effective when molded to the shape of the boiler it is meant to reinforce. . . For the foregoing reasons, the City of Lowell's Motion to Dismiss itself from the Complaint is *DENIED* without prejudice. The court *ORDERS* the bifurcation of the municipal and supervisory liability claims brought against the City (and presumably certain superior officers of the Lowell Police) from the Fourth and Fourteenth Amendment claims brought against the individual officers.”)

*Counter v. Healy*, No. 09-12144-RGS, 2010 WL 2802179, at \*6 (D. Mass. June 28, 2010) (“Whether or not Counter's allegations against the City of Cambridge suffice to state a claim for municipal liability pursuant to Section 1983 presents a closer question, but Counter has advanced enough facts to proceed to discovery on this claim. To be sure, Count III, standing alone, reads as a boilerplate recitation of the elements of a *Monell* claim, without supporting factual allegations. . . Counter, however, has pleaded that he serves as a mentor to students of color at Harvard and is aware of, and has discussed with the Police Department, numerous instances of ‘mistreatment of students of color by the Cambridge Police.’. . These allegations, combined with the specific allegations regarding the two different criminal complaints Counter faced, are sufficient to state a claim for relief that is plausible on its face.”)

## **SECOND CIRCUIT**

*Hu v. City of New York*, 927 F.3d 81, 106-07 (2d Cir. 2019) (“In short, the Amended Complaint provides no basis for concluding that the defendants' discriminatory enforcement actions against the plaintiffs ‘represent[ed] the conscious choices of the municipality itself.’. . While it can reasonably be inferred that the plaintiffs have been the victims of persistent harassment by several subordinate officers at DOB, the factual allegations do not ‘compel[ ] the conclusion that the local government has acquiesced in or tacitly authorized its subordinates' unlawful actions.’. . Accordingly, we affirm the District Court's dismissal of the plaintiffs' *Monell* claim.”)

*Colon v. City of Rochester*, 419 F.Supp.3d 586, \_\_\_ (W.D.N.Y. 2019) (“In their thirteenth and fourteenth claims for relief, plaintiffs allege respectively that the City has maintained unconstitutional policies with respect to the use of excessive force in making arrests, and by permitting the RPD's use of ‘cover’ charges to punish so-called ‘contempt of cop.’ In support of the thirteenth claim, plaintiffs have set forth allegations about several RPD officers, none of whom were involved in the incident giving rise to this suit, asserting that those officers have used excessive force and were never disciplined for their actions. . . There is no bright-line rule for determining whether allegations of prior incidents involving other officers and different alleged victims are sufficient to make out a *Monell* claim. On the one hand, a plaintiff asserting

a *Monell* claim must go beyond merely reciting a ‘litany of other police-misconduct cases’ involving the same municipality. . . . But that does not mean that past incidents are irrelevant, or that they can never support a claim of municipal liability. A plaintiff asserting a *Monell* claim based on a municipality’s ongoing practice or custom will typically need to rely on past cases involving police misconduct. . . . The question on a motion to dismiss is whether, assuming the truth of the plaintiffs’ factual allegations, those past incidents give rise to a plausible claim of deliberate indifference on the part of the municipality to the types of constitutional violations alleged in the case before the court. In making that determination, courts typically consider both the number of alleged prior incidents and the degree of similarity that they bear to the incident that gave rise to the lawsuit at bar. . . . In the case before me, plaintiffs have set forth allegations about six RPD officers who have allegedly used excessive force in the past, but never been disciplined for doing so. . . . Those twelve incidents took place between July 15, 2001 and September 18, 2015. Some of the incidents alleged are factually quite dissimilar from the incident that occurred here. . . . Some of the alleged incidents, however, do bear some similarity to the one alleged in this case. . . . The other incidents alleged fall at various points on the spectrum in terms of their similarity to the incident here, but in they all involve alleged uses of excessive force by RPD officers, who were not disciplined for their actions. As stated, plaintiffs assert in the thirteenth cause of action that the City has been deliberately indifferent to RPD officers’ use of excessive force, both in carrying out arrests and in non-arrest interactions with civilians. Plaintiffs allege that at the time of the incident giving rise to this suit, the RPD essentially had *no* standards governing officers’ use of force. In other words, officers were given free rein to use force as they saw fit. Given those allegations, the Court cannot simply disregard the allegations about prior incidents. If the claim is that the City and the RPD have routinely ignored officers’ use of force, no matter *how* excessive or unwarranted, then the fact that some of the prior alleged incidents involved uses of force that were more egregious than what is alleged here is not dispositive. In making this determination, the Court is mindful that this is not a motion for summary judgment. On a motion to dismiss, the Court must accept the truth of plaintiffs’ factual allegations, and construe all reasonable inferences in their favor. Applying that standard, I conclude that plaintiffs’ thirteenth claim should be allowed to proceed. . . . The fourteenth claim alleges that the City and RPD have created and maintained a custom and policy of wrongfully arresting people without probable cause. Plaintiffs allege a number of aspects in which those arrests are wrongful, such as: the use of false ‘cover’ charges like disorderly conduct, trespass, resisting arrest, etc.; so-called ‘contempt of cop’ arrests based on the arrestee’s perceived lack of respect for the officer; and making arrests without probable cause, simply to meet the goals of temporary law-enforcement initiatives. Plaintiffs also allege that the City’s and RPD’s policies in this regard proximately caused their injuries. In particular, plaintiffs allege that the arrests of plaintiffs were made in part to carry out an RPD policy then in effect, known as ‘Operation Cool Down,’ pursuant to which RPD officers were instructed to aggressively engage citizens in public areas, in an ostensible effort to deter crime and violence in Rochester. . . . As in the thirteenth cause of action, plaintiffs have alleged and rely upon other past incidents involving RPD officers. . . . While the matter is not free from doubt, the Court will deny defendants’ motion to dismiss this claim. The mere fact that lawsuits were filed in connection with these incidents is not in itself probative of the existence of a municipal custom or policy. . . . But

as with the excessive force claim, that does not mean that the underlying incidents themselves may not be considered in determining whether plaintiffs have adequately stated a claim. Again, this is not a motion for summary judgment, and accepting the truth of plaintiffs' allegations, I conclude that they have presented a facially viable *Monell* claim in their fourteenth cause of action. It bears repeating that this decision is based on the relatively lenient standard applicable to Rule 12(b)(6) motions. It remains to be seen whether, after discovery, summary judgment may be appropriate.”)

*Newson v. City of New York*, No. 16CV6773ILGJO, 2019 WL 3997466, at \*8-10 (E.D.N.Y. Aug. 23, 2019) (“Plaintiff’s *Monell* claims are structured similarly to those in *Benitez*. He alleges that the City instituted and implemented ‘unlawful policies, procedures, regulations, practices and/or customs concerning the continuing obligation to make timely disclosure to the defense’ and avers that there was ‘deliberate indifference by policymaking officials at the [QCDA] in its obligation to properly train, instruct, supervise and discipline its employees, including the ADAs involved in the prosecution of the plaintiff’s case, with respect to such matters.’. . . Importantly, Plaintiff cites 87 cases of prosecutorial misconduct by the QCDA between 1985 and 2004, including 28 cases in which the QCDA withheld *Brady* or *Rosario* material. . . This list of cases largely overlaps with the one submitted in *Benitez* and, as in *Benitez*, the Court finds that it is circumstantial evidence of a pattern and practice of which municipal policymakers ‘must have been aware.’. . . To be sure, discovery may reveal that no such policy existed at the time of the proceedings against Plaintiff, if it ever existed at all. But ‘a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and “that a recovery is very remote and unlikely.”’. . . For purposes of this motion to dismiss, Plaintiff’s allegations push his *Monell* claim over the line from ‘mere[ly] possib[le]’ to ‘plausible.’. . . Accordingly, the City’s motion to dismiss Plaintiff’s *Monell* claim as it relates to the conduct of the QCDA is denied. . . [I]n this case, Plaintiff does not expressly allege that the NYPD wrongfully withheld evidence from *prosecutors*. Instead, his only § 1983 claim as it relates to the NYPD is that it ‘withheld favorable material evidence *from the plaintiff and his attorney*.’. . . This fails to state a constitutional violation. As the Second Circuit held nearly three decades ago, ‘the police satisfy their obligations under *Brady* when they turn exculpatory evidence over to the prosecutors.’. . . Thereafter, it is the responsibility of the prosecutors, not the police, to ensure that *Brady* material is disclosed to the defense. . . Because Plaintiff has failed to explicitly allege a constitutional violation by the NYPD, he cannot maintain a *Monell* claim against the City based on the NYPD’s alleged misconduct. . . . In this case, the Court deems it appropriate to allow Plaintiff to amend his § 1983 claim to include an explicit allegation that the NYPD failed to forward exculpatory evidence to the QCDA. As noted above, the factual portion of the complaint amply supports the inference that the NYPD did not disclose evidence to prosecutors when it should have. . . It is plausible that, had the ballistics evidence and cellphone been received by the QCDA more promptly, they would have influenced the decision to continue the charges against Plaintiff rather than dismiss them without further action. It is also plausible that the belated disclosure of this evidence contributed to the QCDA’s *own* failure to abide by its obligations under *Brady*, which itself resulted in the postponement of trial and prolonged the amount of time that Plaintiff would remain incarcerated. Therefore, allowing Plaintiff to amend the complaint will not be futile. The amended complaint,

in its current form, does not allege any facts—only ‘mere assertion[s],’ . . . that there was a municipal pattern or practice that caused the NYPD to withhold evidence from prosecutors, or that tolerated or ratified such conduct. . . The compendium of judicial decisions attached to the amended complaint describes occasions where the QCDA withheld evidence, not where the NYPD did so. Accordingly, should Plaintiff desire to amend the complaint, he must furnish additional facts from which such a policy or custom can be inferred. Alternatively, Plaintiff may join individual police officers as defendants under Federal Rule of Civil Procedure 21, . . .in which case a showing of a municipal custom or policy will not be required. For the reasons stated above, Plaintiff’s § 1983 claim as it relates to the conduct of the NYPD is dismissed with leave to amend.”)

**Price v. City of New York**, No. 15 CIV. 5871 (KPF), 2018 WL 3117507, at \*19–20 (S.D.N.Y. June 25, 2018) (“Plaintiff . . . asserts a *Monell* claim against the City based upon its alleged failure to train its employees about the interplay between social media use and the First Amendment. . . . In order for municipal liability to attach on a failure-to-train theory, ‘a municipality’s failure to train its employees in a relevant respect must amount to “deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.”’ . . . ‘A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train.’ . . . Plaintiff alleges that ‘[t]he City’s failure to train employees on the proper use of social media carries a high risk that deleting comments or blocking users will cause violations of those users’ First Amendment rights.’ . . . This allegation, without more, does not ‘nudge[ ] [Plaintiff’s] claims across the line from conceivable to plausible,’ . . . and fails to meet the ‘rigorous standard of culpability and causation’ required to plead municipal liability based upon alleged municipal inaction[.]. .Plaintiff’s bare allegation therefore does not state a claim of deliberate indifference by the City. . . . It may well be that this lawsuit, and this Opinion, place the City on notice of the need to train its employees that viewpoint discrimination is unlawful in forums governed by the Free Speech Clause, including the City’s official Twitter accounts. Indeed, the Court hopes that it does. But that does not mean that the City’s alleged failure to train—when it had no reason to believe ‘to a moral certainty’ that its failure would result in constitutional violations. . . caused the violation of Plaintiff’s First Amendment rights.”)

**Price v. City of New York**, No. 15 CIV. 5871 (KPF), 2018 WL 3117507, at \*20–21 (S.D.N.Y. June 25, 2018) (“[A]lthough the FAC is not entirely clear, it can be read to suggest that the City should be liable because its employees failed to correct the problem—that is, unblock Plaintiff on Twitter—after Plaintiff made them aware of what had happened. . . . By making these allegations, Plaintiff may be attempting to argue that the City of New York itself undertook the alleged conduct pursuant to a policymaker’s adoption or ratification of his subordinates’ conduct. . . . It is true that Commissioner O’Neill is a ‘policymaker’ for *Monell* purposes, such that his decisions can bind the City of New York. . . . But Plaintiff’s bare allegation that she ‘complained orally to NYPD Commissioner James O’Neill about being blocked on Twitter’ is insufficient to show that O’Neill knew that his subordinates blocked Plaintiff *for unconstitutional reasons*. . . . Because Plaintiff fails to allege that O’Neill knew that Obe and Brooks blocked Plaintiff *because of her viewpoint*, and

because the allegations do not suggest that O’Neill agreed with his employees’ decision to engage in viewpoint discrimination, Plaintiff fails to allege plausibly that the City ratified or adopted the conduct of Brooks and Obe. For these reasons, the Court grants the City Defendants’ motion to dismiss the *Monell* claim against the City of New York, and the official-capacity claims against Obe, Brooks, and Pierre-Louis, related to the their blocking of Plaintiff from the subject Twitter accounts.”)

*Turner v. City of New York*, No. 17-CV-8563 (KBF), 2018 WL 2727889, at \*3–4 (S.D.N.Y. June 6, 2018) (“Plaintiff attempts to support his claim that the Officers were acting pursuant to a pervasive NYPD policy or custom based on: (1) vague reference to ‘numerous lawsuits, complaints and notices’ brought against the City, the NYPD, and individual NYPD officers that allege similar constitutional violations; (2) certain statements made by Judge Shira A. Scheindlin in an unrelated civil case, *Floyd v. City of N.Y.*, 813 F. Supp. 2d 417 (S.D.N.Y. 2011); . . . (3) a conclusory assertion that ‘[t]housands of individuals, like plaintiff, have been arrested and prosecuted for trespassing without probable cause,’ and that the City is aware of such instances ‘through lawsuits, notices of claims, complaints filed with the NYPD’s Internal Affairs Bureau, and the Civilian Complaint Review Board, and extensive media coverage’; (4) the decision of Judge Scheindlin in another unrelated case, *Davis v. City of N.Y.*, 959 F. Supp. 2d 324, 355 (S.D.N.Y. 2013); (5) various conclusory assertions that the City and NYPD are broadly aware of such policies and/or customs and have failed to take any corrective measures. . . But those purported bases, even when considered in their totality and viewed in the light most favorable to the plaintiff, are plainly insufficient to support a municipal liability claim capable of withstanding defendants’ motion for judgment on the pleadings. First, plaintiff’s various references to other individuals who have been wrongfully searched and/or arrested are vague and insufficient to state a claim to relief that is plausible in this case under *Iqbal* and *Twombly*. Plaintiff asserts, in a conclusory fashion, that the City and NYPD have violated ‘thousands’ of other people’s constitutional rights. But plaintiff does not make *any* specific factual allegations regarding those other people, their claims, or why they are relevant to the allegations raised herein. Besides noting that the City and NYPD (and some individual officers) have faced other complaints and lawsuits, and making the conclusory allegation that those previous complaints involved similar conduct, the SAC does not even attempt to describe or explain the actual similarities between those previous complaints/lawsuits and the incident giving rise to this lawsuit. A complaint must allege ‘more than a sheer possibility that a defendant has acted unlawfully,’ and more than ‘facts that are merely consistent with a defendant’s liability.’ . . The SAC’s vague and conclusory assertions regarding previous constitutional violations does neither. Second, plaintiff’s reference to statements made by Judge Scheindlin in two entirely unrelated cases (*Floyd* and *Davis*) does nothing to bolster his *Monell* claim against the City in this case. Plaintiff does not describe how or why the facts or allegations in *Floyd* or *Davis* are relevant to the misconduct alleged herein. Further, plaintiff does not even attempt to explain how or why Judge Scheindlin’s statements are relevant to the question at hand, which is whether the Officers in this case acted pursuant to a policy and/or custom of the City. The cited statements from *Floyd* and *Davis*, as presented in the SAC, are irrelevant to the Court’s analysis of the pending motion. Even assuming that plaintiff did successfully allege a

custom or practice for unlawful searches and/or arrests, however, the allegations in the SAC do not create a plausible inference that any such custom or practice was pervasive. . . As previously noted, plaintiff does not even attempt to actually explain *how* the ‘thousands’ of other instances of misconduct relate to the misconduct alleged herein, or, critically, how many of those previous instances actually involved misconduct. Without further factual support, the other lawsuits and complaints referenced by plaintiff represent nothing more than unproven allegations that are plainly insufficient to support a municipal liability claim. Additionally, reference to certain statements made by Judge Scheindlin (which, the Court notes, were specific to the facts and legal questions at issue in those cases) are immaterial. Whatever evidence was before Judge Scheindlin is not currently before the Court, and is not laid out in the SAC. In short, the SAC is devoid of the types of factual allegations regarding a pervasive policy or custom that is required to sustain a *Monell* claim against a municipal entity like the City. For that reason, plaintiff’s municipal liability claim must be dismissed.”)

*Paul v. City of New York*, No. 16-CV-1952 (VSB), 2017 WL 4271648, at \*6–7 (S.D.N.Y. Sept. 25, 2017) (“Whether an individual officer has violated the Fourth Amendment during a particular encounter is an entirely separate question from whether a municipal policy caused a constitutional violation. While the municipal policy must be the ‘moving force’ behind the ultimate constitutional injury, . . . it need not be facially unconstitutional[.]. . . Here, Plaintiffs have adequately alleged that the NYPD had a policy that needlessly escalated otherwise safe situations by breaching doors of contained EDPs, which caused constitutional violations to which the City was deliberately indifferent. While Plaintiffs are of course required to plead an actual constitutional injury that resulted, they have done so here, which Defendants implicitly concede by choosing not to move to dismiss the excessive force and unlawful entry claims. Defendants also argue the Banks Communication does not support a plausible inference of the existence of an unconstitutional policy, and is ‘more fairly construed as raising a thoughtful inquiry as to law enforcement best practices in light of evolving experience with EDPs.’ . . . Again, Defendants’ arguments display a fundamental misunderstanding of *Monell* doctrine; Plaintiffs need not establish that the municipal policy itself is facially unconstitutional. . . Defendants also misconstrue the force of the Banks Communication, which cites ‘several occasions in the past,’ . . . and supports Plaintiffs’ allegation that the Police Commissioner was on notice of the danger posed by partial door breaches involving emotionally disturbed persons. The Amended Complaint also alleges that at least two other EDPs have died during interactions with NYPD officers. . . Moreover, the fact that the Banks Communication could also be viewed as ‘a thoughtful inquiry as to law enforcement best practices in light of evolving experience with EDPs,’ . . . does not mean that the Communication is not relevant to and/or evidence of a policy and an alleged *Monell* violation. Thus, Plaintiffs have plausibly asserted a municipal policy and inaction in light of notice of constitutional deprivations on the part of the NYPD. Next, Defendants argue that the Amended Complaint fails to plausibly allege failure to train. The Amended Complaint does not specify a particular deficiency in the NYPD’s training program. However, Plaintiffs do allege that the ESU is a ‘specialized unit’ tasked with handling people experiencing ‘emotional disturbances,’ . . . which implies some amount of additional training on interacting with mentally disturbed individuals. Moreover, plaintiffs cannot

be expected to know the specifics about a municipality's training program or be able to name the alleged deficiencies at the pleading stage. . . Therefore, dismissal of Plaintiffs' *Monell* claim at the motion to dismiss stage is premature under the circumstances presented here, and Defendants' motion to dismiss the *Monell* claim is DENIED.”)

*An v. City of N.Y.*, No. 16 CIV. 5381 (LGS), 2017 WL 2376576, at \*3–5 (S.D.N.Y. June 1, 2017) (“The Complaint adequately alleges the equivalent of an official policy based on a failure to supervise or train. The allegations satisfy all three requirements for deliberate indifference under *Walker*. First, the Complaint plausibly alleges that the City knows to ‘a moral certainty’ that NYPD officers will confront individuals filming them. . . The City issued the FINEST Message, entitled ‘Recording of Police Action by the Public,’ that reminded officers that the public may legally record police interactions. Second, the Complaint plausibly alleges a history of employees mishandling the situation in which an officer is being recorded. The Complaint cites 47 lawsuits, 18 news reports and hundreds of complaints to the CCRB involving allegations that NYPD officers arrested or otherwise interfered with individuals who were recording them in public. Further, the CCRB concluded that complaints regarding police interactions in which the officer was being filmed warranted an Issued-Based Report, a document the CCRB produces if its investigation ‘reveals problems that go beyond specific acts of misconduct and suggest the need for a change in police department policy, procedures, or training.’ At this stage of the litigation, these allegations support the inference of a history of NYPD officers mishandling situations in which individuals film police activities in public. . . Third, the Complaint plausibly alleges that the ‘wrong choice’ by a police officer will ‘frequently’ deprive an individual of a constitutional right. . . The FINEST Message expressly warns officers that ‘intentional interference such as blocking or obstructing cameras or ordering the person to cease ... violates the First Amendment.’ The allegations regarding the numerous lawsuits, news reports, complaints to the CCRB between 2014 and 2016 and the CCRB’s decision to prepare the so-called ‘bystander report’ not only support the inference that the City’s need for more or better supervision to protect against constitutional violations was obvious, they also support the inference that the City failed to make meaningful efforts to address the risk of harm. . . The City’s argument that a plaintiff cannot rely on these sources because they contain hearsay is unavailing; although this objection may prevail on summary judgment, it does not on this Rule 12 motion. . . Accordingly, the Complaint plausibly alleges a municipal policy based on a failure to supervise or train. The City argues that Plaintiff lacks standing in light of the FINEST Message, which it contends is a constitutionally-adequate official policy. . . . The City reasons that Plaintiff cannot allege standing because the FINEST Message did not authorize the NYPD officers to arrest Plaintiff in July 2014 solely for recording a police interaction. Neither *Curtis* nor *Lyons* stands for the proposition that a plaintiff is foreclosed from alleging standing whenever the municipality has a written policy that is constitutionally adequate. As subsequent cases make clear, a ‘municipal policy’ may be found ‘[w]here a city’s official policy is constitutional, but the city causes its employees to apply it unconstitutionally.’”)

*Brown v. City of New York*, No. 13-CV-06912, 2017 WL 1390678, at \*14 (S.D.N.Y. Apr. 17, 2017) (“Brown alleges numerous times that the DOC allows—even invites the Bloods to control

DOC facilities such as GMDC. . . Standing alone, these allegations are conclusory and are insufficient to support a plausible *Monell* claim based on Brown’s single incident. But Brown also claims that the Bloods perpetrated a similar attack on another inmate a few days before he was attacked, . . . and he cites an assortment of cases and articles reporting on corruption and gang-related violence at Rikers. Granted, many of these reports offer no support for Brown’s allegation that the City has an unofficial custom of allowing gang activity to occur at GMDC. Certain ones, however, bear enough factual similarity to the incident that is the subject of this lawsuit to allow Brown’s *Monell* claim to survive the City’s motion to dismiss. For example, Brown cites a *New York Times* article about the killing of a teenage inmate at Rikers by other inmates in 2008. . . In that case, the teen’s attackers had allegedly been enlisted by correction officers to act as enforcers to help maintain control over the jail. The scheme, nicknamed ‘the Program,’ also gave certain inmates special privileges such as deciding who was allowed to use chairs in common rooms. Brown also cites a 2007 *Village Voice* article reporting on violence at Rikers. . . That article, which quotes deposition testimony by a former correction officer, describes how certain inmates were deputized as enforcers by correction officers to control other inmates. The article also discussed an alleged practice known as ‘write with us,’ in which DOC personnel conspired to make false reports on incidents involving inmates. These articles, which contain allegations that are strikingly similar to the factual allegations here, plausibly support Brown’s contention that the DOC has not adequately responded to a pattern of misconduct. At this stage in the litigation, the court finds that Brown has adequately alleged the existence of a municipal policy or custom. To state a claim for municipal liability under § 1983, a plaintiff must not only establish the existence of a municipal policy or custom, but also show a causal connection, or ‘affirmative link,’ between the policy and the deprivation of his constitutional rights. . . The City argues that, even if Brown has sufficiently alleged the existence of a municipal policy, he has not plausibly alleged that his constitutional rights were violated as a result of that policy. If the City has a custom of enlisting gang members to help control other inmates, it is plausible that the attack on Brown—and the correction officers’ lack of response—was directly connected to this policy. Accordingly, the City’s motion to dismiss Brown’s claim for municipal liability based on an unofficial custom or practice is denied.”)

*An v. City of New York*, 230 F.Supp.3d 224, 229-31 (S.D.N.Y. 2017) (“The Complaint fails to allege that the City has a practice that is ‘so persistent and widespread as to practically have the force of law.’ . . Plaintiff cites six lawsuits filed between 2012 and 2016 and one newspaper report. But the Complaint fails to allege that any of the six lawsuits, which were filed over a course of four years, resulted in a finding that the NYPD officers violated the plaintiffs’ First Amendment rights. . . The Complaint also cites a newspaper report about an incident in which an officer was charged with official misconduct after arresting a person who was filming him. These lawsuits and the one newspaper article do not plausibly support an inference of a widespread illegal custom of violating individuals’ First Amendment rights at the time of Plaintiff’s arrest. . . Plaintiff argues that the lawsuits and newspaper article show that the City had notice of ‘repeated allegations of misconduct, including after the FINEST message was issued, and yet took no corrective action.’ Plaintiff’s argument is unavailing as to both parts—that the City had notice that the need to act was obvious and that it took no corrective action. First, the six lawsuits and one newspaper article

over the span of four years is insufficient to plausibly allege the need was obvious. The district court opinions that Plaintiff cites in his brief in which the court held a plaintiff had pleaded deliberate indifference involved significantly more instances of similar misconduct than that alleged in the Complaint. . . .Second, the Complaint is insufficient in alleging that the City, once on notice, failed to take corrective action required to show deliberate indifference. As to the incident cited in the news article, the officer was charged with a crime after the arrest. As to the other incidents, the Complaint does not allege any specific facts regarding whether the City investigated or disciplined the officers that arrested Plaintiff or the officers in any of the six lawsuits cited in the Complaint. . . . In sum, because the Complaint does not adequately allege the existence of an official policy or its equivalent, Plaintiff lacks standing to pursue injunctive relief against the City.”)

***Williams v. City of New York***, No. 14-CV-5123 NRB, 2015 WL 4461716, at \*7 (S.D.N.Y. July 21, 2015) (“We agree with our colleagues, who have consistently held boilerplate allegations such as the ones in this case to be inadequate. The Complaint assures us that *some* policy or custom drives officers to arrest falsely, to apply excessive force, and to prosecute maliciously, but utterly fails to identify any specific policy or custom. Likewise, the Complaint mentions the ideas of deliberate indifference and failure to train, but fails to identify any widespread pattern of conduct to which the City blinded itself or any deficiency in the City’s oversight and training. At bottom, the Complaint alleges that, at one particular place and time, NYPD officers used excessive force in falsely arresting one criminal suspect. Seasoning an allegation of one-off conduct with catchphrases from leading Supreme Court cases is not sufficient to state a *Monell* claim. Therefore, we dismiss the section 1983 against the City.”)

***Adams v. City of New Haven***, No. 3:14-CV-00778 JAM, 2015 WL 1566177, at \*4 (D. Conn. Apr. 8, 2015) (“What facts does a plaintiff asserting a § 1983 failure-to-train claim need to plead in order to withstand a motion to dismiss? Over a decade ago, the Second Circuit suggested that such plaintiffs ‘need only plead that the city’s failure to train caused the constitutional violation,’ in view of the fact that ‘[i]t is unlikely that a plaintiff would have [information about the city’s training programs or about the cause of the misconduct at the pleading stage.’ *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 130 n. 10 (2d Cir.2004). Since then, however, the pleading standards have been ‘substantially reworked’ in *Twombly* and *Iqbal*, and so district courts ‘have generally required that plaintiffs provide more than a simple recitation of their theory of liability, even if that theory is based on a failure to train.’ *Simms v. City of New York*, 2011 WL 4543051, at \*2 n. 3 (E.D.N.Y.2011), *aff’d*, 480 F. App’x 627 (2d Cir.2012). The Second Circuit has endorsed this approach (albeit in an unpublished disposition), stating that, ‘[w]hile it may be true that § 1983 plaintiffs cannot be expected to know the details of a municipality’s training programs prior to discovery, ... this does not relieve them of their obligation under *Iqbal* to plead a facially plausible claim.”)

***Kucharczyk v. Westchester Cnty.***, No. 14-CV-601 KMK, 2015 WL 1379893, at \*6 (S.D.N.Y. Mar. 26, 2015) (“Although there is no heightened pleading requirement for complaints alleging

municipal liability under § 1983, . . . a complaint does not ‘suffice if it tenders naked assertion [s] devoid of further factual enhancement,’[citing *Iqbal*]. . . Thus, to survive a motion to dismiss, Plaintiffs cannot merely allege the existence of a municipal policy or custom, but ‘must allege facts tending to support, at least circumstantially, an inference that such a municipal policy or custom exists.’. . . Put another way, conclusory allegations of a municipal custom or practice of tolerating official misconduct are insufficient to demonstrate the existence of such a custom unless supported by factual details.”)

*Tieman v. City of Newburgh*, No. 13-CV-4178 KMK, 2015 WL 1379652, at \*20-23 (S.D.N.Y. Mar. 26, 2015) (“[T]he Court concludes that Plaintiff has sufficiently alleged that the need for more or better supervision was obvious. There is no bright line rule for how many complaints of civil rights violations is sufficient to show the need for more supervision, nor is there a bright line rule for how recent those complaints must be. The City asserts that the complaints relied on by Plaintiff regarding excessive force incidents that occurred between 2005 and 2008 are too sparse and too remote to support an inference of obviousness. . . However, the City provides no authority to support the notion that a plaintiff must cite a certain number of complaints in a certain time period to make out a *Monell* claim. Indeed, the case law supports Plaintiff’s position here. [collecting cases] The Court does not see any material difference between the seventeen excessive force claims in seven years in *McCants*, the fifteen excessive force claims in five years in *Farrow* . . . and the thirteen claims alleged in nine lawsuits in five years here. . . While there may be questions about the quantum of proof Plaintiff has regarding these other complaints at summary judgment, Plaintiff’s allegations allow the Court to plausibly infer that the City was on notice that the police officers were using excessive force in making arrests. . . However, an allegation of numerous claims of excessive force by itself is insufficient to raise an inference of deliberate indifference due to failure to supervise. Instead, a plaintiff must allege that ‘meaningful attempts to investigate repeated claims of excessive force are absent.’. . . Put another way, ‘[f]or deliberate indifference to be shown, the response must amount to a persistent failure to investigate the complaints or discipline those whose conduct prompted the complaints.’. . . Here, Plaintiff does not offer any allegations plausibly establishing that the City failed to investigate the listed complaints of excessive force. The *only* allegation Plaintiff makes regarding the City’s response to the other lawsuits and the complaints made in the public forum is that ‘[u]pon information and belief, the officers that were the subject of these lawsuits were not disciplined by [the City] for their actions.’. . . This is insufficient. There are two ways to plausibly plead deliberate indifference with respect to failure to supervise/discipline. First, a plaintiff may plead (1) that there was a pattern of allegations of or complaints about similar unconstitutional activity and (2) that the municipality *consistently failed to investigate* those allegations. Second, a plaintiff may plead (1) that there was a pattern of actual similar constitutional violations and (2) the municipality *consistently failed to discipline* those involved. However, what Plaintiff alleges here is (1) that there was a pattern of allegations of or complaints about similar unconstitutional activity and (2) that those allegedly involved were not disciplined. This does not plausibly plead a claim for deliberate indifference. There is no basis for the Court to conclude that Plaintiff plausibly alleged that the past conduct was *actually* unconstitutional, and therefore it would not be deliberately

indifferent of the City to fail to punish police officers for conduct that was not improper or that they did not commit. Indeed, to plausibly allege a deliberate indifference failure to discipline claim under the second strategy, Plaintiff must allege a consistent pattern of a failure to discipline unconstitutional action. . . Finally, Plaintiff's allegation that the Matrix Report concluded that the City's 'discipline guidelines and decisions are unstructured' and recommended that certain changes be made is insufficient to plausibly plead that there was a consistent failure to investigate allegations of misconduct or punish incidents of unconstitutionally excessive force to meet the stringent standard of deliberate indifference. In particular, Plaintiff alleges no causal link between the allegedly 'unstructured' discipline guidelines and the unconstitutional practice of not investigating allegations of use of excessive force. For the above reasons, the Court holds that Plaintiff has not plausibly alleged a failure to supervise/discipline case against the City. . . [S]ince *Twombly* and *Iqbal*, 'courts in this district have generally required that plaintiffs provide more than a simple recitation of their theory of liability, even if that theory is based on a failure to train.' . . To state a claim for municipal liability based on failure to train, Plaintiff therefore must allege facts that support an inference that the municipality failed to train its police officers, that it did so with deliberate indifference, and that the failure to train caused his constitutional injuries. . . Other than Plaintiff's boilerplate assertions discussed above, the sole fact Plaintiff pleaded with respect to the City's failure to train its officers is that, 'only 43% of sworn officers who responded to the polling in the [Matrix Report] agreed that they received appropriate training to do their job well.' . . This factual allegation is just not enough to nudge Plaintiff's claim from possible to plausible. The polling data is not specific as to training regarding the use of excessive force. Nor has Plaintiff pleaded any facts suggesting that an alleged training deficiency *caused* his constitutional injury, for example by identifying 'procedural manuals or training guides' or by 'highlight[ing] relevant particular aspects of police training or supervision.' . . The allegation that, three years after the incident in question took place, only 43% of officers who responded to polling stated that they received appropriate training to do their job well does not allow the Court to plausibly conclude that, at the time of the incident, the City's training as to the use of force during arrest was insufficient and that that insufficiency led to Plaintiff's injuries. . . For the foregoing reasons, Plaintiff fails to state a claim against the City under *Monell*. However, the Court will give Plaintiff one last chance to plead a *Monell* claim against the City.")

***A. ex rel. A. v. Hartford Bd. of Educ.***, 976 F.Supp.2d 164, 197 (D. Conn. 2013) ("The Supreme Court of the United States has held that there is no heightened pleading standard for civil rights actions alleging municipal liability under Section 1983. . . Instead, a plaintiff need do little 'more than plead a single instance of misconduct,' and plaintiff's complaint need include little more than 'a short plain statement of the claim showing that the pleader is entitled to relief[]'. . . The Court concludes that, under the facts alleged in Plaintiffs' Amended Answer and Counterclaims and for reasons discussed at length *supra*, a claim that the Board evinced deliberate indifference to the allegations of discrimination as to show that the defendant intended the discrimination to occur is plausible, and consequently survives a motion to dismiss.")

***Cooper v. City of New York***, No. 12 Civ. 8008(SAS), 2013 WL 5493011, \*6, \*7 (S.D.N.Y. Oct.

2, 2013) (“Cooper alleges that the City has a policy of racial profiling that led to his arrest and subsequent prosecution in violation of his constitutional rights. . . Specifically, Cooper alleges that the City’s *de facto* policies include the failure to properly train police officers, resulting in the racial profiling of African–Americans. He alleges,

[u]pon information and belief, the CITY OF NEW YORK failed to screen, hire, supervise and discipline their police officers, including the DEFENDANT DETECTIVE MICHAEL MacDOUGALL herein, for racial bias, particularly with respect to the treatment of African–Americans, lack of truthfulness, and for their failure to protect citizens from unconstitutional conduct of other police officers, thereby permitting and allowing the defendant DETECTIVE MICHAEL MacDOUGALL herein to be in a position to maliciously prosecute the plaintiff and violate his federal constitutional rights, and/or permit these actions to take place with their knowledge and consent. . . .

Drawing all inferences in favor of Cooper, Cooper has failed to properly plead a plausible *Monell* claim against the City. The Complaint contains nothing more than ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,’ which ‘do not suffice’ to withstand defendants’ motion to dismiss. . . Cooper has failed to allege any fact which would give rise to an inference that the City had a constitutionally violative policy or that a policymaking individual was deliberately indifferent to the NYPD’s alleged lack training. . . Therefore, Cooper’s *Monell* claim against the City is dismissed with leave to amend.”)

*Guzman v. U.S.*, No. 11 Civ. 5834(JPO), 2013 WL 5018553, \*4-\*6 (S.D.N.Y. Sept. 13, 2013) (“Given that *Leatherman* predates both *Twombly* and *Iqbal*, the City highlights that it ‘does not set forth the proper standard under which a Court should evaluate whether a run-of-the-mill complaint is sufficient to survive a motion to dismiss under Rule 8.’ . . The City also contests the Court’s citation of *Rheingold* for the proposition that *Leatherman* ‘specifically rejected the argument that a plaintiff must do more than plead a single instance of misconduct to establish municipal liability under section 1983.’ . . Additionally, the City notes that the Second Circuit has continued to cite its opinion in *Dwares v. City of New York*, 985 F.2d 94 (2d Cir.1993), for the proposition that ‘merely asserting the existence of a municipal policy is insufficient absent allegations of underlying facts’ . . . despite the Supreme Court’s rejection of *Dwares*’ central holding that *Monell* claims require a heightened standard in *Leatherman*. The City is correct in noting that, when alleging a pervasive, albeit unofficial, pattern or practice carried out by officials without final policymaking authority, ‘[a] single incident alleged in a complaint, especially if it involved only actors below the policymaking level, *generally* will not suffice to raise an inference of the existence of a custom or policy.’ . . Additionally, with respect to the failure to train theory of municipal liability, advanced by Plaintiff in paragraphs 502–506 in his Complaint, the alleged deprivation must have ‘occurred as the result of a faulty training program, “rather than as a result of isolated misconduct by a single actor...”’. . . This requirement—the so-called ‘identified training deficiency’—together with a ‘close causal relationship’ between the training failure and the constitutional wrong, reflects a requirement that ‘plaintiffs [ ] prove that the deprivation occurred

as the result of a municipal policy rather than as a result of isolated misconduct by a single actor, ensur[ing] that a failure to train theory does not collapse into *respondeat superior* liability.’ . . . The City wrongly assumes that the Court disregarded *Twombly*, *Iqbal*, and their progeny. The Court’s prior opinion clearly outlined the applicable legal standard for a motion to dismiss, citing both cases. Moreover, the Court’s analysis of Guzman’s *Monell* claim reflected a conclusion that Guzman’s allegations with respect to the City’s policy, custom, or practice were *plausible* on their face, highlighting the Court’s awareness of the relevant precedent and its effect. . . . Nevertheless, it was error to maintain the *Monell* claim in light of the Complaint’s boilerplate allegations and this particular claim’s lack of factual support. As this Court has previously observed, ‘[t]o state there is a policy does not make it so.’ . . . And while *respondeat superior* is a valid theory by which a plaintiff may assert a state tort claim against a municipality, as Guzman has done here, a *Monell* claim pursuant to § 1983 requires something more, and is not to be equated with, nor subsumed into, agency theory. . . . At bottom, Guzman’s Complaint merely recites, without factual support, that the threats and coercion to which he was subjected are the products of an unofficial policy, carried out by officers and sanctioned by the City. Additionally, with respect to the failure to train theory, there are no allegations from which the Court could infer deliberate indifference on the part of policy-making officials or even the required causal link between a failure to train and the resultant harm. Accordingly, upon reconsideration, Guzman’s *Monell* claim is dismissed.”)

*Goode v. Newton*, No. 3:12cv754 (JBA), 2013 WL 1087549, \*7, \*8 (D. Conn. Mar. 14, 2013) (“While the parties largely agree on the ultimate requirements under *Monell*, they disagree about the nature of the pleading standard for *Monell* claims on a Rule 12(b)(6) motion. Plaintiff argues that the proper standard for pleading a *Monell* claim is articulated in *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), which, according to Plaintiff, makes clear that a *Monell* claim can survive on conclusory allegations, so long as the pleading gives fair notice to Defendants. . . . Plaintiff claims that *Leatherman* remains good law, notwithstanding the Supreme Court’s decisions in *Twombly*, 550 U.S. 544, and *Iqbal*, 556 U.S. 662. *Leatherman* does not, however, represent a substantive carve-out for *Monell* claims, but rather stands for the proposition that courts may not impose a more rigorous pleading standard to *Monell* claims. . . . To survive a motion to dismiss, a *Monell* claim must include enough factual material to be plausible. . . . That said, in evaluating the plausibility of *Monell* claims, courts are mindful of the Second Circuit’s observation that ‘[i]t is unlikely that a plaintiff would have information about the city’s training programs or about the cause of the misconduct at the pleading stage.’ . . . The question, then, is whether the nonconclusory allegations in the Amended Complaint are sufficient to render the *Monell* claims plausible. The Court recognizes that this presents a close question, but concludes that Plaintiff has pled sufficient facts ‘to raise a reasonable expectation that discovery will reveal evidence’ of inadequate training or supervision . . . . First, the Court notes that Plaintiff alleges two separate violations—six months’ apart—committed by New London officers, which share a common thread: manufactured criminality. According to the Amended Complaint, Officer Newton planted drugs and falsified his police report, and Officer Lynch lied to obtain a ‘no trespassing’ letter from the NLHA that then served as the basis for a pretextual arrest. Second, notwithstanding Defendants’ characterization of the Francovilla incident as ‘completely unrelated’ to this suit . . .

, the Francovilla matter involves allegations that New London policemen falsified police reports and manufactured criminal charges in 2009 . . . . Third, as Plaintiff notes, the New London police force is relatively small, consisting of approximately eighty sworn officers. . . In light of the small size of the police force, the prior allegations of falsifying police reports in 2009, and the continued practice of falsifying reports in 2010, the Court finds that it is plausible that Defendants had an informal custom of ‘tolerating police misconduct’ and that this custom caused the violations alleged in Counts Four and Six. . . Accordingly, the City Defendants’ motion to dismiss is denied as to the *Monell* counts.”)

*Sherwyn Toppin Marketing Consultants, Inc. v. City of New York*, No. 08 CV 1340(ERK)(VVP), 2013 WL 685382, \*5, \*6 (E.D.N.Y. Feb. 25, 2013) (“Claims against municipalities under § 1983 are not subject to a heightened pleading standard. . . Nevertheless, such claims must meet the requirements of Rule 8 of the Federal Rules of Civil Procedure and satisfy the plausibility standard articulated in [*Ashcroft* and *Twombly*] . . . Moreover, ‘boilerplate allegations of unconstitutional policies and practices’ are insufficient to survive a motion to dismiss for failure to state a claim. . . Here, the complaint lacks sufficient factual details concerning *Monell* liability and contains mere conclusory statements regarding the City’s alleged unconstitutional policies and practices. In this regard, the amended complaint includes only two brief allegations. First, plaintiffs allege that the ‘process of setting up illegal roadblocks as a form of harassment is a specific practice and policy of the New York City Police Department and has been utilized on numerous occasions against similarly situated establishments in Brooklyn.’ . . No evidence is cited in support of this statement in the amended complaint and the ‘illegal roadblocks’ are not mentioned in plaintiffs’ memorandum of law in the discussion of their claims against the City. Moreover, it is not clear which cause of action the alleged ‘illegal roadblocks ... practice and policy’ would support, even if evidence of such a practice and policy had been presented. Second, plaintiffs allege that ‘[d]efendants’ illegal actions were undertaken pursuant to municipal defendants’ customs, practices and policies.’ . . This allegation is insufficient to state a cause of action against the City.”)

*Collins v. City of New York*, 923 F.Supp.2d 462, 477-79 & n.7 (E.D.N.Y. 2013) (“The First and Ninth Circuit have followed *Grandstaff’s* logic. . . The Court is likewise persuaded. Subsequent events may, as the City argues, reflect only Hynes’s support for a subordinate accused of wrongdoing. But the lack of any corrective action might also reflect a tacit policy on Hynes’s part to condone whatever his subordinates deemed necessary to secure a conviction. Collins is, for now, entitled to the latter inference. . . In any event, Collins’s theory does not hinge solely on Hynes’s response to an isolated incident. He further alleges that despite scores of cases involving *Brady* violations and other prosecutorial misconduct, Hynes has never disciplined an assistant for such misconduct, even after the violations were confirmed by court decisions. The City claims that the prior instances of misconduct were not precisely the same as those alleged by Collins. Those differences might lead a jury to agree that there was no underlying policy connecting each incident. But the Court’s role at this stage is to determine whether Collins has alleged facts that support a plausible theory. . . The Court concludes that Collins’s allegations regarding Hynes’s response—or lack thereof—to misconduct by Vecchione and other assistants make plausible his theory that

Hynes was so deliberately indifferent to the underhanded tactics that his subordinates employed as to effectively encourage them to do so. . . Hynes himself is not named as a defendant and would, in any event, be entitled to the same absolute immunity that protects Vecchione. . . . Since Collins’s complaint is governed by *Iqbal*, it is subject to a higher standard than the Second Circuit applied in *Walker*. He must allege, not only a viable theory, but facts that render the theory plausible. In that regard, allegations of *Brady* violations are unhelpful. Better training as to what *Brady* requires might increase officer awareness of what information must be disclosed to prosecutors, but it could not plausibly have prevented the egregious conduct alleged here because Vecchione, according to the allegations, was well aware of what Gerecitano and Hernandez had done to secure Oliva’s testimony. Further, the Court agrees with the City that the litany of other police-misconduct cases are insufficient to make a plausible case for *Monell* liability. The cases either involve *Brady* violations, post-date Collins’s conviction, or involve something less (settlements without admissions of liability and unproven allegations) than evidence of misconduct. *Zahrey*, by contrast, involves actual evidence of analogous misconduct during the relevant time frame. But the wrongdoing in *Zahrey* occurred, as noted, in the Internal Affairs Bureau. Without more, the Court would be hard-pressed to conclude that two incidents in two completely separate units within the NYPD were sufficient to plausibly establish the City’s deliberate indifference. The Mollen Report, however, establishes—at least for present purposes—that the misconduct underlying this case and *Zahrey* was sufficiently widespread to support an inference of deliberate indifference. An entire section of the Report is devoted to ‘Perjury and Falsifying Documents,’ which is described as ‘a serious problem facing the Department.’ . . . It describes testimonial and documentary perjury—‘as when an officer swears falsely under oath in an affidavit or criminal complaint’—as ‘probably the most common form of police corruption facing the criminal justice system today, particularly in connection with arrests for possession of narcotics and guns.’ . . . Finally, it notes that ‘[s]everal officers . . . told us that the practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: “testilying.”’ . . . Of course, the Report’s findings are not conclusive. But they at least make it plausible that the type of misconduct that led to Collins’s arrest and prosecution was endemic within the NYPD. A jury could reasonably infer from that circumstance, if proven, that the department’s policymakers were aware of a serious risk of constitutional violations, and that the failure to take any action in response to the problem—whether through training or otherwise—was the result of deliberate indifference.”)

***Triano v. Town of Harrison, NY***, 895 F.Supp.2d 526, 539-41 (S.D.N.Y. 2012) (“After *Twombly* and *Iqbal*, the Second Circuit has made clear that Plaintiff must do more than merely state that the municipality’s failure to train caused his constitutional injury. . . . To state a claim for municipal liability based on failure to train, Plaintiff therefore must allege facts which support an inference that the municipality failed to train its police officers, that it did so with deliberate indifference, and that the failure to train caused his constitutional injuries. [citing cases] Plaintiff’s mere claim that the Town failed to train and supervise its police officers is a ‘boilerplate assertion[ ]’ and is insufficient, without more, to state a *Monell* claim. . . . Nor has Plaintiff pled any facts suggesting that an alleged training deficiency caused his constitutional injury, for example by identifying ‘procedural manuals or training guides’ or by ‘highlight[ing] relevant particular aspects of police

training or supervision.’ . . . The only facts which Plaintiff includes in the Amended Complaint relate to his interactions with Barone on the night of his arrest . . . , but ‘the facts provided in connection with the single incident experienced by [ ]Plaintiff does not put the [Town] on notice as to what its policymakers have done or failed to do that amount[s] to deliberate indifference to unconstitutional conduct by its police force,’ *Rodriguez v. City of New York*, No. 10–CV–1849, 2011 WL 4344057, at \*5 (S.D.N.Y. Sept. 7, 2011). Because Plaintiff has done no more than make conclusory assertions, he has not adequately alleged that the Town’s training policies caused Plaintiff’s injuries, thus providing an independent basis to dismiss this claim.”)

*Castilla v. City of New York*, No. 09 Civ. 5446(SHS), 2012 WL 3871517, \*3-\*5 (S.D.N.Y. Sept. 6, 2012) (“Castilla does not claim that the City’s liability pursuant to *Monell* and its offspring arises from a formal City policy or an unconstitutional act by an authorized decision-maker. Rather, she alleges, under the third and fourth theories, a widespread custom of at least tolerating male police officers’ sexual misconduct, and a failure to train, supervise, and/or discipline male police officers in connection with their handling female detainees and informants. Taking plaintiffs’ allegations as true, the Court finds that Castilla has sufficiently pled claims for *Monell* liability against the City of New York. This finding is based, in part, on the Second Circuit’s recognition that ‘[it] is unlikely that a plaintiff would have information about the city’s training programs or about the cause of the misconduct at the pleading stage, and therefore need only plead that the city’s failure to train caused the constitutional violation.’ *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 130 n. 10 (2d Cir.2004). The Second Circuit has not yet addressed whether *Iqbal* has heightened the pleading requirements for such a municipal liability claim, but district courts in this Circuit have continued, post-*Iqbal*, to apply the pleading standard articulated in *Amnesty* to a *Monell* claim based on a failure to train. [citing cases] Thus, in assessing the sufficiency of plaintiff’s *Monell* claims—particularly the failure to train claim—the Court keeps in mind that plaintiff has not yet had the full benefit of discovery. The City’s position cannot be ignored. The City contends that this case simply concerns an isolated incident involving a single rogue police detective. The City may be right. However, the alleged facts, taken as true for purposes of this motion, plausibly suggest otherwise. Plaintiff alleges that multiple detectives and officers helped Sandino threaten, abuse, and sexually assault Castilla over many hours and in many locations, including at a police precinct. The complaint specifically alleges concerted action by other police officers in addition to Sandino who were not supervised and at least not immediately stopped or disciplined. Sandino is alleged to have continued for weeks after the assault to contact, proposition, and threaten Castilla. When Sandino paid Castilla a visit at her family’s home, Sandino was accompanied by another officer. Furthermore, Castilla alleges that the police officers maintained a ‘code of silence’ to cover up their misconduct. In *Michael v. County of Nassau*, the U.S. district court in the Eastern District of New York found, on a motion to dismiss decided under *Iqbal*, that an informal custom ‘of at least tolerating police misconduct’ and/or a failure to properly train police officers could be inferred where the alleged conduct took place over several hours, including at police headquarters, and several officers participated in the repeated denials of the plaintiff’s rights. . . . Castilla, like the plaintiff in the *Michael* case, alleges a string of incidents in which she was repeatedly victimized by multiple officers in multiple locations, both on and off

City property. More than that, Castilla alleges various other instances of male police officers taking sexual advantage of females under their custody or control. . . Although the City challenges the admissibility of the evidence plaintiff cites as relevant examples of police misconduct, the Court need not decide that issue at this time. Finally, the City argues that plaintiffs' allegations do not demonstrate an unconstitutional policy or custom, but rather show the opposite: a readiness on the part of the City to investigate and discipline police officers who misbehave. In particular, the City points to the IAB's responsiveness to Castilla's IAB complaint and the fact that Sandino was ultimately punished for his wrongdoing. While these facts inure to the City's benefit on this motion, Castilla also alleges that not all the individual perpetrators have been investigated and disciplined. In any event, the issue of whether the City eventually investigates and disciplines employees accused of misconduct is distinct from whether the City was deliberately indifferent to the violation of citizens' constitutional rights in the first place. In other words, even if the City took corrective action, its training and supervision of male officers vis-a-vis female detainees and informants still may have been inadequate. The Court is not evaluating the ultimate merits of plaintiff's *Monell* claims here. The Court is simply finding that the allegations of very serious police misconduct, supported by adequate facts, raise an inference of municipal liability that is plausible enough to permit the claims to proceed. . . Accordingly, for the reasons set forth above, the City's motion for judgment on the pleadings with respect to Castilla's claims against the City is denied. Plaintiff is entitled to discovery regarding the City's policies and practices regarding training, supervision, and discipline in connection with male officers' handling of female suspects, prospective confidential informants, and inform")

***Rodriguez v. City of New York***, No. 10 Civ. 1849(PKC), 2011 WL 4344057, at \*5 (S.D.N.Y. Sept. 7, 2011) (“[T]he facts provided in connection with the single incident experienced by the plaintiff does not put the City on notice as to what its policymakers have done or failed to do that amount to deliberate indifference to unconstitutional conduct by its police force. The actions at issue were undertaken by perhaps two police officers in a single precinct. The plaintiff provides no facts relating to any action undertaken by any City policymaker or any facts referencing established City policies in, for example, training manuals or otherwise. Plaintiff's vague reference to the existence of additional incidents of unjust arrest, detention and incarceration based on improperly reviewed bench warrants occurring prior to the alleged incident on February 15, 2007 (Compl.¶ 67), without providing even the most basic facts pertaining to such incidents, cannot be said to establish a policy of deliberate indifference putting the City on notice of the grounds upon which the plaintiff's *Monell* claim rests. Accordingly, plaintiff has failed to state a claim upon which relief can be granted against the City of New York.”).

***Plair v. City of New York***, No. 10 Civ. 8177, 2011 WL 2150658, at \*7, \*8 (S.D.N.Y. May 31, 2011) (“Following *Iqbal* and *Twombly*, *Monell* claims must satisfy the plausibility standard: It is questionable whether the boilerplate *Monell* claim often included in many § 1983 cases, including this one, was ever sufficient to state a claim upon which relief could be granted. . . In light of [*Ashcroft* and *Twombly*] it is now clear that such boilerplate claims do not rise to the level of plausibility. [citing cases] Here, the complaint lacks sufficient factual details concerning *Monell*

liability and contains boilerplate allegations of unconstitutional policies and practices. . . Specifically, Plaintiff conclusorily alleges that the City ‘permitted, tolerated and was deliberately indifferent to a pattern and practice of staff brutality and retaliation by DOC staff at the time of plaintiff’s beatings [which] constituted a municipal policy, practice or custom and led to plaintiff’s assault.’ . . . As discussed above in reference to Plaintiff’s claims under *Colon*, the prior violent incidents relied upon by Plaintiff are too attenuated and isolated from his own injury to plausibly establish (a) a policy or custom of violence against prisoners, and (b) that his injury was linked to that policy or custom. Plaintiff relies on conclusory allegations to fill the gaps in his complaint, rendering his *Monell* allegations insufficient under *Iqbal* and *Twombly*.”)

***Michael v. County of Nassau***, No. 09-CV-5200(JS)(“KT), 2010 WL 3237143, at \*4, \*5 & n.2 (E.D.N.Y. Aug. 11, 2010) (“Defendants . . . contend that Plaintiff has not sufficiently pled a *Monell* claim for municipal liability. . . The Court disagrees. Plaintiff’s Complaint does not identify any official Nassau County policy or custom that resulted in the alleged constitutional violations. Nor does Plaintiff’s Complaint identify a policymaker who promulgated such a policy or custom through his acts. But, at least at this stage, the law does not require him to do so. . . . On the surface, it might be argued that *Amnesty America* conflicts with the *Iqbal* and *Twombly* standard, by permitting a plaintiff to assert a *Monell* ‘failure to train’ claim without amplifying the complaint with enough facts to render the claim ‘plausible.’ But such an argument sees the forest while ignoring the trees. The Supreme Court has instructed that assessing a complaint’s plausibility ‘is context-specific, requiring the reviewing court to draw on its experience and common sense.’ . . . Though pre- *Iqbal*, the Second Circuit, drawing upon its experience and common sense, has recognized that plaintiffs should be afforded a lenient pleading standard on failure to train claims, because they have no realistic way to learn about a municipality’s training programs without discovery. *Amnesty America*, 361 F.3d at 130 n. 10. Here, the Complaint pleads sufficient facts to infer that Nassau County had: (1) an informal policy, or a custom, of at least tolerating police misconduct; and/or (2) failed to properly train its officers, thereby expressing deliberate indifference to the potential for violations. The conduct alleged in the Complaint took place over several hours. At least five officers allegedly participated in repeated denials of Plaintiff’s rights, including his right to be free from arrest without probable cause, his right to counsel, and his right to be free from excessive force. Some of the officers allegedly mocked Plaintiff during the ordeal, including for invoking his right to counsel. (Compl ¶¶ 40, 53, 65, 79.) Much of the alleged conduct took place at police headquarters. (Compl.¶¶ 45-82.) This includes an alleged beating Plaintiff suffered in a public hallway at headquarters. (Compl.¶ 70.) And it also includes an incident where officers allegedly interrupted a video recording of Plaintiff’s interrogation so they could beat him. (Compl.¶¶ 72-77.) Thus, Plaintiff has not alleged one isolated incident of police misconduct. . . He has alleged multiple incidents over a long, continuous time period. And, assuming Plaintiff’s allegations as true, the fact that so much of this happened at headquarters, including in a public hallway, suggests that the officers involved did not fear supervisory personnel observing their conduct, intervening to stop them, or subjecting them to disciplinary action for their misdeeds. . . And this, in turn, suffices – at this stage – to create the plausible inference that Nassau County had an informal policy or custom of at least tolerating police misconduct. . . Likewise, the alleged

involvement of numerous officers, the mocking Plaintiff allegedly received when invoking his right to counsel, and the headquarters location, suffices to suggest that Nassau County poorly trained and/or supervised its officers concerning the need to not violate suspects' civil rights.”)

*Araujo v. City of New York*, No. 08-CV-3715 (KAM)(JMA), 2010 WL 1049583, at \*9 (E.D.N.Y. Mar. 19, 2010) (“In the context of a motion to dismiss, ‘[t]o allege the existence of an affirmative municipal policy, a plaintiff must make factual allegations that support a plausible inference that the constitutional violation took place pursuant either to a formal course of action officially promulgated by the municipality’s governing authority or the act of a person with policymaking authority for the municipality.’ *Missel v. County of Monroe*, No. 09-0235-cv, 2009 U.S.App. LEXIS 24120, at \*4 (2d Cir. Nov. 4, 2009) (citing *Vives v. City of New York*, 524 F.3d 346, 350 (2d Cir.2008)); *see also Iqbal*, 129 S.Ct. at 1951; *Twombly*, 550 U.S. at 555. Mere ‘boilerplate’ assertions that a municipality has such a custom or policy which resulted in a deprivation of the plaintiff’s rights is insufficient to state a *Monell* claim. . . Here, plaintiff’s Complaint contains only a conclusory allegation that the Municipal Defendants had ‘*de facto* policies, practices, customs, and usages of failing to properly train, screen, supervise, or discipline employees ... [which] were a direct and proximate cause of the unconstitutional conduct alleged.’ . . Plaintiff alleges no facts to indicate any deliberate choice by municipal policymakers to engage in unconstitutional conduct. Moreover, plaintiff’s allegation that the Municipal Defendants acted pursuant to ‘*de facto* policies, practices, customs, and usages’ (Compl.& 58), without any facts suggesting the existence of the same, are plainly insufficient to state a Section 1983 claim against the Municipal Defendants.”).

*Cuevas v. City of New York*, No. 07 Civ. 4169(LAP), 2009 WL 4773033, at \*3, \*4 (S.D.N.Y. Dec. 7, 2009) (“Plaintiff’s boilerplate allegations against the City of New York satisfy neither the elements enumerated above, nor the pleading requirements set forth in *Iqbal*. In conclusory fashion, Plaintiff makes the following allegations against the City of New York: That all of the aforesaid actions, errors and omissions by defendants including the City of New York’s and New York City Police Department’s failures to supervise or properly train ‘John Doe’s [sic] and Jane Doe Numbers ‘1’ through ‘5’ [sic] inclusive, and their agents, servants and employees, were intentional, reckless, and grossly negligent; and moreover evidenced a deliberate callous and reckless indifference to the plaintiff [sic] constitutional rights; all of which constituted a policy of supervisory indifference and a pattern and practice of indifferent conduct by defendants. (Compl.& 18) That there was direct affirmative culpability on the part of defendant CITY for the actions, errors and omissions of the aforesaid officers and supervisory personnel in this matter. . . That all of the aforesaid actions, errors and omissions, and those alleged hereinafter, of the said defendants and their agents, servants, employees and subordinate officials, were particularly egregious; were morally culpable; were actuated by evil and reprehensible motives; constituted wrongs directed at the general public; implied and entailed a criminal indifference to civil and administrative obligations; implied a policy, custom and practice of deliberate, callous and reckless indifference and constitutional violations of the citizens of the City of New York; established an inference of gross negligence and failure to train; and/or involved a wanton and reckless disregard of and indifference to plaintiff’s rights. . . That all of the aforesaid actions ... constituted a single,

unusually brutal and egregious beating administered by a group of municipal employees, sufficiently out of the ordinary to warrant an inference that such act was attributable to inadequate training or supervision amounting to deliberate indifference and/or gross negligence. . . While these allegations are heavy on descriptive language, they are light on facts. Baldly asserting that Plaintiff's injuries are the result of the City's policies does not show this Court what the policy is or how that policy subjected Plaintiff to suffer the denial of a constitutional right. After stripping away the bare legal conclusions, the Complaint is devoid of any 'well-pleaded factual allegations ... plausibly [giving] rise to an entitlement to relief.' *Iqbal*, 129 S.Ct. at 1950. Accordingly, Plaintiff's claims against the City of New York are dismissed.”).

*Colon v. City of New York*, Nos. 09-CV-8, 09-CV-9, 2009 WL 4263362, at \*1, \*2 (E.D.N.Y. Nov. 25, 2009) (“The Colons claim to have been falsely arrested, imprisoned, subjected to an illegal strip search, and maliciously prosecuted. . . The City is said to be liable under section 1983 for the Colons’ injuries, pursuant to *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978), because the acts complained of were the result of the ‘customs, policies, usages, practices, procedures, and rules’ of the City. . . The following are alleged to be City customs or policies: (a) wrongfully arresting minority individuals on the pretext that they were involved in drug transactions; (b) manufacturing evidence against individuals allegedly involved in drug transactions; (c) using excessive force on individuals who have already been handcuffed; (d) unlawfully strip-searching pre-arraignment detainees in the absence of any reasonable suspicion that said individuals were concealing weapons or contraband; and (e) arresting innocent persons in order to meet ‘productivity goals’ (i.e. arrest quotas). . . The Colons assert that such customs and policies may be inferred from the existence of other similar civil rights actions that have been brought against the city, Complaints & 85 (listing example cases), and from a January 2006 statement by Deputy Commissioner Paul J. Browne that police commanders are permitted to set ‘productivity goals,’ Complaints & 86. In support of its motion to dismiss, the City argues that the Colons fail to identify any actual custom or policy of the city, and that their allegations are too speculative and inconclusive to meet the pleading standard established in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Absent a viable federal claim against the City, the court is urged to decline supplemental jurisdiction over the Colons’ state-law claims with respect to the City. ‘[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.’ *Iqbal*, 129 S.Ct. at 1940 (citing *Twombly*, 550 U.S. at 556). Informal inquiry by the court and among the judges of this court, as well as knowledge of cases in other federal and state courts, has revealed anecdotal evidence of repeated, widespread falsification by arresting police officers of the New York City Police Department. Despite numerous inquiries by commissions and strong reported efforts by the present administration – through selection of candidates for the police force stressing academic and other qualifications, serious training to avoid constitutional violations, and strong disciplinary action within the department – there is some evidence of an attitude among officers that is sufficiently widespread to constitute a custom or policy by the city approving illegal conduct of the kind now charged. It would be desirable to quantify this general reputation, but such quantification is beyond the scope and capacity of the court on this motion. Upon inquiry at oral

argument, neither party was able adequately to address what documentation may exist supporting or refuting the existence of such a policy or custom. . . Nevertheless, there are substantial issues: first, whether this reputation is predicated on a significant number of misstatements by police officers – even though the overwhelming majority of the police force does not engage in such fabrications; and, second, whether failure to train, supervise, or discipline members of the police force that do commit such fabrications constitutes a policy or custom under *Monell*. . . While the charge may prove to be completely unfair to the city and its generally outstanding police force, there are sufficient issues of fact to warrant further proceedings under *Monell*. Neither *Twombly* nor *Iqbal* can trump the Constitution. Under these circumstances, the Colons have ‘nudged their claims across the line from conceivable to plausible,’ and state viable section 1983 claims against the City.”).

### THIRD CIRCUIT

*Estate of Roman v. City of Newark*, 914 F.3d 789, 798-801, 805-06 (3d Cir. 2019) (“Although a policy or custom is necessary to plead a municipal claim, it is not sufficient to survive a motion to dismiss. A plaintiff must also allege that the policy or custom was the ‘proximate cause’ of his injuries. . . He may do so by demonstrating an ‘affirmative link’ between the policy or custom and the particular constitutional violation he alleges. . . This is done for a custom if Roman demonstrates that Newark had knowledge of ‘similar unlawful conduct in the past, ... failed to take precautions against future violations, and that [its] failure, at least in part, led to [his] injury.’. . . Despite these requirements, Roman does not need to identify a responsible decisionmaker in his pleadings. . . Nor is he required to prove that the custom had the City’s formal approval. . . The pleading requirements are different for failure-to-train claims because a plaintiff need not allege an unconstitutional policy. . . Instead, he must demonstrate that a city’s failure to train its employees ‘reflects a deliberate or conscious choice.’. . . For claims involving police officers, the Supreme Court has held that the failure to train ‘serve[s] as [a] basis for § 1983 liability only where [it] ... amounts to deliberate indifference to the rights of persons with whom the police come into contact.’. . . In view of this case law, Roman has not pled a municipal policy, as his amended complaint fails to refer to ‘an official proclamation, policy, or [an] edict.’ However, he has sufficiently alleged a custom of warrantless or nonconsensual searches. He has also adequately pled that the City failed to train, supervise, and discipline its police officers. . . . We conclude that the allegations regarding Newark’s failure to train, supervise, and discipline are strong enough to survive a motion to dismiss. . . Among them are: a failure to train officers on obtaining a search warrant . . . and on ‘issuing truthful investigative reports,’. . .; a failure to supervise and manage officers, . . .; and a failure to discipline officers, . . . first by ‘refus[ing]’ to create a well-run Internal Affairs Department, . . . and second by ‘inadequately investigating, if investigating at all, citizens’ complaints regarding illegal search and seizure[.]’. . . The result was a ‘complete lack of accountability’ and of ‘record keeping,’. . . leading to a culture in which officers ‘knew there would be no professional consequences for their action[s]’. . . As the amended complaint alleges, it should come as no surprise that these conditions led to a federal investigation. . . . Roman has sufficiently alleged a municipal liability claim against the City of Newark under § 1983. He cites various

examples of inadequate police training, poor police discipline, and unheeded citizen complaints. He tells us certain police officers did not receive training for over 20 years, and their training did not cover the basic requirements of the Fourth Amendment. In his pleadings, he states the Newark Police Department did not discipline officers who engaged in police misconduct, . . . including unlawful searches and false arrests[.] . . He also notes the public filed formal complaints about improper searches and false arrests that were disregarded almost wholesale. . . These alleged practices were ongoing when Roman’s search and arrest occurred, and the City had notice of them at that time. While the proof developed to support these allegations may or may not be persuasive to a finder of fact, they are enough to survive dismissal at this stage. Based on this conclusion, we part with the District Court’s holding that Roman failed to state a § 1983 claim against the City. Though we affirm otherwise, we vacate and remand its decision on municipal liability.”)

***Siehl v. City of Johnstown***, No. CV 18-77J, 2019 WL 762933, at \*10 (W.D. Pa. Feb. 20, 2019) (“Here, Plaintiff has alleged with great specificity that Defendant Johnstown caused the deprivation of his rights by its failure to employ policies and protocols regarding the training, supervision, and discipline of its police officers including, but not limited to, the initiation of prosecution only on a finding of probable cause, and police responsibility not to fabricate evidence or interfere with a criminal suspect’s attorney-client relationship. . . Constitutional injuries are a ‘highly predictable consequence’ of a failure to train (and likewise supervise and discipline) police officers in the handling of recurring situations involving investigations and arrest. . . Plaintiff has alleged a plausible claim pursuant to *Monell* and *Bryan County*. Therefore, the Court must deny Defendant City of Johnstown’s Motion to Dismiss Count VI.”)

***Lansberry v. Altoona Area Sch. Dist.***, No. 3:18-CV-19, 2018 WL 3520496, at \*14 (W.D. Pa. July 20, 2018) (“After several careful readings of the Amended Complaint, the Court finds that Lansberry failed to state a plausible *Monell* claim. As noted above, to state a plausible claim for deliberate indifference in the § 1983 context, a plaintiff generally must allege that the government entity had notice of a pattern of similar constitutional violations by employees who had not been properly trained. . . However, Lansberry’s Amended Complaint fails to allege that AASD had notice of a pattern of constitutional violations. For example, Lansberry does not allege that AASD had received, and failed to adequately respond to, previous reports of bullying. Nor does he allege that other students’ rights to bodily integrity had been violated due to known bullying incidents that the school failed to properly address. In other words, while Lansberry alleges that W.J.L. experienced bullying, he does not allege a wider bullying problem at AASD that could have plausibly put AASD on notice that the constitutional rights of its students were being violated. Accordingly, Lansberry does not plausibly allege that, given the conditions at Altoona Junior High with regard to bullying, the need for additional training was ‘so obvious’ and the status quo so likely to result in constitutional violations that AASD ‘can reasonably be said to have been deliberately indifferent to the need.’. . Therefore, the Court finds that Lansberry failed to state a plausible *Monell* claim.”)

*Estate of Bard v. City of Vineland*, No. 117CV01452NLHAMD, 2017 WL 4697064, at \*5 (D.N.J. Oct. 19, 2017) (“As in *Iqbal*, and also in *Zampetis*, Plaintiff’s conclusory contention that an infirm policy, or custom, or training practice by the City of Vineland, and the police chiefs’ knowledge of one or all of these infirmities, caused Bard’s shooting death is insufficient to properly plead a viable *Monell* claim. Plaintiff is required to provide facts – not simply regurgitate all the legal bases for liability under *Monell* - to support her contentions and adequately plead her claims against the City and the police chiefs. Because of Plaintiff’s failure to do so, Plaintiff’s claims against the City of Vineland, Codispoti, and Beu must be dismissed.”)

*Wichterman v. City of Philadelphia*, No. CV16-5796, 2017 WL 1374528, at \*4 (E.D. Pa. Apr. 17, 2017) (“In this case, plaintiff alleges that ‘reasonably trained...police supervisors were aware of their responsibilities to train...police to recognize the signs of overdose and to intervene to reverse the effects of overdose.’ . . . Plaintiff also alleges that ‘[d]efendant City of Philadelphia, as an entity that operates a prison system and police holding cells, is aware of the need to train its employees as described above.’ . . . In similar circumstances, courts have concluded that failure-to-train claims based on a single incident state a claim under *Monell*. . . . At this stage, plaintiff’s allegations with respect to the lack of training on monitoring and treating detainees on opiates are sufficient to state a *Monell* claim against the City based on a failure-to-train theory.”)

*Geist v. Ammary*, No. 11–07532, 2012 WL 6762010, \*7 (E.D. Pa. Dec. 20, 2012) (“In the Complaint, Plaintiff alleges the following:

38. At all relevant times the Defendant, City of Allentown, gave the Defendant, Ammary, a Taser, despite actual notice that the Ammary was not a candidate for using a taser [sic] because of his propensity to use excessive force against the public.

39. At all times herein relevant Defendant, City of Allentown, intentionally, purposefully, and knowingly, had a policy, practice, regulation or custom of giving minimal training about the usage of the taser [sic], especially on a non violent female minor.

40. At all times herein relevant the policy of the Defendant, City of Allentown, practice, regulation or custom caused Plaintiff to be subject to arrest and abuse by Defendant, Jason Ammary.

43. The Defendant, City of Allentown, failed to use adequate training before issuing a taser [sic] to Defendant, Ammary.

I find these allegations sufficient to survive the instant motion to dismiss. If Plaintiff can prove that Defendant had policies or customs that condoned the use of excessive force in effectuating seizures of suspects, the municipality could be liable. Plaintiff identifies a ‘policy and practice’ which potentially constitutes deliberate indifference to the constitutional rights of citizens, namely, failing to create a policy or train officers regarding proper Taser gun use and deployment. Likewise, if the Plaintiff can prove that the municipality did not provide training to police officers

on procedures to avoid the use of excessive force in arresting suspects, she could prevail on her excessive-force claim. These allegations are not merely a recitation of the elements of a *Monell* claim, but point towards specific failings in training that led to the specific violation of constitutional rights here alleged. Plaintiff is entitled to discovery to determine whether her allegations of inadequate training and corrupt policy are true. The court will therefore deny the motion on this point.”)

***Ford v. City of Philadelphia***, No. 12–2160, 2012 WL 3030161, \*6, \*7 (E.D. Pa. July 24, 2012) (“In the instant case, Plaintiff contends that the City maintained a policy, practice or custom that failed to account for additional or different training, supervision, investigation, or discipline that related to: (a) Legal cause to stop, detain, and/or arrest a citizen; (b) police officers’ duties and responsibilities to engage in proper investigative techniques; (c) proper police procedure for interviewing juvenile witnesses to a crime; (d) police officers’ duties not to coerce witnesses into identifying a suspect; (e) police officers’ constitutional duties to disclose to the prosecution exculpatory information; (f) the failure to identify and take remedial or disciplinary action against police officers who were the subject of prior civilian or internal complaints of misconduct; (g) the hiring and retention of officers who are unqualified for their employment position; and (h) the failure to properly sanction or discipline officers who are aware of and conceal and/or aid and abet violations of constitutional rights of citizens by other Philadelphia police officers. . . Defendant contends that these allegations are nothing more than ‘threadbare recitals of the elements of a cause of action,’ and that Plaintiff ‘appears to take a scattershot approach by launching a barrage of legal conclusions at the wall to see which ones will stick.’ . . More specifically, Defendant avers that Ford’s *Monell* claim must be dismissed because he has not identified a precise policy, practice, or custom which demonstrates that the City was deliberately indifferent to his constitutional rights. . . The Court disagrees. In order for Ford to prevail on his municipal liability claim, he needs to show that the City was deliberately indifferent ‘to the rights of people with whom the police c[a]me into contact.’ . . To properly do so, Ford must establish that the City had a pattern of engaging in constitutional violations such as those present in this case, and that this pattern lead to his eventual constitutional injuries. . . Ford cannot, however, prove such a pattern without a sufficient period of discovery to adduce this evidence. . . As such, Plaintiff’s claim that the City maintained a policy that failed to properly train, supervise, investigate, or discipline its officers is still too premature for the Court to dismiss from suit at this time. Accordingly, Defendant’s request for dismissal on these grounds is denied.”)

***Zenquis v. City of Philadelphia***, 861 F.Supp.2d 522, 531, 532 (E.D. Pa. 2012) (“The City argues that the amended complaint contains only ‘a formulaic recitation of the elements of a failure to train argument’ and otherwise ‘does not allege a pattern or practice of The City of Philadelphia to violate the rights of its citizens by acts of “vigilante justice.”’ . . As pleaded, this is not a situation in which there was a single exceptional incident of constitutional misconduct. . . After the mistaken public dissemination of Zenquis’s name and photograph as a suspect in the rape, the police are alleged to have adopted the same tactic to apprehend Carrasquillo— *i.e.*, instructing private citizens to detain the suspect and to use force to do so, with the understanding that force could be

used ‘with impunity.’ At the least, the two alleged incidents of vigilante behavior instigated by the police (together with the other allegations catalogued above) are sufficient to place the City on notice of the factual basis for the claim of municipal liability.”)

**Washington v. City of Philadelphia**, No. 11–3275, 2012 WL 85480, at \*7 (E.D. Pa. Jan. 11, 2012) (“Though *Leatherman v. Tarrant County*. . . makes plain that § 1983 claims are not subject to a heightened pleading standard, *Iqbal*’s unambiguous extension of *Twombly* to ‘all civil actions’ leaves the ordinary notice pleading requirement intact for those claims. . . . Under this standard, a pleading may not simply offer ‘labels and conclusions’ . . . and ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.’ . . . Plaintiff’s municipal liability claims fail Rule 8’s notice pleading requirement under *Iqbal* and *Twombly*. Plaintiff’s allegations are conclusory for they ‘express[ ] . . . factual inference[s] without stating the underlying facts on which the inference[s][are] based.’ . . . Aside from the single incident of alleged police misconduct, the complaint pleads no other facts necessary to establish a municipal liability claim.”)

**Halterman v. Tullytown Borough**, No. 10-7166, 2011 WL 2411020, at \*8, \*9 (E.D. Pa. June 14, 2011) (“All of Halterman’s allegations as to Tullytown policy are conclusory. Halterman’s claims as to Tullytown’s failure to train or supervise its employees include no factual details as to Tullytown’s training programs, the history of cognate violations allegedly committed by its employees, or Tullytown’s supposed failure to respond to these violations with discipline. Halterman thus fails to provide ‘enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.’ . . . Instead, it appears that Halterman has merely imagined what types of training deficiencies or failures to discipline *might* support municipal liability in the present case and then asserted that these deficiencies and failures indeed exist. She thus on the complaint as drafted fails to state a cause of action against Tullytown as a municipality for violation of § 1983.”)

**Mitchell v. Township of Pemberton**, No. 09-810 (NLH)(“MD), 2010 WL 2540466, at \*6 (D.N.J. June 17, 2010) (“The Supreme Court’s and, accordingly, the Third Circuit’s recent clarification of the standard for reviewing a complaint to determine whether a valid claim has been advanced instructs that a plaintiff, such as Plaintiff in this case, cannot merely claim that a racial profiling policy or custom caused a constitutional violation, without a single fact, aside from the Plaintiff’s particular incident, to support such a claim. This rule prevents a defendant from being subjected to a plaintiff’s fishing expedition through discovery in the hope that facts will be unearthed to support plaintiff’s speculation. . . . Despite this, the Court recognizes that Plaintiff’s racial profiling claim against the mayor, the police chief and the town may not be foreclosed to him in the future, for two reasons. First, *pro se* complaints, ‘however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers[.]’ . . . Second, information concerning a town’s customs or policies, the policymakers’ motivations behind such policies, or the facts surrounding police department customs, are typically unavailable to an outsider, so that pleading facts to sufficiently advance a racial profiling claim may be impossible without some assistance through

litigation tools such as request for admissions, interrogatories, document requests, and depositions. With these two considerations in mind, the Court will not grant Plaintiff leave to amend his complaint with regard to his claims against the mayor, police chief and town, as it does not appear that during the time since Plaintiff filing his original complaint, he has gathered the requisite factual basis to support his racial profiling claim. The Court notes, however, that Plaintiff's case remains pending, and discovery has commenced, as to Plaintiff's constitutional violation claims against the two officers involved in the February 2007 stop. Should Plaintiff, by developing his case against the officers, discover facts to support that the officers were acting pursuant to a racial profiling policy or custom promulgated by the mayor or the police chief, the Court will entertain a motion for leave to amend the complaint at that time. . . . As it stands now, Plaintiff's claims are too specious to go forward.")

**Lease v. Fishel**, No. 1:07-CV-0003, 2010 WL 1390607, at \*6 (M.D. Pa.Mar.31, 2010) ("Defendants argue that Lease has made only conclusory allegations in the amended complaint that are insufficient to state a valid cause of action against Hamilton Township. . . . The Court must agree. Lease alleges in the amended complaint that Hamilton Township failed to properly train and supervise its employees 'by acquiescing to Beard, Balutis, and Fishel retaliating against the Plaintiff for seeking a redress of his grievances.' . . . He further alleges that though Hamilton Township has been properly notified about Beard, Balutis, and Fishel's retaliatory actions, no action has been taken to prevent continued retaliation. . . . Even considering these allegations and the entire amended complaint in a light most favorable to Lease, the allegations are not sufficient to sustain the claim against Hamilton Township. The Court is not satisfied that the amended complaint contains 'sufficient factual matter' to show that this claim is facially plausible. These allegations are more in the form of bare-bones legal conclusions that are not sufficient in light of the newly articulated pleading standard in *Twombly* and *Iqbal*. For instance, there is no allegation and no inference to be drawn from the allegations that specific training was needed or that the absence of specific training was the moving force behind Lease's First Amendment injuries. Accordingly, the Court will dismiss this claim. Lease will have an opportunity to cure these deficiencies in complying with this Court's order granting Defendants' motion for a more definite statement, discussed below. *See Alston v. Parker*, 363 F.3d 229, 235 (3d Cir.2004) (court must generally *sua sponte* extend leave to amend dismissed civil rights claims).").

**Griffin v. Township of Clark**, No. 09-4853 (JLL), 2010 WL 339031, at \*8 (D.N.J. Jan. 22, 2010) ("A history of a policy or custom is not always necessary to state a *Monell* claim . . . . Officer Griffin has alleged that Chief Connell is a policy-maker – he is the Chief of Police for the Township. Additionally, this Court found above that Officer Griffin has adequately plead, for purposes of a motion to dismiss, that Chief Connell violated his First Amendment rights. Thus, the Court also will allow Officer Griffin's *Monell* claim against the Township based on a theory of policy-maker liability to proceed at this time. Defendants' motion to dismiss this claim is denied. . . . . With respect to [the failure to train] claim, Officer Griffin simply alleges in his Complaint 'Pursuant to official policy or custom and practice, [the] Township of Clark intentionally, knowingly, or with deliberate indifference to the rights of the Plaintiffs failed to train, instruct,

supervise, control and/or discipline ... Defendant Chief Connell and other officials, known and unknown, in the performance of their duties.’ (Compl. & 29.) This bare allegation lacks the requisite specificity required by *Iqbal* to survive a motion to dismiss. Officer Griffin’s *Monell* claim based on this theory is dismissed without prejudice.”).

***Swift v. McKeesport Housing Authority Action***, No. 08-275, 2009 WL 3856304, at \*9 (W.D. Pa. Nov. 17, 2009) (“In the instant case, plaintiff in a conclusory fashion alleges that MHA is liable under § 1983 because MHA has a policy or custom that led to the deprivation of plaintiff’s rights afforded by the Fourteenth Amendment and the USHA and recites a number of circumstances, which he asserts violated his rights under the Constitution and Section 8. To support his claim, plaintiff alleged that a MHA employee and the employee’s relative expressed to plaintiff adverse and inflammatory remarks about plaintiff’s faith and disabilities, made repeated false statements to authorities about plaintiff, and sent plaintiff a letter through an attorney expressing a desire to sue plaintiff. Plaintiff alleged that MHA’s policies and practices deprived him of property rights available to him under Section 8 voucher program. Plaintiff alleged that he was not permitted the proper or the same amount of time allowed to other Section 8 voucher participants of different religions or who lack a disability and that his Section 8 benefits were terminated without providing him a fair and proper informal hearing, before determining the outcome of plaintiff’s grievance proceedings. Plaintiff’s allegations, however, are mere conclusions that policies or practices exist. Conclusory allegations are not entitled to assumption of truth. *Twombly*, 550 U.S. at 555. Liberally construing the alleged facts, the court would have to speculate whether these specific circumstances were a single instance or part of an official policy or custom. Plaintiff failed to implicate one of the three ways the Court of Appeals for the Third Circuit identified as necessary to show municipal liability for the actions of the municipality’s employees. First, plaintiff did not identify a policy or procedure long accepted by defendant, i .e., plaintiff did not set forth factual allegations concerning any similar incidents that have occurred in the past to prove some pattern of conduct or identify a specific municipal ordinance or regulation that could establish a custom or policy. Second, plaintiff did not set forth factual allegations concerning the identity of the MHA employee who made the decision to terminate plaintiff’s Section 8 voucher or concerning the policy making authority of the employee who was ultimately responsible for the decision to terminate plaintiff’s voucher. Whether one has the authority to formulate official municipal policy is a matter of state law. . . Third, plaintiff did not set forth any factual allegations that show an official with authority ratified the alleged violations. Therefore, the court cannot conclude that the complaint raises a plausible claim that municipal liability can attach to MHA. *Iqbal*, 129 S.Ct. at 1950. Because plaintiff did not sufficiently state a claim under § 1983 for municipal liability, the court will grant defendant’s Motion to dismiss plaintiff’s § 1983 claims without prejudice. Plaintiff may file an amended complaint within thirty days; provided, that plaintiff is able to set forth a sufficient factual basis to support a plausible claim for municipal liability.”).

#### **FOURTH CIRCUIT**

*Owens v. Baltimore City State’s Attorneys Office*, 767 F.3d 379, 403, 404 (4th Cir. 2014) (“Although prevailing on the merits of a *Monell* claim is difficult, simply alleging such a claim is, by definition, easier. For to survive a motion to dismiss under Rule 12(b)(6), a complaint need only allege facts which, if true, “state a claim to relief that is *plausible* on its face.”. . . The recitation of facts need not be particularly detailed, and the chance of success need not be particularly high. . . . A plaintiff fails to state a claim only when he offers ‘labels and conclusions’ or formulaically recites the elements of his § 1983 cause of action. . . . In support of his claim, Owens alleges that ‘[r]eported and unreported cases from the period of time before and during the events complained of’ establish that the BCPD had a custom, policy, or practice of knowingly and repeatedly suppressing exculpatory evidence in criminal prosecutions. He further alleges that ‘a number of motions were filed and granted during this time period that demonstrate that [the BCPD] maintained a custom, policy, or practice to allow this type of behavior either directly or . . . by condoning it, and/or knowingly turning a blind eye to it.’ The assertions as to ‘reported and unreported cases’ and numerous ‘successful motions’ are factual allegations, the veracity of which could plausibly support a *Monell* claim. That BCPD officers withheld information on multiple occasions could establish a ‘persistent and widespread’ pattern of practice, the hallmark of an impermissible custom. . . . If (but only if) the duration and frequency of this conduct was widespread and recurrent, the BCPD’s failure to address it could qualify as ‘deliberate indifference.’. . . Urging a different result, the BCPD contends that Owens alleges nothing more than ‘unadorned, the-defendant-unlawfully-harmed-me accusation[s].’. . . We recognize, of course, that courts have dismissed *Monell* claims when the plaintiff has alleged nothing more than a municipality’s adherence to an impermissible custom. But Owens has done more than that: Owens has alleged facts—the existence of ‘reported and unreported cases’ and numerous ‘successful motions’—which, if true, would buttress his legal conclusion. Owens’s brief, but non-conclusory, allegations closely resemble those in *Haley v. City of Boston*, 657 F.3d 39 (1st Cir.2011). There, a defendant was convicted of murder when two Boston police officers suppressed a witness’s statement casting doubt on his guilt. . . . The defendant discovered this *Brady* material, and after thirty-four years in prison, obtained his release; he then sued the Boston Police Department under § 1983. The First Circuit reversed the district court’s dismissal of the claim, holding that the defendant had stated a plausible *Monell* claim against the Boston Police Department in view of the ‘wholly unexplained’ nature of its officers’ suppression of evidence and the alleged (but *not* identified in the opinion or record) ‘volume of cases’ involving similar violations in the Boston Police Department. . . . The *Haley* court concluded that this ‘volume’ of other cases documenting officers’ suppression of evidence lent credence to the claim that policymakers ‘encouraged, or at least tolerated’ an impermissible practice. . . . Accordingly, ‘[a]lthough [the complaint was] couched in general terms,’ the court concluded that the complaint nonetheless ‘contain[ed] sufficient factual content to survive a motion to dismiss.’. . . The same reasoning applies here. Of course, to prevail on the merits, Owens will have to do more than *allege* a pervasive practice of BCPD misconduct; he must *prove* it. But at this early stage in the proceedings, we must conclude that Owens has pled sufficient factual content to survive Rule 12(b)(6) dismissal.”)

**Fordham v. Doe**, No. 4:11-CV-32-D, 2011 WL 5024352, at \*6 (E.D.N.C. Oct. 20, 2011) (“Assuming without deciding that the 21 sustained complaints imparted constructive notice on city policymakers of improper taser use, Fordham has failed to show that knowledge of these 21 sustained complaints gives rise to a ‘specific intent or deliberate indifference ... to correct or terminate’ the officers’ improper behavior. . . Although Fordham claims that the city did not respond to these complaints, he provides no factual basis for this assertion. . . Rather, he merely asserts that the city, as a matter of policy, fails to inform complaining citizens of corrective action taken against officers found to have used their tasers improperly. However, the failure to inform citizens of corrective action does not necessarily suggest that such corrective action was not taken or suggest that any improper taser use equates to an excessive use of force. In short, Fordham has failed to plausibly allege that the city policymakers failed to respond to complaints of excessive force arising from improper taser use, much less that any failure met the scienter standard required by *Randall* and *Carter*. Without providing plausible allegations that support deliberate indifference on the part of the city policymakers, Fordham cannot show that any indifference caused his injuries.”)

**Jackson v. Brickey**, No. 1:10CV00060, 2011 WL 652735, at \*9 (W.D. Va. Feb. 11, 2011) (“Jackson’s current allegations are limited to mere conclusory statements regarding the police department’s failure to train, and thus these statements amount to the ‘naked assertion[s] devoid of further factual enhancement’ that I must disregard for pleading purposes. . . As above, Jackson’s references to generalized deficiencies within the department do not sufficiently flesh out his allegations. . . Once again, I am not applying a heightened pleading standard to Jackson’s claims, but rather requiring Jackson to provide some basis for determining that his allegations are plausible.”)

**Harden v. Montgomery County**, No. 8:09-CV-03166-AW, 2010 WL 3938326, at \*3 (D. Md. Oct. 6, 2010) (“Even though the Court assumes the veracity of the allegations against the individual officers and grants the Plaintiff all reasonable inferences from those allegations, the Complaint does not ‘plausibly establish’ the inference that a policy or custom of the County is responsible for the actions of the individual Defendants. . . . Plaintiff counters that section 1983 claims are not subject to a ‘heightened pleading standard[.]’. . . . However, the Court is simply applying the generally-applicable pleading standard of Federal Rule of Civil Procedure 8(a), as interpreted by the Supreme Court in *Iqbal* and *Twombly*; the Court is not fashioning a special form of heightened pleading for section 1983 claims. Thus, *Leatherman* and *Jordan* are inapplicable, and the Plaintiff’s section 1983 claims against the County must be dismissed.”)

## **FIFTH CIRCUIT**

**Ratliff v. Aransas Count., Texas**, 948 F.3d 281, 284-85 (5th Cir. 2020) (“[W]e note that the ordinary *Twombly* pleading standard applies. It is, of course, true that *Leatherman*, a pre-*Twombly* case, held that courts must not apply a ‘heightened’ pleading standard to *Monell* claims. . . Although Ratliff argues otherwise, however, *Leatherman* did not require courts to accept

‘generic or boilerplate’ pleadings in this case or in any other context. Indeed, our precedents make clear that the *Twombly* standard applies to municipal liability claims. . . . ‘To survive a motion to dismiss, Ratliff’s *Monell* pleadings ‘must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.’”)

*Prince v. Curry*, 423 F. App’x 447, 451-52 (5th Cir. 2011) (“[W]e conclude on this *de novo* review that even when taking this factual content into consideration, Prince still fails to state a claim for relief against Tarrant County that is plausible on its face. The facts discussed in Prince’s motion to supplement relate to one other case involving a sex offender whose sentence was found to have been mistakenly enhanced by Tarrant County officials, as well as the trial court and defense counsel, under circumstances similar those of Prince’s case. . . . The existence of only one or, at most, two other similarly situated defendants does not plausibly suggest that Tarrant County has a policy or custom of unconstitutionally subjecting sex offenders to enhanced sentences that is ‘so persistent and widespread as to practically have the force of law.’ . . . Nor does the existence of one or two prior incidents indicate that Tarrant County was deliberately indifferent to defendants’ rights or had a pattern of failing to train personnel to comply with the relevant sex offender classification system. . . . Prince’s factual allegations are simply not enough to meet the ‘stringent standard of fault’ for establishing a municipality’s deliberate indifference, which requires showing that ‘a municipal actor disregarded a known or obvious consequence of his action.’ . . . Furthermore, Prince’s claim clearly does not fall into what the Court recently described as the extremely narrow category of claims where ‘the unconstitutional consequences of failing to train could be so patently obvious that a city [or other local government] could be liable under § 1983 without proof of a pre-existing pattern of violations.’ . . . Accordingly, we hold that accepting Prince’s factual allegations as true, Prince’s complaint does not contain enough factual matter to state a plausible claim for relief against Tarrant County.”)

*Delacruz v. City of Port Arthur*, No. 1:18-CV-11, 2019 WL 1211843, at \*14-15 (E.D. Tex. Mar. 14, 2019) (“Plaintiffs allege that the City did not provide officers de-escalation and crisis intervention techniques training (“CIT training”) for interacting with persons with mental impairments. They allege that a 2005 Texas state law requiring officers to undergo such training put the City’s policymakers on notice that the City’s training policy was insufficient. Plaintiffs contend that the City’s deliberate indifference to providing officers this state-mandated training caused the defendant officers to resort to unreasonable and excessive force by treating Manuel as a criminal resisting arrest rather than as a person with mental impairments, which was a violation of Manuel’s constitutional rights. The City argues that the Complaint is conclusory and fails to establish causation and deliberate indifference. It maintains that Plaintiffs have not identified any policymaker who knew the alleged lack of training would cause, or had caused, any previous constitutional violations. The City argues that the Texas statute requiring such training places that burden on the Texas Commission on Law Enforcement (“TCOLE”), not the City, and that even if a statutory violation were found, that does not equate to a constitutional violation. Further, the City points out that Plaintiffs concede that two of the City’s officers have the training, which indicates that the City has conducted such training. . . . [Plaintiffs] allege that the named Officers did not

receive the state-mandated training and that only two of the City’s officers have received such training. These facts are sufficient, particularly under the 12(b)(6) standard, to infer that the City failed to train the involved officers adequately. . . The City argues that Plaintiffs do not identify a policymaker or an established policy not to train officers in techniques related to interactions with mentally disabled persons. At the 12(b)(6) stage, however, ‘the specific identity of the policymaker is a legal question that need not be pled; the complaint need only allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable.’. . Similarly, Plaintiffs’ allegation that only two of the City’s police officers had received the state-mandated CIT training suggests that inadequate training existed within the ranks of the police department. The City also argues that because these two officers received the training, it shows that the municipality did, in fact, offer the training. Conversely, the same evidence suggests that the City *knew* this training was required, but *still* failed to comply with the mandate throughout the force. If anything, it underscores the inadequate training of the City’s police force. The City also argues that its failure to comply with state law does not equate to a constitutional violation. While this is accurate, it similarly misses the point: the constitutional violation at issue is the alleged excessive force purportedly exerted by the Officers, not the failure to comply with state law. This lack of compliance, however, could support a ‘failure to train’ finding. . . Plaintiffs do not seek to hold the City accountable for non-compliance with Texas law, but rather to hold it responsible for a constitutional violation allegedly stemming from the lack of adequate training.”)

***Delacruz v. City of Port Arthur***, No. 1:18-CV-11, 2019 WL 1211843, at \*17-18 (E.D. Tex. Mar. 14, 2019) (“Plaintiffs do not cite to any officially adopted or promulgated policy, or to any pattern or sequence of events, that could allow the court to infer that the City has a policy or custom of dispatching improperly trained officers to mental health calls. While the limited number of CIT-trained officers could plant the seed of an inference that the City likely does not dispatch these officers to every CIT-related call, the complaint lacks any ‘factual enhancements’ that would permit the court draw such an inference. Rather, this allegation relies solely on the incident that gave rise to Manuel’s demise, which is insufficient to plead a practice ‘so persistent and widespread as to practically have the force of law.’. . Because Plaintiffs’ claim lacks particularity that would raise the claim above the speculative level, the court cannot conclude that Plaintiffs have sufficiently stated a claim against the City for instituting a policy to dispatch only non-CIT trained officers, or alternatively, for failure to institute a policy to dispatch CIT-trained officers to situations where their expertise is needed. Plaintiffs have also, at times, framed this claim as a failure to train dispatchers about when to dispatch CIT-trained officers. Any such claim is similarly devoid of adequate facts to survive the City’s motion to dismiss.”)

***Arevalo v. City of Farmers Branch, Texas (Arevalo II)***, No. 3:16-CV-1540-D, 2017 WL 5569841, at \*6-7 (N.D. Tex. Nov. 20, 2017) (“Arevalo’s conclusory assertions are insufficient to enable the court to reasonably infer that Chief Fuller is a final policymaker. As the court notes above, decisionmaking authority and policymaking authority are distinct concepts under *Monell*. Policymakers possess not only the discretion to direct specific actions, but also the ‘final authority to establish municipal policy’ with respect to those actions. . . And that authority is delegated by

the city through either express delegations—such as state or local law—or implied customs and behavior. Here, however, Arevalo has failed to allege any state or local law or evidence of custom that would enable the court to reasonably infer that the Farmers Branch chief of police possesses final policymaking authority. She instead relies solely on the repeated, conclusory assertions that Chief Fuller is a ‘final policymaker.’ These threadbare recitations of a *Monell* element are insufficient to plausibly plead that Chief Fuller is a final policymaker. . . This is because the policymaking authority of chiefs of police within their own department is not something that can be inferred from their title alone. Courts that have determined that chiefs of police are final policymakers have done so because the particular governmental body has provided the chief of police with policymaking authority. . . Other government entities, such as the City of Dallas, do not delegate final policymaking authority to their chief of police. . . Thus without any additional well-pleaded facts regarding a particular police chief’s policymaking authority, the court cannot reasonably infer that the chief of police is a *de facto* final policymaker. . . . For the foregoing reasons, the court concludes that Arevalo has failed to plausibly plead that Chief Fuller was a final policymaker for Farmers Branch. Absent final policymaking authority, neither his decision not to train Officer Johnson nor his decision to hire him can qualify as official city policy. And absent any other basis to hold Farmers Branch liable to Arevalo under § 1983, the court holds that Arevalo’s second amended complaint fails to state a claim for municipal liability against Farmers Branch.”)

***Sanders v. Vincent***, No. 3:15-CV-2782-D, 2016 WL 5122115, at \*4 (N.D. Tex. Sept. 21, 2016) (“These conclusory allegations are insufficient to support a reasonable inference that there existed an official city policy or custom that led to the violation of Sanders’ constitutional rights. First, Officer Bagley’s alleged statement that ‘[r]ight now what you are doing is violating a policy that you should not be doing this okay,’ . . . is insufficient to plausibly allege that the Town of Addison actually had a policy against videotaping police activities. Second, even assuming that all of the facts alleged in the amended complaint are true, Sanders has alleged only that a single episode occurred in which Officer Bagley, Officer Jones, and Lt. Vincent violated his constitutional rights. . . Sanders does not allege that there was any prior instance in which an Addison police officer prohibited the videotaping of police activities, interfered with individual citizens’ exercise of their First Amendment rights, or arrested individuals ‘merely for failing to provide...identification.’ . . The court is therefore unable to draw the reasonable inference that there was a widespread practice that was so common and well-settled as to constitute a custom that fairly represented municipal policy. Nor does he allege any facts that enable the court to draw the reasonable inference that Addison police officers received insufficient training. ‘A mere allegation that a custom or policy exists, without any factual assertions to support such a claim, is no more than a formulaic recitation of the elements of a § 1983 claim and is insufficient to state a claim for relief.’ . . Without factual allegations that are sufficient to support a reasonable inference that such official policies or customs exist, Sanders’ amended complaint fails to state a plausible § 1983 claim against the Town of Addison, and defendants’ motion to dismiss must be granted.”)

*Schaefer v. Whitted*, 121 F. Supp. 3d 701, 718-20 (W.D. Tex. 2015) (“Defendants attack the factual sufficiency of Plaintiff’s municipal liability pleadings, arguing they amount to a ‘bare-bones’ recitation of elements of a *Monell* claim. . . In *Leatherman*, . . .the Supreme Court rejected the Fifth Circuit’s application of the heightened pleading standard to § 1983 claims against municipalities, reaffirming ‘all the Rules require is a “short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’. . *Leatherman* predates the ‘plausibility’ requirement of *Twombly* . . . and *Iqbal* . . . . It remains unresolved how and to what extent the directives of *Twombly* and *Iqbal* alter the *Leatherman* pleading standards for municipal liability claims. However, the Court agrees, for now, the standards can be reconciled in the manner articulated in *Thomas v. City of Galveston*, 800 F.Supp.2d 826, 842–45 (S.D.Tex.2011). To state a claim, the complaint must contain ‘more than boilerplate allegations’ but need not contain ‘specific facts that prove the existence of a policy.’. . .The Court finds Plaintiff’s allegations concerning the City’s policy or custom are inadequate to state a claim for relief. Plaintiff’s allegations are simply a reformulation of the elements of a claim for municipal liability based on an unconstitutional custom or practice devoid of any factual enhancement or support. . . To survive a motion to dismiss, Plaintiff must allege the existence of a sufficient number of similar prior violations rather than isolated instances. . . Without specifically identifying policies promulgated by City policymakers, and without providing specific examples of persistent and widespread abuse, Plaintiff fails to provide the City with fair notice of the grounds for its claim. . . These allegations are no more than ‘generic, boilerplate recitations of the elements of claims against a municipality for an unconstitutional custom or practice’ and thus do not raise a plausible claim City police adopted unconstitutional customs or practices. . . . In contrast, Plaintiff’s failure to train or supervise claims pass muster. Plaintiff alleges the City failed adequately train or supervise its officers concerning: (a) the use of deadly force; (b) interactions with individuals legally entitled to possess and carry weapons; and (c) citizens’ Second Amendment right to possess weapons for self-defense in their homes. . . To substantiate these claims, Plaintiff alleges the City does not ‘properly train officers on how to interact with [lawfully armed citizens], or educate them on the laws concerning the lawful possession of weapons and the rights of citizens to lawfully possess weapons’ nor does it ‘train officers about the legal distinction between possessing weapons in one’s home versus public areas.’. . Plaintiff also alleges the City ‘trains its officers it is always permissible to shoot a person with a weapon, even when the officer has been given a warning and the arrested citizen is non-threatening’. . . Plaintiff alleges the City knew the ‘obvious consequences of these policies was that City of Austin Police officers would be placed in recurring situations’ similar to those faced by Officer Whitted, ‘these policies made it highly predictable that the particular violations alleged here . . . would result,’ and yet with deliberate indifference to Schaefer’s rights, failed to train its officers in these areas. . . While Plaintiff fails to allege sufficient instances of similar past conduct by City police tending to substantiate the claim they were subjectively aware of the risk of failing to train its police force, . . . the Court finds, taking Plaintiff’s allegations as true, ‘the need for more or different training [was] obvious, the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.’. . Indeed, it is highly predictable failing to train officers regarding how to act with individuals

legally entitled to carry firearms would result in the constitutional violation alleged here and this failure to train was a moving force behind Schaefer's death. Because these allegations refer to 'the specific topic of the challenged policy or training inadequacy,' . . . they provide the City with adequate notice of the claims against it. Accordingly, Defendants' motion to dismiss is DENIED as to these claims.")

*Thomas v. City of Galveston, Texas*, 800 F.Supp.2d 826, 841-45 (S.D. Tex. 2011) ("In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), the Supreme Court rejected the Fifth Circuit's application of a heightened pleading standard to Section 1983 claims against municipalities, reaffirming that 'all the Rules require is "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' . . . However, *Leatherman* pre-dates *Twombly* and *Iqbal*, and courts have split as to the appropriate pleading requirements for municipal liability following those cases. Some courts have allowed generic or boilerplate assertions of the grounds for holding the municipality liable. [collecting cases] Other courts have treated *Twombly* and *Iqbal* as dramatically altering the pleading requirements for municipal liability claims. [collecting cases] The Court believes that *Leatherman* and *Iqbal* may be reconciled, without allowing boilerplate allegations, on the one hand, or requiring plaintiffs to plead specific factual details to which they do not have access before discovery, on the other. *Iqbal* instructed that '[d]etermining whether a complaint states a plausible claim for relief' is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.' . . . In the context of municipal liability, as opposed to individual officer liability, it is exceedingly rare that a plaintiff will have access to (or personal knowledge of) specific details regarding the existence or absence of internal policies or training procedures prior to discovery. . . . Accordingly, only minimal factual allegations should be required at the motion to dismiss stage. Moreover, those allegations need not specifically state what the policy is, as the plaintiff will generally not have access to it, but may be more general. . . . Unlike the context presented in *Iqbal*, where high-ranking government officials were sued in their individual capacities, the concerns of protecting public servants from the 'concerns of litigation, including avoidance of disruptive discovery,' *Iqbal*, 129 S.Ct at 1953, are not present in suits against municipalities. . . . Moreover, municipal liability claims do not occur in a vacuum, but rather arise in the context of a plaintiff's specific allegations of misconduct by individual officials to which he was personally subjected. Still, a plaintiff suing a municipality must provide fair notice to the defendant, and this requires more than genetically restating the elements of municipal liability. Allegations that provide such notice could include, but are not limited to, past incidents of misconduct to others, multiple harms that occurred to the plaintiff himself, misconduct that occurred in the open, the involvement of multiple officials in the misconduct, or the specific topic of the challenged policy or training inadequacy. Those types of details, or any other minimal elaboration a plaintiff can provide, help to 'satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests,' . . . and also to 'permit the court to infer more than the mere possibility of misconduct.' . . . This balance, requiring more than boilerplate allegations but not demanding specific facts that prove the existence of a policy, is in line with the approach of other courts post- *Iqbal*. Where a plaintiff provides more

than a boilerplate recitation of the grounds for municipal liability, and instead makes some additional allegation to put the municipality on fair notice of the grounds for which it is being sued, ‘federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.’ *Leatherman*, 507 U.S. at 168- 69. . . . The Court finds that Plaintiff has provided only generic, boilerplate recitations of the elements of claims against a municipality for an unconstitutional custom or practice, failure to adequately train or supervise, and negligent hiring of officials. Although Plaintiff’s allegations are fairly lengthy, they consist only of a list of number of broadly-defined constitutional violations (for example, ‘excessive force’ and ‘unlawful searches and seizures’) followed by the assertion that there was a pattern of such violations, that there was a failure to train, or that the violations resulted from improper hiring. This does not provide the city with fair notice of the grounds for which it is being sued, or allow the Court to plausibly infer actionable misconduct by the city. As discussed above, Plaintiff must provide at least minimal factual allegations regarding the city’s liability that go beyond generic restatements of the elements of such a claim. Because he has not done so, Defendants’ Motion to Dismiss is granted without prejudice with respect to this claim.” footnotes omitted)

***Mills v. City of Bogalusa***, Nos. 12–991, 12–997, 12–1078, 13–5477, 2013 WL 6184984, \*8, \*9 (E.D. La. Nov. 25, 2013) (“Fifth Circuit cases since *Twombly* and *Iqbal* have continued to disapprove of complaints that merely recite failures to train, supervise, or discipline as an element of a municipal liability claim. . . Persuasive authority holds that a plaintiff can transcend bare, conclusory allegations to state a plausible claim for relief by identifying in the complaint, among other things, ‘past incidents of misconduct to others, multiple harms that occurred to the plaintiff himself, misconduct that occurred in the open, the involvement of multiple officials in the misconduct, or the specific topic of the challenged policy or training inadequacy.’ . . Turning to the present case, plaintiff alleges that Sheriff Crowe failed to train officers in the appropriate use of force against detainees, failed to discipline officers who used unnecessary force, failed to train commanders in the supervision of deputies, and sanctioned the use of solitary confinement and other material deprivations as forms of punishment. . . Contrary to defendants’ argument, these allegations concern very narrow, plausible subject areas. That plaintiff’s constitutional injuries occurred in the Washington Parish Jail around other inmates and officers or with command authorization is a specific factual allegation that adds to the overall plausibility of his municipal liability claims. . . In light of these allegations and the authority cited above, plaintiff has adequately stated a claim for relief that may proceed to trial if founded on evidence.”)

***Oporto v. City of El Paso***, No. EP-10-CV-110-KC, 2010 WL 3503457, at \*5, \*6, \*8 (W.D. Tex. Sept. 2, 2010) (“Here, Plaintiffs allege thirty-two prior incidents, spanning fifteen years, in which El Paso Police Department officers allegedly made use of excessive deadly force. . . The incidents are described in varying degrees of detail, with some described in a few sentences and some simply listed with a date and police report number. . . . This case, in which thirty-two incidents of excessive deadly force have been alleged, falls within the acceptable range of ‘sufficiently numerous prior incidents’ needed to allege a pattern at this stage. The Court notes that the

procedural posture of this case is distinguishable from much of the case law on establishing a pattern. Discovery has not occurred in this case, whereas many decisions on this subject concern post-discovery motions. . . . The key common element, made sufficiently clear in the pleadings, is the alleged repeated use of excessive deadly force, often with fatal results. Thus, Plaintiffs have alleged a custom or widespread practice in sufficient detail, similar enough in nature to the alleged facts underlying the instant suit, to allow their pleadings to withstand the City’s motion to dismiss. . . . Even with the higher pleading standards of *Twombly* Plaintiffs have alleged sufficient prior incidents to defeat Defendant’s motion. . . . Here, where Plaintiffs’ allegations are asserted with some level of detail, Plaintiffs should also at least be entitled to discovery. . . .”)

***Charles v. Galliano***, No. 10-811, 2010 WL 3430519, at \*6 (E.D. La. Aug. 26, 2010) (“The Supreme Court has expressly prohibited the application of a heightened pleading standard to § 1983 claims against municipalities. . . . Instead, a plaintiff need only comply with notice pleading requirements by presenting a ‘short and plain statement of the claims showing that the pleader is entitled to relief.’. . . Boilerplate allegations of inadequate municipal policies or customs are generally sufficient. *See, e.g., Mack v. City of Abilene*, 461 F.3d 547, 556 (5th Cir.2006); *Ortiz v. Geo Group, Inc.*, 2008 WL 219564 at \*2 (W.D.Tex. Jan. 25, 2008); *Jacobs v. Port Neches Police Dept.*, 1996 WL 363023, \*13-15 (E.D.Tex. June, 26, 1996); *DeFrancis v. Bush*, 839 F.Supp. 13, 14 (E.D.Tex.1993). Plaintiff alleges that after he reported to his supervisor that Galliano had harassed him, ‘The City of Kenner, thorough its defendant employees, and through policy, custom, or practice did not take prompt remedial action to protect Charles from further racism, discriminatory acts or threats to his safety.’. . . Plaintiff further alleges: The City of Kenner did not adequately or timely address Charles’ numerous and documented claims of severe and pervasive harassment, discrimination, and abuse. The City of Kenner and its employees and mayor allowed Charles to be subjected to retaliation at the workplace after he made repeated complaints to supervisory personnel about the hostile work environment in which he was forced to work due to ongoing racially-discriminatory acts. Thus, it was the practice of the City of Kenner and its employees and mayor to ignore complaints of discriminatory behavior. . . . Considering the foregoing, the Court finds that plaintiff has alleged a municipal policy or custom sufficient to survive defendants’ motion to dismiss.”)

***Wright v. City of Dallas, Texas***, No. 3:09-CV-1923-B, 2010 WL 3290995, at \*3, \*4 & n.4 (N.D. Tex. July 19, 2010) (“Plaintiff argues that based on *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), there is no heightened pleading standard for municipal liability under § 1983. . . . In *Twombly* and *Iqbal*, the Supreme Court clarified that the pleading requirement for facts rather than conclusions lies within Fed.R.Civ.P. 8(a), not any heightened pleading standard. The difference between the Rule 8(a) pleading standard and an impermissible heightened pleading standard is in the factual particularity or specificity needed to state a claim. . . . A heightened pleading standard requires that a plaintiff ‘allege “specific facts” beyond those necessary to state his claim and the grounds showing entitlement to relief.’. . . The *Twombly* court did not find that ‘the allegations in the complaint were insufficiently “particular[ized]”; rather, the complaint warranted dismissal because it failed *in toto* to render

plaintiffs' entitlement to relief plausible.' . Requiring Plaintiff to allege facts sufficient to infer the existence of an official custom or policy does not impose an impermissible heightened pleading requirement. In conclusion, because Plaintiff alleges only one incident to support his inference of an official custom or policy, his factual allegations are insufficient to nudge his claims of municipal liability from conceivable to plausible, and the City's motion to dismiss should be granted. . . . Plaintiff urges the Court to deny the motion to dismiss as premature because he is 'entitled to discovery ... prior to any ruling from this Court.' . . Rule 8 'does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.'")

*Dwyer v. City of Corinth, Tex.*, No. 4:09-CV-198, 2009 WL 3856989, at \*8, \*9 (E.D. Tex. Nov. 19, 2009) ("Plaintiff argues that Defendants' 'failure to train, supervise, test, regulate, discipline or otherwise control its employees and the failure to promulgate and enforce proper guidelines for the use of Tasers constitutes a custom, policy, practice and or procedure in condoning unjustified use of force.' SECOND AMEND. COMP. at 11. Plaintiff argues that 'the Corinth Police Department's Use of Force Policy ... makes clear that the use of the Taser is only permitted to prevent harm to an Officer or some other person.' . . Plaintiff alleges that the 'excessive use of the Taser' is a '*de facto* policy' of the City of Corinth. . . Defendants argue that Plaintiff's claims of 'improper training, supervision/discipline, and retention' should be dismissed because the allegations are insufficient to state a claim. . . According to Defendants, Plaintiff does not make allegations of 'deliberate indifference' in regard to his claims. Here, Plaintiff has alleged facts that allow the Court to conclude that he is entitled to relief. *Iqbal*, 129 S.Ct. at 1950 (quoting Fed. Rule Civ. Proc. 8(a)(2)). The Supreme Court has expressly prohibited the application of a heightened pleading standard to section 1983 claims against municipalities. *Jones v. Bock*, 549 U.S. 199, 212-13 (2007) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)). Instead, a plaintiff need only comply with notice pleading requirements by presenting a 'short and plain statement of the claims showing that the pleader is entitled to relief.' . . 'Boilerplate' allegations of inadequate municipal policies or customs are generally sufficient. . . Plaintiff has alleged that the policy or custom of Defendants, which includes poor training and discipline of law enforcement officers, played a part in the deprivation of his rights. While the allegations alleged by Plaintiff, standing alone, do not contain the sort of specificity normally required, the allegations are nonetheless sufficient to withstand a motion to dismiss at the pleadings stage. . . Plaintiff need not set forth all the details of his case against a municipality under section 1983 at the pleadings stage. *Leatherman*, 507 U.S. at 168. Based on the Court's 'judicial experience and common sense,' Plaintiff's alleged facts give rise to a plausible entitlement to relief under the FHA. *Iqbal*, 129 S.Ct. at 1950 (quoting *Twombly*, 550 U.S. at 555.). Taken as true, Plaintiff's allegations could plausibly entitle Plaintiff to relief under section 1983. Therefore, the Court recommends that Defendants' motion to dismiss Plaintiff's section 1983 claims against the City of Corinth for a failure to properly train and discipline officers and for improper retention should be denied.").

## SIXTH CIRCUIT

*Red Zone 12 LLC v. City of Columbus*, 758 F. App'x 508, 515-17 (6th Cir. 2019) (“Here, Red Zone claims that the City is responsible for potential constitutional violations because its employee—Pfeiffer—improperly pursued a nuisance abatement suit against it. Though the district court addressed whether a city can be liable under § 1983 when a city prosecutor acts on behalf of the state in enforcing state law, we need not do so because the critical question is whether he acted pursuant to City policy. Thus, Red Zone must identify a City policy or custom that was the moving force behind the violation. We affirm because we conclude that Red Zone did not adequately allege that Pfeiffer acted pursuant to city custom or policy in bringing the nuisance action. Throughout Red Zone’s complaint, attached exhibits, and briefs, it contends that the City ‘had a custom and policy by which it used the city attorney as its sole investigator and decision maker concerning whether and when to exert pressure on a recalcitrant business/property owner by filing a nuisance action to effectuate its urban redevelopment program.’ . . . To support the contention that the City has a custom of using the city attorney to file inappropriate nuisance actions on behalf of the state, Red Zone points to two public websites. First, Red Zone notes that the City’s website includes a redevelopment plan for the area where Red Zone operated. Red Zone alleges that the City’s redevelopment plan indicates that the City has a custom of pursuing unconstitutional nuisance actions. But this argument proves too much. Many cities have redevelopment plans. Without more, the simple existence of a redevelopment plan does not indicate a custom of constitutional violations. Second, Red Zone points to the Columbus city attorney website’s description of its ‘Zone Initiative Team.’ Here, Red Zone quotes the team’s description: ‘This is a team of attorneys and others assembled from several divisions whose goal it is to use civil nuisance abatement actions to rid the City of dilapidated buildings. The team addresses issues from the neighborhood perspective, and focuses on what is popularly referred to as quality of life issues.’ . . . Again, even if true, this website fails to support the argument that the City has a custom of using the nuisance abatement system unconstitutionally. Nuisance abatement actions are constitutional. Counterintuitively, Red Zone also argues that the City is liable under § 1983 because ‘[t]he city’s policy of contacting and working with business and property owners to resolve any alleged nuisance was never utilized.’ . . . But this argument cuts against the heart of a § 1983 claim—that official policy or custom was the ‘moving force’ behind the constitutional violation. . . . If this case was an aberration from normal City policy, as Red Zone contends that it was, then this is precisely the type of claim for which § 1983 was *not* intended. . . . Thus, under the facts that Red Zone has alleged, its allegation that the City has a custom of using nuisance abatement actions in an unconstitutional manner is no more than a ‘sheer possibility.’ . . . It might be true that the City has a custom of pursuing unconstitutional nuisance actions. But Red Zone has not sufficiently pled facts which give its claims facial plausibility. . . . Rather, Red Zone conclusively and repeatedly argues that the City’s ‘use of the civil nuisance action process has unfortunately become a city policy, custom, and/or practice.’ . . . But without facts supporting that the City has ever filed a similarly inappropriate nuisance action against another business, or that Pfeiffer served as an official municipal policymaker under the circumstances, we cannot find that the City “‘cause[d]” one of its employees to violate the plaintiff’s constitutional right.’ . . . We therefore conclude that the district court correctly dismissed the § 1983 claims against the City on the grounds that Red Zone did not adequately allege a municipal custom or policy.”)

*Osberry v. Slusher*, 750 F. App'x 385, \_\_\_ (6th Cir. 2018) (“Osberry’s complaint also contains a claim that Chief Martin is responsible for the Officers’ conduct. To raise such a claim, Osberry ‘must demonstrate that the alleged federal violation occurred because of a municipal policy or custom.’ . . . Osberry can establish an illegal policy or custom by showing one of the following: ‘(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations.’ . . . The district court analyzed Osberry’s claim under the third option, as a ‘failure to train’ claim. This requires Osberry to plead ‘(1) a clear and persistent pattern of illegal activity, (2) which the City knew or should have known about, (3) yet remained deliberately indifferent about, and (4) that the City’s custom was the cause of the deprivation of her constitutional rights.’ . . . In other words, Osberry must allege that Chief Martin ignored a ‘clear and persistent pattern of misconduct’ that should have prompted corrective training for the Officers. . . . For this type of *Monell* claim, the municipal liability arises from the history of misconduct that created ‘notice that the training in this particular area was deficient and likely to cause injury.’ . . . This is a close call. Osberry alleges that the Officers used the same unlawful tactics here as they used in six specific cases ranging from 2012 to 2017. We do not know the facts or circumstances of these cases, but the district court inferred that these prior instances could establish a pattern of misconduct, so it granted Osberry’s request to amend her complaint to add these allegations about prior instances. And the Officers concede that the amended complaint is sufficient. . . . Thus, despite our skepticism, if we accept Osberry’s allegations as true, she sufficiently pleaded a failure to train claim. This does not end our inquiry into Osberry’s *Monell* claim. Even though the district court analyzed Osberry’s claim as a failure to train claim, the allegations in her amended complaint perhaps fit best within the first option—the classic *Monell* case that an illegal, official policy existed. Under this theory, a plaintiff must ‘(1) identify the municipal policy or custom, (2) connect the policy to the municipality, and (3) show that his particular injury was incurred due to execution of that policy.’ . . . Here, according to Osberry, Chief Martin affirmatively taught the Officers to: (1) yell out ‘stop resisting’ and ‘stop obstructing’ to imply that all defendants whom they are attacking or manhandling are resisting arrest and/or obstructing official business . . . (2) include a resisting arrest charge in any criminal complaint against any citizen who is injured during an arrest or search . . . ; and (3) overwhelm and intimidate suspects, regardless of the level of probable cause, and to over respond to and escalate casual interactions with citizens to allow officers to use excessive and abusive . . . . Looking at these allegations, Osberry’s *Monell* claim seems more about the affirmative policies of Chief Martin—how he taught and instructed the Officers to perform their duties—and less about topics left out of the Officers’ training. To be sure, these conclusory allegations, without more, may be insufficient to survive a motion to dismiss. . . . Osberry, however, provides more detailed allegations in her amended complaint—the six cases from 2012 to 2017 where the Officers employed Chief Martin’s unlawful tactics. . . . This factual allegation nudges Osberry’s *Monell* claim ‘across the line from conceivable to plausible.’ . . . And while this type of a *Monell* claim is also a close call, it is at least plausible that Chief Martin’s affirmative policies caused this pattern of misconduct. In sum, Osberry has sufficiently pleaded a

viable *Monell* claim under either theory. But which theory Osberry ultimately pursues (or which theory can survive summary judgment) may largely depend on discovery and whether any evidence suggests that Chief Martin implemented an illegal, official policy—or alternatively, that Chief Martin ignored a pattern of misconduct that should have prompted corrective training. We need not answer that question now. The district court correctly denied the Officers’ motion to dismiss the *Monell* claim.”)

***Bailey v. City of Ann Arbor***, 860 F.3d 382, 388-89 (6th Cir. 2017) (“Bailey maintains that, in reviewing a motion to dismiss a *Monell* claim, the plausibility standard of *Twombly* and *Iqbal* does not apply. He insists that the ‘no set of facts’ pleading standard articulated in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), remains good law and applies to this claim. That is wrong. The Supreme Court overruled the *Conley* standard in *Twombly*. 550 U.S. 544, 561–62 (2007). That means district courts may not rely on contrary language in *Petty v. County of Franklin*, 478 F.3d 341, 345 (6th Cir. 2007), which is inconsistent with the Supreme Court’s more recent and precedentially superior decisions in *Twombly* and *Iqbal*.”)

***Robertson v. Lucas***, 753 F.3d 606, 623 (6th Cir. 2014) (“Appellants do not plead that appellees maintained a policy or custom of refusing to turn over exculpatory or impeachment evidence. Appellants’ nebulous assertions of wrongdoing in the form of ‘flawed investigations’ and ‘unconstitutional searches and seizures’ do not pertain to the alleged *Brady* violations; rather, appellants assert constitutional violations in the conduct leading up to but not including the disclosure of exculpatory evidence. Rule 8 requires that a plaintiff’s pleadings ‘give the defendant fair notice of what the claim is and the grounds upon which it rests.’ . . . Appellants’ complaint, which fails to claim that their rights were violated by a policy or custom of refusing to turn over exculpatory or impeachment evidence, cannot be said to have given appellees fair notice of this claim. As this deficiency is manifest from the face of appellants’ complaint, we affirm the district court’s dismissal of appellants’ *Monell* claims alleging *Brady* violations against Richland County and the City of Cleveland.”)

***Howard v. City Of Girard, Ohio***, 346 F. App’x 49, 2009 WL 2998216, at \*2, \*3 (6th Cir. Sept. 21, 2009) (“To prevail on a claim against the city under § 1983, plaintiff must establish both: (1) the deprivation of a constitutional right, and (2) the city’s responsibility for that violation. . . . Despite the fact that Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim’ at the complaint stage, we hold that plaintiff’s amended complaint falls short of the *Twombly* threshold. The district court noted correctly that while plaintiff argues ‘[The City of] Girard was deliberately indifferent to Howard’s Aright to due process of law,’ he does not ‘identify which particular right Girard violated.’ Moreover, the Due Process Clause of the Fourteenth Amendment does not generally require a municipality to protect an individual from harm by third parties.”)

***Laning v. Doyle***, No. 3:14-CV-24, 2015 WL 710427, at \*12 (S.D. Ohio Feb. 18, 2015) (“Plaintiffs’ allegations in this case go beyond conclusory allegations of inadequate training or a pattern of

unconstitutional behavior. Plaintiffs have specifically alleged that Officer Doyle has been the subject of ‘internal complaints and at least one other lawsuit.’ Plaintiffs further allege that the City knew about these complaints, and yet failed to take any remedial action. . . In the Court’s view, these factual allegations satisfy the requirements of *Iqbal* and *Twombly*, and state a plausible claim against the City. Whether Plaintiffs will be able to prevail on this claim, or even survive summary judgment, remains to be seen. However, the Court agrees that, at a minimum, Plaintiffs are entitled to discovery. In *Scott v. Giant Eagle, Inc.*, No. 1:12-cv-3074, 2013 WL 1874853 (N.D. Ohio May 3, 2013), the court noted that ‘applying *Iqbal* too strictly in situations where knowledge of a custom, policy, or practice is unobtainable absent some preliminary discovery could lead to unfair results.’ . . . This is particularly true when the evidence needed is within the exclusive, or almost exclusive, possession of the opposing party. Accordingly, the Court overrules Defendants’ motion to dismiss the § 1983 claim asserted against the City of Huber Heights.”)

***Minick v. Metro. Gov’t of Nashville***, 3:12-CV-0524, 2014 WL 3817116, \*2, \*3 (M.D. Tenn. Aug. 4, 2014) (“Here, Ms. Minick claims that ¶¶ 4.30–4.38 of her Amended Complaint are sufficient to state a claim for municipal liability against Metro Nashville under § 1983. However, the referenced allegations are boilerplate and conclusory and contain no specific factual assertions. In numerous cases, courts (including this one) have found that boilerplate allegations premised on a single incident of alleged police brutality—*i.e.*, the incident that caused the plaintiff’s injury—are insufficient to state a municipal liability claim, thereby justifying dismissal under Rule 12(b) (6). . . Here, the Amended Complaint does not identify or describe any of Metro Nashville’s policies, procedures, practices, or customs relating to training; it does not identify any particular shortcomings in that training or how those shortcomings caused the alleged violation of Minick’s rights; and it does not identify any other previous instances of excessive force or similar violations that would have put Metro Nashville on notice of a problem. . . Accordingly, the court finds that the Amended Complaint does not contain sufficient allegations to state a claim for municipal liability against Metro Nashville. The court recognizes that presenting municipal liability claims is more difficult after *Twombly* and *Iqbal*, but the prevailing view within this circuit and within this district is that allegations that essentially amount to notice pleading of a municipal liability claim are insufficient. . . In sum, Ms. Minick’s § 1983 claims against Metro Nashville will be dismissed. Because it is conceivable that Ms. Minick could allege sufficient facts to support a § 1983 municipal liability claim, the dismissal will be without prejudice.”)

***Hamer v. County of Kent***, No. 1:13-CV-504, 2014 WL 1276563, \*6 (W.D. Mich. Mar. 27, 2014) (“*Twombly* and *Iqbal* did not overrule *Leatherman*. Even after *Twombly* and *Iqbal*, a district court would err in imposing a heightened pleading standard on a complaint alleging municipal liability. Rather, the district court must now apply the new pleading standard applicable to all federal cases as a result of *Twombly* and *Iqbal*. Under that standard, a plaintiff must allege ‘enough facts to state a claim to relief that is plausible on its face.’ . . . In short, although *Twombly* and *Iqbal* did not overrule *Leatherman*, they did overrule *Conley v. Gibson* by enunciating a new pleading standard applicable to all federal cases.”)

*A.M.S. v. Steele*, No. 1:11–cv–298, 2012 WL 2130971, at \*5, \*9 (S.D. Ohio June 8, 2012) (R & R) (“With respect to the City of Cincinnati, plaintiffs allege that in response to a gang-related increase in drug and crime activity the City has developed a custom, policy and practice of arresting young black males for little or no reason, or on false or inflated charges, or on no charges at all, in order to empty the streets of suspected or potential criminals. . . Further, plaintiffs allege that although the official policy is that parents of minors are to be notified when a minor is arrested and before they are taken to the Juvenile Detention Center, the actual policy, custom and practice among Cincinnati Police is to routinely detain minors without notifying their parents. . . This actual practice, which is contrary to the official policy, is used to deny minors access to counsel (a likely result of notifying a parent) and interrogate and extract evidence or confessions. . . Further, the City’s official policy requires that interviews with suspects be recorded in their entirety, but the actual policy, custom and practice among police detectives is to browbeat, threaten, deceive, and otherwise coerce minors in custody into agreeing to provide confessions off-tape and then record only the false confessions or statements. . . This practice makes it appear that the confessions are voluntary and more credible, when they are not, to obtain more criminal convictions. . . Regarding the City of Cincinnati, plaintiffs allege that the City, by and through its policymakers (John Doe Defendants 4–10), is liable for plaintiffs’ constitutional injuries for the failure to provide adequate training to police officers and detectives and for establishing, permitting or condoning policies, practices or procedures of: ‘arrest first, investigate later’ and ‘the ends justify the means’ in policing high-crime neighborhoods such as Northside; coercing confessions ‘off-tape’ and selectively recording portions of confessions to enhance their credibility and increase conviction rates; not notifying guardians of minors that are held for questioning to avoid the possibility of counsel being obtained for the minors; allowing police officers and detectives to present skewed information and evidence to grand juries to increase indictment rates; and allowing rogue officers like Steele to operate without intervention, thus failing to prevent known or obvious police misconduct. . . Plaintiffs further allege that these policies, practices, and procedures resulted in the violations of plaintiffs’ clearly established constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. . . Notably, these allegations are in addition to the extensive factual allegations, recited *supra*, pertaining to specific acts of defendants Steele and Mathis. . . Plaintiffs have alleged sufficient facts at this juncture showing that the City of Cincinnati’s practices and policies are insufficient to protect the rights of minor suspects and have caused the deprivation of plaintiffs’ constitutional rights. Accepting plaintiffs’ allegations as true and drawing all inferences in a light most favorable to plaintiffs, the undersigned finds that plaintiffs have sufficiently pled a § 1983 *Monell* claim against the City of Cincinnati. Accordingly, defendants’ motion to dismiss plaintiffs’ § 1983 claim against the City of Cincinnati should be denied.”)

*Rucker v. City of Cleveland*, No. 1:10 CV 2613, 2011 WL 52486, at \*1 (N.D. Ohio Jan. 6, 2011) (“The Court has reviewed Mr. Rucker’s Complaint against the City, alongside the standard enunciated in *Twombly*, and concludes as a matter of law that there are no allegations demonstrating a plausible right of recovery against the City. Mr. Rucker’s conclusory allegations against the City fail to meet the pleading standards set forth in Fed.R.Civ.P. 8. Accordingly, the Court will grant the City’s motion to dismiss Mr. Rucker’s Complaint against it, pursuant to Rule

12(b)(6), for failure to state a claim upon which relief may be granted.”)

***Cunningham v. Cleveland Police Dept.***, No. 1:10-CV-453, 2010 WL 5636778, at \*5, \*6 (N.D. Ohio Dec. 22, 2010) (“[A]lthough Plaintiff’s second cause of action recites the key elements of a § 1983 claim against the City of Cleveland, it does so only in a conclusory manner. The gravamen of Plaintiff’s argument is that the City failed to train its officers on proper seizure and forfeiture procedures. But, Plaintiff failed to assert any factual allegations to support its conclusion that the city had a policy of failing to train officers on these issues, or encouraging officers to take actions contrary to its written policy, which Plaintiff acknowledged was lawful. Instead, Plaintiff repeatedly made unsupported blanket assertions that the City’s inadequate training, or lack thereof, was accountable for the alleged unlawful behavior by the officers in question. For example, Cunningham states:

To be sure, as we see it, it has to be the fault of the City, and those who supervise them [the officers], if these officers did not know the State of Ohio Legislature provided a statutory remedy for people to get their property back when officers seize it without probable cause – the situation here.

(Doc. 18, p. 12). Such statements are conclusory and are not sufficient to state a plausible claim. As stated by the Supreme Court in *Iqbal*, conclusory statements are not entitled to be assumed as true. . . . When accepting Plaintiff’s remaining factual allegations as true, it is possible to infer that Defendant City acted unlawfully, but it is not plausible. For instance, Plaintiff failed to assert facts from which the Court can do more than speculate that the City’s training, or lack thereof, caused the alleged harm. Furthermore, the Court cannot find any facts from which to infer that the City acted with deliberate disregard to its citizen’s rights. In order to survive a motion to dismiss, Plaintiff’s Amended Complaint had to allege facts showing that the City’s failure to train amounted to deliberate indifference to the rights of persons with whom the police come into contact. . . . In this case, the Plaintiff’s filings, consisting of a Complaint, Amended Complaint, Response to Defendant’s Motion for a More Definite Statement and Response to Defendant’s Motion to Dismiss, do not allege sufficient facts to survive Defendants’ motion and proceed to the next stage of the judicial process. Plaintiff made no factual allegations to support that the City acted intentionally to harm persons such as Plaintiff or to show that the City had a long-standing history of unlawful conduct in this area. Although Plaintiff suggests that he will provide convincing proof of the City’s unconstitutional policy at trial, that proffer does not negate Plaintiff’s duty pursuant to Fed.R.Civ.P. 8 to plead facts plausibly showing that the City acted unlawfully at the pleading stage. There are no facts in the Amended Complaint that reasonably describe a specific policy or custom of the City of Cleveland that violated Cunningham’s rights. Accordingly, Plaintiff’s conclusory allegations do not suffice to satisfy the pleading standard announced in *Iqbal* and *Twombly*.”)

***Johnson v. Metropolitan Government of Nashville and Davidson County***, No. 3:10-0589, 2010 WL 3619790, at \*4 (M.D. Tenn. Sept. 13, 2010) (“Plaintiff must produce facts showing a plausible right to relief because Metro was deliberately indifferent to the need to train, supervise or discipline police officers or Metro was deliberately indifferent to improper pursuit policies or customs, and

that such inadequacies were likely to result in the violation of a citizen's constitutional rights. . . Plaintiff Sweat's pleading on municipal liability has 'stop[ped] short of the line between possibility and plausibility of entitlement to relief.' . . Thus, the § 1983 claims against Metro must be dismissed for failure to state a claim.")

**Modd v. County of Ottawa**, No. 1:10-cv-3372010, 2011 WL 5860425, at \*7 (W.D. Mich. Aug. 4, 2010) ("Certainly, *Leatherman* must be read in conjunction with *Twombly* and *Iqbal*, such that allegations of municipal policy or custom must be sufficient to raise a 'plausible' inference that officers were acting pursuant to municipal custom or policy. At the pleading stage, however, no more is necessary. Under this standard, the amended complaint is sufficient. Plaintiff alleges that the existence of a policy, pattern, or practice of withholding or denying prescription medication is evidenced by the fact that plaintiff was denied all prescription medication for a seven-day period. . . Plaintiff further alleges that on at least twelve occasions prior to plaintiff's incarceration, incoming inmates at the Ottawa County Jail were denied medications which had previously been prescribed for them. . . These factual allegations, accepted as true, are sufficient to meet plaintiff's rather light burden of alleging a plausible claim of a county custom or policy. Further inquiry into this question must await discovery and summary judgment, or trial.")

**Fletcher v. Michigan Dept. of Corrections**, No. 09-CV-13904, 2010 WL 2376167, at \*6 (E.D. Mich. June 9, 2010) ("Although pre-*Twombly*, *Petty* provides guidance in assessing the sufficiency of Plaintiff's complaint. Similar to *Petty*'s allegation that Franklin County had a policy of failing to 'adequately and reasonably train, supervise and discipline officers in such a way to properly protect the constitutional rights of citizens,' Plaintiff alleges that the Oakland County Sheriff's Office had the policy or custom 'to inadequately train or supervise its officers, deputies, nurses and counselors, with respect to the constitutional rights of the inmates.' . . This allegation, however, was the least specific allegation regarding the customs or policies of the Sheriff's Office. Plaintiff goes on to allege six more specific policies relating to the handling of mentally ill inmates, including failure to comply with maintenance orders, as well as inmate abuse and the improper handling of complaints of abuse. Moreover, other courts in the Eastern District of Michigan have found less specific allegations concerning a municipality's customs or policies to be sufficient to withstand a motion to dismiss. [collecting cases] Although the court certainly does not find Plaintiff's pleadings to be *more* than sufficient to survive a motion to dismiss, based on the above-cited case law and applying the Rule 12(b)(6) standard, the court finds Plaintiff's allegations to be minimally sufficient. Defendants' motion to dismiss will therefore be denied as to Sheriff Bouchard in his official capacity.")

**Lott v. Swift Transp. Co., Inc.**, No. 2:09-cv-02287, 2010 WL 937769, at \*3 (W.D. Tenn. Mar. 17, 2010) ("[T]he Court disagrees that Plaintiffs' failure to identify in their complaint the particular policy or custom responsible for the alleged deprivation of their rights necessarily mandates dismissal under Rule 12. Although Swift correctly notes that a private corporation can only be held liable under § 1983 when it has a policy or custom that causes a civil rights violation, *see Street v. Corrections Corp. of Am.*, 102 F.3d 810, 818 (6th Cir.1996), complaints under § 1983 are not

subject to any heightened pleading standards, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination*, 507 U.S. 163, 167-68 (1993). Instead, a plaintiff’s complaint – whether it seeks relief under § 1983 or under any other legal theory – must be plausible and not merely conceivable. *See Iqbal*, 129 S.Ct. at 1950-51. Identifying the precise policy or custom may help make the complaint’s allegations more plausible, but categorically viewing such a failure as dispositive in every case involving § 1983 claims risks imposing a higher standard of pleading than the Federal Rules of Civil Procedure mandate.”).

***Birgs v. City of Memphis***, No. 09-2468, 2010 WL 625401, at \*4 (W.D. Tenn. Feb. 18, 2010) (“To state a successful claim under § 1983 for failure to train, the municipality’s failure must ‘amount [] to *deliberate indifference* to the rights of persons with whom the police come into contact.’ . . . A plaintiff must demonstrate that the municipality ‘has ignored a history of abuse,’ and was on clear notice that its training was deficient to prove that the municipality was deliberately indifferent. . . . The easiest way for an individual to meet her burden is to point to past incidents of similar police conduct that authorities ignored. . . . Birgs argues that her Complaint meets these criteria. She points to the following excerpt as evidence: 21. Defendant City of Memphis permitted, encouraged, and tolerated an official pattern, practice or custom of its employees’ violation of the constitutional rights of the public at large, including the Plaintiff’s. 22. Defendant City of Memphis failed to properly train and instruct the individual Defendants in the proper use of force. Defendant City of Memphis acquiesced in the use of excessive force and/or ratified the actions of the Defendant Officers in the use of excessive force. 23. The actions of all Defendants constitute willful misconduct or an entire want of such care or recklessness as to raise a presumption that the actions were done with conscious indifference to the consequences in a willful and wanton manner and that Plaintiff is entitled to have punitive damages assessed against Defendants. . . . The allegations are nothing more than ‘a formulaic recitation of the elements of a cause of action.’ . . . Stripped of legal language, Plaintiff’s Complaint contains no facts that could plausibly lead one to believe that the City deliberately ignored a history of abuse by officers in the Memphis Police Department. . . . The Complaint also fails to allude to any incident of brutality other than the one Birgs allegedly suffered. . . . Although intensive fact pleading is not required, a plaintiff has the burden to plead more than conclusory statements. *Iqbal*, 129 S.Ct. at 1949. Because Birgs’ Complaint fails to allege ‘more than a sheer possibility that a defendant has acted unlawfully,’ the Court GRANTS the City’s Motion to Dismiss Birgs’ failure-to-train claim.”).

***Hutchison v. Metropolitan Government of Nashville and Davidson County***, 685 F.Supp.2d 747, 751 (M.D. Tenn. 2010) (“In the context of Section 1983 municipal liability, district courts in the Sixth Circuit have interpreted *Iqbal*’s standards strictly. [collecting cases] . . . . Plaintiff’s claim regarding Defendant Metropolitan Government’s custom, policy or practice of stopping vehicles and ordering passengers to exit the vehicles without sufficient cause and in disregard of passengers’ disabilities is just such a conclusion without additional factual assertions of any kind. While Plaintiff details the events of the traffic stop, he does not include any facts related to a municipal policy on probable cause and traffic stops, or a municipal custom, policy or practice regarding drivers or passengers who are disabled. Similarly, beyond the assertion that Defendant

Metropolitan Government failed to adequately train its officers in stopping vehicles and/or ordering passengers out of those vehicles in disregard of their disabilities and injuries, Plaintiff gives no additional factual support. Therefore, Plaintiff's pleadings have 'stop[ped] short of the line between possibility and plausibility' regarding municipal liability. The Supreme Court's decisions in *Twombly* and *Iqbal* seem to suggest a shift from notice back toward fact pleading. See e.g., Wright & Miller ' 1216; West Group, Federal Practice & Procedure Supplemental Service ' 1357 (referencing the Notice Pleading Restoration Act of 2009, S. 1504, introduced in the Senate to reinstate pre-*Twombly* standards for the motion to dismiss); and Jay S. Goodman, *Two, New, U.S. Supreme Court Cases Raise the Question: Is Notice Pleading Dead?*, 58 Feb R.I. B.J. 5 (2010). This reversal of over fifty years of Federal Rules of Civil Procedure interpretation will likely bring vast consequences in fairness to plaintiffs while doing little to increase fair notice to defendants. See Wright & Miller ' 1216 ("the function of the complaint is to afford fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved") (quoting Robert Millar, *Civil Procedure of the Trial Court in Historical Perspective* 190-93 (1952)). Although Plaintiff's Amended Complaint cannot survive the Motion to Dismiss after *Iqbal*, the Court must note that it is uncomfortable with this pleading standard as now applied, especially in the context of Section 1983 and municipal liability.").

***Buster v. City of Cleveland***, No. 1:09 CV 1953, 2010 WL 330261, at \*8, \*9 (N.D. Ohio Jan. 21, 2010) ("The complaint contains no suggestion of a custom or policy of the City of Cleveland which may have resulted in the deprivation of a federally protected right of the plaintiff. Buster states in a generic recitation that the City of Cleveland 'had in effect certain explicit and de facto policies, practices and customs which were applied to the treatment of persons engaged and/or arrested by City of Cleveland Police.' . . . He further alleges that the City 'failed to adequately train properly or supervise properly each and all of the individual defendants named (including DOE 1,2, and 3) above.' . . . As noted above, a pleading must more than unadorned, 'the defendant unlawfully harmed me' accusations. *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). A pleading that offers only 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' . . . Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. . . . There are no facts in the Amended Complaint that reasonably describe a specific policy or custom of the City of Cleveland that violated Buster's constitutional rights. Instead, he merely recites the elements of a cause of action to hold the City of Cleveland responsible for the actions of its employees. This is precisely the type of claim that is not actionable in a § 1983 action. Thus, the fifth cause of action is dismissed.").

***Williams v. City of Cleveland***, No. 1:09 CV 1310, 2009 WL 2151778, at \*4 (N.D. Ohio July 16, 2009) ("A municipality can only be held liable under § 1983 if the complaint alleges that Plaintiff's injury directly resulted from the municipality's policies or customs. . . . Under the heightened pleading standard articulated by the Supreme Court of the United States in recent decisions, Plaintiff's amended complaint does not sufficiently state a § 1983 claim. . . . Plaintiff's amended complaint recites the critical element of a § 1983 claim against a municipality – a policy or custom – but does so in a conclusory manner. Plaintiff makes no factual allegations that can support the

conclusion that the City has a policy or custom of ignoring exculpatory evidence and continuing with prosecutions. To merely state that the City has a policy or custom is not enough; Plaintiff must allege facts, which if true, demonstrate the City's policy, such as examples of past situations where law enforcement officials have been instructed to ignore evidence. Here, while Plaintiff has alleged facts sufficient to demonstrate that exculpatory evidence was ignored in his case, he has not alleged facts from which it can be inferred that this conduct is recurring or that what happened in his case was due to City policy. Accordingly, the amended complaint would not state a claim cognizable under federal law. Thus, Plaintiff's motion for leave to amend the complaint is denied as futile and Count V of Plaintiff's complaint against the City is dismissed.”).

## SEVENTH CIRCUIT

*Williams v. Dart*, 967 F.3d 625, 639 (7th Cir. 2020) (“[T]he Sheriff faults plaintiffs for failing to plead ‘the nature or severity of *their own* pending charges or criminal backgrounds.’ We search Rule 8 and cases interpreting it in vain for a requirement that a plaintiff plead the defendant’s defenses for him. . . The Sheriff would also have us ignore as ‘conclusory,’ for example, plaintiffs’ allegation that his ‘administrative review’ policy was based on ‘racist assumptions about the likelihood that people from primarily African American neighborhoods pose a public safety risk or are likely to reoffend.’ Because we can think of no cause of action that contains as an element proof of racist assumptions about neighborhoods in Chicago, plaintiffs’ allegation cannot fairly be characterized as conclusory. . . Finally, leaning heavily on *Iqbal*, the Sheriff argues there are good reasons to believe his policy was race-neutral in conception and execution. That may or may not be so, but in any event ‘[I]tigators are entitled to discovery before being put to their proof.’. . . *Iqbal* is not a mandate to weigh a plaintiff’s likelihood of ultimate success at the pleading stage. . . Instead it demands ‘more than a sheer possibility’ of liability. . . Alleging merely that defendants ‘approved’ a policy of arresting and detaining ‘Arab Muslim men’ was not enough in that case arising in the immediate wake of the terrorist attacks of September 11, 2001, . . . but there is a good deal more to plaintiffs’ complaint here. The district court erred in dismissing plaintiffs’ equal protection claims on the pleadings.”)

*Swanigan v. City of Chicago*, 881 F.3d 577, 585-87 (7th Cir. 2018) (Hamilton, J., concurring in part and dissenting in part) (“I respectfully dissent. . . from the decision to affirm dismissal of Swanigan’s challenge to the ‘cleared-closed case’ policy. He alleges that the Chicago Police Department maintains a file on him that effectively—but falsely—identifies him as the ‘Hard Hat Bandit.’ This is not a case where the police suspected him of those crimes but were unable to prove guilt beyond a reasonable doubt. There is no doubt here, as my colleagues acknowledge. Swanigan was not the Hard Hat Bandit. In my view, he has standing to raise this claim, and on the merits he should be allowed to proceed past the pleadings. . . Next, consider how any traffic stop of Swanigan in Chicago is likely to unfold as long as the false information is in his police file. When the police carry out a traffic stop, they are entitled to demand the driver’s identification, of course, and it is routine to check the driver’s record for active war-rants, driving history, and criminal history. Those checks are done for important reasons, including officer safety. If the files are

checked, the officer checking Swanigan may well be told that the police department believes he committed a series of armed robberies. At that point, an officer's normal caution will give way immediately to extreme caution, putting Swanigan at a much higher risk that any movement might be misinterpreted as dangerous. And note that this scenario assumes lawful and reasonable actions by both Swanigan and a police officer. How many cases have we seen in this country of unarmed subjects, especially men of color, being shot and even killed by police based on hair-trigger responses to innocent actions? In my view, these risks for Swanigan—today—are not speculative but substantial. He has alleged, and should be allowed to prove, that he has standing to challenge the 'cleared-closed case' policy as applied to him. On the merits of this claim, Swanigan would face a challenge. Ordinarily a civilian has no cognizable legal interest in what police investigative files say about him. *Paul v. Davis*, 424 U.S. 693, 697 (1976), held that even a *public* accusation by the police that a civilian was an 'active shoplifter' did not violate the due process clause of the Fourteenth Amendment. But what Swanigan alleges here is an extreme case with substantial risk of tangible harm not present in that case. And there is virtually nothing to be said here for the integrity of the police files. At this point, after the conviction of the real Hard Hat Bandit, the police refusal to correct the files falsely labelling Swanigan the Hard Hat Bandit is arbitrary and capricious—and dangerous. Constitutional law (not to mention common sense) establishes that the police are *entitled* to rely on such information in their files, . . . even if it turns out to be mistaken. . . .Based on Swanigan's allegations, it is hard to understand how the false information that is still in his police file is the product of anything other than knowing falsity or deliberate indifference to the truth. Why not allow a civilian who faces substantial risk of harm due to false police information an opportunity to have that information corrected? And on the other side of the scales, what harm would the Chicago police or public suffer if the plainly false information were corrected? Again, that information is not just unproven or contestable—it is false. I cannot think of any harm such a correction would cause the police, and it might well help avoid a tragedy. I would allow Swanigan to pursue this claim on the merits beyond the pleadings so that the courts could address it and its potential ramifications based on real evidence rather than allegations and theoretical arguments.”)

***White v. City of Chicago***, 829 F.3d 837, 843-44 (7th Cir. 2016) (“The Supreme Court held in *Leatherman* . . . that federal courts may not apply a ‘“heightened pleading standard”’—more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure—in civil rights cases alleging municipal liability under . . . 42 U.S.C. § 1983.’ The Court emphasized that ‘Rule 8(a)(2) requires that a complaint include only a “short and plain statement of the claim showing that the pleader is entitled to relief.”’ . . . The *Leatherman* holding has survived the Court’s later civil pleading decisions in *Iqbal* and *Twombly*, which require the pleader to allege a ‘plausible’ claim. . . . White alleged in his amended complaint: ‘In accordance with a widespread practice of the police department of the City of Chicago: O’Donnell requested the judge to issue a warrant on the basis of O’Donnell’s conclusory allegation that other law enforcement officers claimed or believed plaintiff had committed an offense, and O’Donnell did not present the judge with an affidavit setting out any affirmative allegation of facts that would indicate that plaintiff had committed an offense.’ Together with the individual claim against O’Donnell and the standard

printed form that does not require specific factual support for an application for an arrest warrant, this allegation was enough to satisfy the ‘short and plain statement of the claim’ requirement of Rule 8(a)(2). White was not required to identify every other or even one other individual who had been arrested pursuant to a warrant obtained through the complained-of process. . . In the end, however, Officer O’Donnell’s sworn testimony about the NAGIS Report provided sufficient evidence to establish probable cause. Probable cause also establishes that White did not suffer a constitutional injury, which is a necessary element of a *Monell* claim. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Since White’s *Monell* claim fails on other grounds, the error on the sufficiency of the pleading was harmless.”)

***McCauley v. City of Chicago***, 671 F.3d 611, 616-19 (7th Cir. 2011) (“Though the district court’s analysis was faulty, the equal-protection claim against the City was properly dismissed. To state a *Monell* claim against the City for violation of Mersaides’s right to equal protection, McCauley was required to ‘plead[ ] factual content that allows the court to draw the reasonable inference’ that the City maintained a policy, custom, or practice of intentional discrimination against a class of persons to which Mersaides belonged. . . He did not meet this burden. . . . We have interpreted *Twombly* and *Iqbal* to require the plaintiff to ‘provid[e] some specific facts’ to support the legal claims asserted in the complaint. . . The degree of specificity required is not easily quantified, but ‘the plaintiff must give enough details about the subject-matter of the case to present a story that holds together.’ . . The required level of factual specificity rises with the complexity of the claim. . . . This case is more like *Brooks* than *Swanson*. Many of the alleged ‘facts’ are actually legal conclusions or elements of the cause of action, which may be disregarded on a motion to dismiss. . . For example, McCauley alleges that the City ‘has an unwritten custom, practice and policy to afford lesser protection or none at all to victims of domestic violence’ and that ‘[t]here is no rational basis’ for this purported policy. Similarly, McCauley alleged the following:

[The City], through its agents, employees and/or servants, acting under color of law, at the level of official policy, practice, and custom, with deliberate, callous, and conscious indifference to McCauley’s constitutional rights, authorized, tolerated, and institutionalized the practices and ratified the illegal conduct herein detailed, and at all times material to this Complaint, [the City] had interrelated *de facto* policies, practices, and customs.

These are the legal elements of the various claims McCauley has asserted; they are not factual allegations and as such contribute nothing to the plausibility analysis under *Twombly/Iqbal*. Once the legal conclusions are disregarded, just one paragraph of factual allegations remains:

Defendant violated McCauley’s constitutional rights under 42 U.S.C. § 1983 by:

- a. failing to provide adequate security and promptly arrest Martinez;
- b. failing to promulgate any policy to ensure the prompt arrest of individuals guilty of violating protective orders;
- c. maintaining a policy or custom of failing to timely arrest violators of protective orders;
- d. maintaining a custom and practice of failing to adequately train officers concerning the necessity of promptly arresting individuals guilty of violating protective orders;
- e. maintaining a policy or custom of failing to have safeguards in place to ensure that violators of protective orders were timely arrested;

- f. failing to have a custom, practice and policy in effect to verify whether someone who is arrested for domestic violence is on parole;
- g. failing to have a custom, practice and policy to communicate with state officials and law enforcement officials regarding domestic violence arrests;
- h. failing to have a custom, practice and policy in effect in order to communicate with parole agents on domestic violence arrests;
- i. failing to have a custom, practice and policy in effect to verify whether an arrestee of a domestic violence offense is on parole prior to issuing an order of protection; and
- j. maintaining a custom, practice and policy of ignoring the seriousness of domestic violence arrests.

McCauley maintains that these allegations are sufficient to state a *Monell* equal-protection claim against the City. We disagree. In order to state a facially plausible equal-protection claim under *Monell*, the factual allegations in McCauley’s complaint must allow us to draw the reasonable inference that the City established a policy or practice of intentionally discriminating against female victims of domestic violence in the provision of police protection. That is, McCauley needed to allege enough ‘by way of factual content to “nudge[e]” his claim of purposeful discrimination “across the line from conceivable to plausible.”’ Because the Equal Protection Clause is ‘concerned ... with equal treatment rather than with establishing entitlements to some minimum of government services, [it] does not entitle a person to adequate, or indeed to any, police protection.’ . . . ‘On the other hand, selective withdrawal of police protection, as when the Southern states during the Reconstruction era refused to give police protection to their black citizens, is the prototypical denial of equal protection.’ . . . The allegations in the paragraph quoted above do not plausibly suggest that the City maintained a policy or practice of selective withdrawal of police protection. To the contrary, the complaint alleges that the City failed to have particularized practices in place for the *special* protection of domestic-violence victims. In essence, the complaint alleges that the City failed to promulgate specific policies for this particular class of crime victims, not that the City denied this class of victims *equal* protection. At most, the factual allegations in the complaint plausibly suggest the uneven allocation of limited police-protection services; they do not plausibly suggest that the City maintained an intentional policy or practice of *omitting* police protection from female domestic-violence victims as a class. Just as in *Brooks*, McCauley’s factual allegations are entirely consistent with lawful conduct – here a lawful allocation of limited police resources. . . . And the complexity of McCauley’s equal-protection claim distinguishes this case from *Swanson*.”)

***McCauley v. City of Chicago***, 671 F.3d 611, 620, 622-25, 627-29 (7th Cir. 2011) (Hamilton, J., dissenting in part) (“I agree with my colleagues that plaintiff has failed to state a claim against defendant Walker. I respectfully dissent from the rejection of plaintiff’s equal protection claim against the City of Chicago. I am skeptical about plaintiff’s ability to prove the claim, but his complaint should be sufficient to survive a motion to dismiss for failure to state a claim, even under the new and subjective pleading standards announced in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). I explain first my skepticism, then some of the problems raised by *Iqbal*, and finally why the complaint should survive the motion to dismiss. Mr. McCauley’s suit seeks to enforce the

Fourteenth Amendment's equal protection requirements on the decisions of a major city police force about how to allocate its resources. Plaintiff's only viable equal protection theory is that the Chicago police department made a deliberate decision to minimize the police protection available to victims of domestic violence, and that the police did so because of an intentional animus against women, who make up the vast majority of adult victims of domestic violence. . . . As a subordinate federal court, it is our responsibility to do our best to apply the law as stated in *Iqbal*. My colleagues do so here, and the *Iqbal* standard is clearly decisive for the panel majority. The problem here is that it also our responsibility to do our best to apply other Supreme Court decisions involving pleading standards, including *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993); *Erickson v. Pardus*, 551 U.S. 89 (2007); and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), as well as the Federal Rules of Civil Procedure as adopted by the Court and approved by Congress, and the form pleadings that are part of the Federal Rules of Civil Procedure and that were also approved by the Court and Congress. *Iqbal* is in serious tension with these other decisions, rules, and forms, and the Court's opinion fails to grapple with or resolve that tension. I do not believe it is an exaggeration to say that these decisions, rules, and forms simply conflict with *Iqbal*. As a result of this unresolved tension, since *Iqbal* was decided, the lower federal court decisions seeking to apply the new 'plausibility' standard are wildly inconsistent with each other, and with the conflicting decisions of the Supreme Court. . . . First, *Iqbal's* reasoning and holding conflict with Rule 9(b), which requires that a party alleging fraud or mistake 'state with particularity the circumstances constituting fraud or mistake.' As for other states of mind, however, the rule provides: 'Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.' . . . Second, *Iqbal* conflicts with other recent Supreme Court decisions. *Iqbal* did not overrule or question a number of the Court's prior cases on notice pleading. . . . Third, *Iqbal* conflicts with the form complaints approved by the Supreme Court and Congress as part of the Federal Rules of Civil Procedure. Rule 84 provides that the forms in the appendix 'suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.' *Iqbal* did not purport to overrule or amend Rule 84 or the forms, but it is difficult to reconcile the new 'plausibility' standard with those forms. Many of the approved forms require virtually no explanation of the underlying facts as long as the defendant is informed of the event or transaction that gave rise to the claim, according to the broad notice purpose of the rules. . . . Unless one can plausibly explain away the tension between *Iqbal* and Rule 9(b) and the Rule 84-endorsed form complaints, then *Iqbal* conflicts with the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, and the prescribed process for amending the Federal Rules of Civil Procedure. . . . Fourth, *Iqbal's* reliance on the fact/conclusion dichotomy is highly subjective, and returns courts to the long disapproved methods of analysis under the regime of code pleading. . . . *Iqbal's* reliance on the fact/conclusion dichotomy makes the difference indeterminate. Application of the dichotomy is leading to judge-specific and case-specific differences in outcome that confuse everyone involved. . . . Fifth, *Iqbal's* reliance on 'judicial experience and common sense' invites the highly subjective and inconsistent results that have been observed. The *Iqbal* concept of plausibility is 'context-specific.' . . . As a practical matter, the concept invites district judges to exercise their individual views of the likely merits of the case at the outset, when the only information available is the complaint. Worse still, an uncritical reading of the Court's 'obvious alternative explanation'

reasoning seems to invite judges to weigh competing explanations for alleged conduct and dismiss cases merely because they believe one explanation over another. . . . In application, this standard bears a striking resemblance to the most stringent pleading requirement in American civil law, for pleading scienter in securities fraud claims, pursuant to the specific direction of Congress in the Private Securities Litigation Reform Act. See 15 U.S.C. § 78u-4(b)(2) (requiring plaintiff to ‘state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind’); accord, *Tellabs, Inc. v. Makor Issues and Rights, Ltd.*, 551 U.S. 308, 323-24 (2007) (explaining that a ‘strong inference’ must be ‘cogent and compelling, thus strong in light of other explanations’ for the defendant’s actions). Congress has not imposed such a demanding standard for pleading in any other context – including civil rights and employment discrimination cases, which often turn on whether a defendant’s explanation for a decision is legitimate or merely a pretext covering for unlawful bias. Rule 9(b) and the Supreme Court decisions in *Swierkiewicz* and *Leatherman* permit plaintiffs to plead intent generally, meaning without the sort of specifics required under the PSLRA. But if the *Iqbal* pleading standard is applied in the district court, plaintiffs who already face the uphill battle of proving secret intent must now contend with the possibility of pre-discovery dismissal whenever the alleged pretext asserted by defendants in their motion to dismiss sounds plausible to the common sense of the particular judge. The potential harm of *Iqbal* in this context is that outcomes will vary based on how different judges view the plausibility of, for example, a police policymaker harboring and acting on improper motives toward women who complain of domestic violence. . . . In the face of all these problems, what are the lower federal courts to do? . . . . The first thing we can do is recognize the uncertainty that litigants, their lawyers, and district courts now face. As a result of that uncertainty, the courts of appeals should insist that in all but the most unusual situations, a party whose pleading is dismissed based on the *Iqbal* plausibility standard should be entitled to an opportunity to amend the pleading after the court has made its decision. . . . We should exercise caution to avoid punishing parties for imperfect predictions as to how the subjective and inconsistent *Iqbal* standard might be applied in their case. . . . But where that approach is not enough to resolve the case, I believe we must take care not to expand *Iqbal* too aggressively beyond its highly unusual context – allegations aimed at the nation’s highest-ranking law enforcement officials based on their response to unprecedented terrorist attacks on the United States homeland – to cut off potentially viable claims. *Iqbal* exemplifies the old adage about hard cases. The failure of the Supreme Court to address all of the law that would conflict with broad application of the case should weigh heavily against that broad application, at least until the Supreme Court provides clearer guidance about how to reconcile *Iqbal* with its prior cases, the Federal Rules of Civil Procedure, and their accompanying forms. Reading the present complaint as a whole, plaintiff McCauley has alleged the particulars of a plausible *Monell* claim. As the majority points out, McCauley has alleged the elements of such a claim using the relevant legal language. While some of these statements are conclusory in nature, they serve to notify defendants and the court of the type of claim being brought. There can be no doubt that the complaint provides sufficient notice of the circumstances that gave rise to the claims. McCauley made factual allegations that Chicago police failed to arrest Martinez despite knowledge of his harassment and violations, ¶ 25, and that this failure resulted from a custom of untimeliness and indifference with regard to the seriousness of domestic violence, ¶ 125(c) and (j).

McCauley alleges ‘deliberate indifference’ generally, see ¶ 126, but elsewhere describes numerous specific failures to act that are factually consistent with such an intent. See, e.g., ¶ 51. It is difficult to imagine what more McCauley might allege on the crucial question of intent without reciting a list of specific states of mind that Chicago police policy-makers might have. We did not require such a recital in *Swanson* and we should not do so here. By extending *Iqbal* to dismiss plaintiff McCauley’s equal protection *Monell* claim against the City of Chicago, the majority runs afoul of *Leatherman*, Rule 9(b), and the form complaints approved by the Supreme Court and Congress as part of the Federal Rules of Civil Procedure. Perhaps the Supreme Court majority intended *Iqbal* to work such a revolution in federal civil practice, but if so, the Court failed to grapple with the conflicts and did not express any direct rejection of these other governing sources of law. Under these circumstances, therefore, I would reverse the dismissal of plaintiff’s equal protection claim against the City of Chicago and give him an opportunity to pursue discovery. Even if I agreed that the current version of the complaint failed to state a claim, I would remand with instructions to give plaintiff an opportunity to file an amended complaint to try to comply with the new and uncertain standards of *Iqbal*.”)

***Hendrick v. Bryant***, No. 20-CV-00249, 2021 WL 4502159, at \*1–5 (N.D. Ill. Sept. 30, 2021) (“Hendrick claims that the City has a history of using excessive force, particularly against young African-American men such as him. . . Yet, according to Hendrick, the City does not document when police officers point their weapons at people. . . And the United States Department of Justice (“DOJ”) found that, ‘[the] CPD does not investigate or review these force incidents involving less than lethal force to determine whether its responses to these events were appropriate or lawful, or whether force could have been avoided.’. . Further, the DOJ found that even though police officers are technically required to report when they use force, in practice they do not provide enough detail about their actions to allow for review and investigation. . . As a result, the DOJ concluded, ‘there is no meaningful, systemic accountability for officers who use force in violation of the law or CPD policy.’. . Hendrick further alleges that the CPD was required to take certain actions to increase accountability for police use of force by January 1, 2019 according to a consent decree. . . Specifically, the CPD was ordered to develop a training bulletin identifying when police officers ‘should and should not point a firearm at a person.’. . It was also required to clarify in policy that police officers must document every time they ‘point[ ] a firearm at a person to detain the person’ and that police officers can only point firearms at people ‘when objectively reasonable under the totality of the circumstances.’. . Further, the City was required to mandate, by July 1, 2019, that CPD officers report every time they point a gun at someone to detain them to the Chicago Office of Emergency Management and Communications. . . However, the City failed to comply with these requirements and did not implement any policy addressing police officers pointing firearms at people. . . . Hendrick has filed a six-count Complaint, but the City’s motion to dismiss only concerns Count I, which asserts a claim for excessive force pursuant to 42 U.S.C. § 1983. . . . As pleaded, Count I is intelligible and gives the City fair notice of Hendrick’s intention to pursue a *Monell* claim for excessive force. Specifically, the count alleges that the City failed to ensure oversight and accountability when its police officers pointed guns at people. It includes several specific factual allegations in support of that claim. . . Indeed, the City’s arguments in its motion

to dismiss demonstrate that it has identified and understood the basis of Hendrick’s *Monell* claim against it. Requiring Hendrick to replead this claim via a separate count would serve no purpose and is not required by the letter or the spirit of Rule 10(b). . . . Hendrick’s allegation that the City has no policy specifically regarding police officers pointing guns at people is a factual contention, not a legal conclusion. If Hendrick merely alleged a conclusion, such an allegation could be disregarded. . . . But Hendrick is specific about the alleged problem with the City’s gun-pointing policy: it does not have one. . . . This allegation is not vague and does not smuggle in any legal conclusions, nor does it merely state an element of a *Monell* claim, such as deliberate indifference by the City. . . . Finally, the City contends that Hendrick’s Complaint is insufficient because he only alleges one instance of unconstitutional conduct and has not alleged ‘additional facts probative of a widespread practice or custom.’. . . But Hendrick has pointed to such facts through his allegations that the City agreed to, and then failed to, adopt a gun-pointing policy under the consent decree. A single instance of unconstitutional conduct, when combined with allegations indicating a broader practice, can suffice to state a *Monell* claim. . . . Hendrick has pleaded that the ‘moving force’ of his injury was ‘CPD’s refusal to train and document when its officers point a weapon at someone.’. . . Hendrick’s say-so that the lack of training caused his injury is, of course, entitled to no deference. But Hendrick’s factual allegations—including the City’s awareness of its gun-pointing problem, its failure to comply with court orders regarding new policies and training, and the specific injury suffered by Hendrick—allow the Court, making inferences in Hendrick’s favor, to conclude that Hendrick has plausibly alleged the necessary connection. He will, of course, have to support that causal link with proof to avoid summary judgment and, eventually, at trial. But for now, his allegations are sufficient to state a claim.”)

*Liggins v. City of Chicago*, No. 1:20-CV-04085, 2021 WL 2894167, at \*7 (N.D. Ill. July 9, 2021) (“The City first argues that Liggins makes only ‘formulaic, conclusory statements’ about municipal policies. . . . The Court strongly disagrees. The allegations in Liggins’ Complaint are overwhelmingly factual, and they clearly meet the relevant pleading standard. Liggins alleges, *inter alia*, that on more than 70 specific occasions in the last few decades Chicago police officers have fabricated witness identifications, fabricated witness statements, manipulated witnesses to influence their testimony, and concealed exculpatory evidence, in order to arrest and prosecute suspects such as Liggins. . . . These allegations are corroborated by an FBI report containing the personal observations of an Assistant State’s Attorney, as described in the Complaint. . . . The Complaint cites the 2017 Department of Justice report that described the pervasive lack of training, discipline, and accountability in the Department. . . . According to the Complaint, that Department of Justice report found that supervising investigators did not ‘diligently review the investigative records to determine whether witnesses have lied in police reports or whether supervisors have blindly approved reports without attempting to determine whether the reports are fabricated.’. . . A 2016 Chicago Police Accountability Taskforce report, also cited in the Complaint, made similar findings. These two reports cover the span of time during which Alonzo and Egan are alleged to have fabricated evidence against Liggins. Moreover, the Complaint alleges that ‘[b]etween 2004 and 2016, the City paid more than \$500 million in settlements or judgments in police misconduct discovery, *without even conducting disciplinary*

*investigations* in more than half of the cases.’. . The Complaint also explains that ‘[b]etween 2011 and 2015, nearly half of complaints filed against Chicago police officers were not even investigated’ and ‘fewer than 4% of those cases’ resulted in discipline. . . According to the Complaint, former Chicago Mayor Rahm Emanuel, former Superintendent of the Chicago Police Charlie Beck, and the president of the Chicago police officer’s union have all acknowledged that there is a ‘code of silence’ that protects police officers from discipline. . . Liggins also cites a contemporaneous case in which it was found that there was a pattern or practice of ‘failing to adequately discipline officers’ and of a ‘code of silence’ about officer misconduct. . . These factual allegations support the Plaintiff’s assertion that ‘[a]s a matter of both policy and practice, municipal policymakers and department supervisors condoned and facilitate [*sic*] a code of silence within the Chicago Police Department,’ had a ‘practice of not tracking and identifying police officers who are repeatedly accused of the same kinds of serious misconduct, failing to investigate cases in which the police are implicated in a wrongful charge or conviction, [and] failing to discipline officers accused of serious misconduct’ which allowed and emboldened officers such as Alonzo and Egan to violate the constitutional rights of civilians like Liggins. . . These . . . specific factual allegations covering the approximate time of the alleged constitutional violations are more than the pleading standard requires. It is difficult to imagine how the Plaintiff could be any more specific without the benefit of discovery.”)

**Page v. City of Chicago**, No. 19-CV-07431, 2021 WL 365610, at \*2–3 (N.D. Ill. Feb. 3, 2021) (“First, Page alleges that the City of Chicago maintains widespread practices of failing to discipline, supervise, and control its police officers. While the Second Amended Complaint contains myriad allegations pertaining to the City of Chicago’s alleged practices, these allegations are insufficient to support such findings. For example, Page alleges that prior to his arrest the CPD ‘facilitated the type of misconduct at issue by failing to adequately punish and discipline prior instances of similar misconduct[.]’ . . He also alleges that CPD officers ‘abuse citizens in a manner similar to that alleged herein on a frequent basis, yet the Chicago Police Department makes findings of wrongdoing in a disproportionately small number of cases.’. . These allegations are general and unsupported by the facts. Similarly, Page alleges that four of the Defendant Officers ‘had dozens of citizens’ complaints filed against them without the City of Chicago implementing any significant discipline against them.’. . As stated earlier, these allegations—without more information connecting the complaints to the alleged constitutional violation at issue here—are insufficient to support Page’s *Monell* claim. . . To further support, Page claims that ‘[a]s a matter of express policy, the City of Chicago refuses to take into consideration patterns of [unsustained] allegations of civil rights violations when evaluating the merits of a complaint.’. . This claim is simply too vague and unclear to support a plausible inference that the CPD maintains any widespread practice that caused Page’s injury. Page also alleges that the CPD maintained a widespread practice referred to as the ‘code of silence’ under which officers do not report other officers’ misconduct. . . According to Page, the City of Chicago was ‘aware of, and condone[d] and facilitate[d]’ this practice through their inaction. . . To support his allegation, Page alleges that Chicago Mayor Rahm Emanuel admitted in a December 2015 television interview that a ‘code of silence exists among Chicago police officers[.]’” (*Id.* at ¶ 59-60). The Court notes that Mayor

Emanuel’s statement was made in the context of an excessive force case involving a police shooting. This is distinguishable from the facts alleged here. Page further alleges that the “code of silence” is the moving force behind his constitutional injuries because Defendant Officers’ ‘decision to violate plaintiff’s civil rights was proximately caused by a belief that they were impervious to consequences due to the City’s willingness to tolerate a code of silence and failure to investigate.’. . While the Mayor’s address sufficiently supports the allegation that the CPD maintained a ‘code of silence,’ Page has failed to adequately allege facts showing the requisite causal connection to allow the Court to plausibly infer that the ‘code of silence’ was the moving force behind his injury. . . Page also alleges that his constitutional deprivation arises out of the CPD’s widespread practice of failing to train its officers. Failure to train ‘may serve as the basis for § 1983 liability only where the failure to train ... amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact.’. . A prerequisite to deliberate indifference is that ‘the defendant must have actual or constructive notice of a problem.’. . Actual or constructive notice can be shown by a ‘pattern of similar constitutional violations by untrained employees.’. . Here, Page has failed to plead a claim for failure to train. Specifically, he has not alleged any other similar constitutional violations by Chicago police officers other than his own, he has not identified the type of training the City failed to provide, nor does he allege sufficient facts linking a failure to train to his injuries. In support of his claim, Page merely asserts that ‘CPD does not provide officers or supervisors with adequate training and does not encourage or facilitate adequate supervision of officers in the field.’. . He broadly explains that ‘[t]hese shortcomings in training and supervision result in officers who are unprepared to police lawfully and effectively; supervisors who do not mentor or support constitutional policing by officers; and a systemic inability to proactively identify areas for improvement, including Department-wide training needs and interventions for officers engaging in misconduct.’. . Outside of these generic statements, there are no further facts substantiating these allegations. Because no other facts link these allegations to particular instances of police misconduct, there is not enough for this Court to plausibly infer that the CPD is liable under this theory. Page attempts to overcome the factual deficiencies in the Second Amended Complaint by citing to the Department of Justice’s January 2017 report on the Chicago Police Department (“DOJ Report”), which mainly addresses the CPD’s deficiencies as it relates to the use of excessive force. Page’s argument is unavailing because he has not brought an excessive force claim and he has failed to show how any of the deficiencies identified in the DOJ Report relate to his claim that Defendant Officers arrested him without probable. . . Therefore, the Court dismisses Page’s *Monell* claim without prejudice.”)

***Mack v. City of Chicago***, No. 19 C 4001, 2020 WL 7027649, at \*5–6 (N.D. Ill. Nov. 30, 2020) (“Some case law suggests that general allegations of a ‘code of silence’ and failure ‘to train, supervise, discipline, and control its police officers’ are insufficient to state a *Monell* claim, and that a plaintiff seeking to assert such a claim must identify other instances of misconduct similar to what he has experienced in order to show ‘that there is a true municipal policy at issue, not a random event.’. . The Court of Appeals considered this issue in *White v. City of Chicago*, 829 F.3d 837, 844 (7th Cir. 2016), where the plaintiff alleged little more than that he had been arrested on an inadequately-supported warrant ‘in accordance with a widespread practice of the police

department of the City of Chicago.’ The district court’s dismissal of the *Monell* claim was error, the court held: ‘White was not required to identify every other or even one other individual’ who had been the victim of the alleged constitutional violation. . . Since *White*, many courts have declined to grant motions to dismiss that are premised on the argument that the complaint does not contain allegations beyond those relating to the plaintiff. . . At summary judgment or trial, Plaintiff will have to offer evidence of widespread unlawful practices and its failure to train officers, and demonstrate how those practices and failures caused the alleged wrongdoing in this case. He need not do so at the pleading stage. The City’s motion to dismiss Count VI is denied.’”)

***Watson v. City of Chicago***, No. 15 C 11559, 2017 WL 11565719, at \*3–4 (N.D. Ill. Aug. 23, 2017) (“Watson relies primarily on two sets of facts to support his contention that the City had a custom of condoning or failing to discipline police brutality. First, he argues that the City’s own April 13, 2016 Police Accountability Task Force Report concluded that the City failed to train the police, perpetuated a code of silence, and encouraged the use of excessive force. . . Because the facts supporting that conclusion are already contained in a document created by the City itself, Watson contends that he does not need to repeat those facts in the Amended Complaint. . . It is true that nothing prevents Watson from mining the Task Force Report for factual support, and indeed Watson (or any other plaintiff, for that matter) can rely on facts in the Report to satisfy Rule 11’s requirement that every factual assertion has evidentiary support, or likely will have evidentiary support after reasonable discovery. . . But it is one thing to dig up specific facts set forth in the Task Force Report and assert them as allegations, and quite another to simply rely on the bare conclusions in the Task Force Report. Put another way, Watson does not actually identify any *specific* facts in the Report that illustrate the existence of a police code of silence or a widespread custom of turning a blind eye to policy brutality, nor does Watson allege facts that establish a causal link between the City’s practices and his own injury. In the Amended Complaint, Watson simply states that the Task Force Report ‘*conclu[des]* that the Defendant City of Chicago and its law enforcement parastatals have for decades systemically failed in ways that cause extrajudicial injury at the hands of the police ....’ . . Conclusory allegations alone cannot sustain a *Monell* claim. . . Litigation via ‘executive summary’ will not cut it. Instead, only when specific *factual* allegations are asserted can the Court evaluate whether a *Monell* claim has been adequately stated. The Task Force Report might very well contain specific factual material that would support a *Monell* claim. But in an adversarial system of litigation, it is not for the Court to sift through a 183-page report, looking for facts to support Watson’s attempt to state a claim. . . Aside from the Task Force Report, the other set of facts that Watson relies on emanates from a statement made by Chicago Mayor Rahm Emanuel on December 9, 2015. . . Specifically, Watson quotes the mayor as saying the following:

They [The Police Accountability Task Force] have to examine decades of past practices that have allowed abusive police officers with records of complaints to escape accountability....This problem is sometimes referred to as the Thin Blue Line. Other times it is referred to as the code of silence. It is the tendency to ignore, deny or in some cases cover-up the bad actions of a colleague or colleagues. No officers should be allowed to behave as if they are above the law just because they

are responsible for upholding the law. Permitting and protecting even the smallest acts of abuse by a tiny fraction of our officers leads to a culture where extreme acts of abuse are more likely. . . . Unlike the plaintiff in *Spearman*, here Watson has not supplied other factual allegations to bolster his *Monell* claim (as discussed earlier, the Task Force Report’s *conclusions* do not count). Nor does Watson allege that Mayor Emanuel would have *personal* knowledge that policymakers knew, in January 2015, of a widespread custom that caused the constitutional violations, or that the policymakers who did know of a custom condoned the custom or were deliberately indifferent that violations would occur. The Amended Complaint, even when read in Watson’s favor, lacks sufficient factual specificity. \*4 One final point is worth noting: the Court is of course *not* applying a heightened pleading standard to *Monell* claims. Time and again the Supreme Court has emphasized that Section 1983 claims are not subject to a Rule 9(b)-type standard. But *Iqbal* and *Twombly* do instruct that ‘determining whether a complaint states a plausible claim for relief will ... be a context-specific task ....’ . . . A claim involving a more complex substantive standard—both on knowledge (or deliberate indifference) and on causation—often will require more detail, both to give the opposing party notice of what the case is about and to adequately plead the claim. . . In this case, Watson not only attempts to state a claim against a municipality for its failure to train and control the police, but also alleges that the City perpetuated a code of silence and encouraged the use of excessive force. To succeed, ultimately he must prove that the City exhibited deliberate indifference to the systemic problems—and that the constitutional deprivation he suffered was caused by that deliberate indifference instead of being an isolated violation. . . Yet Watson provides nothing more than a quote from the Mayor and a restatement of the Executive Summary from the Task Force Report as factual support for his *Monell* claim. *Iqbal* requires *factual* allegations; legal conclusions and conclusory allegations are not entitled to the presumption of truth. . . So Watson’s allegations are insufficient to state a claim of municipal liability.”)

***Barnett v. City of Chicago***, No. 18 C 7946, 2020 WL 4336063, at \*4 (N.D. Ill. July 28, 2020) (“The City Defendants argue that Barnett may not rely only on his personal experience as the basis for his *Monell* claim. But the Seventh Circuit has indicated that at the motion to dismiss stage, a plaintiff may do just this instead of having to plead examples of other individuals’ experiences. [collecting cases]”)

***Hill v. Cook County***, No. 18-CV-08228, 2020 WL 2836773, at \*15 (N.D. Ill. May 31, 2020) (“Hill offers more than mere boilerplate. Even if the additional cases that Hill cites are not on all-fours with his claims here, ‘[p]ost-*White* courts analyzing *Monell* claims...have “scotched motions to dismiss” premised on arguments that the complaint does not contain allegations beyond those relating to the plaintiff.’” *Williams v. City of Chicago*, 2017 WL 3169065, at \*9 (N.D. Ill. 2017) (collecting cases) (citing *White v. City of Chicago*, 829 F.3d 837, 844 (7th Cir. 2016)). Courts in this district have generally stuck with this approach when addressing motions to dismiss municipal *Monell* claims. *See, e.g., Hill v. City of Chicago*, 2020 WL 509031, at \*4 (N.D. Ill. 2020); *Pursely v. City of Rockford*, 2019 WL 4918139, at \*6–7 (N.D. Ill. 2019); *Hallom v. City of Chicago*, 2019 WL 1762912, at \*4 (N.D. Ill. 2019); *Williams v. City of Chicago*, 315 F. Supp. 3d

1060, 1078–79 (N.D. Ill. 2018). Discovery may or may not yield proof that there is a widespread practice of violating constitutional rights. But in the meantime, Hill has alleged enough to support a plausible *Monell* claim against both municipal defendants.”)

***Jones v. Hunt***, No. 19 C 4118, 2020 WL 814912, at \*2–3 (N.D. Ill. Feb. 19, 2020) (“The City argues that Jones still fails to plead enough facts to proceed on a failure to train claim against it. To determine whether Jones has sufficiently alleged a widespread practice courts sometimes consider allegations of other similar instances of misconduct. . . . But this is not a requirement, and Jones need not ‘identify every other or even one other individual’ who was arrested because of the same misconduct at the pleadings stage. . . . Alternatively, courts have looked to other factual allegations to buttress a plaintiff’s claim. . . . In *White*, for example, the plaintiff alleged that the defendant officer sought an arrest warrant, knowing he lacked probable cause, based upon conclusory allegations that the plaintiff had committed a criminal offense. . . . The plaintiff also attached a copy of the ‘standard complaint form’ that did ‘not require specific factual support for an application for an arrest warrant.’ . . . The Seventh Circuit found that plaintiff’s allegations of a widespread practice of requesting warrants based on conclusory allegations, ‘[t]ogether with the individual claim against [the officer] and the standard printed form,’ were enough to state a claim. . . . Here, Jones offers no additional factual allegations beyond his conclusory assertions that the alleged violations ‘can be proven to have occurred in thousands of instances.’ . . . Jones levies broad accusations of misconduct that are not ‘tailored to identify particular police training procedures or policies.’ . . . Accordingly, he has not pleaded enough facts to nudge his claim ‘across the line from conceivable to plausible,’ . . . or to ‘put the [City] on proper notice of the alleged wrongdoing[.]’ . . . Because Jones may be able to cure the complaint’s shortcomings, the Court dismisses the *Monell* claim without prejudice.”)

***Hill v. City of Chicago***, No. 19 C 6080, 2020 WL 509031, at \*4 (N.D. Ill. Jan. 31, 2020) (“Plaintiffs appear to rely on a widespread practice theory of liability. To be successful on such a claim, ‘the plaintiff must demonstrate that there is a policy at issue rather than a random event. This may take the form of an implicit policy or gap in expressed policies, or “a series of violations to lay the premise of deliberate indifference.”’ . . . Defendants contend that Plaintiffs fail to allege the policy at issue, or that any such policy has a causal link to their claims. In so arguing, Defendants set the bar too high for a motion to dismiss. True, Plaintiffs allege several practices and customs unrelated to the claims in this case. But the complaint also alleges that the Chicago Police Department had a widespread practice of suppressing and manufacturing evidence and contriving false narratives against innocent persons that they coerced witnesses into adopting. . . . The complaint then supports those allegations by stating that at least 70 cases have come to light since 1986 in which Chicago Police Department officers have fabricated evidence or suppressed exculpatory evidence that led to convictions, . . . describing a Federal Bureau of Investigation report that discusses Chicago police detectives feeding information to witnesses and working with them to rehearse false narratives, . . . and describing the department’s pattern of suppressing exculpatory information which they support by citing to several other cases,[.]. . . Moreover, the complaint alleges that the Defendants acted in accordance with these widespread practices in

securing the wrongful conviction of Plaintiffs. This is enough to make the Plaintiffs’ *Monell* claim plausible. Defendants’ motion to dismiss Count V is denied.”)

**Harper v. Flores**, No. 18 CV 6822, 2019 WL 6033597, at \*3 (N.D. Ill. Nov. 14, 2019) (“These allegations raise an inference that Crest Hill has a practice of concealing and condoning officer misconduct. And that alleged practice plausibly insulated Flores from professional discipline and criminal prosecution, allowing him to kill Samantha with impunity. The Harers ‘present a story’ of indifference to or approval of officer misconduct ‘that holds together,’ even if that story is not the truth about what ‘really’ goes on in Crest Hill. . . . That is enough for the Harers’ *Monell* claim to survive Crest Hill’s motion to dismiss. . . . And although the court agrees that Flores’s drinking problem, as alleged, may have had nothing to do his shooting of Samantha, Crest Hill’s alleged failure to act on that drinking problem is a ‘bad act’ supporting the inference that Crest Hill generally condones police misconduct.”)

**Bishop v. White**, No. 16 C 6040, 2019 WL 5550576, at \*5 (N.D. Ill. Oct. 28, 2019) (“Plaintiff alleges that the City of Chicago has an ‘informal policy of encouraging its police officers to use unnecessary force in effecting arrests of male black citizens and to make false arrests of male black citizens,’ it ‘fails to train its police officers’ not to make such improper arrests, and plaintiff’s arrest is ‘merely one of many instances of such misconduct.’ . . . To state a claim of municipal liability based on an unconstitutional custom or policy under *Monell*, . . . plaintiff must ‘‘plead[ ] factual content that allows the court to draw the reasonable inference’’ that the City maintained a policy, custom, or practice’ that caused a deprivation of his constitutional rights. . . . ‘An official policy or custom may be established by means of [1] an express policy, [2] a widespread practice which, although unwritten, is so entrenched and well-known as to carry the force of policy, or [3] through the actions of an individual who possesses the authority to make final policy decisions on behalf of the municipality or corporation.’ . . . Plaintiff identifies no express policy or final policymaker, so his claim of an ‘informal policy’ apparently falls within the category for practices so widespread and deeply entrenched that, though unwritten, they carry the force of policy. But plaintiff’s purely conclusory allegation that his arrest is ‘merely one of many instances of such misconduct’ is insufficient. Plaintiff must provide ‘some specific facts’ to support his claim, . . . and ‘the Seventh Circuit has made clear that isolated incidents are insufficient to establish a practice or custom under *Monell*.’ . . . Plaintiff does not make any specific, non-conclusory factual allegations to support an inference of a widespread practice other than to allege that he, himself, suffered a constitutional deprivation. That is the sort of conclusory allegation of an isolated incident that falls short of the *Twombly/Iqbal* standard, . . . because, rather than ‘plausibly suggesting...an entitlement to relief,’ it is ‘merely consistent with’ it[.]”).

**Mendez v. City of Chicago**, No. 1:18 C 6313, 2019 WL 4934698, at \*3–4 (N.D. Ill. Oct. 7, 2019) (“Failure to train or turning a blind eye to repeated excessive force violations could both give rise to *Monell* liability. . . . Plaintiffs alleging a pattern or practice of constitutional violations may incorporate admissible evidence from official investigations, although they are not required to do so at the pleading stage. . . . Plaintiff alleges facts sufficient to survive a motion to dismiss on

his *Monell* claim. Plaintiff alleges that the City's practice of foot pursuits raises the risk of excessive force. . . Plaintiff alleges he was shot during precisely such a foot pursuit, in similar circumstances to those explicated in the portion of the Department of Justice report cited in his complaint. . . Plaintiff alternatively alleges systemic training failures giving rise to Chicago Police's repeated unnecessary use of force, particularly against fleeing suspects. . . Finally, Plaintiff alleges the CPD fails to adequately train or enforce rules related to use of force, undermining deterrence value of those policies in a systematic way. . . Plaintiff thus directly alleges a claim of the type the Supreme Court approved in *Harris* and the Seventh Circuit approved of in *Glisson*, along with allegations supporting his claim in the form of several reports on CPD's practices. . . These allegations state a claim for a *Monell* violation as to unreasonable and excessive use of force, because taken as true they suggest the City's practices or customs proximately caused the use of excessive force against the Plaintiff. . . Plaintiff alleges no facts specific to his claim that the City has a pattern of unlawful searches. . . Plaintiff's complaint primarily focuses on documenting the CPD's failure to train officers about use of force. . . Although a facially plausible complaint need not give 'detailed factual allegations,' it must allege facts sufficient 'to raise a right to relief above the speculative level.' . . Mr. Mendez does not allege facts suggesting a pattern or custom of unlawful stops, despite alleging such a pattern exists when seeking relief. . . Since he fails to allege specific facts, we dismiss his *Monell* claim as to a pattern of unlawful searches.")

***Hallom v. City of Chicago***, No. 1:18 C 4856, 2019 WL 1762912, at \*4 (N.D. Ill. Apr. 22, 2019) ("Hallom has sufficiently pleaded a *Monell* claim against the City by alleging that it has a widespread practice or custom of covering up police misconduct and that this practice was the cause of his injuries. Hallom alleges that the City 'has known and has encouraged a "code of silence" among its police officers.' . . Citing a report from the Department of Justice, Hallom alleges that the City's code of silence is furthered by CPD police officers lying about police misconduct, or intentionally omitting material facts about police misconduct, to hide such misconduct. . . Hallom alleges, again citing the report from the Department of Justice, that high-level CPD officials, current CPD officers, the City's Mayor, and the president of the CPD officers' union all know of this practice. . . In addition to alleging his own injury—his wrongful pretrial detention—Hallom's allegations give rise to the reasonable inference that others have suffered similar injuries because of the City's alleged custom of covering up police misconduct with intentional lies or omissions concerning material facts. . . Ultimately, Hallom need not provide 'evidentiary support' at this stage of his lawsuit. . . Rather, all Hallom needs to do is allege facts sufficient for us to 'draw the reasonable inference that the defendant is liable for the misconduct alleged.' . . Hallom has plausibly alleged his Section 1983 claim against the City, and we therefore deny defendants' motion to dismiss that claim.")

***Austin v. City of Chicago***, No. 18 C 7268, 2019 WL 4750279, at \*3-4 (N.D. Ill. Sept. 30, 2019) ("Austin contends that the Chicago Police Department's code of silence fostered an environment in which officers could act with impunity, which in turn led the officers to violate his civil rights. . . In so arguing, it appears that Austin is alleging an implicit policy exists, which is properly analyzed under a widespread practice – not an express policy – theory of *Monell* liability. . . .

Austin argues that the police department’s code of silence and lack of an effective early warning system to mitigate unlawful police conduct led to the officers’ violation of his civil rights. Both allegations are insufficient to state a *Monell* claim. There are two main problems with Austin’s allegations against the City of Chicago. First, Austin does not allege any facts to explain how these policies caused or related to his own experience. Rather, Austin merely recites the elements of a *Monell* claim in conclusory fashion. That is not enough to survive a motion to dismiss . . . Second, while it is not impossible for a plaintiff to demonstrate the existence of an unofficial policy or custom based on his own experience, it is ‘necessarily more difficult...because “what is needed is evidence that there is a true municipal policy at issue, not a random event.”’ . . . There is nothing in the complaint that allows the Court to infer there was a widespread practice of false arrests or fabrication of evidence at the Chicago Police Department. The closest Austin comes to alleging his experience was not a random event is listing complaints filed against two of the defendant officers in his response to the motion to dismiss. But Austin provides no information about how (if at all) those complaints relate to the officers’ conduct towards him. In short, Austin’s allegations against the City of Chicago consist only of boilerplate legal conclusions. Thus, to the extent Austin asserts a *Monell* claim against the City of Chicago, it is dismissed without prejudice.”)

***Stidimire v. Watson***, No. 17-CV-1183-SMY-SCW, 2018 WL 4680666, at \*4 (S.D. Ill. Sept. 28, 2018) (“Plaintiff asserts that Watson, in his official capacity as the St. Clair County Sheriff, was deliberately indifferent to the serious risk that Stidimire would commit suicide, because the jail had no suicide prevention policy, provided inadequate training and supervision for employees regarding detainee suicide prevention, and had a practice of routinely denying detainees with mental health problems access to mental health professionals and suicide-proof cells. Plaintiff also alleges that Watson was aware of the risk of suicide in the jail as there had been two suicides and fourteen suicide attempts in the jail during the seventeen months preceding Stidimire’s death. A *Monell* claim subjects a local governing body, such as the County, to monetary damages under 42 U.S.C. § 1983 ‘if the unconstitutional act complained of is caused by (1) an official policy adopted and promulgated by its officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority.’ . . . Here, Plaintiff alleges that the policies and widespread informal practices of the St. Clair County Sheriff’s Department were the moving force behind the failure to protect Stidimire from the known risk of suicide in the jail. Heightened pleading standards do not apply to *Monell* claims. . . . Therefore, drawing all inferences in Plaintiff’s favor as the Court must do at this stage, the Court finds these allegations sufficient to put the County on notice of the claims against it. Defendants’ motion to dismiss Count II is denied.”)

***Taylor v. City of Chicago***, No. 17-CV-03642, 2018 WL 4075402, at \*6-7 (N.D. Ill. Aug. 27, 2018) (“Taylor has sufficiently alleged a constitutional injury. Moreover, he has numerous specific factual allegations showing that the City authorized and had a custom approving of this unconstitutional conduct. Specifically, he alleges that the City knew that O’Brien frequently fabricated evidence. Moreover, the City authorized and maintained a code of silence amongst its

police department that discouraged police officers from blowing the whistle on such misconduct. These allegations are supported by a report from the Department of Justice, . . . a factual finding from a federal jury, . . . a public acknowledgment from the Mayor, . . . and a finding made by the City’s Police Accountability Task Force[.]. . Courts in this District have found similar allegations arising from the Chicago Police Department’s code of silence sufficient to state a *Monell* claim against the City. *See, e.g., Powell*, 2018 WL 1211576, at \*9; *Bolden*, 2017 WL 8186995, at \*5–6. This Court follows suit here. Thus, Defendants’ motion to dismiss Taylor’s *Monell* claim is denied.”)

***Williams v. City of Chicago***, No. 17 C 5186, 2018 WL 2561014, at \*10 (N.D. Ill. June 1, 2018) (“[T]he City argues that Williams’s *Monell* claim is deficient because it ‘mainly references his own alleged incident.’ . . . But even this argument acknowledges that Williams has included allegations of other instances with regard to the street files. . . . Not only that, a plaintiff raising a *Monell* claim may rely solely on his own experience, rather than being required to plead examples of other individuals’ experiences. [citing *White v. City of Chicago*] In determining whether a plaintiff has sufficiently pled a widespread practice in a *Monell* claim, the Court looks to the instances of misconduct alleged, the circumstances surrounding the alleged constitutional injury, and additional facts probative of a widespread practice or custom. . . . Looking at all of the circumstances here, Williams has alleged that no less than three GPRs were destroyed or lost and that multiple reports were falsified by the Officers (or numerous reports selectively omitted exculpatory information gained in witness interviews). Based on these allegations, Williams has sufficiently pled that the City has a policy or custom that violates the Constitution. . . . Moreover, the Officers remain potentially liable on the underlying claims, so the Court denies the City’s motion to dismiss the *Monell* claim against it at this stage.”)

***Leibowitz on behalf of Estate of Jacoby v. DuPage County***, No. 12 C 6539, 2018 WL 1184731, at \*4 (N.D. Ill. Mar. 7, 2018) (“Jacoby’s evidence, viewed in a light most favorable to him, does not permit an inference that any of his *Monell* theories could succeed, primarily because he presents no evidence that it is highly, or even somewhat, predictable that an officer who lacks specific tools to handle an individual who presents in an agitated state and refuses to cooperate in a medical assessment is likely to violate his constitutional rights such that failure to train amounts to deliberate indifference. Although it may have been obvious to the officers that Jacoby was severely obese, plaintiff has no evidence specific to obesity that would distinguish such a person from any other detainee in the same situation. For example, he proffers no expert testimony about law enforcement practices that suggest that acceptable practices in correctional or detention settings should include particular protocols for obese or agitated detainees, nor does he identify a course of training that might have made a difference here. In short, the issue in this case is straightforward. It is whether the individual defendants used excessive force against Jacoby on this single occasion in violation of the Fourth Amendment. For these reasons, the Sheriff is entitled to summary judgment on the failure-to-train claim.”)

*Powell v. City of Chicago*, No. 17-CV-5156, 2018 WL 1211576, at \*9 (N.D. Ill. Mar. 8, 2018) (“According to Plaintiff, the ‘code of silence’ permeated throughout CPD, enabling ‘the individual officer defendants to engage in egregious misconduct for many years.’ . . . Plaintiff specifically alleges that the ‘code of silence’ was not just an unspoken rule, but part of the customary course of instruction at the Chicago Police Academy. . . . Based upon those allegations, Plaintiff sufficiently pleads that the City has a policy or custom that violates the Constitution. . . . Here, the individual officers remain potentially liable on the underlying claims, so this Court denies Defendants’ motion to dismiss the *Monell* claim against the City at this stage.”)

*Shields v. City of Chicago*, No. 17 C 6689, 2018 WL 1138553, at \*3-4 (N.D. Ill. Mar. 2, 2018) (“Plaintiff states that it is common knowledge among the CPD that misconduct complaints reviewed by the IPRA do not result in immediate discipline. . . . Plaintiff further asserts that when he was detained on June 6, 2016, Defendant Officers knew the City had a policy or practice that did not hold officers accountable for their use of excessive force. . . . Also, Plaintiff states that Defendant Officers Josephs and Wiberg knew from their past experience with IPRA complaints that it was highly unlikely that the IPRA would recommend discipline for the alleged misconduct. . . . Further adding to this custom or practice, the IPRA did not request statements from the Defendant Officers (as barred by their CBAs). . . . Plaintiff also highlights the United States Justice Department’s (“DOJ”) January 2017 Report concluding that the CPD has engaged in a custom or practice of unreasonable force, due in part, to deficiencies in training, supervision, and accountability. . . . Further, Plaintiff points to the existence of a ‘code of silence’ where Chicago Police Officers conceal police misconduct such as excessive force, including that a Police Accountability Task Force Report found that the CBAs between the police unions and the City have essentially turned the code of silence into an official policy. . . . According to Plaintiff, the above widespread custom or practice was deliberately indifferent to his rights secured by the United States Constitution and was the moving force behind his constitutional injuries. . . . In the present motion, the City argues that Plaintiff has failed to adequately allege his *Monell* claim because he only mentions a single incident, namely, the alleged excessive force surrounding his arrest and detention on June 6, 2016. In response, Plaintiff asserts that he can allege a failure to train claim based on his own experience without alleging other, similar violations. Indeed, the Supreme Court has left open the possibility that in a narrow range of failure to train cases, a plaintiff need not prove a pattern of similar violations to establish deliberate indifference. . . . Outside of this exception, ‘*Monell* claims based on allegations of an unconstitutional municipal practice or custom—as distinct from an official policy—normally require evidence that the identified practice or custom caused multiple injuries.’ . . . That being said, the Supreme Court’s discussions in *Connick*, *Brown*, *Canton*, and the Seventh Circuit’s decision in *Chatham* concern proving a failure to train *Monell* claim, not pleading one. . . . In *White*, the Seventh Circuit recognized the difference in the standards for pleading a *Monell* claim based on a widespread practice or custom and proving one. In doing so, the Seventh Circuit clarified that *Monell* claims are not subject to a heightened pleading standard in the context of allegations that the CPD has a custom or practice where police officers submit arrest warrant applications without enough information to establish probable cause for arrest. . . . In his complaint, the plaintiff in *White* alleged

his own experience in which the officers submitted an inadequate application for his arrest warrant and also included the standard CPD form used for arrest warrants, which on its face did not require specific factual support. . . Under these circumstances, the Seventh Circuit concluded that the plaintiff had sufficiently alleged a *Monell* custom or practice claim because he alleged more than his own constitutional injury based on the attached form. . . Here, Plaintiff has sufficiently alleged his *Monell* claim against the City by alleging factual details concerning the CPD’s alleged widespread practice or custom of covering-up police officers’ unconstitutional use of excessive force and that this practice was the moving force behind his constitutional injuries. In particular, not only has Plaintiff alleged his own Fourth Amendment excessive force injury, but he has also alleged that the Police Accountability Task Force Report and January 2017 DOJ Report highlight the deficiencies in relation to the CPD’s use of excessive force that are sufficiently similar to Plaintiff’s excessive force allegations – raising a reasonable inference that he is not alone in suffering constitutional injuries resulting from this alleged practice or custom. . . Moreover, despite the City’s argument to the contrary, Plaintiff’s allegations – read as a whole – include more than mere legal conclusions and boilerplate language. . . In particular, Plaintiff gives context to his *Monell* claim by explaining that Chicago Police Officers’ CBAs prohibit the IPRA from properly investigating complaints of excessive force and that by delegating responsibility to the IPRA to investigate and recommend discipline of Chicago Police Officers, the City enables the ‘code of silence’ of covering-up police misconduct involving the use of excessive force. In addition, the City’s arguments that Plaintiff’s allegations do not ‘establish’ the existence of a widespread policy are misplaced because at this stage of the proceedings, the Court must determine whether Plaintiff has stated a plausible claim for relief, not that he has ‘established’ or ‘proven’ his claims. . . For these reasons, the Court denies the City’s motion to dismiss Plaintiff’s *Monell* claim as alleged in Count V of the Amended Complaint.”)

*Santos v. Curran*, No. 17 C 2761, 2018 WL 888758, at \*5 (N.D. Ill. Feb. 14, 2018) (“Curran complains that Santos uses only boilerplate language and refers only to a single problem he personally experienced, which cannot give rise to a claim for a widespread practice. But recently, the Seventh Circuit has reminded courts not to apply a ‘heightened pleading standard’ to *Monell* claims. *White v. City of Chicago*, 829 F.3d 837, 844 (7th Cir. 2016) (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L.Ed. 2d 517 (1993)). A plaintiff may rely solely on his own experience to state a *Monell* claim, rather than pleading examples of other individual’s experiences. *See id.* at 844 (noting that plaintiff “was not required to identify every other or even one other individual who had been arrested pursuant to a warrant obtained through the complained-of process”); *Williams v. City of Chicago*, No. 16-cv-8271, 2017 WL 3169065, at \*8–9 (N.D. Ill. July 26, 2017) (“Post-*White* courts analyzing *Monell* claims ... have ‘scotched motions to dismiss’ premised on arguments that the complaint does not contain allegations beyond those relating to the plaintiff.” (collecting cases)). Therefore, Santos’ allegation that he was unconstitutionally detained pursuant to a policy or practice of indefinitely detaining individuals pursuant to ICE immigration detainers, which the Sheriff enforced, suffices at this stage to state a *Monell* claim against Curran in his official capacity. *See Barwicks v. Dart*, No. 14-cv-8791, 2016 WL 3418570, at \*4 (N.D. Ill. June 22, 2016) (at

summary judgment, single incident cannot establish *Monell* claim, but at the motion to dismiss stage, a plaintiff “need only *allege* a pattern or practice, not put forth the full panoply of evidence from which a reasonable factfinder could conclude such a pattern exists”). Additionally, Santos has pleaded that Curran developed and implemented the detention policies and practices at the Lake County Jail, which would include the alleged unconstitutional policy of detaining individuals indefinitely pursuant to an ICE detainer. Because ‘Illinois sheriffs have final policymaking authority over jail operations,’ *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973, 976 (7th Cir. 2000), Santos has also sufficiently pleaded a claim pursuant to the third theory of *Monell* liability[.] . . The Court therefore allows Santos’ claim against Curran in his official capacity to proceed.”)

***Arrington v. City of Chicago***, No. 17 C 5345, 2018 WL 620036, at \*5 (N.D. Ill. Jan. 30, 2018) (“The City also argues that Plaintiff’s claim of investigatory procedures that protect officers from excessive force claims is insufficient because it is based on ‘broad conclusory allegations about the investigative practices of the Chicago Police Department detectives and a former IPRA investigator.’ But a “conclusory” allegation is one that reaches a legal conclusion. As detailed above, Plaintiff does not merely allege that the City’s investigatory procedures encourage excessive force. That allegation alone is conclusory. Plaintiff, however, goes on to make several factual allegations about specific customs and practices the City employs to investigate allegations of excessive force, and how those customs and practices permit police officers to protect themselves from discipline or punishment. . . Contrary to the City’s attempt to dismiss these allegations as ‘conclusory,’ they are allegations of fact, which is what is required under *Twombly* to make a claim plausible. Of course, the City may contend that these allegations are false. But that is not the question on a motion pursuant to Rule 12(b)(6). The City also attacks Plaintiff’s *Monell* claim by separately arguing that ‘Plaintiff does not sufficiently allege a widespread practice of false reporting,’ . . ; that ‘Plaintiff failed to set forth a widespread practice of failure to adequately document claims,’ . . ; and that ‘Plaintiff failed to allege a widespread practice of failure to discipline officers when they commit perjury and false reports[.]’ . . This is another way of arguing that Plaintiff’s allegations are conclusory. But as discussed, Plaintiff provides additional factual details about how the City conducts excessive force investigations. It is certainly plausible that the alleged opportunity for officers to be privy to the facts discovered by investigators would result in widespread false reporting and inadequate documentation. Furthermore, a failure to discipline is inherent in these allegations. Lastly, the City argues that even if the police department has a custom of condoning excessive force and protecting officers accused of excessive force, it ‘strains plausibility’ to allege that this policy was the moving force behind the crash at issue here. . . The City contends that Officer Ewing would not ‘choose’ to ‘ram’ his vehicle into another vehicle at high speed, because it is ‘an act totally against self-preservation.’ . . But it is not implausible for a police officer to engage in a high speed chase. Indeed, the Chicago police department has issued a general order to its officers regarding when it is permissible to engage in a high speed chase. . . The Court also does not find it implausible that in certain circumstances, an officer might use his vehicle to impede a fleeing suspect’s vehicle, and such an action could plausibly be the basis for an excessive force claim. Although it is danger of a different kind, the Court is not convinced that

using a police vehicle to impede the escape of a suspect's vehicle is necessarily any more dangerous than other circumstances police officers face in the course of their duties, at least such that it pushes Plaintiff's *Monell* causation allegations out of the realm of plausibility. To the extent the City condones or enables police officers to use excessive force, the fact that Officer Ewing is alleged to have used his vehicle to commit the act of excessive force—as opposed to his fist or gun—does not undermine the causation element of Plaintiff's *Monell* claim.”)

***Turner v. M.B. Financial Bank***, No. 14-CV-9880, 2017 WL 4390367, at \*8–9 (N.D. Ill. Oct. 3, 2017) (“Plaintiffs are plainly asserting a *Monell* claim in the complaint. . . Plaintiffs allege that ‘[a]s a matter of both policy and practice, the Chicago Police Department directly encourages, and is thereby the moving force behind, the very type of misconduct at issue here by failing to adequately train, supervise and control its officers, such that its failure to do so manifests deliberate indifference.’ . . They allege that Defendant ‘facilitates the very type of misconduct at issue here by failing to adequately investigate, punish and discipline prior instances of similar conduct, thereby leading Chicago Police Officers to believe their actions will not be scrutinized and, in that way, directly encouraging future abuses such as those affecting Plaintiff.’ . . They contend that ‘officers of the Chicago Police Department abuse citizens in a manner similar to that alleged by Plaintiffs in this Court on a frequent basis, yet the Chicago Police Department makes findings of wrongdoing in a disproportionately small number of cases.’ . . Moreover, Defendant is ‘aware of,’ ‘condone[s],’ and ‘facilitate[s]’ by their inaction a “code of silence” in the Chicago Police Department.’ . . In particular, ‘officers routinely fail to report instances of police misconduct and lie to protect each other,’ are not disciplined for this behavior, and Defendant has ‘failed to act to remedy the patterns of abuse’ despite its knowledge of these problems. . . While these allegations bare some resemblance to boilerplate, they have sufficient factual content to make Plaintiffs’ claim plausible. Plaintiffs allege that the City fails to adequately investigate and punish past instances of excessive force by police, which has the effect of condoning and encouraging excessive force by police in the future, such as the alleged excessive force that occurred here. . . Similarly, Defendant’s ‘disproportionately small’ number of findings of police wrongdoing and alleged indifference to the underreporting of excessive force claims because of the police’s ‘code of silence’ are factual allegations that reinforce plausibility of any ‘policy or custom.’ . . These are more than simply legal conclusions, and Defendant does not explain why these allegations are insufficient. Although borderline, there are enough factual allegations in the third amended complaint to ‘nudge[ ]’ this claim ‘across the line from conceivable to plausible.’ . . Therefore, Plaintiff states a claim under *Monell* against the City of Chicago in Count I.”)

***Scheidler v. Metro. Pier & Exposition Auth.***, No. 16-CV-4288, 2017 WL 1022077, at \*5-6 (N.D. Ill. Mar. 16, 2017) (“Rule 8 ‘does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.’ . . Pleading that an unspecified number of lawsuits filed at unspecified times involving unspecified actors and unspecified allegations that violate unspecified rights does not plead sufficient factual allegations to show is plausible that MPEA acted with deliberate indifference regarding NPI’s security practices in the face of a ‘pattern of constitutional violations.’ . . Nor does Plaintiff’s hazy allegation that there were ‘one or more lawsuits’ allege a

number of incidents by which one could infer a ‘pattern’ of relevant unconstitutional conduct. The closest Plaintiff comes is his allegation that ‘prior litigation involving a different victim’ alleged that NPI maintained a ‘policy, custom and practice of confiscating video recording equipment,’ and MPEA was aware of this ‘policy’ because NPI was sued. . . There is no factual content to this allegation beyond asserting that there is a generalized policy of confiscation that applies in unspecified circumstances and was referenced in an unspecified ‘prior litigation.’ That is insufficient. . . . Here, Plaintiffs’ *Monell* claims are high on the complexity scale—consisting of multiple ‘policies’ that violate multiple constitutional rights and purportedly corrupt all of NPI’s interactions with protestors. But Plaintiff does not plead any facts suggesting why it would be ‘plainly obvious’ that allowing NPI to handle Navy Pier security would result in a ‘substantial risk’ that visitors to Navy Pier would have their rights under the First, Fourth, and Fourteenth Amendments violated. . . Merely asserting that there will be ‘predictable violations’ of the Constitution because ‘MPEA failed to adopt and implement any policy or policies limiting the actions of security personnel’ does not make that allegation plausible.”)

*Stokes v. Ewing*, No. 16 C 10621, 2017 WL 2224882, at \*2-5 (N.D. Ill. May 22, 2017) (“In essence, Stokes is suing the City for instituting an implicit policy, custom, or practice that rewards officers in proportion to the number of guns confiscated and licenses the arrest of individuals on false charges unless they can obtain and turn over a gun. . . This policy, as applied to him, allegedly violated his rights under the Fourth and Fourteenth Amendments. . . The City contends that Stokes’ Complaint fatally lacks the requisite specificity to allege a plausible *Monell* claim. Conclusory and boilerplate allegations, the City points out, leave a complaint stranded. Further, the City argues that Stokes has not provided facts permitting an inference that the alleged policy was the driving force behind his injury – ‘that a widespread reward system directed or even influenced the Defendant Officers’ actions’ – or that the City was deliberately indifferent to the effects of its policy. . . In addition, the City maintains that the Complaint fails to elevate what happened to Stokes and his co-arrestee above a ‘random event,’ because it does not identify other instances of the conduct claimed to be ‘widespread.’ . . Stokes, on the other hand, warns against applying a heightened pleading standard to *Monell* claims and notes that his Complaint sufficiently puts the City on notice of the factual basis for his suit. . . . Contrary to the City’s facile assertion, ‘deliberate indifference’ is not an absolute pleading requirement for *Monell* claims. Rather, the Seventh Circuit has typically regarded it as an *alternative* to an implicit policy of the sort alleged here. . . . Here, . . . Stokes charges the City with active participation in maintaining a policy that itself licenses unconstitutional conduct. As such, ‘deliberate indifference’ is conceptually superfluous to the implicit policy alleged here, and Rule 8(a) does not require corresponding allegations in Stokes’ Complaint. The City’s most substantial attack on the Complaint concerns the absence of allegations beyond those relating to Stokes (and, ostensibly, his co-arrestee). This argument merits more consideration but is ultimately rejected in view of *White v. City of Chicago*, 829 F.3d 837 (7th Cir. 2016). . . . White was not required to ‘identify every other or even one other individual who had been arrested pursuant to a warrant obtained through the complained-of process.’ . . To be sure, at summary judgment, impropriety from a single incident may not give rise to liability on the sort of *Monell* claim at issue. . . But that was not the procedural posture in *White*, and it is not

the situation presented here. Post-*White* courts analyzing *Monell* suits have scotched motions to dismiss premised on the same arguments as the City's. . . . In this case, Stokes alleges the City's complicity not in failing to train, supervise, or prevent misconduct, but in establishing a widespread custom or implicit policy that licenses unconstitutional conduct. A 'series of bad acts' is not required to state such a claim. . . . Thus, Seventh Circuit precedent clearly maps the proper course here. Pursuant to *White* and *Jackson*, Stokes need not plead the factual circumstances of additional instances of misconduct pursuant to the alleged policy. Of course, the Court does not opine on Stokes' chances on the merits, but is merely content that Stokes' Complaint adequately meets the pleading requirements of Rule 8(a). Presented with no sound basis for dismissing Stokes' *Monell* claim, the Court denies the City's Motion to Dismiss.")

***Clay v. Cook Cty.***, No. 14-CV-10515, 2017 WL 878451, at \*3 (N.D. Ill. Mar. 6, 2017) ("Plaintiff's allegations are sufficient to state a *Monell* claim based on Defendants' alleged practice, custom, and/or policy of holding individuals beyond the constitutionally required time for a bond hearing (two days) where those individuals were being held for other charges. . . . Plaintiff cites to (1) his own personal experience at the Cook County Jail; (2) alleged admissions made to Plaintiff by Cook County Jail personnel; (3) alleged knowledge of other instances in which individuals being held for other charges were not provided a bond hearing within two days; and (4) another lawsuit in this district in which the same alleged policy, practice, and/or custom was raised. . . . The Seventh Circuit case on which Defendants' motion to dismiss relies, *McCauley*, 671 F.3d 611, does not support dismissal of Plaintiff's *Monell* claim. In *McCauley*, the plaintiff failed to state a *Monell* claim against the City of Chicago for failure to maintain policies to protect victims of domestic violence from persons who violate parole or court orders, where the complaint contained no factual allegations supporting the plausibility of the claim, and the facts alleged were 'actually legal conclusions or elements of the cause of action.' . . . Here, by contrast, Plaintiff cites not only his own experience at the Cook County Jail, but also the alleged experience of other inmates who were waited more than two days for a bond hearing when they were being held on other charges, alleged admissions from Cook County Jail personnel that this was its policy or practice, and another lawsuit alleging the same alleged policy or practice. From these allegations, the Court is able 'to draw the reasonable inference' that the Cook County Jail maintained a policy or practice that caused Plaintiff's alleged constitutional deprivation.")

***Klinger v. City of Chicago***, No. 15-CV-1609, 2017 WL 736895, at \*16–18 (N.D. Ill. Feb. 24, 2017) ("The issue here is whether Plaintiff has alleged sufficient facts to move beyond the pleadings stage on her *Monell* liability claim against Sheriff Kaupas. The Court holds that she has not. Plaintiff alleges in only a conclusory fashion that the Sheriff has 'a policy and/or custom ... to inadequately and improperly investigate citizen complaints of police misconduct,' and to 'inadequately supervise and train officers of the Will County Sheriff's Office, ... thereby failing to adequately discourage further constitutional violations on the part of these officers.' . . . Her further allegation that 'Kaupas and other County policy makers are aware of, and condone and facilitate by their inaction, an environment within the Will County Sheriff's Office in which officers fail to report misconduct committed by other officers, such as the misconduct at issue in this case'. . . .

also is conclusory. No other facts alleged in the complaint regarding the Sheriff or the Sheriff's office are alleged from which the Court could infer a factual basis for these conclusory *Monell* allegations. . . . [C]ourts in this district generally dismiss *Monell* claims in which '[a]ll of the allegations in the Complaint pertain exclusively to [the plaintiff].'. . . Plaintiff makes no allegations about any similar incidents or complaints against Sheriff Kaupas from which the Court can infer that the Sheriff was at fault either for Griebel's use of force against Plaintiff or the alleged conspiracy to cover-up Griebel's identity after the assault occurred. To the extent that Plaintiff's *Monell* claim is based on a failure to train, supervise, and discipline, Plaintiff's allegations too are not supported by non-conclusory facts. . . . Plaintiff does not allege any similar constitutional violations by which a failure to train can plausibly be inferred. . . . Absent any factual allegations that would give rise to a credible inference that Sheriff Kaupas's own conduct contributed to the alleged constitutional violations, Plaintiff's *Monell* claim against the Sheriff must be dismissed. . . . Unlike the allegations against Sheriff Kaupas, the factual allegations regarding a police cover-up involving at least two Chicago police officers at different times and places (Officer Maas, at the scene of the incident, and Detective Callaghan, a few days later when Plaintiff went to the station to file a criminal complaint against the person who assaulted her) nudge Plaintiff's *Monell* claim against the City of Chicago slightly closer to the pleading threshold of plausibly suggesting the existence of an informal policy or custom by which acts of misconduct of other law enforcement officers (Griebel) could be said to be tolerated. The two Chicago police officers in question are alleged to have intentionally misled Plaintiff with the joint purpose of thwarting Plaintiff's efforts to discover the identity of the officer who assaulted her, falsified information on a police report, and made threats of pursuing a criminal prosecution against Plaintiff if she continued her efforts. . . . This Court is not convinced that the involvement of the two police officers here is sufficient to implicate the City of Chicago as an entity. The second source of support for Plaintiff's *Monell* claim against the City of Chicago is found in *LaPorta*, 102 F. Supp. 3d at 1020-21. In that case, the court held that the plaintiff's *Monell* allegations of a widespread practice in the Chicago Police Department of 'failing to investigate, discipline, or otherwise hold accountable its police officers' to be plausible where the plaintiff had alleged that 'complaint registers' and 'repeater lists' made publicly available by order of the Illinois appellate court 'revealed that officer misconduct was prevalent within the CPD, but largely condoned, and to the extent possible, hidden from the public.'. . . This information, however, is not specific enough for the Court to conclude that the type of police misconduct referenced in the *LaPorta* case (as shown in the publicly released complaint registers and repeater lists), is sufficiently similar to the allegations of police misconduct at issue here. . . . Accordingly, the Court finds that the inference of a municipal unofficial policy or custom in this case is too weak based solely on the allegations of the current complaint, which do not involve allegations of other similar complaints or incidents. The Court cannot plausibly infer from the complaint that the actions of the defendant police officers are attributable to an informal policy or custom of the City of Chicago arising out of its deliberate indifference to similar events. . . . For this reason, the Court concludes that Plaintiff's *Monell* claim against the City of Chicago must be dismissed.")

**White v. Watson**, No. 16-CV-560-JPG-DGW, 2016 WL 6277601, at \*4 (S.D. Ill. Oct. 27, 2016) (“Here, the plaintiff has alleged that the policies – including the policy to have no policy – and widespread practices of the St. Clair County Sheriff’s Department listed above were the moving force behind the failure to protect Scarpi from the known risk of suicide in the Jail. This is sufficient to state a § 1983 claim under *Monell* for deliberate indifference to a detainee’s safety needs. That fourteen suicides attempts in the Jail were, for one reason or another, unsuccessful does not foreclose the possibility that inadequate policies amounted to a constitutional violation. Additionally, the plaintiff’s failure to allege the specific aspects of the existing Jail staff training that are inadequate will not render the Amended Complaint insufficient as to Count II.”)

**Cheatham v. City of Chicago**, No. 16-CV-3015, 2016 WL 6217091, at \*6–7 (N.D. Ill. Oct. 25, 2016) (“Plaintiff alleges that the City had an official policy involving the use of excessive force. ‘An official policy or custom may be established by means of [1] an express policy, [2] a widespread practice which, although unwritten, is so entrenched and well-known as to carry the force of policy, or [3] through the actions of an individual who possesses the authority to make final policy decisions on behalf of the municipality or corporation.’ *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 675 (7th Cir. 2012). Plaintiff appears to allege an express policy: ‘Defendant City of Chicago planned and implemented a policy, practice, custom and usage of interrogating person[s], that was designed to and did preempt lawful activities by illegally detaining persons, using excessive force against persons, retaliating against witnesses to police misconduct, and discouraging police officers from reporting the misconduct of other officers.’. . . However, Plaintiff does not allege anything more than that such a policy exists. Conclusory allegations of a ‘policy or practice’ in support of a *Monell* claim ‘are not factual allegations and as such contribute nothing to the plausibility analysis under *Twombly /Iqbal*.’ *McCauley*, 671 F.3d at 617-18. Plaintiff also alleges that the City had a policy of inadequately training, supervising, and disciplining police officers. A failure to train or supervise employees rises to the level of an official policy or custom only where that failure to train amounts to ‘deliberate indifference to the rights of persons with whom the untrained employees come into contact.’. . .Plaintiff has alleged that, prior to February 22, 2015, the City of Chicago was aware of several complaints of police misconduct involving the use of excessive force and numerous claims of constitutional violations involving Medina specifically. Plaintiff also alleges that the City inadequately and improperly investigated citizen complaints of police misconduct and instead tolerated that misconduct. The allegations that the City knew about, failed to properly investigate, and tolerated misconduct raises a plausible claim that the City was deliberately indifferent through a policy or custom of inadequately training, supervising, and disciplining police officers. The City of Chicago’s Motion to Dismiss Count III is granted to the extent that Plaintiff alleges an express policy and denied to the extent that Plaintiff alleges the City was deliberately indifferent and had a policy or custom of inadequately training, supervising, and disciplining police officers.”)

**Collier v. Ledbetter**, No. 4:14-CV-4103-SLD-JEH, 2016 WL 5796765, at \*4–6 (C.D. Ill. Sept. 30, 2016) (“To demonstrate municipal liability under the second prong of *Monell*, a custom-or-practice theory, a plaintiff must show that the municipality’s widespread custom or practice was the

‘moving force’ behind his injury. . . The Seventh Circuit has declined to adopt any ‘bright-line rules defining a widespread custom or practice.’ . . Nor has it reached a conclusion as to ‘how frequently [unconstitutional conduct] must occur to impose *Monell* liability, except that it must be more than one instance, or even three.’ . . Ultimately, a plaintiff must persuade the finder of fact ‘that there is a policy at issue rather than a random event.’ . . To successfully plead a custom-or-practice *Monell* claim, a plaintiff must also plead facts suggesting actual or constructive notice on behalf of the municipality—that is, the custom or practice alleged must be ‘so persistent and widespread that ... policymakers should have known about the behavior.’ . . Where a municipality is alleged to have acquiesced to a harmful practice or custom, the plaintiff will ultimately have to show that policymakers were ‘deliberately indifferent’ to the harm the custom or practice might precipitate. . . A policymaker will be deemed deliberately indifferent ‘where the plainly obvious consequence of [his or her] decision ... would be the deprivation of a third party’s federally protected right.’ . . A well-pleaded custom-or-practice *Monell* claim will not only ‘identify a custom or policy’ as the source of a plaintiff’s injury but also ‘specify what exactly that custom or policy was.’ . . Offering as non-conclusory factual support merely the circumstantial weight of five supposedly unconstitutional arrests (none of which, as pleaded, have resulted in an adjudication of guilt or liability for the City), Collier leaves it to the Court to infer that the Rock Island Police Department’s hiring, training, investigation and disciplinary practices are not only substandard but also the causal forces behind all of these incidents, such that the City should be held liable for its acquiescence. This is not a reasonable inference, and Collier’s shotgun suggestion of allegedly faulty practices cannot be relied upon to bridge the gap. To successfully plead that the City’s assent to deficient police practices caused his injury and the four others he describes in his amended complaint, Collier would need to plead facts that illustrate those deficiencies and not just their purported consequences. . . District courts in the Seventh Circuit have adopted a similar requirement for specificity. For instance, the Northern District of Illinois granted a defendant village’s motion to dismiss a custom-or-practice *Monell* claim where the plaintiff’s allegations comprised ‘completely conclusory, throw-it-against-the-wall-and-see-what-sticks language,’ failing to state a specific policy or practice for which the municipalities could be held liable. . . Arguably, to require Collier to specify more narrowly the custom or practice that could entail the City’s *Monell* liability raises the concern that without the benefit of discovery, he may be foreclosed from acquiring the information he needs to draft a sufficient pleading. The Seventh Circuit has acknowledged this reservation, reasoning nevertheless that under less stringent *Monell* pleading requirements ‘all counsel would need to do would be to concoct some explanation of [a] plaintiff’s injury that implicated the municipality—for example, a custom and practice of hiring as police officers those with a history of brutality—and the doors of the federal courtroom would swing open.’ *Strauss*, 760 F.2d at 769. In addition to inadequately identifying an injurious custom or practice, Collier has failed to plead facts sufficient to fulfill *Monell*’s notice requirement. He has not plausibly alleged that City policymakers deliberately disregarded the plain and obvious consequences of the custom or practice, or that it was so ‘persistent and widespread’ that policymakers should have been aware of it. . . Although Collier repeatedly alleges that the City’s improper police training, inadequate investigation, ineffective discipline and insufficient hiring are ‘pervasive practice[s],’ . . the allegation of their pervasiveness is a conclusory assertion merely

echoing *Monell*'s 'widespread and well-settled' requirement. It is not entitled to the presumption of truth. Setting aside this blanket allegation, the Court is again left to weigh only the facts pleaded in the accounts of the arrests of Derrell Dickerson, Airlyn Powell, Leonard Robinson, Darrin Langford and Collier himself. Pleading isolated incidents of municipal misconduct is generally insufficient to establish a 'widespread custom or practice.' . . . Collier has not alleged that every arrest made by one of the City's officers—or even a substantial percentage thereof—results in a constitutional injury. On the contrary, he has alleged that excessive force was exercised in five of the presumably hundreds of arrests made by Rock Island police between 2011 and 2015—and done so in such a way as to raise no other inference than that lawsuits were filed, in itself no indicator of unconstitutional behavior by the police. The inference cannot reasonably be drawn from these accounts that any excessive force exercised against these individuals was a product any practice or custom that the City should have or would have identified and remedied had it not been deliberately indifferent. Rather, these facts, even if each and every officer in each alleged case had in fact engaged in constitutional violations, plausibly establish only the isolated misconduct of five individual officers. Because Collier does not plead facts that plausibly establish a specific City custom or practice that served as the moving force behind his constitutional injury, and because he fails to support his claim with allegations plausibly suggesting that the forceful arrest he suffered was the product of a pervasive pattern of misconduct toward which the City was deliberately indifferent, Collier's amended complaint fails to adequately state a custom-or-practice *Monell* claim. The City's motion to dismiss the *Monell* claim in Collier's amended complaint is granted.")

*Lee v. Woodlawn Cmty. Dev. Corp.*, No. 14 C 06511, 2016 WL 2997902, at \*5 (N.D. Ill. May 25, 2016) (“[T]he Amended Complaint fails to allege that anyone at the CHA was *aware* that Woodlawn Community employees failed to reasonably accommodate disabled residents. In *Pindak v. Cook County*, the district court dismissed a *Monell* claim because the plaintiff failed to adequately allege that the Public Housing Commission ‘was aware that First Amendment violations were likely, but deliberately chose not to train employees.’ . . . The Public Building Commission had contracted with third-parties. . . to provide security officers on Chicago’s Daley Plaza and the plaintiff alleged that these officers ‘routinely interfere[d] with his peaceful panhandling activity ....’ . . . The district court observed that the plaintiff failed to assert ‘that anyone at [Public Building Commission] had knowledge that Securitas officers allegedly interfered with Plaintiff’s panhandling,’ or ‘any specific facts about the training [Public Building Commission] employees or agents received.’ . . . Because ‘[n]othing in the record suggest[ed] that [Public Building Commission] made a *deliberate* choice not to train employees about obvious constitutional threats,’ the district court dismissed the plaintiff’s *Monell* claim. . . Like the plaintiff in *Pindak*, Lee does not allege in his Amended Complaint that the CHA was aware that Fourteenth Amendment violations were likely, yet deliberately chose not to train Woodlawn Community’s employees. And as in *Pindak*, the Amended Complaint is void of any facts about the training that CHA employees and agents received. In sum, the *Monell* claims cannot stand without any factual basis from which to plausibly infer that the CHA was deliberately indifferent to the need for training. Counts Seven and Eight must be dismissed.”)

*Foy ex rel Haynie, Jr. v. City of Chicago*, No. 15 C 3720, 2016 WL 2770880, at \*9-10 (N.D. Ill. May 12, 2016) (“Plaintiff’s failure-to-train allegations also do not pass muster because they are boilerplate and lack any supporting facts. . . .Plaintiff’s allegations of a failure to discipline are also boilerplate and lacking in detail. . . .Plaintiff succeeds in repeating all of the trigger words required of a *Monell* claim but absolutely no factual content to demonstrate a widespread practice of failing to adequately punish prior instances of similar misconduct. . . .Because Plaintiff has already taken discovery on this claim and after six iterations of her claims has yet to sufficiently state a *Monell* claim, Plaintiff’s *Monell* claim against the City is dismissed with prejudice.”)

*Brown v. Evans*, No. 15 C 2844, 2016 WL 69629, at \*3-5 (N.D. Ill. Jan. 6, 2016) (“Brown’s allegations in his *Monell* claim are focused first on Evans’ actions; however, ‘a single isolated incident of wrongdoing by a nonpolicymaker is generally insufficient to establish municipal acquiescence in unconstitutional conduct.’. . . And Brown’s boilerplate policy and practice statements contain no facts that would allow a plausible inference that the City has a practice or policy of failing to train, supervise, or discipline or condones a ‘code of silence.’. . . Even considering the Complaint in the light most favorable to Brown, the allegations of the City’s policy and practice claims are too vague and lacking in sufficient details to give proper notice of their basis. . . . In support of his *Monell* pleading, Brown asks the Court to take notice of additional facts and a newspaper article submitted with his Response. . . . In opposing a motion to dismiss, a plaintiff ‘may submit materials outside the pleadings to illustrate the facts the party expects to be able to prove’ and ‘elaborate on his factual allegations so long as the new elaborations are consistent with the pleadings’ without converting the motion to one for summary judgment. . . . First Brown states that in September 2014 Evans was charged with two felonies for assault on a suspect and was relieved of his duties pending the outcome of that case. This fact supports the Complaint’s allegations of misconduct by Evans. The City argues this fact entirely undercuts a theory of failure to discipline; however, Evans served for over ten years before being removed from the force, which could support a theory that the Department ‘turned a blind eye’ to his conduct until a criminal charge forced the issue. Second, the attached newspaper editorial questions why, with Evans’ history of citizen complaints, the Police Department continued to promote him. This article intimates that the Department approved of Evans’ ‘aggressive policing style’ because it resulted in a drop in the homicide rate. . . . Again, this relates directly to Evans’ actions and the Department’s view of his actions. However, it could also support an inference that Evans is one example of a wider failure to discipline. Similarly, Evans’ history of citizen complaints and civil rights lawsuits supports Brown’s theory that Evans is a bad actor and shows that the Department disciplined Evans in two out of at least forty-five excessive force complaints in a ten-year span. Although a municipality ‘cannot be held liable *solely* because it employs a tortfeasor,’. . . this long history of complaints without corresponding discipline edges the Complaint toward a policies or practice claim. . . . Brown has not clearly stated the linkage between Evans’ alleged violations and his *Monell* claim. He must do so to provide the City sufficient notice of the basis for these allegations. . . .The failure to supervise and discipline claims are therefore dismissed without prejudice to re-plead. But none of Brown’s new facts support even a stretched inference of a failure to train. . . .

Although *Monell* claims may proceed with conclusory allegations of a policy or practice, some facts must be pleaded to put the defendant on notice of the alleged wrongdoing. . . Brown has not indicated any facts to support a failure to train claim. This aspect of his *Monell* claim is also dismissed without prejudice and with leave to re-plead. Brown also directs the Court’s attention to another case pending against Evans in the Northern District, stating the *Monell* claim survived dismissal there and has proceeded to discovery. Because the City has already engaged in *Monell* discovery in that case, Brown argues that it would not be inconvenient for it to do so here. The allegations of a different complaint involving different facts and actors are irrelevant to Brown’s claims before this Court. . . Furthermore, the Court is disturbed by Brown’s characterization that the *Monell* claim in that case was found to be sufficient, when in fact that court did not consider the sufficiency of pleading or the merits of that claim. . . Furthermore, that discovery proceeded on the *Monell* claim in that case has no bearing on the sufficiency of Brown’s pleadings. The City’s Motion to Dismiss the *Monell* claim is granted. Count XII is dismissed without prejudice.”)

***Duff v. Grandberry***, No. 14 C 8967, 2015 WL 9259844, at \*2-3 (N.D. Ill. Dec. 18, 2015) (“Here, Duff alleges that Grandberry and Reilly violated his constitutional rights by using unreasonable and excessive force to arrest him. . . He further alleges that Maywood’s use-of-force policy ‘allows the use of any degree of force so long as it does not result in death to effect an arrest regardless of whether the arrestee poses a threat of physical harm to themselves or the officer, regardless of whether the arrestee is resisting arrest and regardless of whether the arrestee was trying to escape.’ . Thus, Duff contends that Maywood’s official policy on the use of nondeadly force was the ‘moving force’ behind the violation of his federally protected right. . . At the pleading stage, these allegations are sufficient to state a viable *Monell* claim. . . . [A]s alleged in the Amended Complaint, Maywood’s use-of-force policy does indicate that ‘[a]n officer is justified in using force less than deadly force when the officer reasonably believes it is necessary [t]o effect an arrest.’ . But Supreme Court precedent requires that the officer consider the *totality* of circumstances, including ‘the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight,’ in determining whether the amount of force to effect an arrest is reasonable. . . Thus, while it is an extremely close call, viewing the allegations in the complaint and all reasonable inferences therefrom in the light most favorable to Duff, as the Court must at the pleading stage, the Court declines to dismiss Count IV.”)

***Maldonado v. City of Hammond, Ind.***, No. 214CV310-PPS, 2015 WL 1780133, at \*1-3 (N.D. Ind. Apr. 20, 2015) (“This is a § 1983 case in which, according to the complaint, Norma Maldonado’s dog (Lilly) was shot and killed by Hammond Police Officer Timothy Kreisler in the presence of two of Ms. Maldonado’s minor children. . . . Maldonado alleges that the city had no training in place on how officers should handle barking dogs and that Kreisler was not disciplined for shooting Lilly. Where a total absence of training is alleged concerning as common and ordinary a scenario as barking dogs encountered on patrol, and lethal force was used with no apparent question of its appropriateness by the police department, I find that the failure to train claim (including facts in support of the deliberate indifference prong) has been pled with adequate

specificity. To make the ‘context-specific’ plausibility determination required by *Twombly/Iqbal*, I draw on my ‘judicial experience and common sense.’ . . . I conclude that Maldonado has pled sufficient ‘details about the subject-matter of the case to present a story that holds together’ and to permit a reasonable inference that the city is liable on a failure to train theory.”)

*Hoskin v. City of Milwaukee*, 994 F.Supp.2d 972, 977, 978 (E.D. Wis. 2014) (“At the outset, the Court must note that *Monell* claims are subject to the pleading standard set out by the Supreme Court in the *Twombly* and *Iqbal* cases and discussed more fully by the Court, above. . . . This is an important note because the plaintiff asserts that a liberal pleading standard applies to *Monell* cases. . . . Specifically, the plaintiff asserts that Seventh Circuit precedent allows *Monell* claims to escape dismissal even when they are ‘based on relatively conclusory allegations.’ . . . Prior to the issuance of the *Iqbal* and *Twombly* decisions, it may very well have been possible to state only ‘boilerplate allegations,’ and survive dismissal in § 1983 cases. . . . But, in the time since, the Seventh Circuit has not returned to such a liberal pleading standard. . . . In fact, the Seventh Circuit has made clear that *Iqbal* applies to motions to dismiss in *Monell* cases, just as it would apply in any other case. . . . In that way, under *McCauley*, the Court must disregard conclusory and boilerplate statements in the pleadings to determine whether, without those, the plaintiff has alleged sufficient factual matter to state a claim for relief that is plausible on its face. . . . In other words, there is no liberal pleading standard applicable to *Monell* claims; rather, the Court must apply *Iqbal* and *Twombly* just as it would in evaluating most other claims. However, it is also important to note that this principle swings the other way, too: the Court does not apply a *heightened* pleading standard to civil rights claims, including *Monell* claims. . . . The Seventh Circuit released its decision in *Estate of Sims* after the Supreme Court had already issued its *Twombly* decision. . . . Thus, presumably, the Seventh Circuit was aware that the Supreme Court had at least hinted at a change in the Rule 8(a) pleading standard in *Twombly*, and yet the Seventh Circuit nonetheless declined to apply a heightened pleading standard to *Monell* claims. . . . Moreover, even though *Estate of Sims* pre-dates *Iqbal*, the Court has not found any case law following either case that calls into question the proposition that *Monell* claims are not subject to heightened pleading standards. In fact, district court cases from around the Circuit continue to cite *Estate of Sims* for precisely that proposition. . . . The Seventh Circuit, itself, continues to cite the case approvingly for other purposes in § 1983 litigation, and has never questioned the conclusion that *Monell* claims are not subject to a heightened pleading standard. . . . For this reason, the Court must not apply a heightened pleading standard to the plaintiff’s *Monell* claim. Of course—as with practically all of the case law in this area—there is a further qualification that applies to that conclusion. Recently, the Seventh Circuit reaffirmed *McCauley*’s holding that, for pleadings, ‘ “the degree of specificity required ... rises with the complexity of the claim.”’ . . . Thus, while there is not a heightened pleading requirement for *Monell* claims, *per se*, the Court must also beware to apply a pleading standard that requires a degree of specificity to meet the complexity of such a claim. In essence, all of this is a roundabout way of stating that the Court will apply the standard described in *Iqbal* and *Twombly* to the plaintiff’s *Monell* claim. Nothing more and nothing less. It will not apply a heightened pleading standard, but it also will not apply an unduly liberal pleading standard, either.”)

*Hoskin v. City of Milwaukee*, 994 F.Supp.2d 972, 980-83 (E.D. Wis. 2014) (“To state a widespread practice claim under *Monell*, the plaintiff must allege ‘facts tending to show that the City policymakers were aware of the behavior of officers, or that the activity was so persistent and widespread that City policymakers should have known about the behavior.’ . . . The City, however, cannot be liable unless that policy, ‘although not authorized by written law and express policy, is so permanent and well-settled as to constitute a “custom or usage” with the force of law’ . . . It is necessary that there be some ‘true municipal policy at issue, not a random event.’ . . . Thus, in order to find a widespread policy, the Supreme Court, in *City of Canton v. Harris*, and the Seventh Circuit, in other cases, have both looked for circumstances demonstrating that municipal officials were deliberately indifferent to known or obvious consequences of the municipality’s action or inaction. . . . The plaintiff can plead this deliberate indifference by alleging facts that would establish ‘either (1) failure to provide adequate training in light of foreseeable consequences; or (2) failure to act in response to repeated complaints of constitutional violations by its officers.’ . . . But, whatever the evidence of deliberate indifference, the plaintiff ‘must also show a direct causal connection between the policy or practice and his injury, in other words that the policy or custom was “the moving force [behind] the constitutional violation.”’ . . . This is a tall order to fill; even so, the plaintiff has alleged facts sufficient to do so. The plaintiff’s factual allegations, taken as true, adequately state a claim that is plausible on its face, and thus dismissal of the plaintiff’s *Monell* claim against the City would be inappropriate at this time. Most importantly, the plaintiff has sufficiently alleged that the City received numerous complaints of illegal searches prior to the incident in question. . . . The defendants assert that these allegations are insufficient because they ‘fail to assert any facts pertaining to the time, place, or identity of the individuals involved with the other complaints of unlawful searches.’ . . . This, the defendants argue, means that the plaintiff has failed ‘to plead facts which establish that the complaints of other unlawful searches occurred before the subject incident of December 16, 2011.’ . . . This argument fails for two reasons. First, the plaintiff quite clearly alleged that such complaints were made ‘[a]s early as 2008.’ . . . The complaint also discusses that the MPD ‘had been receiving complaints for several years before’ opening its own investigation. . . . On this basis, the Court can draw the reasonable inference, . . . that the plaintiff is alleging that the MPD and the City had received similar complaints prior to the subject incident. Second, the Court does not believe it is necessary for the plaintiff to have pled specifics like the time, place, or identity of the other complaints. General allegations that the City and MPD received complaints is enough to give rise to an inference that its officials had knowledge that other, similar illegal searches were occurring. Frankly, specifics like time, place, and identity would add very little in the way of substance to the allegations of the complaint. Moreover, the plaintiff would not possibly have access to that information without discovery. Finally, the Court reiterates that it should not apply a heightened pleading standard in *Monell* claims, e.g., *Estate of Sims*, 506 F.3d at 514; this is not a case that falls under Rule 9 of the Federal Rules of Civil Procedure, such that it must be pled with particularity. For these reasons, the Court finds that the plaintiff’s allegations support the conclusion that the City had received complaints of illegal searches prior to the subject incident. Having received those complaints, the City necessarily had knowledge or notice that aggressive searches were occurring and was deliberately indifferent. However, rather than training and disciplining its officers or investigating complaints, the City

instead occasionally commended its aggressive officers and ignored or rejected the complaints. . . . An obvious consequence of these actions would be for aggressive searches to continue and escalate, such that the City could be found deliberately indifferent if the plaintiff's allegations are true. . . . Indeed, the plaintiff alleges that the City not only failed to provide adequate training in light of foreseeable consequences, but also that it failed to act in response to repeated complaints of constitutional violations by its officers, such that he has adequately alleged that the City was deliberately indifferent. . . . Finally, the Court points out that, taking the plaintiff's allegations as true, the City's alleged widespread policies ultimately caused the deprivation of the plaintiff's constitutional rights. As the Court has already noted, whatever the evidence of deliberate indifference, the plaintiff 'must also show a direct causal connection between the policy or practice and his injury, in other words that the policy or custom was "the moving force [behind] the constitutional violation."' . . . The plaintiff has alleged facts to meet this requirement. At the very least, the Court can infer, . . . that the alleged policies were a but-for cause of the plaintiff's injuries, because if the City had, for instance, taken steps to investigate the offending officers, it could have found that they were responsible for other similar incidents and removed them from the force. Likewise, if the City had better disciplined or trained its officers (or perhaps not encouraged them to conduct aggressive searches), it is likely that the officers in question would not have illegally stopped the plaintiff's car, illegally searched the plaintiff, or illegally arrested him. The plaintiff has, therefore, pled facts sufficient to plausibly allege that the City's policies were the moving force behind the constitutional deprivation that he suffered. To be sure, the plaintiff's complaint is not a model of clarity in relation to his *Monell* claim: some of its assertions are vague and border on the sort of conclusory statements that the Court can disregard . . . . At this stage of the proceedings, the Court is obliged to deny the defendants' motion for judgment on the pleadings on the plaintiff's *Monell* claim against the City.")

***Listenbee v. City of Harvey***, No. 11 C 03031, 2013 WL 5567552, \*3-\*5 (N.D. Ill. Oct. 9, 2013) ("Despite disclaiming any responsibility to provide evidence at the pleading stage, Listenbee attaches to his response brief a 2012 report from the Civil Rights Division of the Department of Justice, which investigated the use of force by Harvey police officers and made findings and recommendations to improve 'serious deficiencies' that 'create an unreasonable risk that constitutional violations will occur.' . . . This letter is properly considered in support of Listenbee's claims at the motion-to-dismiss stage. In opposing a Rule 12(b)(6) motion, a plaintiff may elaborate on his factual allegations, so long as the new elaborations are consistent with the pleadings, and may submit materials outside the pleadings to illustrate the facts he expects to be able to prove. *Geinosky v. Chicago*, 675 F.3d 743, 746 n.1 (7th Cir.2012) (citing numerous cases). Indeed, the Seventh Circuit has advised that, in the wake of *Twombly* and *Iqbal*, a plaintiff 'who can provide such illustration may find it prudent to do so.' *Id.* Here, the DOJ letter lends plausibility to Listenbee's allegations that his beating was not an isolated incident but the product of systemic shortcomings. . . . The same is true for the denial of medical care claim, here governed by the Fourteenth Amendment's due process guarantee, rather than the Eighth Amendment, although the 'deliberate indifference' standard applies either way. . . . Listenbee contends that the detainees at the Harvey jail are 'routinely' denied medical care. According to the complaint this routine practice

is attributable to the absence of an appropriate system for accurately documenting and administering medical and medication needs, observing the health status of detainees, and promptly reviewing medical requests from detainees, among other shortcomings. . . The DOJ letter suggests that Harvey officers routinely fail to state whether arrestees ‘sustained any injuries or received medical care,’ which lends plausibility to Listenbee’s allegations that Harvey lacks systems for appropriately acknowledging and documenting arrestee’s injuries, let alone providing access to medical care for them. The DOJ letter also recommends that the Harvey police department make it a policy to have supervisors report to the scene of any arrest involving the use of force that caused serious injury, ‘to ensure that all injured are provided care.’ Again, this bolsters Listenbee’s allegation that in 2010, the Harvey police did not have policies that ensured all injured arrestees were provided care. . . Listenbee’s deliberate indifference claim is also rendered plausible by the allegations regarding his own experience while locked up in the Harvey jail. For instance, he alleges that multiple police officers or staff saw his condition and failed to provide any help or relief. He alleges that he complained to anyone within hearing distance that he was in severe pain, and he was either ignored or told that nothing could be done for him. These allegations permit the inference that, rather than being an isolated incident, Listenbee’s experience at the jail was the product of a policy of indifference to the health of detainees. . . . Because the complaint plausibly alleges that *de facto* policies of the City caused his injuries arising from the use of excessive force and subsequent denial of medical care, the City of Harvey’s motion to dismiss the plaintiff’s *Monell* claims is denied.”)

***Sacks v. Niles Tp. High Schools, Dist. 219***, No. 12 C 4553, 2013 WL 3989297, \*2, \*3 (N.D. Ill. Aug. 2, 2013) (“District 219 contends that Sacks’s claim should be dismissed because he has not identified which *Monell* prong he is pursuing and, regardless, he failed to set forth the basis for his *Monell* claim. Sacks, however, is not held to a heightened standard in pleading a *Monell* claim, even after *Twombly* and *Iqbal*. . . Sacks’s failure to explicitly identify the *Monell* prong is not fatal to his claim against District 219, for a plaintiff need not plead legal theories if the alleged facts are sufficient to show that the claim is plausible. . . Moreover, Sacks clarified in his response that he is arguing that District 219 maintains an express policy—the school code—that when enforced, as alleged here, causes a constitutional deprivation. Although the specific details of the policy are lacking, Sacks has sufficiently provided defendants with notice of the alleged wrongdoing, citing to Heintz’s testimony in the 2012 administrative hearings.”)

***Ingoldsby v. Triplett***, No. 12–681–GPM, 2013 WL 3337841, \*3, \*4 (S.D. Ill. July 2, 2013) (“Plaintiffs’ amendment fails to state a claim to relief that is plausible on its face because Plaintiffs have simply tacked on a bare policy allegation to their already deficient complaint. . . While a heightened pleading standard is not required to state a *Monell* claim against a municipality, *Leatherman v. Tarrant County*, 507 U.S. 163, 164, (1993), a plaintiff cannot simply allege the existence of a policy or practice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009). The plaintiff ‘must do more than merely parrot the language of *Monell*’ to state a claim. . . Plaintiffs’ proposed amendment is utterly devoid of any facts plausibly establishing that the policy or custom actually exists. Plaintiffs’ allegations are based solely on their own experience, and there is nothing to

suggest that any other similar incidents have occurred. Thus, at best, Plaintiffs allegations support an isolated incident of improper conduct unrelated to municipal policy. Since Plaintiffs' amendment fails to state a claim to relief that is plausible on its face, leave to amend is denied.")

**Stacey v. Peoria County, Ill.**, No. 13–CV–1051, 2013 WL 3279997, \*6, \*7 (C.D. Ill. June 27, 2013) (“The *Leatherman* Court held that courts may not impose a heightened pleading standard for § 1983 municipal liability cases beyond that which is required of all cases under Rule 8. . . This Court is following *Leatherman* and is not imposing a heightened pleading standard. This Court is applying the pleading standard announced by in the Supreme Court in *Twombly* and *Iqbal* which applies to all cases in federal court subject to the pleading standards in Rule 8. . . This Court is properly applying the principles announced in *Leatherman*, and so, is not refusing to apply controlling precedent. . . .Stacey must meet the generally applicable pleading standards announced in *Twombly* and *Iqbal* in order to state a claim. Stacey’s municipal liability claim fails to meet that standard.”)

**Jacoby v. DuPage County Ill.**, No. 12 CV 6539, 2013 WL 3233339, \*2, \*3 (N.D. Ill. June 26, 2013) (“Because Jacoby has sued the Sheriff only in his official capacity, the court need only consider whether he has sufficiently pleaded a *Monell* claim against him. . . Jacoby is not held to a heightened standard in pleading a *Monell* claim, even after *Twombly* and *Iqbal*. . . . Jacoby first argues that he has stated a claim because the County and the Sheriff have admitted in their motion to dismiss that the Sheriff is the final policymaking authority for the jail. Further, Jacoby alleges that “[t]he policies and customs at the DuPage County Jail failed to safeguard’ him. . . Although vague, Jacoby does allege that he suffered an injury at the hands of unknown officers or jail guards, that he complained of this injury to various jail employees, and that his injury went untreated for two days because of a failure to properly address the medical needs of detainees. . . .Lacking access to information, Jacoby is not in a position to allege whether the Sheriff was aware of his injury or of the alleged failure to treat that injury, or whether the Sheriff actively condoned the failure. Nor is Jacoby likely to be privy to information about other instances of detainees with similar experience. Nonetheless, he does allege that he made repeated complaints over an 11–day period and that he was repeatedly denied medical care. This series of incidents at least minimally permits the inference that there was a widespread practice that had the force of policy to disregard the legitimate medical needs of detainees. . . The motion to dismiss this claim against the Sheriff is denied.”)

**Ford v. Wexford Health Sources, Inc.**, No. 12 C 4558, 2013 WL 474494, \*9 (N.D. Ill. Feb. 7, 2013) (“In the motion to dismiss, Wexford argues that Ford has failed to allege a custom or practice of deliberate indifference to his medical needs. Despite Wexford’s argument to the contrary, Ford has alleged a widespread practice among Wexford employees of delaying medical treatment that caused him unnecessary pain and suffering. . . Specifically, he alleges facts showing a custom or practice of: (1) delayed delivery of medical permits . . . ; failure to administer medication or administration of ineffective medication . . . ; and delayed scheduling of medical appointments . . . . Viewing these allegations in a light most favorable to Ford, taking as true all well-pleaded

factual allegations and making all possible inferences from the allegations in Ford's favor, these allegations support a permissible inference that Wexford has a widespread custom or practice of treating inmates' medical needs with deliberate indifference. . . . Because Ford has sufficiently alleged a *Monell* claim that is plausible on its face under the federal notice pleading standards, the Court denies Wexford's motion to dismiss.")

***Winchester v. Marketti***, No. 11 CV 9224, 2012 WL 2076375, at \*4 & n.3 (N.D. Ill. June 8, 2012) ("The precise pleading requirements for failure to train claims in the post-*Iqbal* world are not entirely clear. On the one hand, failure to train claims are clearly not subject to a heightened pleading standard over and above Rule 8. [citing *Leatherman*] On the other hand, given its 'nebulous' nature, . . . it would seem that a relatively high level of factual specificity is required at the pleading stage to make a failure to train claim facially plausible. . . . The instant Complaint is sorely lacking in factual specificity. No details are given as to when Plaintiff began suffering seizures, how many seizures he suffered, how long the seizures lasted, when he notified Defendants of his condition, or whether any Defendants actually observed him having a seizure. Nevertheless, as discussed in greater detail below, I am allowing most of the individual claims through. What is fatal to the *Monell* claims, however, is that Plaintiff makes no attempt to plead a pattern of similar constitutional violations with any degree of factual specificity. . . . I cannot say precisely where the facial plausibility line should be drawn for post- *Iqbal* failure to train claims. But I can say with a fairly high degree of certainty-particularly in light of the Supreme Court's recent ruling in *Connick*, emphasizing the 'tenuous' nature of failure to train liability and the need to demonstrate a pattern of recurring constitutional violations-that this complaint falls short of that line. . . . The claims against Grundy County, CHC and HPL are dismissed without prejudice. Plaintiff may replead against these Defendants in a more fact-specific manner. Of particular importance, Plaintiff must give more details concerning other similar constitutional violations that have occurred at the Grundy County Jail such that Defendants' deliberate indifference to the consequences of a failed training program can be plausibly inferred. . . . To be clear, *Connick* is not about pleading standards. However, the opinion makes clear that the Supreme Court considers a failure to train claim to be among the most difficult theories for a § 1983 Plaintiff to prevail under because of its factual complexity. If *Iqbal* plausibility operates as a sliding scale based on the inherent complexity of a claim, as the Seventh Circuit has suggested it does, . . . then failure to train claims demand a relatively high level of factual specificity at the pleading stage.")

***Adams v. City of Chicago***, No. 06 C 4856, 2011 WL 4628703, at \*1, \*2 (N.D. Ill. Sept. 29, 2011) ("Defendant City of Chicago argues that Plaintiffs fail to state a proper *Monell* claim. A municipality or other local government may be liable under 42 U.S.C. § 1983 'if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation.' . . . To properly state a *Monell* claim, a plaintiff must allege that: '(1) the City had an express policy that, when enforced, causes a constitutional deprivation; (2) the City had a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage within the force of law; or (3) plaintiff's constitutional injury was caused by a person with final policymaking authority.' . . .

Plaintiffs allege that Defendant City of Chicago violated their constitutional rights pursuant to widespread practices: (1) that the City failed to properly train, supervise, discipline, and control its officers; (2) that the City failed to identify and respond to officers who repeatedly engaged in patterns of misconduct, including the Special Operations Section; (3) that through its inaction the City condoned and facilitated a ‘code of silence’ in the Chicago Police Department; and (4) that Defendant Officers had and continued to engage in a pattern of misconduct similar to the misconduct against Plaintiffs. Further, Plaintiffs allege that these practices were known by municipal policy-makers of the City both before and after Plaintiffs’ arrests. Defendant City of Chicago argues that these allegations are insufficient because they make broad and generalized allegations without identifying the specific custom, policy, or practice of which they complain. The Court disagrees. The Court finds these allegations sufficient to satisfy *Twombly* and its progeny.”)

***Knapp v. City of Markham***, No. 1:11-CV-00093-DLB PC, 2011 WL 3489788, at \*5 (N.D. Ill. Aug. 9, 2011) (“With respect to the City of Markham, Knapp’s complaint adequately alleges municipal liability. Plaintiffs in a § 1983 suit against a municipality need not meet any heightened pleading standards, but must only comply with conventional pleading standards. . . Throughout his complaint, Knapp alleges that the City of Markham ‘has a pervasive and unconstitutional custom, practice, and policy of condoning discrimination against nonAfrican-American employees.’ . . He claims that the City has intentionally targeted and discriminated against Caucasian employees for years and lists examples of other employees who have filed complaints. . . Knapp alleges that the City Council appointed an African-American to the position of Deputy Chief after the Defendants demoted Knapp because of his race. . . This allegation is in line with Knapp’s broader claim that the City of Markham maintains a practice of treating African-American employees more favorably than Caucasian and other non-African-American employees. Knapp’s allegations are sufficient to state a claim of municipal liability at this stage.”)

***Roberts v. City of Indianapolis***, No. 1:10-cv-1436-TWP-DML, 2011 WL 2443672, at \*2, \*3 (S.D. Ind. June 14, 2011) (“Plaintiff’s *Monell*-related allegations are fairly scant, limited to two statements: the Chief of Police (1) failed ‘to take corrective action with respect to police personnel, whose vicious propensities were notorious’ and (2) ‘failed to assure proper training and supervision of the personnel, or to implement meaningful procedures to discourage lawless official conduct.’ . . These bare-bones assertions, Defendants argue, fail to state a *plausible* claim that the City has a custom, policy, or practice which caused Plaintiff’s alleged constitutional deprivation. This argument is well-taken. That said, it is also important to note that the Supreme Court has expressly rejected heightened pleading standards for Section 1983 claims against a municipality. [citing *Leatherman*] And, significantly, even after *Twombly* and *Iqbal*, district courts in the Seventh Circuit have affirmed this principle, holding that plaintiffs are not required to plead specific facts to prove the existence of a municipal policy. [collecting cases] Here, Plaintiff has alleged that he suffered injuries after police officers locked him in a police car without air conditioning and with the windows closed. The clear upshot of Plaintiff’s allegations is that this injury was a consequence of the City’s failure ‘to assure proper training and supervision’ and ‘implement meaningful

procedures’ to discourage officer misconduct. At bottom, the Court finds that Plaintiff has, by the slimmest of margins, stated a plausible *Monell* claim.”)

***Suber v. City of Chicago***, No. 10 C 2876, 2011 WL 1706156, at \*4 (N.D. Ill. May 5, 2011) (“It’s worth repeating that the Court does not apply a heightened pleading standard to § 1983 cases (or, for that matter, to any other claims that fall outside Rule 9(b) or statutes that required heightened pleading). But *Iqbal* and *Twombly* do instruct that ‘[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task...’. . . . Suber is trying to state a claim against a municipality for a failure to train, which requires the high-culpability standard of deliberate indifference to the deprivation of a constitutional right. On top of that, the underlying constitutional right asserted by Suber (as best as can be deciphered) is substantive due process, specifically, conscience-shocking executive action in the context of an injury inflicted on a bystander, yet another high-culpability standard to meet. Yet to support the failure to train claim, Plaintiff alleges no facts other than the single episode of the injury inflicted on him, and does not even allege that the City acted with ‘deliberate indifference.’ That is insufficient to state a claim of municipal liability in this context.”)

***Tugle v. Stith***, No. 10-849-GPM, 2011 WL 1627332, at \*2 (S.D. Ill. Apr. 28, 2011) (“Defendants also argue that Ms. Tugle fails to sufficiently plead a § 1983 claim against the Village because she ‘failed to allege any express policy’ that caused the Constitutional violation . . . Defendants are correct that municipal liability for a § 1983 claim cannot be based on respondeat superior, but must arise from a claim of municipal policy or custom. . . Here, Ms. Tugle alleges that the Village ‘had customs, policies, and practices that violated the [Fourth Amendment] rights of its arrestees’ including, *inter alia*, failure to ‘properly train, investigate, discipline, and/or fire Officer Stith’. . . This is sufficient to survive Defendants’ Rule 12(b)(6) challenge.”)

***Jordan v. Diaz***, No. 10 C 1178, 2010 WL 5476758, at \*4 (N.D. Ill. Dec. 23, 2010) (“As the Sheriff defendants note in their motion to dismiss, an ‘official capacity claim must at a minimum include allegations in conclusory language that a policy existed, buttressed by facts alleging wrongdoing by the governmental entity.’ No heightened pleading standard applies to *Monell* claims. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). Thus, a plaintiff need not plead particular facts on which his claim of an official policy or custom is based; a ‘short and plain statement’ that the official policy or custom caused his injury will suffice to survive a motion to dismiss. . . Plaintiff’s second amended complaint, filed after the Sheriff defendants moved to dismiss his first amended complaint, successfully remedied their concern that the first amended complaint failed to allege ‘any policy, practice, or custom at all as required in *Monell*.’ The second amended complaint alleges ‘a policy or widespread custom at the Cook County Jail of ignoring detainees’ serious medical conditions” and ‘unconstitutionally denying detainees’ treatment for their serious medical condition.’ Plaintiff further alleges that defendants Dart and Thomas either ‘established this policy or allowed a de facto policy of denying procedures necessary to treat the serious medical conditions of detainees,’ and that they ‘allowed

the custom and practice of denying detainees' necessary medical treatment and thereby endorsed it.' These allegations are sufficiently specific to state a *Monell* claim.”)

*Aleman v. Dart*, No. 09-cv-6049, 2010 WL 4876720, at \*7 (N.D. Ill. Nov. 23, 2010) (“Plaintiff is not required to meet a heightened pleading standard for a § 1983 official-capacity claim. . . Thus, Plaintiff need not plead particular facts upon which he bases his claim of an official policy or custom, and a ‘short and plain statement’ that a government entity’s official policy or custom caused his injury is sufficient to survive a motion to dismiss. . . . Plaintiff’s complaint sufficiently alleges *Monell* liability under § 1983. Plaintiff alleges that the customs, policies, and practices of the institutional Defendants caused Plaintiff’s harm and that the institution charged with ensuring adequate health care to pre-trial detainees repeatedly and consistently failed to provide adequate health care to inmates with obvious, serious medical needs. Plaintiff describes the alleged failures as including the failure to recognize the risk of harm to inmates, the failure to provide adequate care for obvious conditions, the failure to acknowledge complaints of serious medical needs, and the failure to ensure that inmates with serious medical needs were taken to the appropriate medical facilities. Plaintiff also alleges that Defendants repeatedly violated his constitutional rights: his requests for treatment were repeatedly ignored and they continued to be ignored even after he informed staff that he was still in pain. Furthermore, Plaintiff alleges that the previously-referenced DOJ report found that the medical care provided by Cook County Jail fell below the constitutionally required standards of care, conceivably putting the institution on notice of constitutional violations within the jail. Plaintiff’s complaint contains a sufficiently “short and plain statement” that a government entity’s official policy or custom caused his injury. When read in a light most favorable to Plaintiff, the facts alleged adequately state a cause of action for § 1983 municipal liability, and Plaintiff’s complaint, when taken as a whole, sufficiently alleges the existence of official policies or customs that deprived Plaintiff of his constitutional rights.”)

*Jones v. Navia*, No. 09-cv-6968, 2010 WL 4878869, at \*5 (N.D. Ill. Nov. 23, 2010) (“Plaintiff’s claims here amount to little more than ‘boilerplate allegations’ that Cities and Cook County policymakers knew of and tacitly supported unspecified customs. . . Therefore, he fails to state a claim upon which relief can be granted under *Monell*. [citing *Iqbal*] Accordingly, we dismiss Count VII as to all relevant parties, including Cities and Cook County.”)

*Evans v. City of Chicago*, No. 10 C 542, 2010 WL 3075651, at \*2, \*3 (N.D. Ill. Aug. 5, 2010) (“While Plaintiff’s allegations of a practice within the police department are conclusory, such conclusory allegations suffice ‘so long as facts are pled that put the defendants on proper notice of the alleged wrongdoing.’. . Here, Plaintiff’s allegation of a practice within the police department gives Defendant ‘fair notice’ of what the ‘claim is and the grounds upon which it rests.’. . Plaintiff defines what the practice is – to conduct warrantless searches and make arrests without probable cause when investigating the use of deadly force by Chicago police officers – and what that policy is meant to accomplish – to produce evidence, without regard to its reliability, that exonerates the officer from allegations of wrongdoing in his use of deadly force. This level of specificity, along with Plaintiff’s description of how the practice was applied to her particularly, provides Defendant

sufficient notice of the claim against it. Defendant argues that Plaintiff's claim should fail because she only alleged one instance in which the policy was applied, without further facts substantiating the existence of the policy. This case, though, is distinguishable from many cases in which a plaintiff asks the court to infer the existence of a policy from only a single incident, without articulating a specific policy. . . . Here, . . . Plaintiff identified the alleged policy with specificity, so the fact that she has only alleged one instance in which the policy was applied does not defeat the claim.”)

**Wiek v. Keane**, No. 09 CV 920, 2010 WL 1976870, at \*4 (N.D. Ill. May 12, 2010) (“*Monell* claims are not subject to a heightened pleading standard. . . Wiek’s burden is simply to allege facts that would give the City notice of his municipal liability claim. In his amended complaint, Wiek alleges that he was held overnight after being arrested in his home without a warrant. He further alleges that the officers held him pursuant to a City policy allowing police officers to ‘hold an arrestee overnight so that the arrestee could be exhibited in a corporeal identification procedure.’. . . There is nothing more Wiek can allege. He is not required to provide extrinsic evidence that a policy existed. Wiek correctly relies on *Willis v. City of Chicago* for the proposition that when officers make an arrest without a warrant, they may not hold the arrestee in custody for the purposes of gathering additional evidence to justify the arrest. . . Therefore, Wiek’s assertions that the officer’s held him overnight in accordance with a municipal policy are sufficient to put the City on notice of his claim.”)

**Anderson v. City of Blue Island**, No. 09C5158, 2010 WL 1710761, at \*2 (N.D. Ill. Apr. 28, 2010) (“Anderson alleges that Blue Island acted with deliberate indifference in failing to train its police officers to respect the constitutional rights of mentally ill arrestees despite the frequency with which Blue Island police officers would confront persons suffering from mental illness. Anderson claims that the police officers who subdued him on the night in question were not trained in crisis intervention for mentally ill persons and that this particular deficiency in their training was the moving force behind the violation of his constitutional rights. Anderson’s complaint highlights a specific alleged deficiency in the training provided to the Blue Island police officers he encountered on the night in question and presents a plausible causal connection between the training and the constitutional deprivation he allegedly suffered. Anderson has alleged enough facts to suggest he may be entitled to relief against Blue Island; dismissal of his claim at this stage would be inappropriate.”).

**Maldonado v. Racine County**, No. 09-C-1173, 2010 WL 1484235, at \*3, \*4 (E.D.Wis. Apr. 12, 2010) (“In the present case, Maldonado does more than merely recite the elements of a § 1983 claim. She alleges that she was harmed by a specific policy or custom of Racine. Although Racine is correct in stating that Maldonado does not present any supporting facts to establish that such a policy actually exists, under the circumstances of this case, such pleading is not required. At this stage, Maldonado need only sufficiently inform the defendants of the nature of her claim and persuade the court that the complaint states [a] plausible claim for relief. Whether or not Maldonado is able to muster evidence of the actual existence of such a policy or custom is a hurdle

she will have to clear should the defendants move for summary judgment. . . First, is the complaint sufficient to inform the defendants of the nature of the plaintiff's claim? As for this question, the court concludes that the amended complaint is sufficient. Maldonado does not merely baldly allege that she was harmed by a policy or custom but rather identifies the specific policy or custom of Racine that she alleges resulted in her injury, i.e. Racine's policy or custom 'to disregard the investigation and substantiation requirements of Article 3, Section D.17. of the Agreement.'. . Second, the court must ask, is the claim plausible? This is a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense' to determine whether the well-pleaded facts alleged in the complaint are sufficient to 'permit the court to infer more than the mere possibility of misconduct.'. . . On this question as well, the court finds that Maldonado has satisfied the minimal requirements imposed by Rule 8(a).")

*Miller v. City of Plymouth*, No. 2:09-CV-205 JVB, 2010 WL 1474205, at \*4, \*6 (N.D. Ind. Apr. 9, 2010) (“[A] plaintiff is not held to a heightened standard in pleading a *Monell* claim. . . And here, although they are at times confusing, the Plaintiffs’ allegations attempt to fit within the second method of establishing a *Monell* claim in that Plaintiffs allege that the City failed to adequately train and supervise its employees in conducting traffic stops, using dogs in the field, and in keeping records of vehicle stops and the use of police dogs. . . . The Supreme Court’s ruling in *Iqbal* has created some skepticism in the various circuits as to whether the Supreme Court’s decisions in *Twombly* and *Iqbal* suggest a shift from notice-pleading back toward fact-pleading. . . For its part, however, the Court of Appeals for the Seventh Circuit is proceeding cautiously and continues to emphasize that neither *Twombly* nor *Iqbal* have changed the fundamentals of pleading. *See, e.g., Bissessur v. Ind. Univ. Bd. of Trustees*, 581 F.3d 599 (7th Cir.2009) (“Our system operates on a notice pleading standard; *Twombly* and its progeny do not change this fact.”). . . . In the context of section 1983 municipal liability, district courts in the Seventh Circuit post *Twombly* and *Iqbal*, have continued to apply *Leatherman*’s holding that plaintiffs are not held to a heightened pleading requirement nor are they required to plead specific facts to prove the existence of a municipal policy. [collecting cases] The Millers have alleged facts related to the traffic stop which create a plausible claim for relief under the First, Fourth, and Fourteenth Amendments. They allege that they were wrongfully stopped by Weir and the other officers because of their race, subjected to searches by the officers, subjected to an illegal canine sweep of the car and their persons, handcuffed, and detained for nearly an hour, all under false pretenses. In addition, they have alleged that the impetus for their claims is the inadequate training of the officers by the City (and County) as it relates to vehicle traffic stops and the use of police dogs in searches. Finally, they have set out the alleged policies they believe led to the inadequate training of the officers, i.e., the failure to require reports of officers regarding traffic stops and the deployment of canine searches, the failure to train regarding a proper search of a vehicle, etc. Even after *Twombly* and *Iqbal*, a plaintiff doesn’t have to come forward with evidence to survive a motion to dismiss. Moreover, giving the Millers’ the benefit of liberal pleading standards due to their *pro se* status, it appears that they have pled sufficient facts to assert a plausible claim under *Monell* and sufficient facts to put the City on notice of the claim. The Motion to Dismiss is, therefore, DENIED.”)

**Diaz v. Hart**, No. 08 C 5621, 2010 WL 849654, at \*7 (N.D. Ill. Mar. 8, 2010) (“Defendants argue that Diaz fails to adequately define the custom, policy, or practice at issue and that the factual allegations in the complaint do not meet the pleading requirements set out in *Iqbal*. Post-*Twombly* and *Iqbal*, other courts in this district have continued to apply *Leatherman*’s holding that plaintiffs are not required to plead specific facts to prove the existence of a municipal policy. [collecting cases] Diaz’s allegations regarding a widespread custom are specific enough to alert defendants to the policy he alleges infringes on his constitutional right. Diaz alleges in significant detail that (1) he had an injury that required surgery; (2) he was examined by doctors at the Jail, NRC, and Stroger who said he needed surgery; and (3) no surgery was ever performed. These allegations, which include dates, names of parties, accounts of doctors’ visits, and the locations of those visits, are specific enough to put defendants on notice of the policy Diaz is seeking to hold them liable for.”)

**S.J. v. Perspectives Charter School**, No. 09 C 444, 2010 WL 502752, at \*5, \*6 (N.D. Ill. Feb. 9, 2010) (“To state an actionable § 1983 claim based on policy, practice, or custom, a plaintiff cannot merely assert the existence of a policy. . . . Here, S.J. alleges no specific ‘policies, practices and customs’ of ‘Defendants’ other than ‘failure to properly train employees.’ . . . S.J.’s pleading of this Count amounts to mere ‘legal conclusion’ without “show[ing] that [S.J.] is entitled to relief.’ . . . In its statement of facts, moreover, S.J. fails to allege or describe any incidents other than the search of S.J., and claims that this shows failure to properly train employees. . . . [A]lthough the single strip search alleged is ‘consistent with’ S.J.’s theory of liability, S.J. has failed to plead facts sufficient to state a failure to train claim.”).

**Riley v. County of Cook**, 682 F.Supp.2d 856, 861, 862 (N.D. Ill. 2010) (“[T]he Supreme Court has expressly rejected a heightened pleading standard for § 1983 claims against a municipality. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165-66 (1993). Courts in this district have affirmed this principle post-*Twombly*. See *Eckert v. City of Chicago*, 2009 WL 1409707, at \* 6 (N.D.Ill. May 20, 2009); *Jones v. Bremen High Sch. Dist.* 228, 2009 WL 537073, at \*4 (N.D.Ill. Mar. 4, 2009). Thus, an official capacity claim can survive even with conclusory allegations that a policy or practice existed, so long as facts are pled that put the defendants on proper notice of the alleged wrongdoing. *McCormick v. City of Chicago*, 230 F.3d 319, 325 (7th Cir.2000). In this case, Defendants contend that Plaintiff’s official liability claims against all Defendants are deficient. As to Counts I and II against Andrews and Dart, Defendants urge that they contain unsupported conclusions that Defendants acted with deliberate indifference by failing to maintain appropriate suicide prevention policies. However, given the above standards, the Court disagrees. Plaintiff’s Complaint alleges that Andrews and Dart were responsible for the care and management of the prisoners at Cook County Jail, and had policymaking authority to implement appropriate procedures to do so. Plaintiff further alleges that Andrews and Dart acted with deliberate indifference by failing to institute suicide prevention practices at Cook County Jail, and elaborates six specific examples of inadequate procedures as well as the failure to adequately monitor the jail cells. Plaintiff claims that Hopkins’ suicide was the result of this direct indifference. Plaintiff has clearly gone beyond bare legal conclusions and provided Defendants

with fair notice of the basis for her claim. Plaintiff's assertions are therefore sufficient to establish official capacity claims against Andrews and Dart.”).

***Gilbert ex rel. James v. Ross***, No. 09-cv-2339, 2010 WL 145789, at \*2, \*3 (N.D. Ill. Jan. 11, 2010) (“Plaintiff is not required to meet a heightened pleading standard for a § 1983 official-capacity claim. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Simpson v. Nickel*, 450 F.3d 303, 306 (7th Cir.2006). Thus, Plaintiff need not plead particular facts upon which he bases his claim of an official policy or custom, and a ‘short and plain statement’ that a government entity’s official policy or custom caused his injury is sufficient to survive a motion to dismiss. *Id.*; see Fed.R.Civ.P. 8(a)(2). Citing *McCormick v. City of Chicago*, 230 F.3d 319, 325 (7th Cir.2000), Defendants concede that the law does not require Plaintiff to meet a heightened standard of pleading to state an official-capacity claim, but emphasize *McCormick*’s statement that *Monell* requires conclusory allegations to be ‘buttressed by facts alleging wrongdoing’ by the relevant government entity. See *McCormick*, 230 F.3d at 325-26. This language should not be read to require more than notice pleading, but only to require that the pleadings allege that the government entity is responsible for the constitutional deprivation resulting from the alleged policy or custom. . . In fact, as *McCormick* explicitly notes, ‘[t]he Supreme Court has made it very clear that federal courts must not apply a heightened pleading standard in civil rights cases alleging § 1983 municipal liability.’. . Plaintiff’s complaint sufficiently alleges official capacity liability under § 1983 as to Counts I and II. Plaintiff alleges that Officer Ross and an unknown officer were acting in their official capacities as Cook County and Village of Maywood police officers. Plaintiff further alleges that the Cook County Sheriff and the Cook County Sheriff’s Department, as well as the Village of Maywood, directly encourage the misconduct at issue here by a failure to train, supervise, and control officers. The misconduct is described in detail in paragraphs fifteen through eighteen of the complaint, where Plaintiff specifically describes being randomly stopped, physically abused, forced into a police car without probable cause for an arrest, and dropped off near known gang members. Plaintiff alleges that the municipalities encourage this conduct by failing to punish or scrutinize it. Plaintiff also alleges that other Cook County and Village of Maywood citizens have been similarly mistreated but that there have been no findings of misconduct by the municipalities; rather, Plaintiff claims that there is a ‘code of silence’ by which similar misconduct is not reported. These facts, when read in a light most favorable to Plaintiff, adequately state a cause of action for § 1983 municipal liability. Defendants, relying on *Sivard v. Pulaski County*, 17 F.3d 185, 188 (7th Cir.1994), also argue that Plaintiff’s claim must be dismissed for failure to allege more than a single instance of wrongdoing. Although Plaintiff has not identified any other person who was a victim of Defendants’ alleged policies, he does, as described above, allege that the failure to train, supervise, and scrutinize, as well as the ‘code of silence,’ is an ongoing practice that continually harms the citizens of Cook County and the Village of Maywood. Furthermore, *Sivard* involved a motion for summary judgment, not a motion to dismiss, and does not address notice pleading standards. . . Plaintiff’s complaint, when taken as a whole, sufficiently alleges the existence of official policies or customs that deprived Plaintiff of his constitutional rights.”).

***Gardunio v. Town of Cicero***, No. 09-CV-1162, 2009 WL 4506318, at \*9 (N.D. Ill. Nov. 30, 2009) (“Defendants also argue that Plaintiff’s allegations regarding Dominick’s actions are insufficient to establish the Town’s liability because Plaintiff has failed to allege when or how Dominick orchestrated Plaintiff’s arrest and prosecution. But as Defendants themselves note, Section 1983 claims against municipalities are not subject to a heightened pleading standard. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165-66 (1993). Therefore, even post-*Twombly*, Plaintiff is required only ‘to allege enough facts to state a claim to relief that is plausible on its face.’” *Eckert v. City of Chicago*, 2009 WL 1409707, at \*6 (N.D.Ill. May 20, 2009) (quoting *Twombly*, 550 U.S. at 570); see also *Jones v. Bremen High Sch. Dist. 228*, 2009 WL 537073, at \*4 (N.D.Ill. Mar. 4, 2009) (holding that under *Twombly*, Plaintiff ‘is not required to plead with specificity the existence of a municipal policy’).”)

***Wilson v. City of Chicago***, No. 09 C 2477, 2009 WL 3242300, at \*3 (N.D. Ill. Oct. 7, 2009) (“[T]he City argues that the Court should dismiss claims against it because Wilson has not adequately pleaded municipal liability. The City argues that cursory allegations of *Monell* liability are insufficient to plead a claim against the City. Specifically, the City argues that Wilson has not provided any other examples of the alleged ‘widespread practices’ about which he complains. *Monell* claims, however, are not subject to a heightened pleading standard. *Lanigan v. Village of E. Hazel Crest, Ill.*, 110 F.3d 467, 479 (7th Cir.1997). And notice pleading does not require Wilson to plead all of the facts logically entailed by the claim. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir.2008). It is not reasonable to expect a plaintiff to have information about other incidents at the pleading stage; instead, a plaintiff should be given the opportunity to develop an evidentiary record to determine whether he can provide support for his claims. *McCormick v. City of Chicago*, 230 F.3d 319, 325 (7th Cir.2000) (error to dismiss *Monell* claims on the ground that they were too conclusory); *Sledd v. Lindsay*, 102 F.3d 282, 288-289 (7th Cir.1996) (reversing dismissal of *Monell* claims where dismissal based on plaintiff’s failure to identify specific factual patterns in the complaint). Wilson’s pleadings makes it clear that he alleges that the individual Defendants coerced false testimony in order to frame him and then withheld the knowledge that the testimony was false from him. Wilson’s pleadings further makes it clear that he alleges that the City of Chicago turned a blind eye to its officers’ practice of withholding exculpatory information and that failure emboldened the Defendants causing them to believe they could get away with framing him. Such allegations are more than labels and conclusions; rather they provide a factual basis that sets forth a short and plain statement that the government entity’s official policy or custom is the cause of his injury. If the Court accepts these allegations as true, as it must, Wilson’s factual allegations more than adequately raise his right to relief above the speculative level and the Court need not draw any further inferences to conclude that the City would be liable for the misconduct alleged. The Court DENIES the City’s Motion to Dismiss.”).

***Eckert v. City of Chicago***, No. 08 C 7397, 2009 WL 1409707, at \*6 (N.D. Ill. May 20, 2009) (“[T]he Supreme Court has rejected any heightened pleading requirement for claims against a municipality.’ . . . Post-*Bell Atlantic*, other courts in this district have affirmed *Leatherman*’s holding that plaintiffs are not required to plead with specificity the existence of such a municipal policy. .

.We agree with Defendants that under the post-*Bell Atlantic* pleading standard, a plaintiff must provide more than boilerplate allegations to survive a motion to dismiss. . . . However, *Bell Atlantic* only requires plaintiffs to allege ‘enough facts to state a claim to relief that is plausible on its face.’”).

## **EIGHTH CIRCUIT**

*Smith v. Allbaugh*, 987 F.3d 905, 911-12 (10th Cir. 2021) (“Ms. Smith fails to assert sufficient facts to support a causal link between Defendants’ actions and the constitutional violation. Ms. Smith asserts five policies and procedures that Defendants failed to promulgate or enforce. She pleads two policies that Defendants failed to ‘enforce’: (1) a policy requiring facility nurses and staff to immediately inform the facility medical provider when facing complaints of difficulty breathing or complaints relating to the abdomen; and (2) a policy requiring facility nurses and staff to immediately contact emergency services if an inmate complained of severe difficulty breathing or experienced a sudden onset of altered medical status. . . . However, Ms. Smith only alleges that JHCC medical staff failed to follow such procedures, . . . not that Defendants failed to enforce these policies. Indeed, Ms. Smith fails to plead any facts tending to show that Defendants were aware of prior instances of these policies not being followed and that they failed to rectify those situations. Ms. Smith further pleads that Defendants failed to ‘promulgate, implement, and/or enforce policies’ (1) ‘requiring medical staff to inform a physician and/or refer an inmate to a hospital when an inmate complained of difficulty breathing, experienced acute stomach pain, or showed obvious signs of medical distress;’ (2) ‘requiring a facility physician to conduct an in-person examination of a critically ill patient or arrange for their transfer to a facility where a physician’s examination was available;’ and (3) ‘regarding necessary protocols when an inmate lacks capacity to refuse medical treatment.’. . . However, the first two policies are the same policies that Ms. Smith argues should have been enforced above. As for the final policy, Ms. Smith attaches a copy of the Waiver of Treatment/Evaluation Form in the complaint that states protocols that must be followed by the medical staff when completing the form. . . . Again, while the medical staff may not have followed the protocol, Ms. Smith fails to allege facts that Defendants knowingly failed to enforce the policy and therefore fails to assert a causal link between their actions and the constitutional violation. Ms. Smith also failed to plead sufficient factual allegations to support deliberate indifference on the part of these defendants. First, Ms. Smith alleges that Defendants ‘were aware that the policies and procedures they created, promulgated, implemented, and/or enforce[d]—or failed to create, promulgate, implement, or enforce—resulted in grossly deficient medical care to inmates at Joseph Harp.’. . . However, such conclusory allegations, without sufficiently pleaded supporting facts, are insufficient to state a claim. . . . Second, Ms. Smith alleges that Mr. Allbaugh referred to JHCC as a ‘sinking ship.’ However, such a broad statement is inadequate to demonstrate that Mr. Allbaugh knew there were specific policies being violated and failed to enforce them. It is likewise inadequate to demonstrate awareness of an absence of specific policies to prevent the violation of inmates’ constitutional rights.”)

*Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 861 & n.5 (8th Cir. 2018) (“Whitney Sr. contends that the district court was wrong when it concluded that absent a constitutional violation on the part of Sharp, the City had no *Monell* liability. He claims that *Monell* liability is still possible because other jail personnel who were not named as defendants ‘arguably fulfilled a “do nothing” Jail policy vis-a-vis an inmate committing suicide.’ This claim fails for the same reason as the claim against Sharp. The complaint alleges that unnamed jail personnel were deliberately indifferent while Whitney was hanging himself. Tellingly, the complaint does not allege any facts to support this legal conclusion. The surmise of the allegation is unsupported by sufficient factual allegations. There is, for example, no claim that any identifiable jail official had knowledge that Whitney was in the process of committing suicide or even that a particular jail official suspected that he might be committing an act of self-harm. In short the complaint fails to allege any constitutional violation arising out of a municipal policy that would expose the City to *Monell* liability. . . . We also note that a failure to implement a specific policy does not equate to a failure to adopt a constitutionally adequate policy.”)

*B.A.B., Jr. v. Board of Educ. of City of St. Louis*, 698 F.3d 1037, 1040, 1041 (8th Cir. 2012) (“It is well-established that § 1983 claims based on the Board’s failure to train its employees require proof that ‘(1) the [Board’s] training practices [were] inadequate; (2) the [Board] was deliberately indifferent to the rights of others in adopting them, such that the “failure to train reflects a deliberate or conscious choice by [the Board]”; and (3) an alleged deficiency in the ... training procedures actually caused the plaintiff’s injury.’ . . . Plaintiffs must prove that ‘the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [Board] can reasonably be said to have been deliberately indifferent to the need.’ . . . Plaintiffs’ Complaint did not come close to meeting these rigorous standards. The substantive due process claim of Ms. Allen required proof of conscience-shocking behavior. The Complaint alleged that Nurse Franklin told B.A.B. she would administer the vaccine by shot, not by nasal mist, the allegedly harmful alternative, because his asthma put him in need of the H1–N1 vaccination. However inappropriate it may have been to override Ms. Allen’s refusal to consent, this was not conscience-shocking behavior by a public school nurse. B.A.B.’s Fourth Amendment claim failed to allege that he refused to consent to this minimally invasive procedure, only that he told Nurse Franklin his mother did not consent. Adding these insufficiencies to the inadequate and conclusory allegations regarding the Board’s failure to train, we conclude these § 1983 claims were properly dismissed, either for failure to plead a plausible claim, or for failure to state a claim.”)

*Cole v. Does*, No. 21-CV-1282 (PJS/JFD), 2021 WL 5645511, at \*3-4, \*8 (D. Minn. Dec. 1, 2021) (“Following *Twombly* and *Iqbal*, some confusion in the case law arose because in a decision that preceded *Twombly* and *Iqbal*—*Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)—the Supreme Court had appeared to hold that a claim against a municipality for failing to adequately train police officers who violated the plaintiff’s civil rights was adequately pleaded, even though the claim provided nothing more than what *Twombly* described as ‘a formulaic recitation of the elements of

a cause of action.’ Despite the apparent tension between *Leatherman*, on the one hand, and *Twombly* and *Iqbal*, on the other, *Iqbal* did not even mention *Leatherman*, and *Twombly* cited it only once in a footnote (with no hint of disapproval). . . In the aftermath of *Twombly* and *Iqbal*, the federal courts took two positions regarding the continued viability of *Leatherman*. Some courts read *Leatherman* narrowly to hold only that the lower court had erred in applying a heightened pleading standard to *Monell* claims, but to express no opinion as to whether the complaint at issue was adequate under the correct (“un-heightened”) pleading standard. Other courts read *Leatherman* more broadly to hold that the complaint at issue was *adequate*. Because *Leatherman* had not been overturned, these courts applied *Leatherman* in finding that formulaic *Monell* claims passed muster. The undersigned took the latter view in *Gearin v. Rabbett*, No. 10-CV-2227 (PJS/AJB), 2011 WL 317728 (D. Minn. Jan. 28, 2011), which declined to dismiss a *Monell* claim premised on the deliberate indifference of municipal policymakers to the unconstitutional conduct of an official named Kantrud. . . . Understandably, Cole and Hennessy-Fiske have cited this Court’s order in *Gearin* in arguing that a lenient *Leatherman* pleading standard—rather than a stricter *Iqbal/Twombly* pleading standard—should apply to supervisory-liability claims brought under 42 U.S.C. § 1983 (claims that are similar, although not identical, to *Monell* claims). . . . On reflection, however, the Court concludes that it erred in *Gearin*, and that there is no ‘civil rights’ exception to the *Iqbal/Twombly* standard. In the more than 10 years since *Gearin* was decided, numerous appellate and trial courts have applied the *Twombly/Iqbal* pleading standard to *Monell* and supervisory-liability claims. [collecting cases] In reconciling *Leatherman* with *Twombly* and *Iqbal*, these courts have persuasively argued that *Leatherman* did not hold that the bare-bones complaint at issue in that case was adequate. Rather, *Leatherman* simply held that *Monell* claims should be evaluated under the Rule 8 pleading standard—whatever that standard requires—and not under a heightened pleading standard. Accordingly, the Court will apply the *Twombly/Iqbal* standard to plaintiffs’ claims against Dwyer and Salto. . . . Like the allegations at issue in *Iqbal*, Cole and Hennessy-Fiske’s allegation that Dwyer and Salto authorized or approved the Doe defendants’ use of force against the journalists is a ‘ “naked assertion[ ]” devoid of “further factual enhancement.”’ . . . Nowhere in their complaint do Cole and Hennessy-Fiske explain how they know what Dwyer and Salto said to the Doe defendants or provide any details about when or how Dwyer and Salto authorized and approved of the Doe defendants’ use of force against the journalists. As a result, the Court cannot find that Cole and Hennessy-Fiske have satisfied their burden to plead ‘enough facts to state a claim to relief that is plausible on its face.’”)

*Taylor ex rel. Taylor v. Isom*, No. 4:11–CV–1351 CAS, 2013 WL 2447602, \*4, \*5 (E.D. Mo. June 5, 2013) (“The Supreme Court has rejected any heightened pleading requirement for claims against a governmental entity. . . . To survive a motion for judgment on the pleadings, however, a complaint must allege facts sufficient ‘to state a claim to relief that is plausible on its face.’ . . . Considering this pleading standard, in order to state a viable § 1983 claim against the Board or Isom, plaintiff was required to plead facts sufficient to show at least an inference that her constitutional rights were violated as a result of action taken pursuant to an official policy, or as a result of misconduct so pervasive among non-policymakers as to constitute a widespread custom

and practice with the force of law. . . Assuming arguendo that plaintiff suffered a constitutional deprivation, she has pleaded no facts in the Complaint that would demonstrate the existence of either an official policy or a widespread custom or practice that caused the deprivation. Plaintiff's allegations concerning official policy and custom are mere labels and conclusions, which are inadequate to state a claim. . . Although plaintiff need not identify the specific unconstitutional policy to survive a motion for judgment on the pleadings, *see Crumpley–Patterson v. Trinity Lutheran Hospital*, 388 F.3d 588, 591 (8th Cir.2004), she must, at the least, allege facts that would support the drawing of an inference that the conduct complained of resulted from the existence of an unconstitutional policy or custom. *Id.* Plaintiff does not plead any facts that would support the existence of an unconstitutional policy or custom. Rather, all the facts alleged relate to the actions of the police officer defendants themselves. . . In the absence of any factual allegations to support the existence of an unconstitutional policy or custom, there is no basis upon which to hold the Board or Isom liable under § 1983. These defendants' motion for judgment on the pleadings should therefore be granted.”)

## NINTH CIRCUIT

*Hyun Ju Park v. City and County of Honolulu*, 952 F.3d 1136, 1141-43 (9th Cir. 2020) (“When, as here, a plaintiff pursues liability based on a failure to act, she must allege that the municipality exhibited deliberate indifference to the violation of her federally protected rights. . . We agree with the district court that Park’s *Monell* claim must be dismissed because she has not plausibly alleged that the County’s inaction reflected deliberate indifference to her Fourteenth Amendment right to bodily integrity. . . . Park premises her claim against the County on the failure of the relevant policymaker—here, the Chief of Police—to address deficiencies in the two Honolulu Police Department policies or customs mentioned earlier. As to Policy 2.38, Park contends that the Chief of Police failed to amend the policy to prohibit officers from carrying firearms whenever they consumed alcohol in any amount. As to the ‘brotherhood culture of silence,’ Park alleges that the Chief of Police failed to implement mandatory whistleblowing policies, which would have rooted out the culture of silence. Even accepting those allegations as true, Park has not plausibly alleged that the Chief of Police had actual or constructive notice that his inaction would likely result in the deprivation of her federally protected rights. . . . Park has not plausibly alleged that the Chief of Police was aware of prior, similar incidents in which off-duty officers mishandled their firearms while drinking. In her complaint, she alleges only that, on two prior occasions, she witnessed Kimura drunkenly brandish his firearm in the presence of Naki and Omoso while drinking at the bar. As Park acknowledges, however, the Chief of Police did not learn of those incidents before her injury, and she alleges no other prior incidents that would have alerted the Chief of Police that officers were interpreting Policy 2.38 to require conduct that endangered members of the public. Instead, she asserts that the Chief of Police knew or should have known of Policy 2.38’s foreseeable consequences because the Honolulu Police Department referenced on its website a Hawaii statute prohibiting individuals with alcohol-abuse disorders from possessing firearms. That allegation falls far short of establishing deliberate indifference. . . . Park’s allegations concerning the ‘brotherhood culture of silence’ fare no better. Park asserts that the Chief of Police had actual

notice of the foreseeable consequences of his inaction because he knew about three prior instances in which officers attempted to conceal each other's misconduct. But Park offers no details about the type of misconduct allegedly committed by these officers or the extent to which their actions implicated community members' federally protected rights. Without *any* information about the nature of the prior incidents, we cannot reasonably infer that the Chief of Police knew or should have known that the culture of silence would likely result in the deprivation of Park's constitutional rights.")

***Hyun Ju Park v. City and County of Honolulu***, 952 F.3d 1136, 1144-49 (9th Cir. 2020) (Smith, J., concurring in part and dissenting in part) ("I respectfully disagree with the majority's analysis of Park's *Monell* claim against the County. . . . Park plausibly alleges that Officer Kimura handled his revolver on the night in question for HPD reasons, not personal reasons. Construing the facts in Park's favor, Officer Kimura therefore acted under color of law. . . . On the facts plausibly alleged in the SAC, I have no doubt that Officer Kimura's drunken wielding of his revolver in a bar full of people was an abuse of power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' . . . Thus, I believe that the majority's assumption that Officer Kimura acted under color of law in fact reflects the correct result. I therefore also have no doubt that Park has plausibly alleged a Fourteenth Amendment violation of her right to bodily integrity, given the plausible allegation of a state actor, and of deliberate indifference by the County as I discuss below. . . . Park points to many policy corrections that plausibly would have prevented her injuries, including a prohibition on firearm possession while consuming alcohol in any amount, guidance regarding assessing impairment and preventing firearm misuse by impaired officers, mandatory reporting of officer misconduct, and whistleblower protections for reporting officers. I would reject Defendants' suggestion that a policy prohibiting firearm carrying while 'drinking' would have been just as ineffective as the actual policy—prohibiting firearm carrying while 'impaired'—because 'impairment starts with the first sip.' Most people do not consider themselves impaired after 'one sip.' Similarly, I disagree with the majority's conclusion that HPD Policy No. 2.38 did not require HPD officers to carry their firearms with them to a bar. It is unclear when exactly the majority reads the policy to direct (or even permit) officers to dispossess themselves of their holstered pistols in relation to a plan to drink at a bar, nor is it clear what the officers should then do with the pistol. Officers who fail to carry their pistol while at a bar but not impaired would violate the policy's plain terms. Officers who become impaired while carrying a holstered pistol are dangerous. . . . I disagree with the majority's conclusion that Park has failed to plausibly allege that the County had notice here. Officer Kimura's repeated engagement in drunken and dangerous weapons handling occurred in the presence of other HPD officers. This put the County on at least 'constructive' notice of the substantial risk of harm, whether on account of its policies generally or on account of its policies' effects on Officer Kimura specifically. I certainly would not shield the County from being charged with 'constructive notice' of Officer Kimura's past behavior where the very reason individual policymakers may not have had 'actual' notice was the offending brotherhood culture of silence. To the extent that the majority identifies additional facts that, if alleged, would have made out a more compelling case for constructive or actual notice, Park should be given leave to amend. . .

For the foregoing reasons, I respectfully dissent as to the dismissal of Park’s *Monell* claims against the County. I would reverse the district court and allow that portion of Park’s lawsuit to proceed.”)

***Garmon v. Cty. of Los Angeles***, 828 F.3d 837, 846 (9th Cir. 2016) (“A local government may be liable under § 1983 for an official’s conduct where the official had final policymaking authority concerning the action at issue, and where the official was the policymaker for the local governing body for the purposes of the particular act. *Goldstein v. City of Long Beach*, 715 F.3d 750, 753 (9th Cir. 2013). In fact, a municipality may be liable for an ‘isolated constitutional violation when the person causing the violation has final policymaking authority.’ *Lytle v. Carl*, 382 F.3d 978, 983 (9th Cir. 2004) (citation omitted). A municipality’s failure to train its employees may also constitute an actionable policy or custom under § 1983 if it amounts to deliberate indifference to the rights of persons with whom the untrained employees come into contact. . . . A *pro se* complaint must be held to less stringent standards than formal pleadings drafted by an attorney. . . . Because Garmon filed her operative complaint *pro se*, we “construe the pleadings liberally” and afford her ‘the benefit of any doubt.’ *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)). Although the operative complaint states that Garmon is suing the County Defendants for violating a county policy, it includes other allegations that might support viable theories for county liability. For example, the operative complaint states that ‘Steve Cooley ... is [a] policy maker for the District Attorney’s office.’ An amended complaint could add allegations to bolster a claim that the facts alleged constitute an isolated constitutional violation stemming from Cooley’s actions as a final policymaker. . . . The operative complaint also states that Hanisee, ‘acting on behalf of the County of Los Angeles ... acted negligently ... by misusing the power of her office.’ Garmon might be able to allege more facts that would support a claim that Hanisee’s actions were performed as a final policymaker. Likewise, the operative complaint alleges claims for ‘Negligent training’ and ‘Negligent supervision.’ Garmon could allege additional facts relating to the County’s failure to train and supervise. . . . Allegations based on these theories could be consistent with the operative complaint, rather than necessarily inconsistent with it as the district court concluded. Thus, it was an abuse of discretion to deny leave to amend. The court shall grant Garmon leave to amend on remand.”)

***AE ex rel. Hernandez v. County of Tulare***, 666 F.3d 631, 637 (9th Cir. 2012) (“Our circuit precedent, articulated first in *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir.1986), and most recently in *Whitaker*, 486 F.3d at 581, requires plaintiffs in civil rights actions against local governments to set forth no more than a bare allegation that government officials’ conduct conformed to some unidentified government policy or custom. The County argues that our precedent has been implicitly overruled by the reasoning of intervening Supreme Court decisions, including *Ashcroft v. Iqbal*. . . . Yet briefing on this appeal was completed before our decision in *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011). There, we identified and addressed conflicts in the Supreme Court’s recent jurisprudence on the pleading requirements applicable to civil actions. . . . [W]hatever the difference between [*Swierkiewicz*, *Dura Pharmaceuticals*, *Twombly*, *Erickson*, and *Iqbal* ], we can at least state the following two principles common to all of them. First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply

recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. . . . This standard applies to *Monell* claims and should govern future pleadings in this case. The district court abused its discretion when it denied AE the opportunity to allege additional facts supporting the claim that Portillo’s, Wampler’s, and Felix’s alleged constitutional violations were carried out pursuant to County policy or custom. AE’s allegation of plausible facts supporting such a policy or custom could have cured the deficiency in the *Monell* claim.”)

***Dougherty v. City of Covina***, 654 F.3d 892, 900, 901 (9th Cir. 2011) (“Here, Dougherty’s *Monell* and supervisory liability claims lack any factual allegations that would separate them from the ‘formulaic recitation of a cause of action’s elements’ deemed insufficient by *Twombly*. . . . Regarding the *Monell* claim, Dougherty alleged only that (1) ‘Defendant CITY’s policies and/or customs caused the specific violations of Plaintiff’s constitutional rights at issue in this case[ ]’ and (2) ‘Defendant CITY’s polices and/or customs were the moving force and/or affirmative link behind the violation of the Plaintiff’s constitutional rights and injury, damage and/or harm caused thereby.’ The Complaint lacked any factual allegations regarding key elements of the *Monell* claims, or, more specifically, any facts demonstrating that his constitutional deprivation was the result of a custom or practice of the City of Covina or that the custom or practice was the ‘moving force’ behind his constitutional deprivation. Regarding supervisory liability, Dougherty alleged only ‘negligent’ hiring and training and pointed to no instances of deliberate indifference. Dougherty failed to plead ‘enough facts to state a claim to relief that is plausible on its face.’”)

***Cariega v. City of Reno***, No. 316CV00562MMDWGC, 2017 WL 1900980, at \*3–4 (D. Nev. May 8, 2017) (“The FAC alleges that the City of Reno has a ‘pattern and practice of not processing traffic citation payments and quashing the related arrest warrants of Native Americans and/or other minorities in a proper and timely manner.’. . . The FAC’s mere legal conclusion that there is a ‘pattern or practice’ without pointing to specific decisions of the City of Reno’s lawmakers, specific acts of the City’s policymaking officials, or factual examples of practices so persistent as to have the force of law, is insufficient under the pleading standards of *Iqbal/Twombly* to withstand a motion to dismiss under Rule 12(b)(6). Therefore, the Court grants Defendant’s Motion. The Court has discretion to grant leave to amend and should freely do so ‘when justice so requires.’. . . As pleaded, the FAC does not contain sufficient factual allegations to state a claim for relief under § 1983. However, the Court is unclear on whether amendment would be futile. Accordingly, the Court grants Plaintiff leave to amend the FAC if Plaintiff is able to cure the deficiencies identified in this Order.”)

***Lopez v. Cnty. of Los Angeles***, No. CV 15-01745 MMM MANX, 2015 WL 3913263, at \*7-8 (C.D. Cal. June 25, 2015) (“After *Iqbal*, *Monell* allegations must identify the challenged policy, custom, or failure to train, explain why it is deficient, and state how it harmed plaintiff. Where a claim is based on a failure to train, the complaint must also plead facts showing that the

municipality's conduct amounted to deliberate indifference. . . .Plaintiffs' complaint fails to plead a plausible *Monell* claim based on defendants' alleged policies and practices. . . . Plaintiffs do not sufficiently identify the specific policy, custom, or failure to train being challenged, explain why it is deficient, or state how it harmed Gabriel or them. Nor do plaintiffs allege facts showing that the defendants acted with deliberate indifference in failing properly to train their employees. Rather, plaintiffs do little more than recite the elements of a municipal liability claim. This is not sufficient under *Twombly* and *Iqbal*.”)

***Hernandez v. City of Beaumont***, No. EDCV 13–00967 DDP (DTBx), 2013 WL 6633076, \*5 (C.D. Cal. Dec. 16, 2013) (“Plaintiffs’ complaint does not meet the heightened pleading standards for municipal liability after *Iqbal*. Nowhere does Plaintiffs’ complaint contain specific allegations regarding the customs, policies, and practices that they allege are insufficient. Instead, Plaintiffs plead simply that City, Coe, and Does 1–10 ‘act[ed] with gross negligence and with reckless and deliberate indifference’ in (1) employing and retaining Clark and Velasquez, who they knew or should have known had dangerous propensities; (2) inadequately training, supervising, and disciplining Clark and Velasquez; (3) maintaining inadequate procedures for reporting misconduct; (4) failing to adequately train officers in their use of the JPX pepper spray gun; and (5) maintaining an unconstitutional policy or practice of arresting and detaining individuals without probable cause and through use of excessive force. . . . Plaintiffs plead no facts regarding what policies and practices City used in training, hiring, disciplining, and supervising their officers in the use of the JPX pepper spray gun, let alone why those policies and practices were deficient. Plaintiffs also fail to plead any facts as to why Clark and Velasquez had ‘dangerous propensities’ or why Coe and City should have known about them. Therefore, the Court GRANTS the motion to dismiss this cause of action against City, with leave to amend should Plaintiffs be able to allege specific facts giving rise to an inference of *Monell* liability.”)

***Tien Van Nguyen v. City of Union City***, No. C–13–01753–DMR, 2013 WL 3014136, \*9, \*10 (N.D. Cal. June 17, 2013) (“Plaintiff’s *Monell* allegations are little more than conclusory. Although the allegations allude to the possibility of a deficient policy regarding the use of canines, they do not describe the policy. Plaintiff’s broad charges are insufficient to give fair notice to the City about the specific basis for municipal liability, such that the City could defend itself. . . .Plaintiff has thus failed to sufficiently allege a Section 1983 claim against the City for municipal liability and Defendants’ motion to dismiss this claim is granted with leave to amend.”)

***Mateos-Sandoval v. County of Sonoma***, 942 F.Supp.2d 890, 898-900 (N.D. Cal. 2013) (“The Supreme Court, in *Leatherman v. Tarrant Narcotics Intelligence and Coordination Unit*, cited with approval to *Karim–Panahi* in rejecting a ‘heightened pleading standard’ for *Monell* claims. . . . *Karim–Panahi* has not been overruled, but the Ninth Circuit has recognized that, under the Supreme Court’s recent pleading jurisprudence, it is no longer clear that, without more, an allegation that an officer’s conduct ‘conformed to official policy, custom, or practice’ continues to be sufficient to state a claim under *Monell*. See *A.E. ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 637–38 (9th Cir.2012); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Iqbal*,

556 U.S. at 678. In *Starr v. Baca*, the Ninth Circuit attempted to reconcile the apparent inconsistency between the Supreme Court’s decisions in *Twombly* and *Iqbal* and other recent cases in which the Court construed Rule 8(a) in a way that would permit more claims to survive a motion to dismiss. . . . Recently, in *A.E. ex rel. Hernandez v. County of Tulare*, the Ninth Circuit applied the *Starr* standard to a *Monell* claim. . . . In the present case, as in *A.E.*, Plaintiffs base their *Monell* claims on the theory that County Defendants had deliberate customs, policies, or practices that were ‘the “moving force” behind the constitutional violation [Plaintiffs] suffered.’ . . . But Plaintiffs’ allegations, in contrast those offered by the plaintiffs in *A.E.*, specify the content of the policies, customs, or practices the execution of which gave rise to Plaintiffs’ Constitutional injuries. . . . Plaintiffs allege that County Defendants ‘routinely enforce’ § 14602.6 by: seizing and impounding vehicles on the basis that the driver does not have a current, valid California driver’s license, including when the vehicle was not presenting a hazard or a threat to public safety; keeping the vehicle [even though] someone was available to pay the impound fee to date, usually for the 30 day period specified by § 14602.6; seizing and impounding vehicles even though the driver has previously been licensed, whether in California or a foreign jurisdiction; failing and refusing to [provide] a hearing on the justification for impounding the vehicle for 30 days; failing and refusing to provide notice of the reason for impounding the vehicle for 30 days; and, on information and belief, charging an above-cost administrative fee. (Docket No.1, at p. 4.) These allegations, in contrast those set out by the plaintiffs in *A.E.*, specify the content of the policies, customs, or practices the execution of which gave rise to Plaintiffs’ constitutional injuries. . . . The allegations are sufficient to ‘give fair notice and to enable the opposing party to defend itself effectively,’ particularly since information relating to the policies, customs, and practices of County Defendants in enforcing § 14602.6 and related statutory sections is likely to be easily available to them. . . . As to *Starr’s* second prong—whether the allegations ‘plausibly suggest entitlement to relief’—it is inherently plausible that Plaintiffs’ constitutional claims, which largely are based in the alleged misconstruction of or failure to comply with California statutory law, arose as a result of the County Defendants’ customs, policies, or practices. . . . To the extent that Plaintiffs’ allegations relating to each individual Constitutional claim satisfy Rule 8(a), plaintiffs therefore have pled facts sufficient to state a claim that County Defendants are liable under *Monell*.”)

***Brown v. Contra Costa County***, No. C 12–1923 PJH, 2012 WL 4804862, \*11, \*12 (N.D. Cal. Oct. 9, 2012) (“Prior to *Iqbal* and *Twombly*, the long-standing rule was that a plaintiff need only make ‘a bare allegation that the individual [defendants’] conduct conformed to official policy, custom, or practice.’ *Karim—Panahi*, 839 F.2d 621, 623 (9th Cir.1988). Indeed, the Supreme Court rejected a heightened pleading standard for *Monell* claims in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). While neither *Iqbal* nor *Twombly* overruled *Leatherman*, the pleading standard for *Monell* claims has been thrown into question, and, in the Ninth Circuit at least, appears to have been modified. In *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir.2011), *cert. denied*, 132 S.Ct. 2101 (2012), the Ninth Circuit considered the impact of *Iqbal* and *Twombly*, and concluded that a pleading of municipal liability ‘must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively,’ and that the facts must ‘plausibly suggest an entitlement to

relief.’ *Id.* at 1216 (citations omitted); *see also AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 636–38 (9th Cir.2012) (noting impact of recent Supreme Court decisions, including *Twombly/Iqbal*, on pleading standards, and applying *Starr* to municipal liability claims, holding that ‘plausible facts supporting a policy or custom ... could ... cure[ ] the deficiency in [a] Monell claim’). Here, the court finds that while the FAC alleges all three bases for *Monell* liability, it asserts legal conclusions only. That is, there are no facts pled in support of any of these theories of liability. Accordingly, the motion to dismiss must be GRANTED with leave to amend to allege facts sufficient to state a claim against the County under §§ 1981 and 1983.”)

***Cannon v. City of Petaluma***, No. C 11–0651 PJH, 2012 WL 1183732, at \*19 (N.D. Cal. Apr. 6, 2012) (“Prior to the U.S. Supreme Court’s decisions in *Twombly* and *Iqbal*, a claim of municipal liability based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice was sufficient to state a claim. . . However, the Supreme Court has now made clear that conclusory, ‘threadbare’ allegations that merely recite the elements of a cause of action will not withstand a motion to dismiss. . . In light of *Iqbal*, it appears that the prior Ninth Circuit pleading standard for *Monell* claims—‘bare allegations’—is no longer viable.”)

***Smith-Downs v. City of Stockton***, No. 2:10–cv–02495–MCE–GGH, 2012 WL 671932, at \*9, \*10 (E.D. Cal. Feb. 29, 2012) (“In arguing that the FAC sufficiently states a *Monell* claim against the City, Ulring, and Moore, Plaintiffs rely on the Ninth Circuit’s pre-*Iqbal* decision in *Karim–Panahi*, 839 F.2d 621, 624 (9th Cir.1988), which held that ‘a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a *bare allegation* that the individual officers’ conduct conformed to official policy, custom, or practice.’. . Plaintiffs’ reliance on pre-*Iqbal* law to demonstrate sufficiency of their complaint is misplaced. The Supreme Court in *Iqbal* made it clear that conclusory, ‘threadbare’ allegations merely reciting the elements of a cause of action cannot defeat the Rule 12(b)(6) motion to dismiss. . . Thus, a viable *Monell* claim against the City, Ulring and Moore requires more than ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’. .The FAC does not contain *any* factual allegations plausibly demonstrating that the City, Ulring or Moore had official or de facto policies of failure to train police officers and deputy sheriffs. Plaintiffs have failed to identify what training practices the City, Ulring or Moore had and how these practices were deficient. . . Accordingly, construing the facts in the light most favorable to the non-moving party, the Court finds that Plaintiffs have failed to state a *Monell* claim upon which relief can be granted.”)

***Tandel v. County of Sacramento***, Nos. 2:11–cv–00353–MCE–GGH, 2:09–cv–00842–MCE–GGH, 2012 WL 602981, at \*17 (E.D. Cal. Feb. 23, 2012) (“A pre- *Iqbal* Ninth Circuit decision held that ‘a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice.’ *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir.2007). However, the Supreme Court in *Iqbal* made it clear that conclusory,

‘threadbare’ allegations merely reciting the elements of a cause of action cannot defeat the Rule 12(b)(6) motion to dismiss. . . Thus, a *Monell* claim against the County requires more than ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’ “)

***J.K.G. v. County of San Diego***, No. 11CV305 JLS (RBB), 2011 WL 5218253, 7 (S.D. Cal. Nov. 2, 2011) (“In order to withstand a motion to dismiss for failure to state a claim, a *Monell* claim must consist of more than mere ‘formulaic recitations of the existence of unlawful policies, customs, or habits.’ *Warner v. Cnty, of San Diego*, 2011 U.S. Dist. LEXIS 14312, at \*10 (S.D.Cal., Feb. 14, 2011). Prior to the Supreme Court’s holdings in *Twombly* and *Iqbal*, the Ninth Circuit had held that ‘a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss “even if the claim is based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice.”’ . . In light of *Twombly* and *Iqbal*, however, something more is required; mere conclusory allegations are insufficient. . . Here, the Court finds that Plaintiff’s complaint does not meet the pleading requirements of *Twombly* and *Iqbal*. Plaintiff merely recites the existence of unlawful policies, practices, and customs, without supporting these conclusory allegations with specific facts. Plaintiff has provided no facts from which to infer that the County ‘condones’ the use of excessive force, unlawful searches and seizures, or the filing of false police reports, outside this one alleged instance.”)

***Von Haar v. City of Mountain View***, No. 10-CV-02995-LHK, 2011 WL 782242, at \*5 n.2 (N.D. Cal. Mar. 1, 2011) (“The Ninth Circuit does not appear to have considered whether the Supreme Court’s decisions in *Iqbal* and *Twombly* would require something more than ‘bare allegations’ regarding municipal liability. Here, however, Plaintiff alleges more than bare legal conclusions and identifies three specific areas in which the City of Mountain View, pursuant to practice and custom, allegedly fails to adequately train its officers. Such a claim is cognizable under Section 1983, although liability will not ultimately attach unless Plaintiff can prove deliberate indifference.”)

***Kelly v. Spokane Airport Bd.***, No. CV-10-0312-LRS, 2011 WL 204867, 4 (E.D. Wash. Jan. 20, 2011) (“Taking all of Plaintiff’s allegations together, the Court finds Plaintiff has sufficiently pleaded a claim of municipality liability against SIA. Plaintiff has gone beyond the minimal ‘bare allegations’ standard followed by the Ninth Circuit. Plaintiff has alleged Defendant Olsen deprived Plaintiff of certain constitutional rights, that Defendant SIA had a policy which amounts to deliberate indifference to Plaintiff’s and others’ constitutional rights, that the Defendants acted pursuant to such policy, and that the policy was the moving force behind the constitutional violations. Plaintiff has plausibly alleged facts which suggest but do not prove that the Defendants may have legal liability herein. However, without basic discovery, Plaintiff cannot reasonably be expected to go further at this time. Plaintiff is not required at this stage in the litigation to state with any *extra* specificity the nature and extent of this de facto policy by Defendant. Defendant SIA’s motion to dismiss should be denied in this respect.”)

*Canas v. City of Sunnyvale*, No. C 08-5771 JF (PSG), 2011 WL 1743910, at \*6, \*7 (N.D. Cal. Jan. 19, 2011) (“Despite the length of these allegations, the Court concludes that the facts alleged are insufficient to support a theory of municipal liability. Although ‘[t]he Ninth Circuit has held that a bare allegation that individual officials’ conduct conformed to official policy, custom, or practice suffices to plead a *Monell* claim in this circuit’[citing cases], these cases no longer are controlling in the post-*Iqbal/Twombly* era. . . . Although Plaintiffs have been litigating their claims for more than three years and have had several opportunities to amend, their *Monell* allegations still are conclusory in nature. Other than alleging that the officers’ EMT training was inadequate [to] enable them to assist the Decedent after he was shot, Plaintiffs do not explain in detail *how* the City’s alleged policies or customs are deficient, nor do they explain *how* the alleged policies or customs caused harm to Plaintiffs and the Decedent. . . . [On the inadequate training claim], [a]lthough Plaintiffs allege that the City provides less training in police work than is required by POST standards, they do not identify the relevant standards or otherwise explain how the City’s policies result in ‘diluted training.’. . . To the extent that Plaintiffs’ seek to establish municipal liability based on the theory that the City ratified the alleged unconstitutional conduct of the officers, the claim also fails to meet the *Iqbal* standard. Plaintiffs’ ratification claim appears to be based solely on the fact that the City’s investigation did not result in disciplinary action against the officers.”)

*Ward v. Nevada*, No. 3:09-CV-00007-RCJ-VPC, 2010 WL 1633461, at \*5 (D. Nev. Feb. 26, 2010) (“Here, plaintiff’s complaint mentions that one of the defendants failed ‘to instruct, supervise, and train their employees and agents’ in the delivery of medical care to detainees. . . . Then plaintiff alleges that both defendants acted ‘pursuant to policies, customs, practices, rules, regulations, ordinances, statutes and/or usages of the State of Nevada.’. . . These bare allegations lack the required factual content to overcome a motion to dismiss. The Supreme Court has explained in *Iqbal* that, under Federal Rule of Civil Procedure 8(a), a plaintiff must support claims with factual content. . . . However, *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 624 (9th Cir.1988), notes that § 1983 claims for municipal liability can be ‘based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice.’ The Ninth Circuit’s ruling in *Karim-Panahi* gathered support under *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993), which rejected any heightened pleading standard with respect to § 1983 claims for municipal liability. *Accord Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (holding that plaintiff in Title VII discrimination claim need not allege ‘specific facts’ beyond those necessary to state a claim). Nonetheless, *Leatherman* held that the pleading of municipal liability claims is to remain consistent with those standards under Rule 8. *See Leatherman*, 507 U.S. at 168. Turning to the most recent controlling law on Rule 8, *Iqbal* and *Twombly* declare that allegations must be supported by factual content, and the Court makes no exceptions for § 1983 municipal liability claims. Therefore, plaintiff’s amended complaint should seek to include factual content to support his allegations.”).

**Coric v. County of Fresno**, No. 1:08cv1225 JTM (BLM), 2010 WL 364322, at \*3, \*4 (E.D. Cal. Jan. 25, 2010) (“Plaintiff alleges that despite Sheriff Mims’ ‘warning’ to county officials of the over crowding and under staffing in the jail, the County continued to inadequately fund the jail, even after Plaintiff was beaten in the absence of sufficient supervision. . . Construing this factual allegation as true and in the light most favorable to Plaintiff, the Court finds it is possible to draw an inference that the County acted consciously in its budget decisions regarding funding to the jail. . . . Plaintiff alleges, ‘the County of Fresno were [sic] well aware that they were under staffed[ ] for the amount of inmates housed in Fresno County Jail’ and ‘ignored the risk of injuries (in this case serious) as a result of *being under staff* [sic].’ . . Plaintiff further states, among other things, ‘the Sheriffs dept. had clearly informed the County that the over-crowding and under staffing was a real issue.’ . . Again, if the Court assumes the factual content of Plaintiff’s Complaint to be true, the information about under staffing and over crowding that was given to County officials by Sheriff Mims, and the attack on Plaintiff itself (documented in letters and medical reports), provide a plausible claim that both the Sheriff and County knew, or that it was obvious, that over crowding and under staffing would eventually lead to a violation of detainees’ constitutional right to protection. . . . According to Plaintiff, had there been sufficient numbers of officers on duty at the time he was attacked, the attacks would not have happened, nor would the perpetrators have had the time and opportunity to drag him back to the scene for a second beating when he attempted to leave for help. Plaintiff asserts ‘there wasn’t *any* staff watching out for inmates safety during the time Plaintiff was [ ] beaten! Plaintiff wasn’t beaten once (1), but *twice* (2), Plaintiff dragged back to a second beating for attempting to leave and find *someone* to *Help* him. A period of time passed for both attacks to happen.’ . . Taken as true, and construed in the light most favorable to the Plaintiff, these facts lead to a reasonable inference that inadequate funding for sufficient staff presence led to the attack on Plaintiff. Having assessed the four conditions that need to be alleged under *Monell*, the Court finds Plaintiff’s Complaint contains sufficient factual matter, accepted as true, that allows the Court to draw a reasonable inference of liability on the part of Defendant. *Iqbal*, 556 U.S. \_\_\_, 129 S.Ct. at 1949, 173 L.Ed.2d 868 (2009).”).

**Kassim Abdulkhalik v. City of San Diego**, No. 08CV1515-MMA (NLS), 2009 WL 4282004, at \*10, \*11 (S.D. Cal. Nov. 25, 2009) (“A plaintiff has alleged sufficient facts to assert a *Monell* claim ‘ Aeven if the claim is based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice.’” *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 624 (9th Cir.1988) (quoting *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir.1986)). Here, Plaintiff’s allegations are sufficient under the standards set forth *supra*. Specifically, Plaintiff alleges: Defendant City of San Diego effectively has condoned and ratified the use of excessive and unnecessary force and other violations of constitutional rights of persons in San Diego by failing to thoroughly investigate such violations, punish those responsible, and modify its training, procedures, and policies to prevent the recurrence of same, which caused the violation of Kassim Abdulkhalik’s rights. By ratifying and condoning the violation of its citizens’ constitutional rights, including the rights of Mr. Abdulkhalik, Defendant City of San Diego has encouraged the future use of excessive force and other constitutional violations. . . Plaintiff alleges that the City has adopted a custom or policy of failing to investigate

violations of constitutional rights or modify its training, procedures, and policies to prevent future constitutional violations. Plaintiff alleges that by adopting this policy, the City has essentially condoned and ratified the use of excessive and unnecessary force, which led to the injuries ultimately alleged by Plaintiff. Plaintiff also alleges facts to support his allegations that the City indeed has such a policy by alleging facts that McBeth filed a complaint of harassment with the San Diego Police Department against McMurrin, but that the SDPD never contacted Mr. Abdulkhalik in connection with this complaint and never bothered to tell Mr. McBeth how his complaint was addressed – if at all.’ (*Id.* at & 16.) Plaintiff’s allegations are sufficient to state a claim for liability under *Monell*. Thus, the Court hereby **DENIES** Defendants’ motion for judgment on the pleadings on this claim.”).

*Carnes v. Salvino*, No. CV-08-1846-PHX-GMS, 2009 WL 2568643, at \*5 (D. Ariz. Aug. 18, 2009) (“ ‘In [the Ninth Circuit], a claim of municipal liability under § 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice.’” *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir.2007); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 682-83 (9th Cir.2001); *Peschel v. City of Missoula*, No. CV 08-79- M-JCL, 2009 WL 902438, at \*4 (D. Mont. Mar. 27, 2009) (citing multiple Ninth Circuit district court cases that have applied the “bare allegations” standard post-*Twombly* ).”)

*Young v. City of Visalia*, No. 1:09-CV-115 AWI GSA, 2009 WL 2567847, at \*6 (E.D. Cal. Aug. 18, 2009) (“In light of *Iqbal*, it would seem that the prior Ninth Circuit pleading standard for *Monell* claims (i.e. “bare allegations”) is no longer viable.”).

## **TENTH CIRCUIT**

*McCubbin v. Weber County*, No. 1:15-CV-132, 2017 WL 3394593, at \*20 (D. Utah Aug. 7, 2017) (“In this case, Plaintiffs’ allegations hue much more closely to municipal action or inaction that *itself* violated federal law, rather than a single bad decision tied to a facially valid policy or practice. Thus, issues of fault and causation are less difficult here. Plaintiffs allege that Weber County’s policy of identifying who to serve with the gang-specific injunction *itself* violated the Constitution by being wholly discretionary, and inviting subjectivity and improper ethnic considerations into the service and enforcement of the injunction. Plaintiffs’ allegations also appear to involve a pattern of tortious conduct by Weber and Ogden agents: Hispanics were disproportionately targeted and served, at least two non-gang members were successfully prosecuted under the injunction, and at least two non-gang members remain on a gang database for future enforcement actions. Whether these pattern allegations simply reinforce the claim that municipal policy or practice itself violated the constitution, or also suggest some other, narrower theory of liability, such as failure to train or supervise, the allegations plausibly support an inference of deliberate indifference on the part of the municipality itself to the consequences of the policy or practice, that is, injury to the Plaintiffs’ First Amendment and due process rights. And whether these allegations more appropriately support that a decisionmaker, like Mr. Allred, promulgated an actual policy

attributable to the County, or that the County permitted a practice so persistent as practically to have the force of law—or whether the evidence fails to live up to either view—will become apparent as discovery proceeds. . . For now, the allegations on the whole support both theories. Plaintiffs have stated plausible § 1983 claims for municipal liability in these circumstances.”)

***Bark v. Chacon***, No. 10-cv-01570-WYD-MJW, 2011 WL 1884691, at \*3, \*4 (D. Colo. May 18, 2011) (“Here, I find that Plaintiff’s allegations regarding the City’s and County’s failure to adequately train and supervise its police officers are not sufficient to state a claim for municipal liability under § 1983 and Fed.R.Civ.P. 12(b)(6). While Plaintiff generally alleges that the City and County have not properly trained or supervised the individual Defendants with respect to certain tasks such as obtaining search warrants, recognizing exigent circumstances, giving *Miranda* warnings, questioning suspects, as well as concepts of reasonable suspicion and probable cause, he fails to allege specific deficiencies in training and supervision, or explain how the incident described in the Amended Complaint could have been avoided with different or better training and supervision. Mere conclusory allegations that an officer or group of officers are unsatisfactorily trained will not ‘suffice to fasten liability on the city.’. . . Even construing the allegations in the Amended Complaint in the light most favorable to Plaintiff, I find that Plaintiff has set forth only a ‘formulaic recitation’ of the elements of a § 1983 claim based on failure to train and supervise and, therefore, Plaintiff’s claims against the City and County based on inadequate training and supervision should be dismissed under Fed.R.Civ.P. 12(b)(6).”)

***Twitshell v. Hutton***, No. 10-cv-01939-WYD-KMT, 2011 WL 318827, at \*6 (D. Colo. Jan. 28, 2011) (“[H]ere, since Plaintiff has set forth only a ‘formulaic recitation’ of the elements of a § 1983 claim based on failure to train, Plaintiff’s inadequate training allegation should be dismissed against the City under Fed.R.Civ.P. 12(b)(6).”)

## ELEVENTH CIRCUIT

***Hoefling v. City of Miami***, 811 F.3d 1271, 1280 (11th Cir. 2016) (“Although Mr. Hoefling may ultimately have to identify (and provide proof concerning) a single final policymaker in order to survive summary judgment or prevail at trial, . . . we do not think that he had to name that person in his complaint in order to survive a Rule 12(b)(6) motion. All he needed to do was allege a policy, practice, or custom of the City which caused the seizure and destruction of his sailboat. And that, as we detail below, he did.”)

***Banuchi on behalf of the Estate of Foster v. City of Homestead***, No. 20-25133-CIV, 2021 WL 2333265, at \*5–6 (S.D. Fla. June 8, 2021) (“In count four, Banuchi alleges the City had a number of unofficial customs or practices, falling, more or less, into three general categories: (1) insufficient investigations or processing of complaints of officer misconduct . . . (2) inadequate recordkeeping . . . and (3) maintenance of a ‘code of silence’ among City officers. . . According to Banuchi, these practices resulted in Foster’s shooting death. . . In its motion to dismiss, the City argues that, despite summarily identifying a long list of what Banuchi describes as ‘de facto

policies, practices and/or customs,' Banuchi has failed to set forth any actual factual allegations establishing that the City has a widespread pattern and practice of inadequately handling police misconduct complaints, insufficient recordkeeping, or an improper 'code of silence.' The Court agrees. Banuchi says that the factual basis of her claim rests on her allegations of the City's 'continued use of an officer with a well-known history of on-duty shootings and on-duty killings of civilians.' . . Banuchi maintains her complaint 'alleges five prior on-duty shootings plus a catalogue of other misconduct and police violence by Green prior to the Foster shooting.' . . She also says that count four 'details the customs and practices that allowed Green to remain armed despite numerous on-duty shootings and numerous investigations into alleged excessive force, neglect of duty, unbecoming conduct, unreasonable searches and seizures, illegal arrests, illegal seizures, and other misconduct.' . . But Banuchi's allegations, along with her characterization of those allegations, are problematic. First, the vast majority of Banuchi's allegations are comprised of vague and conclusory assertions, devoid of factual support. For example, Banuchi lists dozens of 'de facto policies, practice, and/or customs' . . . but provides no factual support that would establish the necessary widespread and persistent practice required for municipal liability. Similarly, Banuchi's vague claims that 'complaints have been lodged against ... Green for excessive force, neglect of duty, unbecoming conduct, unreasonable search and seizure, illegal arrest, illegal seizure, and other misconduct' . . . are both factually unsupported and, in any event, insufficient. Banuchi provides no context for the 'complaints': Who submitted them? When were they submitted? To whom were they submitted? How many were there? What did they say? Further, even if Banuchi had set forth facts supporting the existence of the alleged complaints, she fails to allege whether the complaints were ever substantiated in any way. Lastly, her reference to Green's having 'used deadly force against three others and excessive force not resulting in death against a fourth' . . . is also conclusory and vague: missing is any allegation that the deadly force was improper or any facts showing that the force, against the fourth person, was actually excessive. Banuchi's summarily labelling it as excessive, is simply not enough. Banuchi's separate allegations, as to Green's prior shooting incidents, elsewhere in her complaint fare no better. While she provides more details about the shootings, she fails to even allege that any of them amounted to excessive force. . . In sum, Banuchi fails to allege facts supporting the kind of widespread, known, and substantially similar constitutional violations that are required to state a *Monell* against the City. Second, Banuchi's characterization of her complaint's allegations, in her response, is misleading. She argues that her complaint 'alleges ... a catalogue of ... misconduct and police violence by Green prior to the Foster shooting.' . . Tellingly, she provides no citation to her complaint to support her claim. And, indeed, there is no factual support for Banuchi's portrayal of Green's prior 'misconduct' or unconstitutional 'police violence' anywhere in the complaint. Accordingly, then, Banuchi has failed to allege facts showing a pattern of prior known, constitutional violations that rise to the level of establishing any kind of unofficial policy that could have led to Green's shooting of Foster. Accordingly, the Court dismisses count four. . . . In count five, Banuchi identifies a number of City 'failures': a failure to maintain or utilize an 'early warning system' to detect personnel problems . . . a failure to identify officers with the highest numbers of complaints . . . and a failure to 'act on' the identification of officers with the highest number of personnel complaints[.] . . Once again, like her allegations in count four, Banuchi's

claims of ‘de facto policies, practices, and/or customs’ are wholly unsupported by any accompanying facts. The cases Banuchi relies on as support prove the point: in contrast to her own allegations, the complaints in those cases allege actual facts establishing a history of excessive force. . . And so, for the same reasons set forth above, in the preceding section, the Court dismisses count five because Banuchi fails to allege facts showing a pattern of prior known, constitutional violations that rise to the level of establishing an unofficial policy that led to Green’s shooting of Foster.”)

***Burns v. City of Alexander City***, 110 F.Supp.3d 1237, 1250 (M.D. Ala. 2015) (“As to the Alexander City Defendants’ contention that the Second Amended Complaint does not satisfy the basic requirements of notice pleading, Plaintiffs argue that they have alleged enough at this point, in light of Judge Thompson’s holding in *Porter*, *supra*, in which the plaintiffs brought a claim for § 1983 municipal liability against the City of Enterprise, Alabama. . . . The complaint in *Porter* and the Second Amended Complaint in the present case are similar enough that *Porter* is persuasive. Here, Plaintiffs allege that a deliberate indifference is at work in Alexander City based on what Plaintiffs contend are acts of unlawful uses of force prior to Mr. Crayton’s death that were known to Alexander City, which is like enough to arguing a ‘consistent’ failure by the City to train. Upon consideration of *Porter*, the Alexander City Defendants’ argument that the Second Amended Complaint is insufficient under *Twombly*, *Iqbal*, and Rule 8, Fed.R.Civ.P., is not compelling. . . . Accordingly, the motion to dismiss the municipal liability claims is due to be denied.”)

***Bell v. Shelby County, Ala.***, No. 2:12–CV–2991–LSC, 2013 WL 5566269, \*3-\*5 (N.D. Ala. Oct. 8, 2013) (“Counties in Alabama do not participate in the day to day governance of the jail or the creation of its policies; they merely provides the funding. . . Nonetheless, a county may be liable if its failure to provide funding ‘constituted deliberate indifference to a substantial risk of serious harm to the prisoners.’. . In this case, therefore, Shelby County could be liable for its own actions in providing (or failing to provide) the funding for the jail. Plaintiff must therefore plead facts that allow the court to plausibly infer that the County government acted with deliberate indifference regarding this funding. In her pleadings, Plaintiff alleges two potential factual bases for a finding of deliberate indifference on the part of Shelby County. First, she alleges the County failed to provide funding for the medical treatment of prisoners. . . Secondly, Plaintiff alleges Shelby County failed to provide funding for the maintenance of the jail, including its plumbing system. . . The factual support for these two claims varies greatly in Plaintiff’s pleadings, and the Court will thus address them separately. The first claim, regarding funding for the medical treatment of prisoners, is due to be dismissed. In *Ancata*, the Eleventh Circuit held that counties had a non-delegable duty to provide for indigent prisoners’ medical treatment. . . Thus, if Shelby County had taken any action that contributed to the violation of Allred’s constitutional right to treatment, it could not hide behind an outside contractor to avoid liability for it. However, this does not absolve Plaintiff of her duty to plead facts that plausibly allege that the County actually did something to contribute to the violation. . . Here, Plaintiff alleges only that ‘the lack of funding for appropriate medical care for inmates, caused or contributed to the utter denial of treatment to Allred, as a cost saving mechanism.’. . This conclusory statement cannot suffice to survive a motion to dismiss,

especially when Plaintiff has not even pleaded any facts that support a conclusion that a lack of funding existed in the first place. Plaintiff presents no facts, or even allegations, concerning the jail's budget, or any decision by the County to cut or limit that budget by limiting prisoner healthcare. Plaintiff provides no factual basis to infer that the jail nurse who turned Allred away without treatment did so because of a lack of funding. She does not allege that jail officials failed to notice Allred's illness because the jail was understaffed or because of security problems that could be tied to a funding failure. . . Likewise, Plaintiff presents no facts alleging that any of the other incidents mentioned in her Third Amended Complaint were caused by a lack of funding. . . Even in *Ancata*, which was decided prior to the Supreme Court's abrogation of the 'any set of facts' standard, the Plaintiff provided considerably more substance from which to infer a lack of funds from the county. . . In that case, the prisoner was twice denied treatment until a court order was obtained, so the court could legitimately infer at least the possibility of a county policy requiring such an order. . . Here we have only the fact that the decedent received no treatment. The Court is permitted to infer 'obvious alternative explanation[s]' that reflect lawful conduct instead of the violations Plaintiff claims. . . The facts here make it at least as likely that Shelby County properly funded a contract that should have served the prisoners' needs, and that the denial of treatment stemmed from either the mistakes or the deliberate indifference of entities other than Shelby County. The County cannot be held liable under § 1983 for any actions not its own. . . Therefore, Plaintiff has not stated a claim against Shelby County for failure to fund medical treatment, and this claim must be dismissed. It does not follow, however, that the same result must be reached regarding Plaintiff's allegations that Shelby County failed to properly fund the maintenance of the jail. Plaintiff provides considerably more factual support for this claim. She claims that the plumbing system was not maintained in proper order. More specifically she alleges that drinking fountains were inoperable and that the hot water regulation failed at multiple times during Allred's incarceration. Because this regulation failed, the water was sometimes too hot to cup in one's hands or drink. Deterioration in the physical upkeep of the jail can serve as the basis of a complaint that prisoners' constitutional rights have been violated. . . While the maintenance problems alleged in the present case may not be as severe as those in *Marsh*, the Court is not prepared to dismiss this claim. Plaintiff further alleges that the plumbing problems in the jail contributed to Allred's injuries by leading to dehydration, which is one cause of hepatic encephalopathy. Dehydration could also have contributed to the severity of Allred's bronchopneumonia. The Court may thus plausibly infer that Shelby County's failure to maintain the jail was one cause of Plaintiff's injuries. At the least, these facts form a framework that makes it reasonably likely that discovery will reveal further evidence. . . Therefore, Plaintiff's claim against Shelby County set out in Count I for failure to maintain the plumbing system in the jail survives this motion to dismiss.")

***Rykard v. City of Dothan***, No. 1:10-cv-868-MHT, 2011 WL 3875609, at \*3 (M.D. Ala. Aug. 9, 2011) ("The City argues that Plaintiff fails to point to any pervasive custom or practice of city jail personnel failing to give prisoners the medication. However, a review of the complaint clearly shows that Plaintiff specifically averred '[t]he City of Dothan through its agents and employees and pursuant to a policy of the city failed to provide the plaintiff with the medication prescribed.'")

. Further, there is no heightened pleading standard as to § 1983 claims asserted against municipal defendants. . . Thus, Plaintiff must simply satisfy the basic pleading requirement of Fed.R.Civ.P. 8(a)(2) which requires a ‘short and plain statement of the claim showing that the pleader is entitled to relief.’ In order for the plaintiff to satisfy his ‘obligation to provide the grounds of his entitlement to relief,’ he must allege more than ‘labels and conclusions’; his complaint must include ‘[f]actual allegations [adequate] to raise a right to relief above the speculative level.’ . . Further, the Supreme Court has further stated that ‘[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face ... A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’ . . Turning to the complaint at issue, the Court finds that there are sufficient allegations which allow the Court to reasonably infer that the defendant may be liable for the alleged misconduct. Taking the facts as true – as the Court must do – Plaintiff informed numerous jail personnel of her worsening medical condition and all these personnel ignored and neglected her over some period of time. There are reasonable facts to infer that a policy and custom exists where multiple city employees repeatedly ignore a detainee’s ongoing requests for medical care despite obvious serious symptoms. Thus, the Court determines that dismissal is inappropriate as this nascent phase of the lawsuit. The claim is more properly addressed at summary judgment.”)

**Cooper v. City of Starke, Fla.**, No. 3:10-cv-280-J-34MCR, 2011 WL 1100142, at \*6-\*8 (M.D. Fla. Mar. 23, 2011) (“To the extent Plaintiffs contend that Smith is subject to supervisory liability on the basis of a ‘failure to train and/or supervise,’ Plaintiffs have failed to identify any specific deficiency or deficiencies in Smith’s training and/or supervision of Watson and Crews. Moreover, Plaintiffs do not adequately allege that the failure to train amounted to deliberate indifference because Plaintiffs do not set forth any facts demonstrating that Smith had notice of a need to train and/or supervise. . . . Although, in their introductory paragraphs Plaintiffs assert in a conclusory fashion that Defendants have ‘tolerated, condoned and encouraged a pattern of brutality and excessive force,’ . . . the Amended Complaint is devoid of any facts in support of this contention. . . Thus, the Court finds that Plaintiffs’ vague references to unidentified failures, policies, and patterns are not sufficient to withstand a motion to dismiss. . . . Similar to the principles for supervisory liability, a municipality also may not be held liable for constitutional deprivations on the theory of *respondeat superior*. Upon review, the Court concludes that Plaintiffs’ boilerplate and conclusory allegations of municipal policy or practice – devoid of factual development – are insufficient to state a § 1983 claim. Plaintiffs fail to identify any *actual* policies or decision makers and, in describing only the single incident of force involving Plaintiffs, fail to offer any facts to support the existence of a widespread custom.”)

**Oliver v. City of Montgomery, Ala.**, No. 2:10-cv-467-MHT, 2011 WL 833954, at \*9 (M.D. Ala. Feb. 15, 2011) (“The Supreme Court has made it clear that courts may not impose a heightened pleading requirement for claims pursuant to 42 U.S.C. § 1983 against municipal entities. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68, 113 S.Ct. 1160, 1162-63, 122 L.Ed.2d 517 (1993). However, this Court does not attempt to

impose any kind of ‘heightened’ requirement, but rather the basic pleading requirements of Fed.R.Civ.P. 8. *See Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009). . . A careful review of the plaintiffs’ facts fail to show a claim that any deprivation of their rights was attributable to a policy or custom of the City of Montgomery.”)

***Robbins v. City of Miami Beach***, No. 09-20804-CIV, 2009 WL 3448192, at \*2 (S.D. Fla. Oct. 26, 2009) (“Here, Robbins’s alleges that the City of Miami Beach’s failure to investigate excessive force complaints is a ‘custom or policy’ that was the ‘moving force [behind] the constitutional violation’ at issue. . . In the pleadings, Robbins submits that the City has refused to properly investigate excessive force complaints and failed to discipline or prosecute police officers for using excessive force. The plaintiff claims that when incidents of excessive force are investigated, the investigation reports omit unfavorable evidence, exclude statements of non-police witnesses, and rely solely on the word of the police officers involved. These factual allegations are sufficient to support municipal liability for constitutional violations pertaining to excessive force. However, no facts whatsoever have been alleged to support municipal liability under § 1983 for equal protection violations or for the alleged conspiracy, and, therefore, these claims must be dismissed.”).

### **M. Ethical Concerns for Government Attorneys**

Note the ethical problems for government attorneys who might be required to defend both the government body and its employees. After *Monell*, there is the potential for a conflict of interest between the local government body and its employee when both are named as defendants in a § 1983 suit. It is in the interest of the local government unit to establish that the employee was not acting pursuant to any official policy or custom. The employee, on the other hand, may avoid or substantially reduce personal liability by asserting that his conduct was pursuant to official policy. *See Dunton v. County of Suffolk*, 729 F.2d 903 (2d Cir. 1984). *But see Patterson v. Balsamico*, 440 F.3d 104, 114, 115 (2d Cir. 2006) (“In *Dunton*, . . . this court declined to create a *per se* rule requiring disqualification whenever a municipality and its employees are jointly represented in a Section 1983 case. . . Rather, a case-by-case determination is required, and it is clear that the facts of this case do not rise to the level of those in *Dunton*. It is true that Gorman represented all defendants from the time this action was first filed on December 18, 2000 until shortly after this Court remanded the case to the district court. However, Gorman had successfully obtained the dismissal of all claims against all defendants in the district court, and there was no apparent conflict in the interests Gorman represented on appeal. Balsamico’s position was that he did not participate in the January 1999 incident. That position was not inconsistent with the County’s position. Moreover, on September 17, 2004, approximately five weeks before the commencement of trial on October 25, 2004, a new lawyer, Diodati, was substituted for Gorman to represent Balsamico. At trial, therefore, Balsamico was represented by counsel who had no potential conflict of interest. This case is materially distinguishable from *Dunton*, where the same attorney represented both the municipality and an individual defendant at trial and where there was an actual conflict of interest in the positions that were of benefit to the two clients. This Court has found a new trial unnecessary even where municipal counsel actually represented individual

officers employed by the municipality at trial where there was no actual conflict of interest. *Rodick v. City of Schenectady*, 1 F.3d 1341, 1350 (2d Cir.1993). The defense attorney in *Rodick*, as here, had jointly represented the municipality and individual police officers prior to trial, and had successfully sought dismissal of the claims against the municipality. Although, unlike this case, the same attorney remained on the case on behalf of the individual defendants throughout the trial, this Court concluded that whatever potential conflict may have existed did not require a new trial because defense counsel advanced and argued all possible defenses available to the officers, including the qualified immunity defense. . . . This case more closely resembles *Rodick* than *Dunton*. We required a new trial in *Dunton* because the defense attorney had in fact advanced arguments at trial that were directly contrary to the individual officer's interests. . . . It is clear that, as was true in *Rodick*, Balsamico cannot make the required showing of a sufficiently serious actual conflict of interest. The particular conflict cited in *Dunton* as inherent in Section 1983 actions against municipalities, namely that the municipality can escape liability by arguing that its employees were not acting within the scope of official employment while the employee can escape liability by arguing the opposite, is simply not present here. At no time did Gorman assert that Balsamico was acting 'outside the scope of his employment' during the January 1999 assault, as the attorney had in *Dunton*. Rather, Balsamico's defense, before and during trial, was that he had not actively participated in the January 1999 assault."); *Moskowitz v. Coscette*, No. 02-7097, 2002 WL 31541004, at \*2 (2d Cir. Nov.15, 2002) (unpublished) ("We have recognized that a potential conflict can arise between the interests of a municipal employee and the interests of the municipality when both are defendants in a lawsuit arising out of the municipal employee's alleged misconduct. See *Dunton v. Suffolk County*, 729 F.2d 903, 907 (2d Cir.1984). For the reasons that follow, however, we do not believe that any conflict of interest here warrants Rule 60(b)(6) relief. It is true that the fact that a police officer acts pursuant to orders can bolster a qualified immunity defense where the officer could reasonably have believed that he was not violating any rights. . . . It is also certainly possible that the jury would have viewed Coscette as less culpable had it perceived him merely to be following orders, and would not have awarded (or would have awarded lower) punitive damages. . . . Coscette's reliance on our decision in *Dunton v. Suffolk County*, 729 F.2d 903 (2d Cir.1984), is misplaced. In *Dunton*, the attorney representing the municipality and the officer sacrificed the officer's interests to those of the municipality by arguing that the officer acted not as a police officer but as an irate husband. *Id.* at 907-08. Here, in contrast, the defense attorney did not argue that Coscette's actions went beyond the scope of his employment, and the Town had in fact conceded that Coscette's actions were taken under the color of state law. There is simply no indication that at any time before, during, or after the trial the defense attorney took a position, advanced an argument, or adopted a strategy that benefitted the Town at Coscette's expense."); *Lieberman v. City of Rochester*, 681 F.Supp.2d 418, 425, 429, 430 (W.D.N.Y. 2010) ("District courts have interpreted *Dunton* to require disqualification of counsel representing both an individual officer and the municipal employer in Section 1983 cases only where counsel acts in a way that is *actually* against the officer's interests. . . . In other words, a potential conflict is insufficient to warrant disqualification; rather, the employee must show that an actual conflict exists. Further, in the absence of a showing of actual prejudice to the employee, the Second Circuit has declined to disturb jury verdicts against municipal employees in Section 1983 actions where

the employee was jointly represented with the municipality. . . . These post-*Dunton* decisions refute any suggestion by the Officers that *Dunton* stands for the proposition that joint representation of a municipality and its employee is prohibited in all Section 1983 cases. . . . Although the City's and the Officers' involvement in three separate proceedings arising from the same incident appears unusual, any potential conflict arising from their roles in those proceedings has been adequately addressed by the City's retention of outside counsel to represent it in the Article 75 proceeding and the Officers' Section 1983 lawsuit. To require the City to retain outside counsel in a third action – this case – without a demonstrable showing that Corporation Counsel is laboring under an actual conflict would impose an even greater financial burden on the City that is not justified under controlling precedent. My determination on the important and sensitive issues raised in this motion, however, does not exclude the possibility that circumstances may arise or change as this litigation proceeds that will necessitate revisiting those issues. For that reason, I deny the motion without prejudice to renewal.”).

In *Coleman v. Smith*, 814 F.2d 1142 (7th Cir. 1987), the Seventh Circuit noted that it was “troubled by the Second Circuit’s broad holding that after *Monell* an automatic conflict results when a governmental entity and one of its employees are sued jointly under section 1983.” *Id.* at 1147-48. The court in *Coleman* found no conflict of interest warranting disqualification where the Village acknowledged that the individual defendants were acting in their official capacities and where the claim against the Village was of an “entirely different character” than the claim against the individual defendants. *Id.* at 1148.

In *Silva v. Witschen*, 19 F.3d 725 (1st Cir. 1994), the court upheld an award of attorney fees to the City of East Providence, Rhode Island, for fees by counsel appearing for five individual defendants, and by the City Solicitor appearing on behalf of the City and the same five individuals in their official capacities. The First Circuit agreed that it was reasonable for the five defendants, in their individual capacities, to obtain representation by their own counsel while the merits of plaintiffs’ claims remained in litigation, since counsel to the City represented the individual defendants in their official capacities only.’ *Id.* at 732. The court also affirmed the disallowance of fees for counsel for the individual defendants for services rendered after the point in time when it became clear that no conflicts of interest precluded the individual defendants’ joint representation by counsel to the City.’ *Id.*

In *Atchinson v. District of Columbia*, 73 F.3d 418 (D.C. Cir. 1996), the court of appeals affirmed the district court’s denial of leave to amend the complaint on the eve of trial to name a police officer defendant in his individual, rather than official, capacity. The court noted that “the district court’s concerns regarding Officer Collins’s choice of counsel and litigation strategy seem well-founded.” *Id.* at 427. The court further observed:

Municipal officials sued only in their official capacities may early on, as here, agree to be represented by the municipality’s attorneys. Subsequently naming the officials in their individual capacities, however, may make continued joint

representation problematic, if not impossible. A municipality and officials named individually may have mutually exclusive defenses. For example, officials sued individually may find it advantageous to agree with a plaintiff that training was inadequate, for a jury might conclude that officials without proper training should not be liable for any harm caused. Because of these potential conflicts, it is possible that had the officials known all along of the potential for personal liability, they would never have agreed to joint representation at the outset. [*Id.*]

In *Johnson v. Board of County Commissioners for the County of Fremont*, 85 F.3d 489, 493-94 (10th Cir. 1996), the court adopts the following position on the conflict issue:

While some courts have held separate representation is required in the face of the potential conflict, *see, e.g., Ricciuti v. New York City Transit Auth.*, 796 F.Supp. 84, 88 (S.D.N.Y. 1992); *Shadid v. Jackson*, 521 F.Supp. 87, 90 (E.D.Tex. 1981), we decline to adopt a per se rule. We hold that when a potential conflict exists because of the different defenses available to a government official sued in his official and individual capacities, it is permissible, but not required, for the official to have separate counsel for his two capacities. *See Silva v. Witschen*, 19 F.3d 725, 732 (1st Cir. 1994); *Richmond Hilton Assocs. v. City of Richmond*, 690 F.2d 1086, 1089 (4th Cir. 1982); *Clay v. Doherty*, 608 F.Supp. 295, 303 (N.D.Ill. 1985). Obviously, if the potential conflict matures into an actual material conflict, separate representation would be required. [citing *Dunton* and *Clay*] Model Rules of Professional Conduct, Rule 1.7. Though separate representation is permissible, an attorney may not undertake only the official capacity representation at his or her sole convenience. Under Colorado Rules of Professional Conduct, Rule 1.2(c), a lawyer may limit the objectives of her representation only “if the client [consents] after consultation.” In the case where an attorney has been hired to represent a government official in only his official capacity in a suit where the official is also exposed to liability in his individual capacity but has no representation in that capacity, this rule serves an important function. When adhered to properly, the rule ensures the defendant is adequately informed about the workings of 42 U.S.C. § 1983 and the potential conflict between the defenses he may have in his separate capacities. Above all else, the attorney and the district court should ensure the official is not under the impression that the official capacity representation will automatically protect his individual interests sufficiently. Courts have recognized a “need for sensitivity” to the potential for conflict in this area, and have advised that “[t]he bar should be aware of potential ethical violations and possible malpractice claims.” *Gordon v. Norman*, 788 F.2d 1194, 1199 n. 5 (6th Cir. 1986) (quotation omitted). In the service of these interests, we embrace the Second Circuit’s procedure whereby counsel notifies the district court and the government defendant of the potential conflict, the district court determines whether the government defendant fully understands the potential conflict, and the government

defendant is permitted to choose joint representation. *See Kounitz v. Slaatten*, 901 F.Supp. 650, 659 (S.D.N.Y. 1995). In addition, the defendant should be told it is advisable that he or she obtain independent counsel on the individual capacity claim. We reinforce that, as with many issues relating to the relationship between attorney and client, the crucial element is adequate communication.

*See also DeGrassi v. City of Glendora*, 207 F.3d 636 (9th Cir. 2000), where the court affirmed the district court's rejection of a former city council member's claim to indemnification from the city for attorney fees incurred in defending a slander action. The city had complied with its obligation to provide a defense when it offered defense of the slander action against the city council member subject to the condition that the city control the litigation and approve of any potential settlement. The city council member rejected the offer and retained her own counsel. In rejecting her request for indemnification, the court noted that there is no authority entitling DeGrassi to retain independent counsel on the strength of her unilateral assertion of a conflict of interest involving the City. Section 995.2(a)(3) permits the public entity to refuse to provide a defense if it determines that the defense would create a conflict of interest between the entity and the employee. *See id.* That section does not entitle the employee to independent counsel simply because she asserts the existence of a conflict of interest.' *Id.* at 643.

In *Maderosian v. Shamshak*, 170 F.R.D. 335 (D. Mass. 1997), the court held that a conflict of interest that arose from town counsel's joint representation of the town, the town's selectmen, and the police chief, warranted relief from the judgment with respect to plaintiff's due process claim against the police chief in his individual capacity. Plaintiff, a part-time police officer, had sued defendants for terminating him without due process. The police chief, in his motion to set aside the judgement, submitted an affidavit in which he stated that, with respect to the termination of the plaintiff, town counsel had advised the police chief that plaintiff was an at will employee' who was not entitled to notice and a hearing prior to termination. *Id.* at 337. At the trial for the wrongful termination, town counsel did not elicit any testimony concerning his conversation with the police chief, the advice the chief had received or the fact that the chief had relied on counsel's advice. *Id.* at 341.

The court concluded:

There is no question that Town Counsel's dual representation of the Town, its Selectmen and Chief Shamshak presented a conflict of interest. Although in hindsight the potential conflict of interest should have been readily apparent, at the time of trial, I did not recognize this conflict and therefore, failed to inquire of the parties as to whether or not they were aware of the conflict, the potential prejudice which this conflict presented and whether they knowingly and voluntarily wished to proceed with Town Counsel as trial counsel in this matter. Chief Shamshak as a lay person cannot be expected to recognize the potential conflict and therefore, cannot be said to have waived his objection to multiple representation. . . . It is

obvious that there was an actual conflict of interest between Chief Shamshak and Town Counsel, who was also acting as his trial counsel and that Town Counsel's failure to advise Chief Shamshak to testify as to his conversation with Town Counsel, a conversation during which Town Counsel may have given Chief Shamshak erroneous legal advice, resulted in prejudice which may well have affected the jury's verdict in this case. Additionally, I am convinced that Chief Shamshak's interests may have been prejudiced by the actual conflict of interests created by Town counsel's simultaneous representation of him and the Town.

*Id.* at 340-42.

In *Guillen v. City of Chicago*, 956 F. Supp. 1416 (N.D. Ill. 1997), plaintiff sued the City and several police officers for their role in the death of her husband. The court denied plaintiff's motion to disqualify the City's corporation counsel from representing the paramedic employees of the City who transported her husband to the hospital and who were to be witnesses, but not parties, in the legal proceedings. The court held that City counsel could continue to represent the paramedics at their depositions, but with one caveat: City counsel must fully inform its clients of the pros and cons of joint representation. . . . For instance, what if the statements given to City Counsel by the paramedics do tend to establish liability of the City or the officers? What then? Under these circumstances, City counsel should candidly disclose the potential hazards of common representation to Marlow and O'Leary. The paramedics will then be in a position to decide whether or not retaining City counsel is in their best interests.' *Id.* at 1426, 1427.

## **II. HECK v. HUMPHREY & WALLACE v. KATO : INTERSECTION OF SECTION 1983 AND HABEAS CORPUS**

### **A. Heck v. Humphrey**

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that a state prisoner cannot bring a § 1983 suit for damages where a judgment in favor of the prisoner would necessarily imply the invalidity of his conviction or sentence.' *Id.* at 486. If a successful suit would necessarily have such implications on an outstanding conviction or sentence, the complaint must be dismissed and no § 1983 action will lie unless and until the conviction or sentence has been invalidated, either on direct appeal, by executive order, or by writ of habeas corpus. *Id.* at 487. The statute of limitations on the section 1983 claim would then begin to run from the time of the favorable termination. *See also Thomas v. Eschen*, 928 F.3d 709, 711-13 (8th Cir. 2019) ("Thomas's claim . . . collides with the rule from *Heck v. Humphrey*. In *Heck*, the Supreme Court held that a claim for damages is 'not cognizable under § 1983' if it would undermine a still-valid state criminal judgment. . . . To be sure, Thomas's claim involves a *civil*-commitment order, not a *criminal* conviction, and neither this court nor the Supreme Court has applied *Heck* in this particular context, at least in a published decision. . . . Even so, *Heck*'s logic reaches Thomas's wrongful-commitment claim too. . . . [A]s in *Heck*, Thomas is trying to use section 1983 to bring

what is essentially a malicious-prosecution claim. Courts have long recognized that individuals like Thomas can sue those who pursue ‘unfounded proceedings ... to have [them] declared insane’ for malicious prosecution, even if the proceedings are ‘not criminal in their nature.’ . . . To bring such an action, however, the plaintiff ordinarily has to ‘prove the termination of the former proceeding in his favor.’ . . . Given that Thomas has not done so, we have little trouble concluding that his claim ‘is not cognizable under § 1983.’ . . . To hold otherwise would undermine ‘finality and consistency’ and encourage ‘parallel litigation.’ . . . Thomas argues that *Heck* does not apply because his wrongful-commitment claim is based on the underlying ‘conduct’ of prison officials, not on the ‘fact of [his] civil commitment itself.’ He reasons that, because *Heck* does not apply to constitutional claims that, ‘if successful, would not necessarily imply that the ... conviction was unlawful,’ . . . his claim may proceed. His theory is that facts other than the deceptive and manipulative conduct of prison officials led to his commitment, particularly the extent of his mental illness. But Thomas’s attempt to distinguish this case from *Heck* conflicts with both his theory of the case and the description of the injury he allegedly suffered. He does not claim that encouraging him to misbehave, by itself, violated his constitutional rights or injured him. Rather, he alleges that relying on his misbehavior to *civilly commit him* is what gave rise to his cause of action. Indeed, as Thomas told the district court, his ‘constitutional rights were violated *because* [prison officials] obtained a civil commitment against him.’ . . . In short, Thomas’s real complaint is that he never should have been committed in the first place. This has also been his central argument throughout the Iowa proceedings, and each time the Iowa courts have disagreed with him. As long as those judgments stand, he cannot proceed with his wrongful-commitment claim.”); *Magee v. Reed*, 912 F.3d 820, 822-23 (5th Cir. 2019) (“Magee’s claims stem *not* from his arrest but from his denial of bail. In *Eubanks v. Parker County Commissioners Court*, we held that *Heck* was inapplicable to violations stemming from a denial of bail because a denial of bail has ‘no bearing’ on the validity of the underlying convictions. . . . Even assuming Magee was guilty of the crime he was arrested for, he was still entitled to bail under the Louisiana Constitution. LA. CONST. art. I, § 18. Success on Magee’s false imprisonment and free speech retaliation claims would not invalidate his initial arrest or guilty plea. Thus, the district court erred in relying on *Heck* to dismiss Magee’s false imprisonment and free speech retaliation claims.”); *Huber v. Anderson*, 909 F.3d 201, 208 (7th Cir. 2018) (“We recognize that many of Huber’s claims relate to events that are now more than 20 years in the past. But that is a natural consequence of the *Heck* rule. And this is not a situation in which the doctrine of laches has any role to play. As our account of Huber’s saga illustrates, he did try to contest his custody, but he was acting *pro se* and did not know what steps he needed to take. He did not sit on his rights. If wrongful custody lasts for a long time, then *Heck* will require both parties to litigate over dated civil claims. That is simply the price of the *Heck* doctrine, which normally ensures that civil litigation does not undermine the basis of criminal convictions and sentences.”); *Smith v. Hood*, 900 F.3d 180, 185-86 (5th Cir. 2018) (“This circuit has thus far applied the *Heck* doctrine only to claims that implicate criminal convictions or sentences. In Smith’s case, however, the district court concluded that there was ‘no reason not to’ apply *Heck* to the civil commitment context, citing other courts that have done so. . . . In *Huftile*, the Ninth Circuit reasoned that *Heck* is equally applicable to people who are civilly committed because, as with a criminal sentence, the appropriate avenue to challenge the

validity of civil confinement is through a habeas petition, not § 1983. . . Because *Heck*'s holding was based at least in part on 'prevent[ing] a person in custody from using § 1983 to circumvent the more stringent requirements for habeas corpus,' the Ninth Circuit held that *Heck*'s reasoning therefore applies to the civil commitment context as well. . . Though we note that the Ninth Circuit's and other courts' reasoning on this issue is persuasive, whether *Heck* extends to civil commitments is still a res nova question in this circuit. However, Smith's case is an unusual one because the parties, including Smith, all assume that the *Heck* doctrine does apply in a civil commitment case. Smith, in a peculiar move on appeal, concedes that *Heck* should bar any claim that would challenge the validity of his underlying civil commitment. He argues only that some of his claims are viable because they are, allegedly, conceptually distinct from the commitment itself. As to some of these claims, however, we reject his argument that they are, in fact, distinct. Additionally, he fails to demonstrate a denial of a federal right with regards to other claims. . . . Ultimately, we conclude that Smith raises only one § 1983 claim that is both conceptually distinct and asserts a denial of a constitutional right: his allegation that Defendants McMichael, Chastain, and Savoie confined him using leather and metal restraints in violation of his due process rights. . . . Smith's claim that those Defendants' use of restraints amounted to a due process violation is a challenge to the conditions of his confinement rather than the fact of his confinement itself, and is thus unquestionably not barred by *Heck*. . . As to this claim, the district court incorrectly concluded that 'any award for damages under the theories advanced by the plaintiff would necessarily include a finding by this court that he is wrongfully held [at the State Hospital].' Accordingly, we find that the district court erred by dismissing this claim."); *Karsjens v. Piper*, 845 F.3d 394, 406 (8th Cir. 2017) ("This action . . . would not necessarily imply the invalidity of any of the plaintiffs' commitment. See *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1140 (9th Cir. 2005) (noting *Heck* applies to civilly committed persons as well as prisoners). They do not allege that their initial commitment was invalid. Nor is it alleged that any specific class members should be immediately released. Instead, the plaintiffs claim that they should receive relief including regular, periodic assessment reviews to determine if they continue to meet the standards for civil commitment. It is conceivable that upon receiving an assessment none of the plaintiffs would be eligible for release, despite the district court's finding otherwise. Because the injunctive relief sought would not necessarily imply the invalidity of the plaintiffs' commitment, this action is not barred under *Heck* or *Preiser*."); *Kuhn v. Goodlow*, 678 F.3d 552, 555 (7th Cir. 2012) ("We have previously reserved judgment on whether *Heck* applies to 'an administrative proceeding or a finding of a violation of a city ordinance,' *Justice v. Town of Cicero*, 577 F.3d 768, 773 (7th Cir.2009), and we continue to reserve judgment until the issue can be more thoroughly considered from a carefully maintained record."); *Hoog-Watson v. Guadalupe County Tex*, 591 F.3d 431, 434 (5th Cir. 2009) ("For the purposes of a *Heck*-based motion for summary judgment, a proceeding's civil or criminal nature is a question of fact. . . . In other words, the existence (or not) of a prior criminal proceeding is, like many other concrete circumstances, a fact to be proven by the party asserting the § 1983 claim. . . . Thus, we evaluate the defendants' motion for summary judgment by determining whether Hoog-Watson's evidence created a genuine question of fact with respect to the animal cruelty proceeding's criminal or civil nature."); *Cogle v. County of Desoto, Miss.*, 303 F. App'x 164, 165 (5th Cir. 2008) ("*Heck* applies to proceedings that call into question the fact or duration of

probation. . . . The district court correctly recognized that the allegations of unlawful search and arrest in this case, if true, would necessarily imply the invalidity of the revocation of Cogle’s probation, which was based, at least in part, on the same search and arrest. Cogle has not demonstrated that the revocation of his probation has been reversed, expunged, set aside or called into question as required by *Heck* as a prerequisite for this case to proceed.”).

*See also Bryant ex rel. Bryant v. City of Ripley, Miss.*, No. 3:12CV37-B-A, 2015 WL 686032, at \*3 (N.D. Miss. Feb. 18, 2015) (“To date, the Fifth Circuit has had no occasion to address the role and effect of Section 43–21–51(5) for *Heck* purposes; so this court has no binding authority to guide it on the issue. A number of courts in other circuits have addressed the issue in similar circumstances, however. Among them is an Arizona district court in the case of *Dominguez v. Shaw*, No. CV 10–01173–PHX–FJM, 2011 WL 4543901 (D.Ariz. Sept. 30, 2011). In Arizona, as in Mississippi, a juvenile court adjudication ‘shall not be deemed a conviction of crime.’ . . . The minor plaintiff in *Dominguez* was adjudicated a delinquent for resisting arrest and later brought a § 1983 action to recover for, inter alia, alleged false imprisonment and excessive force claims. . . . Citing a number of cases in which various courts applied *Heck* to juvenile adjudications, the *Dominguez* court recognized that Arizona (like Mississippi) treats a minor who has committed a crime differently than an adult who has committed the same crime, but the court found no reason why this distinction should extend to *Heck* analysis. . . . The court stated, ‘Whether the juvenile court’s finding is labeled a conviction or an adjudication is, for *Heck* purposes, irrelevant.’ . . . This court finds accordingly.”)

## **B. Application to Fourth Amendment Claims**

In the wake of *Heck*, there has been considerable confusion and debate about whether and when certain Fourth Amendment claims might run afoul of the *Heck* rule that requires deferral of the § 1983 action until there has been a favorable termination of the criminal proceeding. Much of the confusion stems from a footnote in *Heck*, where the Court noted:

For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff’s still-outstanding conviction. Because of doctrines like independent source and inevitable discovery. . .and especially harmless error. . . such a § 1983 action, even if successful, would not necessarily imply that the plaintiff’s conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury. . . which, we hold today, does not encompass the ‘injury’ of being convicted and imprisoned (until his conviction has been overturned).

*Heck*, 512 U.S. at 487 n.7. *See also Ballenger v. Owens*, 352 F.3d 842 , 846, 847 (4th Cir. 2003) (*Heck* precluded § 1983 claim where suppression of evidence seized pursuant to challenged search would necessarily invalidate criminal conviction).

*But see Rollins v. Willett*, 770 F.3d 575, 576-77 (7th Cir. 2014) (“Rollins pleaded guilty. There isn’t any doubt that he *was* guilty—that he’d been driving on a suspended or revoked license. If he can prove that the action of the police in forcing him to get back in his car and show them his driving papers was unconstitutional, that cannot change the fact that he was driving without a valid license. Illegal searches and seizures frequently turn up irrefutable evidence of guilt. The evidence can be suppressed if the government attempts to present it at trial, but there was no trial. A finding that the defendant was illegally seized—the finding he seeks in this suit—would therefore have no relevance to the validity of his guilty plea and ensuing conviction. The case is like *Reynolds v. Jamison*, 488 F.3d 756 (7th Cir.2007). The plaintiff had pleaded guilty to telephone harassment and then brought a false-arrest claim. Whether the arresting officer had probable cause to arrest the plaintiff had no bearing on the validity of the guilty plea and conviction, and so *Heck* was irrelevant. *Id.* at 767. *Lockett v. Ericson*, 656 F.3d 892 (9th Cir.2011), is similar. The plaintiff had pleaded nolo contendere to charges that he was driving under the influence and then sued the police for having searched his home without probable cause and in the course of the search having obtained evidence concerning the DUI charge. The court held that whether the search had been unlawful could not affect the plaintiff’s conviction because the conviction had not been based on any evidence introduced against him, so again *Heck* was inapplicable. . . And in this case as well. The district judge did say that the ‘plaintiff should also understand that his remaining claims fail, even if they are not *Heck*-barred,’ such as his claim that the police had unlawfully demanded that he show them his driver’s license and when he refused ordered him out of the car and subjected him to a full custodial search and arrest. But the judge ignored the fact that there was no evidence that the police had seized the plaintiff lawfully by ordering him back into his car—the action that precipitated his arrest, thus extending the seizure. The case must be remanded for reconsideration of the plaintiff’s Fourth Amendment claim, unclouded by *Heck*.’); *Lockett v. Ericson*, 656 F.3d 892, 896. 897(9th Cir. 2011) (“Lockett pled nolo contendere after the superior court denied his California Penal Code section 1538.5 suppression motion. He was not tried, and no evidence was introduced against him. Therefore, like the convicted plaintiffs in *Ove*, Lockett’s conviction ‘derive[s] from [his] plea[ ], not from [a] verdict[ ] obtained with supposedly illegal evidence.’. . ‘The validity of’ Lockett’s conviction ‘does not in any way depend upon the legality’ of the search of his home. . . We therefore hold that *Heck* does not bar Lockett’s § 1983 claim.”); *Apampa v. Laying*, 157 F.3d 1103, 1105 (7th Cir. 1998) (as in the parallel case of an illegal search, a Title III suit by a convicted defendant need not challenge the conviction and so does not fall afoul of *Heck*); *Simpson v. Rowan*, 73 F.3d 134, 136 (7th Cir. 1995) (claims relating to illegal search and arrest not barred by *Heck* because neither claim, if successful, would necessarily undermine validity of conviction for felony murder).

*Compare Byrd v. Phoenix Police Dep’t*, 885 F.3d 639, 643-45 (9th Cir. 2018) (“*Heck* does not prohibit a habeas corpus petition and a § 1983 action from proceeding simultaneously; indeed the Court seemed to anticipate this possibility. . . The critical question under *Heck* is a simple one: Would success on the plaintiff’s § 1983 claim ‘necessarily imply’ that his conviction was invalid? . . Answering this question, we find that *Heck* does not bar Byrd’s § 1983 claims. Because Byrd’s conviction resulted from a plea agreement and Byrd alleged no facts in his complaint suggesting

that the plea was not knowing and voluntary, success in the § 1983 action would not affect his conviction. Our conclusion finds support in *Ove v. Gwinn*, 264 F.3d 817 (9th Cir. 2001), which reviewed the dismissal of a § 1983 case involving plaintiffs who were convicted pursuant to plea agreements of driving under the influence. . . . Similarly, *Heck* poses no bar to Byrd’s claims. He pleaded guilty to conspiracy to commit possession of a dangerous drug for sale. No evidence was produced against him at his plea hearing. Thus, success on his § 1983 claims would not necessarily demonstrate the invalidity of his conviction. Appellees argue that *Whitaker v. Garcetti*, 486 F.3d 572 (9th Cir. 2007) and *Szajer v. City of Los Angeles*, 632 F.3d 607 (9th Cir. 2011), support the district court’s application of the *Heck* bar. . . We find those cases are distinguishable. In those cases, as here, the plaintiffs were convicted pursuant to pleas of guilty and nolo contendere to crimes of possession—possession of illegal drugs in *Whitaker*, and possession of an illegal assault weapon in *Szajer*. . . The evidence supporting the possession convictions in those cases and the conspiracy conviction here was found in the challenged search. . . . In *Whitaker* and *Szajer*, however, the plaintiffs’ civil suits ‘challenge[d] the search and seizure of the evidence upon which their criminal charges and convictions were based.’ . . Therefore, in both cases, the court concluded that if the plaintiffs prevailed on the § 1983 claims, ‘it would necessarily imply the invalidity of their state court convictions.’ . . Here, in contrast, Byrd’s conviction was based on methamphetamine he threw when the police were questioning him, which they subsequently recovered ‘a distance away from where he was at.’ Byrd’s civil suit concerns allegations that the police illegally searched his person and used excessive force on him—*after* they discovered the drugs, for all we know—which has nothing to do with the evidentiary basis for his conspiracy conviction. . . Therefore, success in Byrd’s § 1983 action does not ‘necessarily imply’ that his conviction was invalid.”) *with Byrd v. Phoenix Police Dep’t*, 885 F.3d 639, 645-46 (9th Cir. 2018) (Eaton, J., concurring) (“I join in the panel’s reasoning in all respects other than those dealing with the *Heck* bar. Under *Heck*, where a plaintiff’s § 1983 claim for damages, ‘even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.’ . . Applying this rule, some of this Circuit’s opinions have concluded that, because no evidence is presented against a plaintiff where a conviction results from a plea agreement, a § 1983 case is not barred by *Heck* [. . . I believe this analysis to be correct, and thus would not draw the distinction, apparently made in *Whitaker* and *Szajer*, that would impose the *Heck* bar in cases where the § 1983 action involves the seizure of evidence that might have been used to prosecute a defendant had there been a trial. . . . This rule regarding pleas has been adopted elsewhere, and, it seems to me, should be adopted here. . . . Thus, I would allow Byrd’s § 1983 claims to proceed, not because he pled guilty to conspiracy, and there was no way of knowing whether he threw the drugs away before or after the complained of civil rights violations, but because his conviction resulted from a plea agreement and was thus based on no evidence at all.”).

*See also Szajer v. City of Los Angeles*, 632 F.3d 607, 611, 612 (9th Cir. 2011) (“§ 1983 claims premised on alleged Fourth Amendment violations are not entirely exempt from the *Heck* analysis, as the Szajers suggest. Nonetheless, the Szajers urge this Court to follow two Seventh Circuit cases: *Copus v. City of Edgerton*, 151 F.3d 646 (7th Cir.1998) and *Booker v. Ward*, 94 F.3d

1052 (7th Cir.1996). In those cases, the plaintiffs were allowed to pursue § 1983 claims based on Fourth Amendment violations although their criminal convictions were not challenged. The Seventh Circuit read footnote seven to mean that § 1983 claims based upon Fourth Amendment violations may proceed because *Heck* simply does not bar such claims. . . These holdings, however, are in direct conflict with Ninth Circuit precedent. . . We decline to take up the Szajers’ invitation to follow the Seventh Circuit’s approach because this Court must follow its own precedent.”); ***Crooker v. Burns***, 544 F.Supp.2d 59, 62, 63 (D. Mass. 2008) (“Circuit courts have split on whether the Supreme Court’s allusion to this possibility signifies that civil Fourth Amendment claims should receive a blanket exception from the application of *Heck* or whether courts should analyze such complaints on a case-by-case basis. As Judge Neiman ably explained, the Seventh, Eighth, Tenth, and Eleventh Circuits have adopted the ‘blanket exception’ approach, while the Second, Sixth, and Ninth Circuits, and arguably the Fifth Circuit as well, follow the ‘case-by-case’ approach. [citing cases] The First Circuit has not weighed in on this issue. Defendants do not appear to challenge Judge Neiman’s recommendation that this court apply the ‘case-by-case’ approach. Indeed, evolving authority seems to favor this mode of analysis, rather than the ‘blanket exception’ approach taken by some courts. . . Leaving aside the merits of the arguments relied on by the circuit courts that have addressed this issue, the Supreme Court itself recently appeared to confirm the position that *Heck* might apply to Fourth Amendment claims in *dicta* appearing in *Wallace v. Kato*, 127 S.Ct. 1091 (U.S.2007). In that case, the Court observed, in a slightly different context, ‘that a Fourth Amendment claim can necessarily imply the invalidity of a conviction, and that if it does it must, under *Heck*, be dismissed.’ . . This statement strongly suggests that the Supreme Court never meant footnote seven of *Heck* to completely exempt Fourth Amendment claims from its holding.”).

Depending upon the facts of the case, the courts have found *Heck* applicable to both false arrest claims and excessive force claims. For false arrest claims, *see, e.g., Wiley v. City of Chicago*, 361 F.3d 994, 997 (7th Cir. 2004) (“If, as alleged, Wiley was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, then any attack on the arrest would necessarily challenge the legality of a prosecution premised on the planted drugs.”), *cert. denied*, 125 S. Ct. 61 (2004) ; ***Case v. Milewski***, 327 F.3d 564, 567, 568 (7th Cir. 2003) (“Because Case plead guilty to resisting arrest . . . his claim is barred by *Heck* . . . . If this court were to allow Case to recover damages because he was arrested without probable cause, Case’s conviction would be rendered invalid because, under Illinois law, so long as there is physical resistance an officer has probable cause to arrest someone who resists an arrest attempt.”); ***Snodderly v. R.U.F.F. Drug Enforcement Task Force***, 239 F.3d 892, 899 (7th Cir. 2001) (“The issuance of an arrest warrant is an act of legal process that signals the beginning of a prosecution. Therefore, Snodderly’s sec.1983 wrongful arrest claim seeks damages for confinement imposed pursuant to legal process, thereby making it akin to a malicious prosecution claim and triggering the application of *Heck*.”); ***Covington v. City of New York***, 171 F.3d 117, 123 (2d Cir. 1999) (“[I]n a case where the only evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of that evidence.”); ***Hudson v. Hughes***, 98 F.3d 868, 872 (5th Cir. 1996) (“[B]ecause a successful section 1983 action for false

arrest on burglary charges necessarily would imply the invalidity of Hudson’s conviction as a felon in possession of a firearm, *Heck* precludes this claim.”).

*But see Shultz v. Buchanan*, 829 F.3d 943, 949 (8th Cir. 2016) (“Success on Shultz’s Fourth Amendment claim . . . would not demonstrate the invalidity of his conviction for public intoxication. All of the conduct relating to the public intoxication offense necessarily occurred in public and before Buchanan’s entry into Shultz’s home. *See* Ark. Code Ann. § 5-71-212. Shultz’s claim is thus not barred by *Heck*.”); *Nelson v. Jashurek*, 109 F.3d 142, 145-46 (3d Cir. 1997) (*Heck* did not bar § 1983 suit where plaintiff did not charge officer falsely arrested him, but charged officer effected a lawful arrest in an unlawful manner); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 182 (4th Cir. 1996) (“[A] charge that probable cause for a warrantless arrest was lacking, and thus that the seizure was unconstitutional, would not necessarily implicate the validity of a subsequently obtained conviction – at least in the usual case.”) *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir.1995) (claim of unlawful arrest, standing alone, does not necessarily implicate validity of criminal prosecution following arrest); *Brown v. Gorman*, No. CV 07-026-BLG-RFC-CSO, 2008 WL 2233497, at \*4 (D. Mont. Apr. 29, 2008) (“Plaintiff alleges that he was racially profiled because as an African American he was stopped for speeding by Defendant Gorman while white motorists traveling at speeds in excess of the speed limit were not stopped. This is sufficient to state a claim for denial of equal protection on the basis of race. Plaintiff is not challenging his conviction, and his racial discrimination claim, if successful, would not necessarily imply the invalidity of his underlying conviction. Accordingly, Plaintiff’s claims are not barred by *Heck*.”)

*See also Calabrese v. Tierney*, No. 19-12526 (FLW), 2020 WL 1485944 (D.N.J. Mar. 27, 2020) (“Plaintiff’s claims solely involve the police officers’ basis for the motor vehicle stop, and his conviction presumably stems from marijuana and drug paraphernalia discovered on Plaintiff’s person or in Plaintiff’s vehicle during the traffic stop. Because the instant lawsuit only requires the Court to ascertain the validity of the traffic stop, such a determination will not impact the validity of Plaintiff’s conviction. In a civil rights suit, doctrines such as ‘fruit of the poisonous tree’ and the ‘exclusionary rule’ are inapplicable, and therefore, in analyzing whether Plaintiff’s constitutional rights were violated by an unlawful stop, the Court need not reach the ultimate questions of whether the evidence seized during the traffic stop should have been suppressed or the ultimate validity of Plaintiff’s conviction. *See Hector v. Watt*, 235 F.3d 154, 158 (3d Cir. 2000) (explaining that the exclusionary rule “is not a personal constitutional right of the party aggrieved” and thus, victims of such violations “cannot be compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution” (internal citations and quotation marks omitted)); *Price v. City of Philadelphia*, 239 F. Supp. 3d 876, 903 (E.D. Pa. 2017)(“[t]he ‘fruit of the poisonous tree’ doctrine likewise cannot be used by a plaintiff in a civil suit to avoid consideration of evidence obtained through police misconduct”) Accordingly, Plaintiff’s civil rights claim does not impugn the validity of his guilty plea or conviction and the *Heck* bar does not apply.”)

## 1. *Wallace v. Kato* and False Arrest Claims

The Supreme Court has now made clear that the statute of limitations on a section 1983 false arrest claim begins to run at the time legal process is initiated. In *Wallace v. Kato*, 127 S. Ct. 1091(2007), the Court held:

We conclude that the statute of limitations on petitioner’s § 1983 [false arrest/false imprisonment] claim commenced to run when he appeared before the examining magistrate and was bound over for trial. Since more than two years elapsed between that date and the filing of this suit—even leaving out of the count the period before he reached his majority—the action was time barred. . . . If a plaintiff files a false arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended. . . . If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit. . . . We hold that the statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process. Since in the present case this occurred (with appropriate tolling for the plaintiff’s minority) more than two years before the complaint was filed, the suit was out of time.

*Id.* at 1097, 1098, 1100.

## 2. *Post-Wallace* Cases:

*Mills v. City of Covina*, 921 F.3d 1161, 1166-68 (9th Cir. 2019) (“We begin by determining whether Mills’s § 1983 claims for unlawful stop and detention, false arrest, false imprisonment, failure to screen and hire properly, failure to train properly, and failure to supervise and discipline are time-barred. The parties and the district court agree that those claims accrued on April 14, 2013, when the search was conducted and Mills was arrested. That is correct. ‘[T]he accrual date of a § 1983 cause of action is a question of federal law ...’ . . . Mills had complete and present causes of action for all but his malicious prosecution and *Monell* liability claims when he was subjected to a search in violation of the Fourth Amendment and was arrested; therefore, those claims accrued at that time. Next, to determine whether the statute of limitations ran on Mills’s claims, we ‘apply [California’s] statute of limitations for personal injury actions, along with [California’s] law regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent with federal law.’ . . . California’s two-year statute of limitations for personal injury actions thus applies to Mills’s claims. . . . Mills filed his claims on September 22, 2016, roughly three years and five months after the search and arrest. His claims would therefore be

time-barred absent tolling. The parties agree that California Government Code § 945.3 tolled the statute of limitations during Mills’s criminal proceedings in the Superior Court, but not during his criminal appeal. The parties also agree that, but for additional tolling, the statute of limitations elapsed during Mills’s criminal appeal. Mills, however, argues that California Code of Civil Procedure § 356 tolled the statute of limitations during the pendency of his criminal appeal because he was legally prevented from bringing those claims during that period by the Supreme Court’s decision in *Heck*. We disagree. Under § 356, ‘[w]hen the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.’ As Appellees argue, a judicially created bar to commencing an action appears to fall outside § 356 based on its plain language. The California Supreme Court, however, has explained that § 356 ‘has been applied in situations where the action is legally prohibited by other means than injunctions or statutory prohibition.’ . . . Indeed, while the California Supreme Court has not specifically addressed the impact of a judicially created bar on § 356, it has held ‘that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights.’ . . . We are bound by this interpretation. . . . Notably, however, in *Hoover* and each case it discussed, a *definitive* bar to commencing an action was required to trigger tolling under § 356, regardless whether the prohibition was by statute, injunction, or otherwise. . . . Because we hold the *Heck* bar did not operate as such a definitive bar to the commencement of Mills’s action, we need not decide whether a judicially created bar can trigger tolling under § 356. . . . [W]e find that where, as here, a § 1983 claim accrues pre-conviction, the *possibility* that *Heck* may require dismissal of that ‘not-yet-filed, and thus utterly indeterminate, § 1983 claim,’ is not sufficient to trigger tolling under California Code of Civil Procedure § 356. In such circumstances, it is not known whether the claim is barred by *Heck* until the claim is filed and the district court determines that it will impugn an extant conviction. Until that determination is made, a plaintiff is not ‘legally prevented from taking action to protect his rights.’ . . . Mills nevertheless implores us to adopt a rule allowing California plaintiffs to wait until the resolution of their criminal appeals to file their § 1983 claims, leaving district courts to retroactively pronounce the applicability of the *Heck* bar and, in turn, tolling under § 356. As discussed above, however, the Supreme Court rejected the petitioner’s invitation to adopt a similar rule in *Wallace* in part because ‘[d]efendants need to be on notice to preserve beyond the normal limitations period evidence that will be needed for their defense; and a statute that becomes retroactively extended, by the action of the plaintiff in crafting a conviction-impugning cause of action, is hardly a statute of repose.’ . . . We likewise decline to adopt such a rule. Ultimately, nothing prevented Mills from commencing his suit during his criminal appeal. Had he done so, the district court could have determined whether his claims impugned his conviction. If so, the district court could have dismissed those claims without prejudice, and Mills could have refiled the claims once his conviction was reversed. . . . If Mills’s claims did not impugn his conviction, the suit could have proceeded. Because Mills was not legally precluded from commencing his § 1983 claims during the pendency of his criminal appeal, he was not ‘legally prevented from taking action to protect his rights’ and tolling under § 356 was not triggered. . . . We therefore affirm the district court’s holding that all but Mills’s claims for malicious prosecution and *Monell* liability are time-barred.”)

[See also *Cross v. City and County of San Francisco*, No. 18-CV-06097-EMC, 2019 WL 1960353, at \*7–10 (N.D. Cal. May 2, 2019) (“Here, § 945.3, on its face, provides for tolling of the statute of limitations in a civil action while criminal charges are pending before a ‘superior court.’ Cal. Gov’t Code § 945.3. The purpose of § 945.3 is clear. The statute has three objectives: (1) civil damage complaints should not be used as plea bargaining levers in the pending criminal proceeding; (2) civil actions should not be used as a discovery device in the pending criminal proceeding; and (3) criminal defendants should be encouraged to await the outcome of the criminal action before bringing a § 1983 case. . . . As to these objectives, it does not matter whether criminal charges are pending in a state superior court or in a federal district court. That is, if criminal charges are pending before a federal district court, the same three objectives would still be served by applying tolling. . . . Only two other courts appear to have considered whether § 945.3 could be applied where criminal charges are pending in a federal trial court, instead of a state superior court. . . . Both held that statutory tolling should apply. . . . Accordingly, the Court holds that statutory tolling is applicable in the instant case and thus there is no time bar to Plaintiffs’ claims. . . . Even if Plaintiffs could not rely on statutory tolling, their claims still would not be time barred because equitable tolling also applies. . . . As the Court noted at the hearing, Plaintiffs’ decision to wait for the federal criminal proceedings to be completed before proceeding with their civil action was justified given that (1) more likely than not, the court in the civil action would stay the case until the federal criminal proceedings were completed and that (2) Plaintiffs could not realistically litigate their civil action while federal criminal proceedings were still ongoing without putting their Fifth Amendment rights in the criminal proceedings in jeopardy. . . . The Court also notes that the facts in the case at bar also bear some similarity to facts in those cases that have allowed for equitable tolling because the plaintiff has been pursuing an alternate remedy before initiating suit. . . . Here, Plaintiffs were litigating the issue of selective enforcement in an alternate forum, *i.e.*, the criminal proceedings, before moving on to file a civil action. Defendants argue still that equitable tolling should not be permitted here because they would suffer prejudice if the Court were to allow this civil case to proceed. More specifically, they argue prejudice because ‘the records retention policy for Department of Emergency Management records is three years, and those records have now disappeared. [Also], [m]emories have faded, and because the USAO and DEA created the paperwork and prosecuted these matters, the SFPD lacks their normal investigatory records to refresh recollection.’. . . But none of these arguments is particularly compelling, at least at this juncture of the proceedings.”)]

*Johnson v. Winstead*, 900 F.3d 428, 436-39 (7th Cir. 2018) (“The *Heck* bar is normally raised defensively to win dismissal of a § 1983 claim when the plaintiff’s conviction has not been overturned; if the bar applies, the plaintiff’s claim must be dismissed as premature. In contrast, *Heck*’s rule of deferred accrual is raised *offensively* to overcome a statute-of-limitations defense. The Court’s decision in *Wallace* was such a case. . . . Our cases since *Wallace* have sent mixed signals on the methodological question. Some take a categorical approach to *Heck* questions, either implicitly or explicitly. . . . Others approach *Heck* questions on a fact-intensive, case-by-case basis. . . . [T]he analysis in *Moore* was categorical, based on the theory of

relief; we did not undertake a factual evaluation of each plaintiff's criminal case to determine what role the constitutionally tainted trial evidence played in his conviction. That makes sense in this context. Applying *Heck* categorically is sound as a matter of limitations law where the need for clear rules is especially acute. *Moore* points the way toward greater consistency in evaluating *Heck* questions. Applying it here, we hold that *Heck*'s rule of deferred accrual applies to § 1983 claims for violation of the Fifth Amendment right against self-incrimination. A claim of this kind seeks a civil remedy for a trial-based constitutional violation that results in wrongful conviction and imprisonment. Such a claim, if successful, necessarily implies the invalidity of the conviction and under *Heck* is neither cognizable nor accrues until the conviction has been overturned. As we've noted, the Eighth Circuit reached the opposite conclusion in *Simmons v. O'Brien*, holding that *Heck* categorically does not apply to a § 1983 claim for violation of the Fifth Amendment right against self-incrimination. 77 F.3d at 1095. More specifically, in *Simmons* the plaintiff was convicted of murder based in part on his videotaped confession, and his conviction was upheld on direct appeal and post-conviction review. He then brought a § 1983 claim alleging that his confession was obtained without *Miranda* warnings and while he was under physical and mental duress. The district court thought the claim was premature under *Heck* 'until a habeas court ruled on the validity of [the] conviction.' . . . The Eighth Circuit disagreed. Leaning heavily on the reference to harmless-error doctrine in *Heck*'s footnote 7, the court held: 'Because harmless error analysis is applicable to the admission at trial of coerced confessions, judgment in favor of [the plaintiff] on this § 1983 action challenging his confession will not necessarily demonstrate the invalidity of his conviction.' . . . This misreads footnote 7 for the reasons we've already explained. More fundamentally, the Eighth Circuit's holding is irreconcilable with *Heck* itself. The claims at issue there included a challenge to the admission at trial of an unlawful voice identification. . . . A constitutional error in admitting identification evidence at trial is subject to harmless-error review. . . . If the Eighth Circuit is right, *Heck* would have come out differently, at least as to the unlawful-identification claim. Finally, the Eighth Circuit's approach cannot be reconciled with our decision in *Moore*, which held that claims for trial-based constitutional violations are indeed *Heck*-barred until the conviction is overturned. For these reasons, we decline to follow *Simmons*. . . . Our holding that *Heck* applies does not mean that *all* of Johnson's Fifth Amendment claims may proceed. To the extent that Johnson seeks damages associated with alleged Fifth Amendment violations at his first trial in 2007, the claims are indeed time-barred. That conviction was reversed in 2010, and the two-year time clock began to run then. The limitations period expired long before he filed this suit in 2015. The claims arising from the second trial in 2012 are timely, however. That conviction was reversed in 2014, and Johnson filed suit less than a year later.'")

***Mordi v. Zeigler***, 870 F.3d 703, 707-09 (7th Cir. 2017) ("A plaintiff is the master of his own complaint . . . and so we must examine what Mordi is asking for, before we can decide whether he may pursue his section 1983 action or if the *Heck* line of cases stands in his way. . . . As the Supreme Court put it in *Muhammad v. Close*, . . . '*Heck*'s requirement to resort to state litigation and federal habeas before § 1983 is not . . . implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence.' In addition, 'when a defendant is convicted pursuant to his guilty plea rather than a trial, the validity of that conviction cannot be affected by

an alleged Fourth Amendment violation because the conviction does not rest in any way on evidence that may have been improperly seized.’ . . Mordi insists that he is complaining only about the improper racial profiling that led to his traffic stop, and about the officers’ decision to prolong his detention while they waited for the drug-sniffing dog to arrive. If he were to prevail on either or both of these points, his conviction would be unaffected. . . . [E]ven if [Mordi] were to prevail on his racial-profiling and prolonged-detention arguments, the discovery of the cocaine found within the car would be just as secure, his guilty plea would stand, and his conviction would, too. All he can hope for in his Fourth Amendment case would be some form of damages for the loss of his time and the dignitary insult inflicted by racial discrimination. Despite the fact that Mordi insisted in his complaint that he was not challenging his conviction (a point that the district court recognized), the state urges us to read the complaint as if he were. There is an exception to the *Heck* bar, under which a challenge may be brought to actions such as searches and seizures or a false arrest that do not have any necessary effect on the validity of a conviction. . . . The state acknowledges the *Wallace* exception, but, it argues, there is an exception to that exception. The second-layer exception comes into play if a plaintiff’s allegations *necessarily* imply the invalidity of a conviction (even one based on a guilty plea); in that case, it says, the *Heck* bar springs back into existence. . . .The worst one can say about Mordi’s case is that he made a few half-hearted attempts to assert his innocence between the time the police arrested him and the time he found himself facing federal charges. But those efforts did not make their way into his complaint as anything but background information or an account of what he said at the time. . . . Mordi is not asking for any form of relief that would undermine his guilty plea or his conviction. He is raising a civil rights complaint, and he is raising the type of complaint that *Wallace* says accrues at the time of the stop and arrest. In addition, even if Mordi filed a complaint that included some *Heck*-barred contentions and other cognizable arguments, we have held that the proper response is not to toss the entire complaint. Instead, the judge must carve off any *Heck*-barred contentions and proceed with what remains. . . The district court cut off this case at the screening stage, based on a finding that it could not properly proceed under section 1983. This was in error, and so we Reverse and Remand for further proceedings consistent with this opinion.”)

*Morrill v. City of Denton*, 693 F. App’x 304, \_\_\_ (5th Cir. 2017) (“The statute of limitations for a section 1983 claim is determined by the forum state’s limitations period for personal injury torts. . . In Texas that is two years from the date the cause of action accrues. . . So if Morrill’s claim accrued the day the officers allegedly used excessive force, then the statute of limitations expired in August 2014, months before he filed his complaint. Morrill disputes the date of accrual. He argues his claim did not accrue until the state dismissed a resisting arrest charge against him in March 2014. Federal law determines when a section 1983 cause of action accrues. . . It does so when the plaintiff has ‘a complete and present cause of action.’ . . An excessive force claim generally accrues on the date when the force is inflicted. . . Morrill tries to distinguish his case because he was charged with resisting arrest. He contends his cause of action did not accrue until the resisting arrest charge was dismissed because: (1) the charge was ‘fraudulent concealment’ that kept him from knowing of his injury; (2) his excessive force claim is analogous to a malicious prosecution claim, which does not accrue until the underlying prosecution ends; and (3) although

he knew he had been hurt when the excessive force occurred, he did not know the force was excessive as a constitutional matter until the charge was dismissed.

We reject his attempts to avoid the normal accrual rule. First, the resisting arrest charge did not conceal facts necessary to Morrill's cause of action. For fraudulent concealment to toll a limitations period, a plaintiff cannot be aware of the critical facts underlying a cause of action and must instead reasonably rely on a defendant's deception that obscures those facts. . . . Even if Defendants were deceptive, Morrill's complaint does not allege facts showing he reasonably relied on the resisting arrest charge to conclude that the officers did not use excessive force. Instead, his complaint alleges he knew the critical facts all along: he did not resist arrest and complied with officer commands, yet officers kicked and tased him 'without provocation or justification.' It says he immediately and at all times 'steadfastly refused to even discuss [the] possibility of agreeing ... that he in any way, shape, or form resisted arrest.' Second, Morrill's excessive force claim is not analogous to a malicious prosecution claim. A malicious prosecution claim only accrues once the criminal charges are dismissed because an element of that tort is the termination of a criminal prosecution in the plaintiff's favor. . . . Thus, no cause of action exists until the prosecution is resolved. The same is not true of a section 1983 excessive force claim, which can be brought whether or not the defendant is prosecuted for resisting arrest. . . . We have repeatedly held that a pending criminal charge does not delay accrual of an excessive force claim arising out of an arrest for that charge. . . . Morrill claims this case is different because resisting arrest is more closely linked with the amount of force an officer may lawfully use than was true for the crimes in these prior cases. Determining whether force is excessive does require consideration of whether a plaintiff was 'actively resisting arrest.' . . . But we do not see why this makes a difference. Even if Morrill's excessive force claim would call into question a conviction for resisting arrest, mere pending charges would not prevent the claim from accruing. . . . And, as discussed above, Morrill was aware of the factual basis for his claim long before the state dismissed the resisting arrest charge, and the existence of his claim, unlike the existence of a malicious prosecution claim, 'did not depend on the outcome of the subsequent criminal proceedings.' . . . Finally, Morrill argues that although he was aware of his personal injury in August 2012, he had no actionable constitutional claim until the resisting arrest charge was dismissed. He cites no caselaw for this proposition, and this court has long held that a plaintiff need only know the facts underlying a cause of action for accrual to begin, not that a claim is legally viable. . . . Morrill's constitutional injury was complete on the day the alleged excessive force took place. His section 1983 claim thus accrued in August 2012, more than two years before he filed suit.")

***King v. Harwood***, 852 F.3d 568, 578-79 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 640 (2018) ("The Supreme Court clarified in *Wallace* that the rule in *Heck* does not extend to claims for false arrest or false imprisonment, in which the limitations period begins when the allegedly false imprisonment ends, such as by the commencement of legal process. . . . Whereas some circuits, including ours, *see, e.g., Shamaeizadeh v. Cunigan*, 182 F.3d 391 (6th Cir. 1999), had held that *Heck* applied to pre-conviction claims for false arrest, *Wallace* limited the rule in *Heck* to claims of malicious prosecution. In short, under *Heck*, a malicious-prosecution claim is not available before the favorable termination of criminal proceedings, nor does the limitations period for such

a claim begin until the favorable termination of criminal proceedings. Here, the district court recognized that King’s § 1983 suit was ‘based upon a malicious prosecution claim.’ Nevertheless, the district court applied the rule in *Wallace* to hold that King’s ‘cause of action accrued and the statute of limitations began to run on the date the judgment was vacated on July 18, 2014, rather than the date the charges were dropped.’ . . . This language comes from *Wallace*, where the Supreme Court held that the date on which charges are dropped is not necessarily the date on which a false-imprisonment claim accrues, because such a claim instead accrues when the *false* imprisonment ends, which may be the date of indictment or arraignment. . . . When the Kentucky Court of Appeals granted King relief, it vacated her *Alford* plea, but it did not result immediately in a ‘termination of the ... criminal proceeding in favor of the accused,’ as *Heck* would require for the limitations period to begin. . . . Rather, King’s case was remanded for trial on the same charges that formed part of the malicious prosecution for which King now seeks relief. Accordingly, the one-year statute of limitations period did not begin until October 9, 2014, when King’s indictment was dismissed, and King’s complaint—filed October 1, 2015—is timely under *Heck*. The district court therefore erred in holding that King’s malicious-prosecution claims were time-barred.”)

***Buckley v. Ray***, 848 F.3d 855, 867 (8th Cir. 2017) (“The Supreme Court’s decision in *Wallace* controls Buckley’s claim. The trial court invalidated Buckley’s 1999 conviction on November 1, 2010. No extant conviction exists for his § 1983 claims to impugn. The possibility that the State may have re-tried and convicted him of the cocaine charges—“*an anticipated future conviction*”—does not implicate the *Heck* rule. . . . The *Brady* violation committed against Buckley by the Law Enforcement Defendants caused him damage when he was convicted and incarcerated in 1999. The trial court vacated his conviction on November 1, 2010. That is the date on which his cause of action accrued. The limitations period on Buckley’s claims, in accordance with Arkansas law, ended on November 1, 2013. His claims against the Law Enforcement Defendants, filed over a year later, are time-barred.”)

***Rapp v. Putman***, 644 F. App’x 621, 625 (6th Cir. 2016) (“For plaintiff’s retaliatory-prosecution claim, ‘what would otherwise be the accrual date,’ *Wallace*, 549 U.S. at 393, was when defendants initiated the prosecution. At that point, plaintiff had engaged in protected activity (first element), defendants took an adverse action (second element) by initiating a prosecution of plaintiff purportedly motivated by plaintiff’s protected conduct (third element) and without probable cause (fourth element). . . . Notably, in contrast to the *malicious*-prosecution claim at issue in *Heck*, a plaintiff need not prove favorable termination of the prosecution in order to establish a *retaliatory*-prosecution claim. . . . Thus, once defendants initiated the prosecution against plaintiff, each element of the cause of action was present and his claim became actionable. . . . At that point, plaintiff had no ‘*extant conviction* which success in [a] tort action would impugn.’ . . . Therefore, *Heck* would not have barred the claim. As a consequence, *Heck*’s delayed-accrual rule does not apply. . . . Because *Heck* does not apply in this situation, the general accrual standard controls. Under that standard, plaintiff’s claim accrued in September 2008, when defendants initiated the prosecution. The governing statute of limitations for § 1983 claims arising in Michigan is three

years. . . Thus, as the district court held, plaintiff's November 2014 complaint is untimely as it pertains to his First Amendment retaliatory-prosecution claim.”)

*Smith v. Campbell*, 782 F.3d 93, 100-02 (2d Cir. 2015) (“While the applicable statute of limitations in a § 1983 case is determined by state law, ‘the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law.’. . . Rather, ‘it is the standard rule that accrual occurs when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.’. . . Accordingly, [Smith’s] cause of action for First Amendment retaliation accrued on November 26, 2007, more than three years prior to the filing of the initial complaint. That the full scope of her injury was not known at that time, including whether or not she would be convicted of the traffic infractions and that Campbell would continue harassment. . . does not alter the date that her cause of action accrued. . . Plaintiff argues that the accrual of her claim was delayed until after her trial or appeal and incorrectly cites *Heck v. Humphrey*, 512 U.S. 477 (1994), for this proposition. Quite apart from whether *Heck* is at all relevant, her argument mistakenly conflates the Fourth Amendment tort of malicious prosecution with the First Amendment tort of retaliation. These two kinds of claims are not subject to the same standards. . . . [I]t may be that had Smith’s claim been one for malicious prosecution in violation of her Fourth Amendment rights, that claim would not have accrued until after the trial and appeal related to her tickets. That, however, is not the cause of action which plaintiffs have pressed in this case. As the Supreme Court explained in *Wallace*, delayed accrual of the constitutional tort in *Heck* occurred because in that case there was an extant criminal conviction that, unless otherwise expunged, a federal court’s finding of a constitutional violation under § 1983 would necessarily ‘impugn.’. . . Put another way, *Heck* only comes into play potentially to delay accrual of an action when a resolution of that action in a plaintiff’s favor could not be reconciled with an extant criminal conviction. . . The *Heck* rule *does not* delay the accrual of ‘an action which would impugn *an anticipated future conviction.*’ *Wallace*, 549 U.S. at 393. Nor does the *Heck* rule operate as a toll on the statute of limitations when a criminal conviction that would be impugned by a § 1983 action occurs after the accrual of the § 1983 action. . . . In this Circuit, First Amendment claims, even those arising out of the same series of events that give rise to Fourth Amendment claims, do not require a favorable termination in the criminal action to be cognizable as a matter of law. . . . Moreover, the First Amendment retaliatory prosecution claim here presents itself in a temporal posture similar to the unlawful arrest claim that the Supreme Court’s decision in *Wallace* held accrued prior to any conviction. Just as in a false arrest claim, the cause of action here accrues when all of the elements necessary to state the claim are present, even though later developments in a related criminal action may ultimately effect the viability of the claim and a stay of the § 1983 action may be appropriate while the criminal action pends. . . . As a consequence of the foregoing analysis, there is nothing in our prior case law that delays the accrual of Smith’s claim for retaliatory prosecution in violation of her First Amendment rights. Having not been delayed or otherwise tolled, Smith’s claim accrued on November 26, 2007. Thus, the district court was correct that Smith’s claim for retaliatory prosecution, filed more than three years later on June 24, 2011, is barred by the statute of limitations. The holding of the district court as to this claim is affirmed.”)

**Moore v. Burge**, 771 F.3d 444, 446 (7th Cir. 2014) (“[C]laims based on out-of-court events, such as gathering of evidence, accrue as soon as the constitutional violation occurs. That’s because misconduct by the police does not (at least, need not) imply the invalidity of any particular conviction. See not only *Wallace* but also, e.g., *Rollins v. Willett*, No. 14–2115 (7th Cir. Oct. 21, 2014); *Booker v. Ward*, 94 F.3d 1052 (7th Cir.1996). These decisions deal with the Fourth Amendment’s rule against unreasonable searches and seizures; their holdings are equally applicable to contentions that police tortured suspects during interrogation, because that misconduct is actionable whether or not a suspect confesses, and whether or not any statement is used in evidence at trial. To the extent that Burton, Dungey, Freeman, and Tillis may be arguing that police violated their rights by giving false testimony, or that during trial prosecutors withheld material exculpatory evidence about misconduct during their interrogations, *Heck* indeed bars relief until a conviction is set aside. The district court must modify its judgment so that any claims based on proceedings in court are dismissed without prejudice under *Heck*. Absolute immunity for prosecutors and witnesses, see *Rehberg v. Paulk*, — U.S. —, 132 S.Ct. 1497, 182 L.Ed.2d 593 (2012); *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), would make it hard for these plaintiffs to recover damages based on the conduct of the trials even if their convictions should be vacated some day. That may be why all five plaintiffs stress the injuries they say they suffered at the hands of the police before judicial proceedings began. Those claims are unaffected by *Heck* and are outside the scope of anyone’s absolute immunity.”)

**Matz v. Klotka**, 769 F.3d 517, 530, 531 (7th Cir. 2014) (“Under *Heck*, a plaintiff may not recover damages under § 1983 when a judgment in his favor would necessarily imply the invalidity of a criminal conviction or sentence that has not been reversed, expunged, invalidated, or otherwise called into question. . . There is no question that Matz’s conviction and sentence have neither been invalidated nor called into question. . . The only question is thus whether Matz’s conviction or sentence necessarily depended on his allegedly coerced confession. We conclude, like the district court, that success on Matz’s Fifth Amendment claim would necessarily imply the invalidity of Matz’s sentence. At sentencing, the judge relied heavily on Matz’s confession as well as his subsequent decision to recant his admissions. Specifically, Matz explained to the judge that he confessed out of loyalty to his fellow Latin King codefendants in the hopes that he could take the fall and the rest of them ‘would be able to go home.’ The sentencing judge rejected the notion that Matz confessed because ‘it was the right thing to do,’ and opined instead that Matz thought he could be out in ‘five—ten years’ and emerge in his ‘rightful spot’ as the leader of the Latin Kings brotherhood because he had stepped up and taken responsibility for the ‘weaklings’ beneath him. The judge believed that when the reality of the prison sentence Matz was facing set in and it came to light that his fellow Latin Kings had inculpated him in the crime, he was scared and realized that it was not worth taking the fall for his confederates. The court accordingly concluded that Matz had only a ‘sort of a selfish, self-centered remorse’ and thus posed a high risk of reoffending. Matz’s confession and the sentencing judge’s assessment of the reasons behind it thus figured prominently in the court’s decision to sentence Matz consecutively on the two counts of conviction. Because that sentence remains intact, Matz cannot pursue a § 1983 claim for damages

premised on his allegedly coerced confession because success on his claim would call into question his sentence. *Heck* thus bars Matz’s Fifth Amendment claim.”)

***Hornback v. Lexington-Fayette Urban County, Government***, No. 12–6589, 2013 WL 5544580, \*2, \*3 (6th Cir. Oct. 8, 2013) (not reported) (“The district court correctly concluded Hornback knew or had reason to know of the unlawful search of his bedroom on the day of the search. On August 31, 2010, Hornback knew he was not under the supervision of the Division of Probation and Parole, Appellees did not have a warrant or his consent to search his bedroom, and that Appellees nonetheless had searched his bedroom. On that date, Hornback had a ‘complete and present cause of action’ and could have sued for relief. . . Hornback fails to identify any case law in support of his contention that the Supreme Court’s ruling in *Wallace* is applicable only to claims of false arrest. While the *Wallace* Court issued a case-specific ruling, the driving principle behind that ruling that the deferred accrual rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), does not apply to actions ‘which would impugn an anticipated future conviction’ is generally applicable, including to claims such as Hornback’s. . . Hornback correctly notes *Wallace* distinguishes between causes of action for malicious prosecution and those for false arrest. . . The Court drew this distinction based on the nature of the claims, however; unlike malicious prosecution, some torts redressable under § 1983 (like false arrest) ‘accrue before the setting aside of indeed even before the existence of the related criminal conviction.’ . . Claims of illegal search are analogous to claims of false arrest, as a potential plaintiff very often has a complete cause of action even before criminal proceedings commence. While Hornback argues he could not know his rights had been violated until the trial judge granted his motion to suppress, he fails to identify any authority in support of his contention. Hornback had a colorable claim for the violation of his Fourth and Fourteenth Amendment rights on the day of the search, and the statute of limitations began to run on that date. Hornback also asserts that if this court declines to apply the *Wallace* holding to § 1983 illegal search claims, ‘orderly adjudication of illegal search claims would take place, the risk of inconsistent legal determinations would be minimized, and the clogging of courts with unnecessary filings would be avoided.’ The *Wallace* Court, however, announced a procedure for lower courts to follow when confronted with scenarios such as the one Hornback faced: If a plaintiff files a false-arrest claim before he has been convicted ( *or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial* ), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended. *Wallace*, 549 U.S. at 393–94 . . . Hornback’s arguments concerning judicial efficiency are unpersuasive and ultimately irrelevant to the question of when his legal injury arose.”)

***Franklin v. Burr***, No. 13–1154, 2013 WL 5738891, \*1, \*2 (7th Cir. 2013) (not published) (“There is no necessary inconsistency between the propositions that (a) a conviction based on a guilty plea is valid, and (b) the police violated the accused’s rights at the time of arrest or interrogation. One court of appeals held otherwise in *Trimble v. Santa Rosa*, 49 F.3d 583, 585 (9th Cir.1995), but that decision predates *Wallace* and cannot be considered authoritative. Given *Wallace*, Franklin’s claim

is not barred by *Heck*—which means that the claim accrued in 1996 and that this suit is untimely. The judgment of the district court is affirmed.”)

***Serino v. Hensley***, 735 F.3d 588, 591 (7th Cir. 2013) (“The general rule is that a § 1983 claim accrues ‘when the plaintiff knows or has reason to know of the injury which is the basis of his action.’ . . . There is a specific rule, however, for false arrest claims. The Supreme Court held that for these claims, the action begins to run ‘at the time the claimant becomes detained pursuant to legal process’—that is, when the arrestee is bound over by a magistrate or arraigned on charges. . . . Thus, Serino needed to bring his false arrest claim by September 15, 2010—two years after his arraignment. He did not file his complaint until March 28, 2012. His claim is time-barred. Serino argues that the statute did not begin to run until March 31, 2010, the day the state dropped his second criminal charge. He invokes *Heck v. Humphrey*, 512 U.S. 477 (1994), in which the Supreme Court held that a § 1983 claim based on an unconstitutional conviction does not accrue until the conviction has been invalidated. . . . Serino’s theory is that the *Heck* rule operated to delay the accrual of his false arrest claim—a claim that could imply that the charges against him were meritless—until there was no longer a pending state criminal proceeding. But this argument is a non-starter, because *Heck* relied on the principle ‘that civil tort actions,’ as opposed to habeas corpus petitions,” “are not appropriate vehicles for challenging the validity of *outstanding criminal judgments*.’ . . . And in *Wallace*, the Supreme Court explicitly clarified that ‘the *Heck* rule for deferred accrual is called into play only when there exists a “conviction or sentence that has not been . . . invalidated,” that is to say, an “an outstanding criminal judgment.”’ . . . Here, as in *Wallace*, Serino was never convicted. As such, at the time Serino’s false arrest claim began to accrue, ‘there was in existence no criminal conviction that the cause of action would impugn.’ . . . *Heck* cannot help Serino here.”)

***Gakuba v. O’Brien***, 711 F.3d 751, 752, 753 (7th Cir. 2013) (“*Heck* does not apply absent a conviction. . . . It is *Younger v. Harris*, 401 U.S. 37 (1971), with which we must be concerned. *Younger* holds that federal courts must abstain from taking jurisdiction over federal constitutional claims that may interfere with ongoing state proceedings. See *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 677 (7th Cir.2010). Gakuba’s claims of damages resulting from illegal searches, seizures, and detentions meet that description: they involve constitutional issues that may be litigated during the course of his criminal case. . . . Deciding those issues in federal court could undermine the state court proceeding. . . . Because monetary relief is not available to him in his defense of criminal charges, however, and because his claims may become time-barred by the time the state prosecution has concluded, the district court should have stayed rather than dismissed Gakuba’s civil-rights claims.”)

***Moore v. Mahone***, 652 F.3d 722, 725, 726 (7th Cir. 2011) (“[I]n the wake of *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), complaints must be dismissed if they fail to state a ‘plausible’ basis for relief. The basis for relief stated in our plaintiff’s complaint is, given *Heck*, implausible, for it is that the plaintiff was the victim of an utterly unprovoked assault, and while that conceivably is true, it is barred by *Heck*. The judge could have retained the case (minus the deliberate-indifference

claim) on the authority of *Evans*, and just have forbidden the plaintiff to embroider his claim with the rejection of the disciplinary board's findings. But likewise he could do what he did – dismiss it. But not with prejudice. The plaintiff was proceeding pro se. He may not have heard of *Heck v. Humphrey* when he filed his complaint. All the judge said in dismissing the claim was that ‘as plaintiff lost good time regarding the March 2, 2007, altercation with [the two officers], his claim that they used excessive force against the plaintiff is barred by *Heck v. Humphrey*.’ This was too terse, and in fact was erroneous. That the plaintiff was disciplined didn't trigger the application of *Heck*, as the judge implied; what triggered it was the fact that the plaintiff was challenging the findings of the disciplinary board. The judge should have said that, and rather than dismissing the case with prejudice should either have retained it but warned the plaintiff that he could not challenge the findings made by the disciplinary board or have permitted him to file a second amended complaint that would delete all allegations inconsistent with those findings. . . . The case must be returned to the district court to decide whether to dismiss the complaint without prejudice or not dismiss but warn the plaintiff that he cannot challenge the disciplinary board's findings.”)

*Evans v. Poskon*, 603 F.3d 362, 363, 364 (7th Cir. 2010) (“The district court did not discuss *Wallace v. Kato*, 549 U.S. 384 (2007), doubtless because neither side cited it. But *Wallace* holds that a claim that accrues before a criminal conviction may and usually must be filed without regard to the conviction's validity. The Court held that a claim asserting that a search or seizure violated the fourth amendment – and excessive force during an arrest is such a claim, see *Graham v. Connor*, 490 U.S. 386 (1989) – accrues immediately. The prospect that charges will be filed, and a conviction ensue, does not postpone the claim's accrual. *Wallace* added that a conviction does not un-accrue the claim, even if the arguments advanced to show a violation of the fourth amendment also imply the invalidity of the conviction. . . . Instead of dismissing the § 1983 suit, the district judge should stay proceedings if the same issue may be resolved in the criminal prosecution (including a collateral attack). . . . *Evans*'s situation illustrates how a fourth-amendment claim can coexist with a valid conviction. He contends three things: (1) that he did not resist being taken into custody; (2) that the police used excessive force to effect custody; and (3) that the police beat him severely even after reducing him to custody. (*Evans* says that his skull was fractured and his face mangled, leading to three surgeries and bone grafts. He also contends that his vision has been permanently impaired. These are not normal consequences of arrest.) Proposition (1) is incompatible with his conviction; any proceedings based on this contention must be stayed or dismissed under *Wallace* or *Heck*. But propositions (2) and (3) are entirely consistent with a conviction for resisting arrest. . . . These aspects of the suit can proceed. And if *Evans* is willing to abandon proposition (1), there would be no need for a stay of any kind.”)

*Dique v. New Jersey State Police*, 603 F.3d 181, 187, 188 (3d Cir. 2010) (“*Dique* argues that *Gibson* is binding precedent that we must follow. The Officers, by contrast, argue that the Supreme's Court 2007 decision in *Wallace* repudiates *Gibson* and mandates accrual when the wrongful conduct occurred. Because an intervening Supreme Court decision is a ‘sufficient basis for us to overrule a prior panel's opinion,’ we are able to bypass our general rule of not overruling a prior panel's opinion without referring the case to the full Court. . . . Although, as we just noted,

a Fourteenth Amendment selective-enforcement claim will accrue at the time that the wrongful act resulting in damages occurs, Dique's claim did not accrue until July 2001 because the discovery rule postponed accrual. In 1990 he was reasonably unaware of his injury because Mulvey purported to stop his car for a speeding violation. It was not until July 2001, when his attorney became aware of the extensive documents describing the State's pervasive selective-enforcement practices, that Dique discovered, or by exercise of reasonable diligence should have discovered, that he might have a basis for an actionable claim. His claim accrued at that time. Because he asserted his selective-enforcement claim over two years later, the statute of limitations bars it.”).

***Dominguez v. Hendley***, 545 F.3d 585, 588, 589 (7th Cir. 2008) (“A § 1983 claim for a due process violation based on the denial of a fair criminal trial may be brought only after the conviction is set aside. Otherwise, that civil claim would imply the invalidity of the outstanding conviction and would thus constitute a collateral attack on the conviction through an impermissible route. . . . So viewed, *Dominguez*'s claim did not accrue until 2002 and is therefore timely. *Hendley* argues, however, that the underlying reason why *Dominguez* asserts that his trial was unfair relates to his arrest, and thus we should find that his claim accrued no later than the time when his unlawful seizure was terminated – that is, the time of his arraignment. Fourth Amendment claims for false arrest or unlawful searches accrue at the time of (or termination of) the violation. . . . Even if no conviction could have been obtained in the absence of the violation, the Supreme Court has held that, unlike fair trial claims, Fourth Amendment claims as a group do not necessarily imply the invalidity of a criminal conviction, and so such claims are not suspended under the *Heck* bar to suit. *Hendley*, however, is assuming that *Dominguez*'s claim is limited to his arrest and does not also include independent charges of due process violations. That assumption overlooks critical parts of the case. *Dominguez* has asserted all along that the defendant officers violated his right to due process by manipulating or tampering with identification and testimonial evidence. He backed up these allegations with evidence at the trial. His due process claim is thus more than a Fourth Amendment claim by another name, and for that reason, it is not barred by the limitations rule announced in *Wallace*. *Dominguez*'s right to sue arose only after his criminal conviction was set aside, and, as the district court held, he filed within the two years permitted by law.”).

***Johnson v. Dossey***, 515 F.3d 778, 783 (7th Cir. 2008) (“We turn to the pendent state law claims of malicious prosecution, false arrest, and false imprisonment. Relying on *Wallace v. Kato*, the defendants argue that the claims are time-barred. At least two things prevent us from agreeing. *Wallace* involved the accrual date for a claim of false arrest and false imprisonment, but not as to state law accrual dates. The Court specifically stated that, while the statute of limitations in § 1983 cases is derived from the analogous state law, the ‘accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law.’. . . *Wallace* has no effect on Illinois law.”).

***Meadows v. Whetsel***, No. 06-6211, 2007 WL 1475279, at \*2 (10th Cir. May 22, 2007) (not published) (“*Meadows* does not dispute that Okla. Stat. tit. 12, ‘95(“)(3) furnishes the applicable statute of limitations for his case. Instead, he takes issue with the district court's determination that

his cause of action ‘accrued’ in 2002 when the alleged police misconduct took place. . . .To the extent Meadows alleges constitutional violations based on his arrest and imprisonment on May 29 to June 7, 2002, these claims are barred by the two-year statute of limitations. . . . Next, Meadows contends police did not have probable cause to arrest him on May 29, 2002 and subsequently violated his rights to due process by holding him in custody for ten days without filing formal charges. In addition, he claims he was entitled to, but never received, a prompt judicial determination on probable cause under the Supreme Court’s ruling in *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). . . Under the applicable precedents, these claims are barred by the two-year statute of limitations since they stem from police action that occurred roughly four years before Meadows filed his complaint. . . . But to the extent we construe Meadows’s complaint as alleging a claim for malicious prosecution, that claim may not be time-barred. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that where a § 1983 plaintiff has been convicted and is challenging the prosecution leading to that conviction, a malicious prosecution claim does not mature until the conviction has been invalidated. . . We have extended the *Heck* rule to situations like this one in which a malicious prosecution claim relates to charges that have been dismissed, holding that the claim does not ripen until the charges are dismissed. . . It is unclear exactly when the charges were dismissed, but the record suggests the state court did not formally dismiss them until February 2005. He filed his complaint in February 2006. Thus, his malicious prosecution claim may not be barred by the two-year statute of limitations. . . Because the district court did not address the merits of the malicious prosecution claim and we decline to do so for the first time on appeal, we remand this issue to the district court.”).

***Olaizola v. Foley***, No. 16-CV-3777 (JPO), 2019 WL 428832, at \*4 (S.D.N.Y. Feb. 4, 2019) (“[T]he Court takes no view on whether Olaizola’s detention ended upon his release from the Bronx precinct office. . . And although the Court doubts that an arresting officer’s unilateral issuance of a Desk Appearance Ticket constitutes the sort of legal process that triggers accrual of a false-arrest claim, the Court need not decide that issue either. . . Instead, the Court notes only that Olaizola was arraigned on September 11, 2012, in connection with the challenged arrest. Because arraignment unquestionably constitutes legal process, . . Olaizola’s false-arrest claim against Foley accrued at the latest on September 11, 2012. And because Olaizola’s April 4, 2016 complaint was not filed within three years of that date, Olaizola’s false-arrest claim is time-barred. . . The Court therefore grants summary judgment to Foley on Olaizola’s false-arrest claim.”)

***Miller v. Stallworth***, No. 3:17-CV-01711 (JAM), 2018 WL 3974730, at \*4 (D. Conn. Aug. 20, 2018) (“[T]he Second Circuit has ruled that a false arrest claim under Connecticut law requires proof of a favorable termination. . . Moreover, the Connecticut Supreme Court has also observed that ‘[t]he same reasoning which makes conviction a defense in an action for malicious prosecution would apply as strongly to such a cause of action for false imprisonment as is here asserted, and if conviction is a defense in one, so it should be in the other.’ . . I am required to follow this precedent and to conclude for purposes of a constitutional claim of false arrest that arises in Connecticut that favorable termination of a prosecution is a required element of the cause of action for false arrest. Although plaintiff vacillates between whether he pleaded no contest to the charges from his arrest

of June 21, 2015, or whether those charges remain pending . . . , he has not alleged that any charges from his arrest of June 21, 2015, have been favorably terminated.”)

**Harris v. City of Chicago**, No. 15 CV 3859, 2018 WL 835350, at \*4-5 (N.D. Ill. Feb. 13, 2018) (“The standard rule is that a claim accrues when a plaintiff has ‘a complete and present cause of action.’ . . . Harris asserts that defendants coerced his confession, interrogated him in a manner that shocks the conscience, fabricated evidence and his confession, failed to intervene in each other’s wrongful acts, and conspired with each other along the way. Each of these claims stems from the same alleged wrongs—that defendants engaged in unlawful and untruthful acts during their investigation and then used that wrongfully obtained evidence in legal proceedings against Harris. Harris had a complete and present cause of action for each of these claims once his confession was used against him to deprive him of his liberty—which occurred when he entered a plea of guilty based on his confession and was sentenced to 15 years in prison. *Heck* deferred that accrual, but once his conviction would no longer have been impugned by claims about the confession and the *Heck* bar was removed, the statute of limitations on these claims began to run. State law governs the length of the statute of limitations, which is two years in Illinois. *Wallace*, 549 U.S. at 388; 735 ILCS § 5/13-202. Harris filed this suit in May 2015, more than two years after the clock began to run on his claims, and so they are time barred. . . . Harris argues that his claims are akin to malicious prosecution, so they did not accrue until the proceedings ended in his favor—here when charges against him were dropped in May 2013. I disagree. The reason a malicious prosecution claim cannot be brought before the accused has prevailed on his criminal case is that to allow otherwise could lead to inconsistent judgments. *See Heck*, 512 U.S. at 484. The same cannot be said for Harris’s claims. As discussed above, once he prevailed on his motion to suppress and the state did not appeal, there was no longer a risk of contradictory outcomes. As such, there is no justification for incorporating this element of malicious prosecution into Harris’s due-process based, coerced confession and fabrication of evidence claims and so his suit is dismissed as untimely.”)

**Saunders v. City of Chicago**, No. 12-CV-09158, 2015 WL 7251938, at \*5-7 (N.D. Ill. Nov. 17, 2015) (“Applying the general rule that accrual of § 1983 claims occurs when the plaintiff has a complete and present cause of action, Fifth Amendment claims alleging self-incrimination violations accrue within the criminal proceeding itself. Under a strict reading of *Wallace*, though, because a violation within a criminal proceeding necessarily occurs *before* a conviction, it would not be eligible for *Heck*’s delayed accrual rule. That being said, *Wallace* applies only to Fourth Amendment § 1983 claims, which usually relate to police conduct that occurs before a criminal proceeding is initiated. . . . The Supreme Court has not applied *Wallace* to Fifth Amendment § 1983 claims, which can be predicated on state action occurring all the way up to the point of conviction (*i.e.*, during the criminal proceeding or at sentencing). . . . As such, applying *Wallace* equally to § 1983 claims brought under the Fourth and Fifth Amendments would result in the exclusion of *all* pre-conviction § 1983 claims from deferred-accrual eligibility, essentially erasing *Heck* tolling. This is an unreasonable result. Since the Court’s initial ruling in this case, the Seventh Circuit has addressed this issue, explaining that the relevant inquiry for determining *Heck*-tolling eligibility is

whether the alleged constitutional violation occurred ‘in court’ or ‘out of court,’ thus clarifying the ‘pre-conviction/post-conviction’ delineation discussed in *Wallace*. See *Moore v. Burge*, 771 F.3d 444, 446 (7th Cir. 2014). . . . To be clear, the in-court/out-of-court distinction impacts the applicability of *Heck* tolling, not necessarily *Heck* barring; a § 1983 claim can necessarily imply the invalidity of a conviction or a sentence but nonetheless be ineligible for *Heck*’s deferred-accrual rule. . . . Here, Plaintiffs’ Fifth Amendment self-incrimination claims are based on Defendants’ use of Plaintiffs’ incriminating statements in their respective criminal convictions and sentencing. . . . Because Plaintiffs’ claims are based on ‘in court’ violations under *Moore*, *Wallace* does not apply, and Plaintiffs’ self-incrimination claims are eligible for deferred accrual under *Heck*. . . . But the inquiry does not end there. Just because a Fifth Amendment self-incrimination claim is *Heck* eligible does not mean that the claim necessarily implies the invalidity of the conviction. . . . Both *Hill v. Murphy* and *Matz v. Klotka* post-date the Court’s initial ruling on Defendants’ motion to dismiss, and both opinions show that *Heck* can apply to Fifth Amendment self-incrimination claims. To determine whether a § 1983 claim necessarily implies the invalidity of a conviction or sentence, a court ‘must consider the factual basis of the claim,’ including the factual allegations in the complaint. . . . Plaintiffs have adequately pled that their incriminating statements played a significant-enough role in their respective criminal proceedings such that the invalidity of those confessions necessarily implies the invalidity of Plaintiffs’ convictions. . . . For these reasons, the Court now vacates its dismissal of Count I of Plaintiffs’ complaints as time-barred and reinstates Count I in its entirety in each of Plaintiffs’ complaints. Defendants are free to re-raise this argument at the summary judgment stage should evidence surface indicating that Plaintiffs’ incriminating statements did not figure prominently in their respective convictions and sentences, such that the invalidity of those confessions does not call Plaintiffs’ convictions and sentences into question.”)

***Pipitone v. City of New York***, 57 F. Supp. 3d 173, 186 n.15 (E.D.N.Y. 2014) (“In *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007), the Supreme Court held that § 1983 claims are governed by “the standard rule that accrual occurs when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief,” *id.* at 388, 127 S.Ct. 1091 (internal quotation and punctuation marks omitted). In *Gabelli v. SEC*, — U.S. —, 133 S.Ct. 1216, 185 L.Ed.2d 297 (2013), a case that had nothing to do with § 1983, the Supreme Court quoted the *Wallace* language for the proposition that claims normally accrue at the time of the injury, rather than its discovery, *id.* at 1221–22. Yet following *Gabelli*, the Second Circuit continued to hold that § 1983 claims accrue upon discovery of the injury rather than occurrence of the injury. See, e.g., *Hogan*, 738 F.3d at 518; *Walters*, 517 Fed.Appx. at 42. We note the apparent tension between *Wallace*, *Gabelli*, and Second Circuit § 1983 precedent only for purposes of transparency, and to illustrate the complexities and ambiguities of accrual doctrine. That tension does not affect the holding here because, as explained below, the accrual of these claims is governed by the diligence-discovery rule.”)

***Taylor v. City of Chicago***, No. 14 C 737, 2015 WL 739414, at \*5 n.2, \*6 (N.D. Ill. Feb. 19, 2015) (“Since *Wallace*, the courts in this district have been split on whether the *Heck* bar rule applies to

Fifth Amendment invalid confession claims. [collecting cases] Where a criminal defendant pleads guilty and his allegedly invalid confession plays no part in the criminal proceeding, *Franklin* instructs that *Heck* is inapplicable, and thus a Fifth Amendment claim based upon an invalid confession will be deemed to have accrued when the coerced confession took place. On the other hand, where a confession is used in the criminal proceeding and a civil claim that successfully challenges the confession would effectively nullify the conviction or sentence, *Heck* will bar such a claim, and the claim does not accrue until after the conviction is overturned or otherwise invalidated. Finally, where a plaintiff alleges a coerced confession (by torture or otherwise), to the extent that the constitutional claim is actionable in and of itself without regard to whether any self-incriminating statements were extracted or such statements were used during a criminal proceeding, *Heck* would neither bar such a claim nor defer its accrual. Consistent with *Heck* and *Wallace*, the crux of the inquiry in all three situations remains the same—whether the civil claim based upon a coerced confession ‘necessarily impugns the validity of the conviction.’. . . Here, Plaintiff alleges that the Defendant Officers coerced him into making self-incriminating statements and these statements were later used during the criminal proceeding to convict him. . . Furthermore, Taylor alleges as part of his claim that his conviction rested largely on the unconstitutional use of these coerced statements at trial. . . Because success as to Plaintiff’s Fifth Amendment claim would necessarily imply the invalidity of his conviction, the Court concludes that, under *Heck*’s deferred accrual rule, Taylor’s claim did not begin to accrue until his conviction was set aside in 2013. Taylor filed his Complaint in February 2014, well within the two-year statute of limitations. Accordingly, his Fifth Amendment coerced confession claim is not time-barred, and the motion is denied as to Count I.”)

***Bryant ex rel. Bryant v. City of Ripley, Miss.***, No. 3:12CV37-B-A, 2015 WL 686032, at \*3 (N.D. Miss. Feb. 18, 2015) (“To date, the Fifth Circuit has had no occasion to address the role and effect of Section 43–21–51(5) for *Heck* purposes; so this court has no binding authority to guide it on the issue. A number of courts in other circuits have addressed the issue in similar circumstances, however. Among them is an Arizona district court in the case of *Dominguez v. Shaw*, No. CV 10–01173–PHX–FJM, 2011 WL 4543901 (D.Ariz. Sept. 30, 2011). In Arizona, as in Mississippi, a juvenile court adjudication ‘shall not be deemed a conviction of crime.’. . . The minor plaintiff in *Dominguez* was adjudicated a delinquent for resisting arrest and later brought a § 1983 action to recover for, inter alia, alleged false imprisonment and excessive force claims. . . Citing a number of cases in which various courts applied *Heck* to juvenile adjudications, the *Dominguez* court recognized that Arizona (like Mississippi) treats a minor who has committed a crime differently than an adult who has committed the same crime, but the court found no reason why this distinction should extend to *Heck* analysis. . . The court stated, ‘Whether the juvenile court’s finding is labeled a conviction or an adjudication is, for *Heck* purposes, irrelevant.’. . . This court finds accordingly.”)

***O’Laughlin v. City of Pittsfield***, No. 13–cv–10111–MAP, 2013 WL 6858171, \*5 (D. Mass. Dec. 30, 2013) (“Plaintiff’s second argument is that, given his case’s up-and-down procedural history (e.g., the Massachusetts Appellate Court’s reversal of his conviction and the SJC’s reinstatement of it), a reasonably prudent person in his shoes would not have known that his cause of action

accrued on the date the writ of habeas corpus issued instead of the date that the Supreme Court denied certiorari, thus truly expunging Plaintiff's conviction. Unfortunately for Plaintiff, no authority supports this basis for equitable tolling. As *Wallace* makes clear, the proper course for Plaintiff would have been to file his section 1983 claims within three years of the issuance of the writ of habeas corpus when he knew that his conviction had been called into question. If necessary, the court could have stayed the action pending the Supreme Court's decision on the Commonwealth's petition for certiorari. . . .*Heck* establishes that Plaintiff's claim accrued when his conviction was 'called into question' by the issuance of habeas relief. . . . That date was, at the latest, September 1, 2009, when Judge Young, on instructions from the First Circuit, issued the writ of habeas corpus and released Plaintiff on conditions. . . . Starting at that point, Plaintiff had a full three years to file his lawsuit, up to September 1, 2012. By the time Plaintiff filed his complaint on January 18, 2013, his claims were untimely.")

***Shakleford v. Hensley***, No. 12-194-GFVT, 2013 WL 5371996, \*4 (E.D. Ky. Sept. 24, 2013) ("Based on the aforementioned authority from the Supreme Court and the Sixth Circuit, as well as the persuasive reasoning of the sister-district courts in this circuit, the Court finds that Shakleford's Section 1983 search and seizure claims are time barred. Trooper Hensley came to Shakleford's home on August 6, 2007 looking for a television and a VCR, which Shakleford voluntarily produced. Trooper Hensley then proceeded to search Shakleford's home on the authority of an invalid warrant. At this point, Shakleford had a 'complete and present cause of action,' which triggers the accrual of his Section 1983 illegal search and seizure claim. And this injury was not hidden from Shakleford. He was present to see the search take place, and it is this knowledge, rather than the legal knowledge of the sufficiency of the warrant, that is relevant to the accrual analysis. Therefore, Shakleford's Section 1983 claims for illegal search and seizure accrued on August 6, 2007, the date of the search and seizure, and as he did not raise them until he initiated this action six years later, the claims are time barred and properly dismissed.")

***Telfair v. Tandy***, No. 08-731 (WJM), 2008 WL 4661697, at \*7, \*8 (D.N.J. Oct. 20, 2008) ("Based on the Supreme Court's language in *Wallace*, it would appear that *Wallace* effectively supersedes the Third Circuit's reasoning in *Gibson*, . . .and that *Heck* is inapplicable here . . . and that *Smith v. Holtz* likewise is abrogated by *Wallace*. . . . Thus, under *Wallace*, any Fourth Amendment claim must be brought and, in all likelihood, stayed pending resolution of the underlying charges. . . . In the event of a conviction on the underlying charges, the stay may extend for years while post-conviction relief is sought. . . . This is not an ideal situation because of the potential to clog the court's docket with unresolvable cases. However, in this case, there does not appear to be any clear basis to dismiss the illegal search and seizure claim on the merits. Therefore, this Court is constrained at this time to also allow this claim to proceed, but stay the action until plaintiff's criminal proceedings are concluded.")

***Kamar v. Krolczyk***, No. 1:07-CV-0340 AWI TAG, 2008 WL 2880414, at \*7 (E.D. Cal. July 22, 2008) ("In light of *Wallace*, the *Heck* bar did not prohibit Plaintiff from filing this action until the criminal charges against him were dismissed. The rules announced in *Wallace* apply retroactively

to Plaintiff because the Supreme Court applied these rules to the parties in *Wallace* . . . Because the *Heck* bar did not apply to the filing of this action, this action accrued at the time of the search and Plaintiff is not entitled to a later accrual date. Plaintiff contends that *Wallace* does not apply to this action and *Harvey* is still good law because *Wallace* and *Heck* concerned false arrest and malicious prosecution claims. Plaintiff argues that *Harvey* still applies to this civil rights claims based on Fourth Amendment violations. The court disagrees. Nothing in *Wallace* appears to limit it to certain types of civil rights violations.”)

***Jefferson v. Kelly***, No. 06-CV-6616 (NGG)(LB), 2008 WL 1840767, at \*4, \*5 (E.D.N.Y. Apr. 22, 2008) (“Based upon the allegations in Plaintiff’s Complaint, the latest date of accrual for any of these claims (false imprisonment, false arrest, excessive force, and coerced confession) is July 18, 2003, the day on which Detective Greco and his partner questioned Plaintiff and obtained his written statement. Thus, Plaintiff’s December 11, 2006 Complaint was not filed within the three-year limitations period applicable to section 1983 claims. . . . To the extent that Plaintiff’s allegations may be read as an attempt to state a malicious prosecution claim, the claim is not similarly time-barred.”).

***Barnhill v. Strong***, No. JFM 07-1678, 2008 WL 544835, at \*6 (D. Md. Feb. 25, 2008) (“*Wallace* dictates that these claims be dismissed. As in *Wallace*, the claims here of unlawful search, seizure, and excessive force are analogous to the common law torts of false arrest and imprisonment, and *Wallace* makes clear that despite the pendency of criminal proceedings, the statute of limitations on such claims begins to run at the time the legal process is initiated. Here, any search, seizure, or excessive force ended on September 12, 2001, when plaintiffs were brought before the state Commissioner. Any remaining claims form part of a malicious prosecution case. Accordingly, even though plaintiffs’ motion to suppress was not granted for several years, the statute of limitations for these federal claims expired on September 12, 2004.”).

***Fulton v. Zalatoris***, No. 07 C 5569, 2008 WL 697349, at \*3 (N.D. Ill. Mar. 12, 2008) (“[D]ismissing the false arrest claim rather than staying the proceedings would act in practical effect to bar Plaintiffs from later refileing the claim. Although Plaintiffs’ initial filing was timely, if the claim was dismissed, Plaintiffs would no longer be able to comply with Illinois’ two-year statute of limitations. . . As in this case, where a claim ‘for monetary relief cannot be redressed in [a parallel] state proceeding,’ a stay must be ordered. *Deakins v. Monaghan*, 484 U.S. 193, 202 (1988).”).

***Cash v. Bradley County***, 2008 WL 501338, at \*2 (E.D.Tenn. Feb. 21, 2008) (“Plaintiff argues *Wallace* should not apply because it was not decided until 2007, well after the incident in question occurred. Unfortunately for Plaintiff, the Supreme Court’s interpretation of the law is binding, regardless of whether there was a different interpretation a decade ago. If the Supreme Court had not decided *Wallace*, the Sixth Circuit’s decision in *Shamaeizadeh* may have allowed Plaintiff to bring his case. But in that hypothetical scenario, if Plaintiff had won his case and Defendants

appealed, the Supreme Court could have issued a ruling setting out the same holding as in *Wallace*, which would hold Plaintiff's claim to be time-barred.”).

***Porter v. City of Davis Police Dept.***, 2007 WL 4463344, at \*5 n.2 (E.D. Cal. Dec. 17, 2007) (“*Heck* was based on the premise that no cause of action has accrued until the conviction has been vacated or expunged. . . . Until *Wallace*, *Heck* was seen as barring any defendant/prisoner tort claim which might impugn the criminal judgment. The conceptual bases of *Heck* and *Wallace* seem irreconcilable. *Wallace* does not answer the situation where a cause of action might be accruing, but not expired when the entry of final judgment in a criminal action is entered. If *Heck* is to be followed, the cause of action which once commenced running would then be deemed never to have accrued. Even more confusing would be the situation where a cause of action had expired during the pendency of the criminal action, but according to *Heck* would not have even accrued upon entry of final judgment. Confusing, to say the least. Perhaps *Heck* now only applies to suits which sound in malicious prosecution.”)

***Mallard v. Potenza***, 2007 WL 4198246, at \*3 (E.D.N.Y. Nov. 21, 2007) (“Plaintiff cites no authority for the proposition that *Wallace* does not apply in the context of § 1983 claim for an illegal search and seizure. Indeed, at this relatively early stage, the only courts to consider the expansion of *Wallace* to the search and seizure context have made this rather modest leap. [collecting cases] In sum, the Court fails to see any reasoned basis to distinguish between claims for false arrest and search and seizure, and therefore holds that *Wallace* applies with equal force to a claim for an illegal search and seizure.”).

***Richards v. County of Morris***, 2007 U.S. Dist. LEXIS 49290, at \*11, \*12, \*15, \*16 (D.N.J. July 5, 2007) (“Unless their full application would defeat the goals of the federal statute at issue, courts should not unravel states’ interrelated limitations provisions regarding tolling, revival, and questions of application. [citing *Wilson v. Garcia*, 471 U.S. 261, 269 (1985)] . . . . When state tolling rules contradict federal law or policy, in certain limited circumstances, federal courts can turn to federal tolling doctrine. . . . Based on the Supreme Court’s language in *Wallace*, this Court concludes that *Wallace* effectively supersedes the Third Circuit’s reasoning in *Gibson*,. . . and that *Heck* is inapplicable here. Consequently, Plaintiff’s allegations of false arrest, false imprisonment, racial profiling, and unlawful search and seizure in violation of his Fourth and Fourteenth Amendment rights are time-barred, because plaintiff’s claims actually accrued on April 15, 1997, the date of the unlawful search and arrest. This Complaint was submitted on April 23, 2007, long after the statute of limitations had expired on April 15, 1999. Plaintiff alleges no facts or extraordinary circumstances that would permit statutory or equitable tolling under either New Jersey or federal law. Rather, plaintiff pleads only ignorance of the law and his incarceration, neither excuse being sufficient to relax the statute of limitations bar in this instance.”).

***Hayhurst v. Upper Makefield Tp.***, 2007 WL 1795682, at \*8, \*9 (E.D.Pa. June 21, 2007) (“Although Ms. Hayhurst’s claim for false arrest is barred by *Heck*, the Court will not dismiss it at this time. *Heck* only bars § 1983 claims that suggest the invalidity of a criminal conviction until

that conviction is overturned or declared invalid. If Ms. Hayhurst's pending appeal of her disorderly conduct appeal is successful, *Heck* will no longer apply. Ms. Hayhurst has therefore requested that, if the Court finds her false arrest claim barred by *Heck*, it should stay the entire case pending resolution of her criminal appeal. The defendants have filed an opposition to this request, asking that Ms. Hayhurst's false arrest claim be dismissed outright and that the remaining excessive force claim be allowed to proceed to trial. Having found that Ms. Hayhurst's false arrest claim should be stayed under *Heck* until the resolution of her criminal appeal, the Court believes that Ms. Hayhurst's excessive force claim should be stayed as well. Although the excessive force claim is not barred by *Heck*, it arises out of the same facts and involves the same evidence as the false arrest claim. Declining to stay the excessive force claim would therefore risk having two separate trials on each of plaintiff's claims, should Ms. Hayhurst succeed in her appeal. Although the Court is sympathetic to the defendants' desire to have this claim resolved expeditiously, the Court believes a stay of all claims is necessary to prevent the risk of essentially duplicative proceedings.")

*Finwall v. City of Chicago*, 490 F.Supp.2d 918, 921-23 (N.D. Ill. 2007) ("It is undisputed that Finwall was arraigned on April 13, 2001 and therefore the limitations period ended on April 13, 2003, well before Finwall filed suit. Finwall nevertheless contends that his false imprisonment claims are timely because his claims were also the subject of a class-action lawsuit, the filing of which tolled the statute of limitations. . . . In short, probable cause and length of detention would both have been at issue in the class action proposed in *Lopez*, and therefore the statute of limitations was tolled for both false arrest and unlawful detention claims. The tolling continued until May 20, 2004, the date the plaintiff in *Lopez* withdrew his motion for class certification, freeing Finwall to file his individual suit two months later. In summary, *Lopez* tolled the accrual of Finwall's false arrest and unlawful detention claims until May 20, 2004. Therefore his claims, filed July 15, 2004, are timely. However, the only defendant common to both *Lopez* and the instant suit is the City of Chicago, and therefore Finwall's false arrest and unlawful detention claims against individual defendants Garcia and Boyd (Counts I & III) are time-barred. Finwall's argument that his claims against Garcia and Boyd are timely under the discovery rule is unfounded: although he may not have learned the specifics of the detectives' alleged fabrication of evidence until their depositions, he knew at the time of his arrest that no probable cause existed.").

*Hill v. City of Chicago*, No. 06 C 6772, 2007 WL 1424211, at \*3, \*4 (N.D. Ill. May 10, 2007) (Fourth Amendment claims foreclosed by *Wallace*, but not equal protection and coerced confessions claims, which claims accrued when convictions were vacated).

*Caldwell v. City of Newfield*, Civil Action No. 05-1913 (RMB), 2007 WL 1038695, at (D.N.J. March 30, 2007) ("Under *Wallace*, any Fourth Amendment claim must be brought and, in all likelihood, stayed pending resolution of the underlying charges. . . In the event of a conviction on the underlying charges, the stay may extend for years while post-conviction relief is sought. . . Because of *Wallace*'s potential to clog the Court's docket with unresolvable cases, this Court will

reach Defendant's arguments under *Heck* last, only where dismissal of Plaintiff's claims on other grounds is unavailable.").

### 3. Excessive Force Claims

For cases involving excessive force claims, *see, e.g., Jefferson v. Lias*, 21 F.4th 74, 86-87 (3d Cir. 2021) ("Lias argues that Jefferson's claims are barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). There, the Supreme Court held that a § 1983 action is barred if 'a judgment in favor of the plaintiff would necessarily imply the invalidity of [a prior] conviction or sentence.' . . . The conviction at issue here is second-degree eluding under N.J. Stat. Ann. § 2C:29-2(b), to which Jefferson pled guilty. A person may be convicted under New Jersey's eluding statute if he (1) knowingly flees or attempts to evade police while driving on a street or highway; (2) after having received a signal from the police officer indicating he should stop; and (3) creating a risk of death or injury to any person. Because 'creating a risk of death or injury to any person' is an essential element of the conviction, Lias contends Jefferson's excessive force claim cannot proceed as Lias was justified in using deadly force to prevent the risk from continuing. Lias's argument is unavailing for a number of reasons. For one, as we have explained above, precedent in our Circuit (and in accordance with opinions issued by our sister circuits) establishes that the unbounded use of deadly force is not justified against an individual in flight simply whenever they have precipitated risk to others. *See Lytle*, 560 F.3d at 415 ("Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public ... the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable."). If an individual has engaged in risky flight, but no longer is threatening to officers or the public, the use of deadly force against the individual may no longer be reasonable. The analysis as to whether the use of deadly force to halt a suspect's escape is 'objectively reasonable' depends on the resolution of the kind of intensive, multi-factor analysis articulated by *Graham* and our subsequent Fourth Amendment excessive force precedent. For another, we have declined to apply *Heck* to bar Fourth Amendment excessive force claims under § 1983 when we have found that the quantum of force used may have been disproportionate to the conduct implicated by the underlying conviction, even in cases involving resisting arrest and assaulting officers. *See, e.g., Nelson v. Jashurek*, 109 F.3d 142, 145 (3d Cir. 1997) (holding *Heck* did not foreclose excessive force claim, noting that "the fact that Jashurek was justified in using 'substantial force' to arrest Nelson does not mean that he was justified in using an excessive amount of force and thus does not mean that his actions in effectuating the arrest necessarily were objectively reasonable"); *Lora-Pena v. FBI*, 529 F.3d 503, 506 (3d Cir. 2008) (per curiam) (also declining to apply *Heck* to bar an excessive force claim, noting "Lora-Pena's convictions for resisting arrest and assaulting officers would not be inconsistent with a holding that the officers, during a lawful arrest, used excessive (or unlawful) force in response to his own unlawful actions."). Consequently, Lias's reliance upon *Heck* to defeat Jefferson's excessive force claim is misguided."); *Sanders v. City of Pittsburg*, 14 F.4th 968, 971-73 (9th Cir. 2021) ("Here, Sanders was charged with resisting arrest under § 148(a)(1), which prohibits 'resist[ing], delay[ing], or obstruct[ing]' a police officer during the discharge of his duties. Under California law, a conviction under this statute requires that the defendant's

obstructive acts occur while the officer is engaging in ‘the *lawful* exercise of his duties.’ . . . The use of excessive force by an officer is not within the performance of the officer’s duty. . . . Thus, the ‘lawfulness of the officer’s conduct’ is necessarily established as a result of a conviction under § 148(a)(1). . . . In other words, a defendant can’t be convicted under § 148(a)(1) if an officer used excessive force at the time of the acts resulting in the conviction. Consequently, an excessive force claim can’t survive the *Heck* bar if it’s predicated on allegedly unlawful actions by the officer *at the same time* as the plaintiff’s conduct that resulted in his § 148(a)(1) conviction. . . . Such an allegation would undermine the validity of the § 148(a)(1) conviction. On the other hand, if the alleged excessive force occurred *before* or *after* the acts that form the basis of the § 148(a) violation, even if part of one continuous transaction, the § 1983 claim doesn’t ‘necessarily imply the invalidity of [a] criminal conviction under § 148(a)(1).’ . . . Sanders contends that his claim is not *Heck*-barred because his conviction could have been based on his fleeing officers prior to his arrest in the gully. Under that theory, success on his § 1983 claim would leave the conviction undisturbed since his act of resistance occurred *before* the dog bite and arrest. Sanders relies primarily on *Hooper*, which held that resisting arrest ‘does not lose its character as a violation of § 148(a)(1) if, at some other time during that same “continuous transaction,” the officer uses excessive force or otherwise acts unlawfully.’ . . . We allowed *Hooper*’s excessive force claim to proceed because *Heck* is no impediment ‘when the conviction and the § 1983 claim are based on different actions during “one continuous transaction.”’ . . . *Hooper*’s § 1983 action could separately target one action—the allegedly unlawful dog bite—without disturbing the § 148(a)(1) conviction. Accordingly, *Hooper* merely holds that *Heck* presents no bar to an excessive force claim when an officer’s allegedly *unlawful* action can be separated from the *lawful* actions that formed the basis of the § 148(a)(1) conviction, even if they occurred during one continuous transaction. Here, we cannot separate out which of Sanders’s obstructive acts led to his conviction since all of them did. As part of his guilty plea, Sanders stipulated that the factual basis for his conviction encompassed the three instances of resistance identified in the preliminary hearing transcript. Specifically, Officer Bryan testified that he ordered his dog to bite Sanders’s right calf as he observed other officers struggling to apprehend Sanders’s arms in the gully. So unlike *Hooper*, the dog bite in this case is unquestionably part of the actions that formed the basis of Sanders’s conviction. Under these facts, there is no way to carve out the dog bite from the § 148(a)(1) conviction without ‘necessarily imply[ing]’ that the conviction was invalid. . . . Because the dog bite was part of the § 148(a)(1) conviction’s factual basis, it was necessarily lawful for purposes of the *Heck* analysis. And while *Hooper* held that a continuous transaction can be broken into ‘different actions’ for purposes of a § 1983 action, it did not suggest we may slice up the *factual basis* of a § 148(a)(1) conviction to avoid the *Heck* bar. On the contrary, *Yount*—the case relied on by *Hooper*—specifically rejected this argument. . . . Indeed, we have previously held that a jury conviction for § 148(a)(1) based on multiple acts of resistance necessarily means that officers’ actions throughout the whole course of the defendant’s conduct’ was necessarily found lawful and any action alleging excessive force based on those actions would be *Heck*-barred. . . . Similarly, *Heck* bars any § 1983 claim alleging excessive force based on an act or acts constituting any part of the factual basis of a § 148(a)(1) conviction. In sum, we hold that Sanders cannot stipulate to the lawfulness of the dog bite as part of his § 148(a)(1) guilty plea and then use the ‘very same act’ to allege an excessive

force claim under § 1983. . . Success on such a claim would ‘necessarily imply’ that his conviction was invalid. . . Sanders’s claim against Officer Bryan is, therefore, barred under *Heck*.’”); ***Poole v. City of Shreveport***, 13 F.4th 420, 426-27 (5th Cir. 2021) (“We agree with the district court that *Heck* is no barrier to Poole’s claim. The law Poole violated criminalizes ‘the intentional refusal of a driver to bring a vehicle to a stop’ under circumstances that endanger human life. . . At the time the shooting occurred, Poole had already stopped driving and exited his truck. Poole’s excessive force claim therefore is ‘temporally and conceptually distinct’ from his flight offense. . . Put another way, it would not be inconsistent with the state court’s finding that Poole fled the police for a jury to conclude that an officer used excessive force after that flight ended.”); ***Lopez v. Sheriff of Cook County***, 993 F.3d 981, 987 (7th Cir. 2021) (“Lopez pleaded guilty to aggravated discharge of a firearm, which requires a person to knowingly or intentionally fire in the direction of another person. . . Under Illinois law, however, a person can be found guilty of that offense without posing a threat of serious harm to another. . . This means Lopez can be guilty of aggravated discharge of a firearm while also having had excessive force used against him by an officer after the fact. These two realities are not mutually exclusive. So *Heck* does not bar Lopez’s § 1983 claim.”); ***Hooks v. Atoki***, 983 F.3d 1193, 1201 (10th Cir. 2020), *cert. denied*, 141 S. Ct. \_\_\_ (2021) (“*Heck* bars Mr. Hooks from recovering damages based on the first four alleged uses of force. Mr. Hooks’s no contest plea to two counts of assault and battery of a police officer means he admitted repeatedly hitting the officers before he was subdued. For Mr. Hooks to prevail on his excessive force claim with respect to these uses, he would need to prove that it was unreasonable for the officers to defend themselves by subduing him. In other words, Mr. Hooks would need to show ‘he did nothing wrong.’ . . That inquiry would necessarily entail an evaluation of whether and to what extent Mr. Hooks used force against the officers, an inquiry that would take aim at the heart of his criminal plea, thereby violating the spirit of *Heck*. . . The fifth and sixth uses of force are different. Those allegations align with the examples we articulated in *Havens*, i.e., ‘the claim may be . . . that the officer used force after the need for force had disappeared.’ . . Mr. Hooks alleges that after Officer Irby tased him once, he fell, hit his head, and lay unmoving, on his stomach on the ground. Yet, Officer Irby tased him again and Officer Harding placed him in a chokehold. An officer can be liable for using excessive force against a suspect who ‘no longer posed a threat.’ . . Drawing all reasonable inferences in Mr. Hooks’s favor, it is plausible that the officers were on notice that Mr. Hooks no longer posed a threat after he collapsed on his stomach on the ground.”); ***Harrigan v. Metro Dade Police Dep’t Station #4***, 977 F.3d 1185, 1193-97 (11th Cir. 2020) (“[W]e conclude that *Heck* does not bar Harrigan’s suit. Officer Rodriguez focuses on just two of Harrigan’s state-court convictions -- for aggravated assault and fleeing to elude, conceding as he must that Harrigan’s remaining convictions could not be negated if his § 1983 action were to succeed. Rodriguez says that Harrigan’s § 1983 claim ‘is directly at odds with’ those two convictions and that Harrigan’s ‘version of events, if proven to be true at trial, would show that’ he ‘was wrongly convicted.’ Harrigan’s essential claim in this excessive-force suit is that Officer Rodriguez shot him while he was sitting ‘stationary’ in his vehicle, stopped at a red light. He claims that ‘it was only after being shot by Officer Rodriguez that [he] then accelerated [his] vehicle.’ Thus, the shooting was unprovoked and without any justification. Nothing in the record before us ‘irrefutably’ contradicts that claim; the fact is that ‘both [Rodriguez’s] excessive use of force and’

Harrigan's convictions 'are not a logical impossibility.' . . . As we see it, a jury could have found that Officer Rodriguez shot Harrigan first, and that Harrigan then committed aggravated assault and fled the scene. The jury could have found the following: Officers Carter, Baldwin, and Rodriguez stopped Harrigan at the intersection of SW 216th Street and Allapattah Road. The vehicle was stationary at a red light. Officers Baldwin and Rodriguez got out of their police cars and approached Harrigan as he sat in the stolen Ford pickup truck. Without provocation, Officer Rodriguez opened fire. Then, and only then, did Harrigan drive his truck at Officer Baldwin before fleeing the intersection and leading the officers on a high-speed chase. That finding would be consistent with the jury's general guilty verdicts for aggravated assault and fleeing to elude. And, under this set of facts, a federal jury still could find for Harrigan on his § 1983 claim without undermining -- much less negating -- his aggravated-assault and fleeing-to-elude convictions. The 'facts required for' Harrigan 'to prove his § 1983 case do not necessarily logically contradict the essential facts underlying' those convictions, and that means '*Heck* does not bar the § 1983 action from proceeding.' . . . Officer Rodriguez may be right. Perhaps the jury rejected Harrigan's necessity defense because it concluded that Rodriguez shot Harrigan only after Harrigan gunned his truck at Officer Baldwin. But because the jury returned general verdicts, we don't know that for certain. . . . Perhaps the jury rejected Harrigan's necessity defense for a different reason. Maybe it thought Harrigan had intentionally caused the danger that existed -- after all, Harrigan's encounter with police officers began because he had stolen a truck. The jury could have believed that Officer Rodriguez shot Harrigan; that Harrigan then committed aggravated assault and fled the scene; and that Harrigan was not entitled to the necessity defense he sought. That 'construction of the facts' allows for Harrigan's success in his § 1983 suit without undermining his 'underlying conviction[s].' . . . The long and short of it is that the jury's rejection of Harrigan's necessity defense does not 'necessarily' bring his § 1983 suit within *Heck*'s grasp. Finally, Officer Rodriguez invokes what we've called the 'inconsistent-factual-allegations rule.' . . . He says that *Heck* bars Harrigan's § 1983 claim because Harrigan's 'complaint makes specific factual allegations that are inconsistent with the facts upon which his punishment was based.' . . . As we've explained, the inconsistent-factual-allegations rule on which Rodriguez relies -- itself 'an additional gloss on the *Heck* analysis,' . . . applies only in a 'narrow category of cases': 'where the allegation in the § 1983 complaint is a specific one that both necessarily implies the earlier decision is invalid *and* is necessary to the success of the § 1983 suit itself.' . . . 'When a plaintiff alleges a fact that, if true, would conflict with the earlier punishment, but that fact is not necessary to the success of his § 1983 suit, the *Heck* bar does not apply.' . . . It still remains true that a trial jury could sustain Harrigan's excessive-force § 1983 complaint without negating his state-court convictions. . . . Harrigan says that, after Officer Rodriguez began shooting at him, Harrigan 'backed up' before deliberately swerving around Officer Baldwin in front of him. Though this claim is inconsistent with Harrigan's conviction for aggravated assault on Officer Baldwin, the claim is not necessary to the success of Harrigan's § 1983 suit. As in *Dixon*, the gravamen of Harrigan's lawsuit is that Officer Rodriguez used excessive force by shooting him without provocation. Whether Harrigan intentionally threatened to harm Officer Baldwin or tried only to avoid him -- and we know from his conviction that the former is true -- does not answer whether Officer Rodriguez used excessive force. That Harrigan committed aggravated assault on Officer Baldwin does not necessarily doom

his § 1983 claim. The entry of a judgment in Harrigan’s favor on his § 1983 excessive-force suit would not necessarily imply the invalidity of his state-court convictions. That means *Heck* does not bar Harrigan’s lawsuit, and the district court’s conclusion that it does was error.”); *El v. City of Pittsburgh*, 975 F.3d 327, 339 (3d Cir. 2020) (“Will was convicted of ‘creat[ing] a hazardous or physically offensive condition’ with ‘intent to cause public inconvenience, annoyance or alarm.’ . . . Therefore, his § 1983 claim would be barred by *Heck* if, in order to prevail, he needed to demonstrate that he did not do so. But, even if an individual is engaged in disorderly conduct, there still could be a level of responsive force that is reasonable and a level that is ‘excessive and unreasonable.’ . . . Viewing the facts in the light most favorable to Will, a jury could conclude that Officer Welling’s use of force was objectively unreasonable, even taking Will’s disorderly conduct into account.”); *Aucoin v. Cupil*, 958 F.3d 379, 381-84 (5th Cir. 2020) (“[A]n inmate cannot bring a § 1983 claim for excessive use of force by a prison guard, if the inmate has already been found guilty for misconduct that justified that use of force. But *Heck* does not bar a § 1983 claim for a prison guard’s excessive use of force *after* the inmate has submitted and ceased engaging in the alleged misconduct. . . . In this case, Prisoner Layne Aucoin complains that Lieutenant Andrew Cupil and Master Sergeant Reginald Robinson, guards at the Dixon Correctional Institute, assaulted him. He says they first assaulted him in his cell—and then again later in the prison lobby and shower. At a subsequent prison disciplinary proceeding, Aucoin was found guilty of defiance, aggravated disobedience, and property destruction for misconduct in his cell. But his misconduct ceased while he was in his cell. We conclude that *Heck* bars his § 1983 claim as to the alleged use of force in his cell—but not as to the alleged use of force in the prison lobby and shower. That is what the district court held at one point as well, but the court subsequently changed its mind and dismissed Aucoin’s entire claim under *Heck*. We therefore reverse and remand for further proceedings. In doing so, we of course express no comment on the merits of Aucoin’s § 1983 claim. We hold only that portions of his claim are not barred by *Heck*. . . . So when a plaintiff brings multiple § 1983 claims, *Heck* may bar those claims that potentially conflict with the factual underpinnings of a prior conviction, while posing no bar to other claims. Put simply, there is no *Heck* bar if the alleged violation occurs ‘after’ the cessation of the plaintiff’s misconduct that gave rise to his prior conviction. . . . Applying this analytical framework here, we hold that Aucoin’s excessive force claims for events occurring in his cell are barred by *Heck*—but that the alleged beatings in the prison showers and lobby are not. Aucoin argues that *Heck* does not apply to any of his claims, because he never challenged the loss of the time credits and, by extension, the validity of the underlying conviction. We disagree. First, it is of no consequence that he does not contest the loss of his good-time credits. . . . Second, Aucoin overlooks one critical failing: He *does* challenge the conviction by maintaining his innocence in the events that led up to his disciplinary conviction. Specifically, he alleged both in his complaint and in his live testimony that prison staff ‘snuck up’ on him, sprayed him with mace, and beat him—all unprovoked. He has insisted, in other words, that he is wholly blameless for the use of force against him in his cell. But a claim is barred by *Heck* if the plaintiff’s factual allegations supporting the claim are necessarily inconsistent with the validity of the conviction. . . . That is the case here: If the factual account of Aucoin’s complaint is taken as true, then he cannot be guilty of defiance, aggravated disobedience, and property destruction—in direct conflict with his disciplinary conviction. As we have stated

before, when a plaintiff's claim 'is based solely on his assertions that he ... did nothing wrong, and was attacked by the [ ] officers for no reason,' that suit 'squarely challenges the factual determination that underlies his conviction' and is necessarily at odds with the conviction. . . It is precisely this 'type of claim that is barred by *Heck* in our circuit.' . . The district court was therefore right to dismiss his claim for excessive force within the cell and up to the point that he was restrained. But the district court erred in dismissing all of Aucoin's claims under *Heck*. Aucoin's pleadings include allegations that he was beaten and maced in the prison showers and lobby after he had surrendered. His complaint makes clear that these actions occurred after whatever he may have done in his prison cell, and it does so with at least as much specificity as the plaintiff did in *Bush*. So, as in *Bush* and *Bourne*, the plaintiff challenges the exercise of force distinct and isolated from the facts leading to the disciplinary conviction. As a result, 'the factual basis for the conviction is temporally and conceptually distinct from the excessive force claim[s].' . . *Heck* does not bar those subsequent, discrete claims. . . In sum, *Heck* bars Aucoin's claims of assault while he was in the cell, up to the point he was restrained. But it does not bar the alleged assault in the showers and lobby after he surrendered—allegations we must take as true at the motion to dismiss stage. We reverse and remand.”); *Sconiers v. Lockhart*, 946 F.3d 1256, 1268-70 (11th Cir. 2020) (“As background, and as we have noted, following the incidents between Sconiers and Lockhart, Sconiers pled guilty to resisting or obstructing an officer without violence. Lockhart argues that Sconiers's guilty plea to this charge precludes him under *Heck* and Florida collateral estoppel from 'asserting that he was obeying Lockhart's orders to sit down so the area could be cleared and did not lunge at the officer.' Lockhart is mistaken. In *Heck*, the Supreme Court was concerned about prisoners using § 1983 to implicitly invalidate their convictions, thus making an 'end-run around habeas.' . . To prevent this from happening, the *Heck* Court erected a wall preventing prisoners from obtaining damages under § 1983 in any action where success would necessarily imply the prisoner's state conviction was invalid. . . If a judgment in favor of a prisoner in a § 1983 case would have this effect, the court must dismiss the complaint unless the prisoner can show that the related state conviction has already been invalidated. . . But when the facts required for a prisoner to prove his § 1983 case do not necessarily logically contradict the essential facts underlying the prisoner's conviction, *Heck* does not bar the § 1983 action from proceeding. . . Sconiers pled guilty to resisting, obstructing, or opposing Lockhart, 'who was then and there in the lawful execution of a legal duty ... , to-wit: clearing the ro[v]er's area, without offering or doing violence to the person of such officer.' Crucially, the charging information provides no further facts, and the record similarly fails to identify any facts Sconiers admitted when he entered his guilty plea. So we can look to nothing to illuminate the sequence of events, including who said what when and who hit whom when. As a result, we are left with no way to determine whether Lockhart's use of force was necessarily responsive to Sconiers's non-violent resistance. . . For instance, Sconiers could have 'resisted' by standing up when he should not have or failing to sit when instructed to do so. But following that, Sconiers could have been fully compliant with Lockhart's demands. And Lockhart could have nonetheless used unnecessary force on Sconiers at that time. Or Sconiers's failure to heed Lockhart's commands could have occurred after Lockhart engaged in an unwarranted use of force. For these reasons, similar to the facts in *Hadley*, both Lockhart's excessive use of force and Sconiers's resistance are not a logical

impossibility. Lockhart responds that the arrest affidavit irrefutably establishes he used force only in response to Sconiers’s cursing at him and defiance of him, even after Lockhart warned him that he would be pepper-sprayed if he continued his intransigence. But the problem for Lockhart is that he has not established the arrest affidavit was incorporated into Sconiers’s guilty plea. Indeed, the plea agreement is not even in the record here. Without that, we cannot determine that Sconiers pled guilty to that recitation of events. As a result, *Heck* does not bar Sconiers’s excessive-force claim against Lockhart because Lockhart has not established that Sconiers’s admitted in his plea that his resistance prompted Lockhart’s use of force.”); ***Johnson v. Rogers***, 944 F.3d 966, 968 (7th Cir. 2019) (“The district court’s two reasons for ruling against Johnson—qualified immunity and *Heck*—are incompatible. A suit barred by the doctrine of *Heck* is premature and must be dismissed without prejudice, because *Heck* holds that the claim does not accrue until the conviction has been set aside. . . . By contrast, a claim barred by the doctrine of qualified immunity fails on the merits and must be dismissed with prejudice. Here the district court dismissed with prejudice, an inappropriate step when *Heck* governs. It is possible to bypass *Heck* and address the merits—after all, *Heck* concerns timing rather than subject-matter jurisdiction. See *Polzin v. Gage*, 636 F.3d 834, 838 (7th Cir. 2011). But the district court did not bypass *Heck*. Relying on it, the court concluded that suit had been filed too soon, and a premature suit must be dismissed without prejudice. We therefore start with *Heck* to determine whether it is appropriate to consider immunity at all. *Heck* concludes that a person cannot use § 1983 to collect damages on a theory irreconcilable with a conviction’s validity, unless that conviction has been set aside. (Whether this rule extends past the end of imprisonment is a subject before the *en banc* court in *Savory v. Cannon*, No. 17-3543 (argued Sept. 24, 2019). We assume for current purposes that it does.) Defendants contend that any recovery for excessive force used at the time of arrest would be inconsistent with Johnson’s conviction for resisting arrest. Yet *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007), holds that a claim of wrongful arrest may proceed even if a person has been convicted of the offense that led to the arrest. Whether the police had probable cause to arrest is distinct from the question whether a criminal conviction, on a different factual record or a guilty plea, is valid. Likewise when the arrested person contends that the police used excessive force. The propositions ‘the suspect resisted arrest’ and ‘the police used too much force to effect the arrest’ can be true at the same time. And so we held in *Evans v. Poskon*, 603 F.3d 362 (7th Cir. 2010), and its successors, such as *Mordi v. Zeigler*, 870 F.3d 703 (7th Cir. 2017), and *Hill v. Murphy*, 785 F.3d 242 (7th Cir. 2015). . . . Johnson, however, does not deny that he tried to obstruct the police from maintaining custody after his arrest. He contends only that Rogers used force that was unreasonable in relation to the nature of his obstruction. This contention can be resolved in Johnson’s favor without casting any doubt on the validity of his conviction. It follows that *Heck* does not block this suit.”); ***O’Brien v. Town of Bellingham***, 943 F.3d 514, 529-30 (1st Cir. 2019) (“Whether *Heck* bars § 1983 claims is a jurisdictional question that can be raised at any time during the pendency of litigation. . . . In this case, the record reflects that O’Brien’s excessive force claims arising from the incident in the woods are ‘so interrelated factually’ with his state convictions arising from those events that a judgment in O’Brien’s favor would ‘necessarily imply’ the invalidity of those convictions. . . . Indeed, if the officers had used excessive force against O’Brien while arresting him in the woods, as he now claims, their unlawful behavior

would have provided O'Brien with a defense against the charges for resisting arrest and assault and battery under state law. . . . Similarly, the district court correctly found that *Heck* bars any claim that Officer Melanson and Sergeant Perry used excessive force leading up to when O'Brien struck them with the phone handset. Granting a judgment against Officer Melanson and Sergeant Perry would have implied that O'Brien's conduct was justified, while the officers' actions were unjustified, which would have necessarily undermined the validity of O'Brien's assault and battery convictions. As we explained in *Thore*, although '[a] § 1983 excessive force claim brought against a police officer that arises out of the officer's use of force during an arrest does not necessarily call into question the validity of an underlying state conviction ... [,] it is not necessarily free from *Heck*' either. . . . And because O'Brien has not specified any theory of relief, let alone attempted to identify a factual scenario which would survive *Heck*, we need not go any further, as any argument to that effect is waived. . . . The arguments that O'Brien does raise on appeal are confusing, conclusory, and easily discarded. First, O'Brien's assertion that the Defendants waived a defense based on *Heck* is unavailing as we have already noted that it is a jurisdictional issue that can be raised *sua sponte* by the court."); *Hunter v. City of Leeds*, 941 F.3d 1265, 1274-76 & n.12 (11th Cir. 2019) ("Before we can decide whether the officers are entitled to qualified immunity based on their conduct, we must first determine what exactly that conduct was. . . . Although we must view the facts in the light most favorable to Hunter, as the nonmoving party, the officers' primary argument on appeal is that the District Court erred in crediting Hunter's assertion that he never pointed his gun at Kirk or any of the officers. They argue that his guilty plea to menacing prevents him from relitigating whether he pointed his gun, on the ground of either judicial or collateral estoppel, or the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994). We conclude that collateral estoppel bars Hunter from asserting, contrary to his guilty plea, that he never pointed his gun at Kirk, but does not bar him from contesting Kirk's statements regarding the number of times that Hunter allegedly pointed his gun. . . . Since we conclude that collateral estoppel bars this assertion, we do not reach the officers' claim that judicial estoppel also bars the assertion. Furthermore, the facts properly asserted—i.e., not barred by collateral estoppel—do not 'necessarily imply the invalidity of [Hunter's] conviction.' . . . Because it is logically possible that Hunter pointed his gun at Kirk, and that Kirk nonetheless used excessive force in response, the *Heck* bar does not apply. . . . Although Hunter's guilty plea to menacing constitutes an admission that he pointed his gun at Kirk, it cannot fairly be construed as an admission that he pointed his gun at Kirk all three times. The only fact *necessarily* decided by his guilty plea is that Hunter pointed his gun at Kirk (at least) once. The indictment upon which his guilty plea was based stated only that Hunter 'attempt[ed] to intentionally cause the death of another person, Robert Kirk, by pointing a pistol at Peace Officer Robert Kirk,' which could be based on a single act of gun-pointing, or three, or ten. Though Hunter cannot dispute that he did in fact point his gun at Kirk, it would not be inconsistent with his guilty plea to permit him to dispute *when* he pointed his gun, or whether he pointed his gun multiple times as Kirk claims. Therefore, while collateral estoppel prevents Hunter from denying simply that he ever pointed his gun at Kirk, it does not go so far as to prevent him from denying Kirk's claims that he pointed his weapon multiple times."); *Harris v. Pittman*, 927 F.3d 266, 278 (4th Cir. 2019) ("Pittman offers an alternative justification for going beyond our mandate and refusing to adopt Harris's account

in evaluating the reasonableness of Pittman’s use of force: According to Pittman, doing so would require invalidating Harris’s state court conviction, something a federal court may not do under *Heck v. Humphrey*[.] . . . This argument – also raised for the first time on appeal – is without merit. Nothing about Harris’s § 1983 suit calls into question his North Carolina judgment of conviction on charges of assaulting Officer Pittman while in possession of Pittman’s gun. Harris would remain guilty on those charges even if Pittman were found to have used excessive force when he arrested Harris following Harris’s commission of his crimes.”); *Bourne v. Gunnels*, 921 F.3d 484, 491 (5th Cir. 2019) (“Bourne was convicted of tampering with his cell door and creating a disturbance in connection with the use of force, resulting in a forfeiture of thirty days’ good-time credit. The district court determined that *Heck* bars the excessive-force claims because, ‘if true, [they would] implicate the validity of his disciplinary conviction for creating the disturbance that resulted in the use of force.’ To the contrary, Bourne’s § 1983 excessive-force claims implicate neither the validity of his underlying conviction nor the duration of his sentence. Bourne’s underlying conviction is for aggravated assault with a deadly weapon. A finding of excessive force here would have no bearing on that conviction. Nor would it negate his disciplinary conviction, potentially affecting the duration of his sentence by restoring his good time credits. Bourne was disciplined for ‘[t]ampering with a locking mechanism or food tray slot and ‘[c]reating a [d]isturbance’ resulting from his jamming the food-tray slot to his cell and refusing to relinquish it, thereby requiring the use of force by prison officials. Conversely, the § 1983 excessive-force claims arise from the specific force defendants used after he was restrained on his cell floor. The basis of Bourne’s § 1983 excessive-force claims, therefore, is distinct from the basis of his disciplinary conviction. A finding of excessive force would not negate the prison’s finding that Bourne violated its policies and was subject to disciplinary action as a result. A ruling in Bourne’s favor on his excessive-force claims would not affect his underlying conviction, his disciplinary conviction, or the duration of his sentence. Accordingly, *Heck* and its progeny do not bar Bourne’s excessive-force claims.”); *Phillips v. Curtis*, No. 18-5868, 2019 WL 1551698, at \*1–2 (6th Cir. Apr. 10, 2019) (not reported) (“Generally speaking, for example, if an individual is convicted of resisting arrest, that conviction bars claims that the police used excessive force during an arrest. . . . A victory in a damages suit thus would mean that the officer used force improperly, while the conviction for resisting arrest would dictate the opposite conclusion. . . . That is a classic *Heck* problem. But a person convicted of resisting arrest may still allege that an officer used excessive force *after* the arrest occurred. In that situation, the civil suit and the conviction potentially deal with separate moments and potentially can coexist without contradicting one another. . . . In this case, Phillips purports to identify two separate incidents, one when she endangered Curtis, the other when he opened fire. To be sure, if the two incidents happened at roughly the same time—or in legitimate response to one another—*Heck* would bar her lawsuit. For placing Curtis in substantial danger of serious death or injury would mean that, at that moment, Curtis could use deadly force. . . . But Phillips says that she placed Curtis’s life in jeopardy at point one, she ceased to be a threat at point two, and only after that did Curtis shoot her. Under that scenario, assuming a material gap in time between the two events, her victory in this lawsuit would not necessarily invalidate her criminal conviction. All of this means that the district court applied *Heck* prematurely in granting the defendants’ motion to dismiss. Limited discovery should

flesh out the nature of Phillips’s plea and the timing of her conduct and the shooting. We realize that seven years have passed since the events in question. Under these circumstances, it is imperative that the district court require Phillips (and, where necessary, the officers) promptly to provide answers to these questions or the lawsuit should be dismissed for failure to prosecute it.”); *Dixon v. Hodges*, 887 F.3d 1235, 1237-40 (11th Cir. 2018) (“Dixon was punished and lost gain time, but his § 1983 suit, if successful, would not necessarily imply that his punishment is invalid. Because success in this § 1983 suit would not necessarily be ‘logically contradictory’ with the underlying punishment, this suit is not barred by *Heck*. . . Pollock admits, in an accurate statement of the law, that ‘[i]t is possible for an excessive-force action and a battery conviction to coexist without running afoul of *Heck*.’ . . A prisoner may be punished for battery on a prison guard, and that prison guard may be held liable for using excessive force on the prisoner in subduing him; both may be true. At first glance, then, it appears *Heck* is inapposite. Pollock contends that *Heck* nonetheless applies here because Dixon alleges that he did not lunge at Pollock before Pollock used force against him. Because Dixon’s disciplinary punishment is grounded in those facts, and Dixon is alleging contrary facts in his § 1983 complaint, Pollock claims that *Heck* should bar the suit. We have recognized that, in some cases, *Heck* may bar a prisoner’s suit ‘if his § 1983 complaint makes specific factual allegations that are inconsistent with the facts upon which his [punishment was] based.’ . . This footnote in *Dyer*, relied upon by Pollock, is a recitation of the inconsistent-factual-allegations rule from *McCann v. Neilsen*, 466 F.3d 619 (7th Cir. 2006). *McCann* is a Seventh Circuit decision that reversed a district court’s dismissal of a § 1983 complaint under *Heck*. . . It approvingly discusses the inconsistent-factual-allegations rule, an ‘additional gloss on the *Heck* analysis,’ only in the context of one case: *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003). . . In *Okoro*, the plaintiff brought a § 1983 suit following his conviction of a drug crime after heroin was discovered in a search of his home. . . His defense in the criminal drug case was that he sold gems, not heroin, and that police officers had stolen his gems during their search. . . After his drug conviction, he alleged in his § 1983 complaint that the police officers who searched his home had violated his civil rights by illegally seizing his gems. . . The Seventh Circuit determined that the plaintiff’s suit was barred under *Heck* because his § 1983 suit had the effect of ‘challenging the validity of the guilty verdict by denying that there were any drugs and arguing that he was framed.’ . . To the extent we adopted the inconsistent-factual-allegation gloss on *Heck* in our *Dyer* decision, we agree with the Seventh Circuit that it is only apposite in the narrow category of cases like *Okoro*: where the allegation in the § 1983 complaint is a specific one that both necessarily implies the earlier decision is invalid *and* is necessary to the success of the § 1983 suit itself. The ‘logical necessity’ of conflict between the punishment and the § 1983 suit, itself ‘at the heart of the *Heck* opinion,’ is present only in these circumstances. . . When a plaintiff alleges a fact that, if true, would conflict with the earlier punishment, but that fact is not necessary to the success of his § 1983 suit, the *Heck* bar does not apply. Such is the case here. The gravamen of Dixon’s § 1983 complaint is that Pollock used excessive force against him. The success of this claim is not necessarily dependent on whether Dixon lunged at Pollock or not. His disciplinary punishment, of course, establishes that he did. . . But that factual finding is not determinative of whether Pollock used excessive force against Dixon. It is logically possible both that Dixon lunged at Pollock and that Pollock used excessive force against him. Because ‘there is

a version of the facts which would allow the [punishment] to stand’ alongside a successful § 1983 suit, *Heck* does not control. . . . We conclude that *Heck* and its progeny, including *Balisok*, do not bar this lawsuit. On the contrary, *Dyer* requires that the suit be allowed to proceed through the threshold gates of *Heck*. We therefore vacate the judgment of the District Court and remand for further proceedings not inconsistent with this opinion.”); ***Viramontes v. City of Chicago***, 840 F.3d 423, 427-29 (7th Cir. 2016) (“This court has held that a plaintiff’s conviction for assaulting a police officer does not ‘necessarily imply’ that the officer used appropriate force during the course of arrest after the assault. . . . A subsequent excessive-force claim may, however, imply the invalidity of a conviction if the plaintiff attempts to testify in a way that contradicts the conviction’s factual basis. To balance this tension, we held in *Gilbert* that the district court should implement *Heck* by instructing the jury that it must take as true the facts proved at the earlier criminal or disciplinary proceeding. . . . The district court gave this exact instruction. . . . [W]e expressly stated in *Gilbert* that an instruction could be read to the jury ‘at the start of trial, as necessary during the evidence, and at the close of the evidence.’. . . The district court did exactly what we stated district courts should do and thus did not err. Despite the plain language in *Gilbert*, *Viramontes* argues that this case is distinguishable because the court in *Gilbert* was faced with a plaintiff who ‘encountered difficulty adhering to an agnostic posture on’ the disciplinary board’s factual findings. . . . *Viramontes* argues, then, that no instruction should be given until a defendant contradicts a prior conviction. Although *Viramontes* correctly articulates the factual situation in *Gilbert*, we decline to adopt his narrow interpretation of the rule. In most cases, a district court judge won’t know before trial whether a plaintiff will remain agnostic about a prior conviction. Indeed, before trial, all plaintiffs must claim to remain agnostic in order to have their day in court. . . . Waiting to instruct the jury to take certain facts as true until the plaintiff claims innocence or disputes the conviction’s factual basis might confuse the jury. An instruction before the presentation of evidence solves this potential problem—the jury knows upfront that it must decide all facts except for the facts already stipulated. Even if the rule was not as plain as we make it here, the district court’s decision would still withstand scrutiny because *Viramontes* proved that he could not remain agnostic about his conviction. *Viramontes* claimed in his deposition that he never tried to hit Officer Lapadula, a claim that directly contradicts his conviction. Further, at trial, *Viramontes* testified that he ‘never resisted’. . . and was ‘innocent[.]’. . . Far from remaining agnostic, *Viramontes*’s conduct makes clear why a *Gilbert* instruction is necessary in these cases. Because the district court was within its discretion to give the *Gilbert* instruction at the beginning of trial, the timing of the instruction was appropriate.”); ***Tolliver v. City of Chicago***, 820 F.3d 237, 242-44 (7th Cir. 2016) (“*Tolliver* pled guilty to aggravated battery of a peace officer. . . . [I]n order to be guilty of aggravated battery to a peace officer, *Tolliver* must have (1) known that *Sobieraj* was a peace officer performing his official duties; and (2) intentionally or knowingly; (3) voluntarily; (4) without legal justification; (5) caused bodily harm to Officer *Sobieraj*. . . . In *Tolliver*’s current version of the shooting, he concedes that he knew that *Sobieraj* was a peace officer performing his duties and that *Sobieraj* was injured when he attempted to move away from *Tolliver*’s car as it rolled towards him. But *Tolliver*’s version of the event denies any act that was knowing, intentional, voluntary and lacking legal justification that caused the harm to Officer *Sobieraj*. Instead, *Tolliver* affirmatively asserts that he did not intentionally drive the car towards the officers, and that after the first, unprovoked

shot, he was paralyzed, fell over, and could not see what was happening. He argues that it is reasonable to infer that he knocked the gear shift into a forward gear when he fell or ‘ducked’ to the right after being shot, and he assumes his car drifted towards the officers. Without any acknowledgment of the mental state necessary for a conviction for aggravated battery, Tolliver’s version of the shooting thus implies the invalidity of his conviction. . . .Tolliver’s conviction was based on voluntarily, and knowingly or intentionally causing bodily harm to Officer Sobieraj, without legal justification. But if the incident unfolded as Tolliver alleges in his civil suit, then he could not have been guilty of aggravated battery of a peace officer because the officer shot him without provocation and was injured as a result of involuntary and unintentional actions by a paralyzed Tolliver. Because Tolliver is the master of his ground, and because the allegations he makes now necessarily imply the invalidity of his conviction, *Heck* bars his civil suit. . . . Tolliver could have brought a suit for excessive force that occurred after the crime was complete. . . .If Tolliver had conceded that he voluntarily and intentionally or knowingly drove towards the officers, or if Tolliver had even remained agnostic on who struck the first blow, he could have brought a claim that the officers’ response of firing fourteen bullets at him constituted excessive force and that claim . . . would not be barred by *Heck*. . . . But Tolliver’s version of events negates the mental state necessary to support his conviction for aggravated battery of a peace officer and thus necessarily implies the invalidity of his conviction.”); ***Parvin v. Campbell***, No. 15-5566, 2016 WL 97692, at \*4-5 (6th Cir. Jan. 8, 2016) (not reported) (“As we have previously found that an officer’s excessive use of force is a defense to a charge of resisting arrest under Tennessee law, Parvin’s resisting arrest conviction barred his excessive force claim because he did not raise excessive force as a defense. Parvin’s excessive force claim challenges his underlying conviction and is, therefore, barred under *Heck*. But the analysis does not end here. For *Heck* to bar a § 1983 claim, success on the claim must necessarily imply the invalidity of the conviction. Accordingly, both the § 1983 claim and the conviction must arise out of the same events. . . . On the other hand, an excessive force claim is not barred when the alleged use of force occurred after the suspect was handcuffed and brought under control. . . . In such a case, the force would not be ‘inextricably intertwined’ with the suspect’s resistance to arrest. This case falls much closer in that spectrum to the *Cummings* situation. Parvin made no effort to argue excessive force *after* arrest to the district court, nor does he do so on appeal. Both Parvin’s and Campbell’s versions of facts describe Parvin being handcuffed after he was pepper-sprayed. Parvin specifically argues that Campbell used excessive force before he was handcuffed. Therefore, under our prior holdings, Parvin’s excessive force claim arises out of the same conduct that led to his conviction. Moreover, Parvin’s claim is not that Campbell used excessive force after Parvin stopped resisting or to stop his resistance. Rather, his claim is based solely on his assertions that he did not resist arrest, did nothing wrong, and was attacked by Campbell for no reason. Thus, Parvin’s suit ‘squarely challenges the factual determination that underlies his conviction for resisting an officer’ and, if he prevails, ‘he will have established that his criminal conviction lacks any basis.’ . . . This is exactly the type of claim that is barred by *Heck*.”); ***Hill v. Murphy***, 785 F.3d 242, 248 (7th Cir. 2015) (“‘Imply’ is not synonymous with ‘invalidate.’ A judgment in favor of Hill’s claim in this civil suit that his conviction of making a false statement was unconstitutional because it rested on police coercion would not invalidate the conviction, or provide a ground for a suit for postconviction relief (release from prison), but it

would cast a shadow over the conviction. It would allow Hill to argue that he had been determined by a court to have been unjustly convicted and sentenced but was forbidden to obtain relief on the basis of that finding. It would thus enable him to indict the legal culture. This *Heck* forbids. . . . Hill thus can't be permitted in his civil suit to prove that his first statement was coerced, though he can complain about the beating or threats or other brutalities that induced the three statements to the extent the brutalities inflicted injuries (whether physical or mental) for which tort damages can be awarded. All that matters, in short, is that Hill be forbidden to assert on remand that the statement on which his conviction of making a false statement to the government was predicated was coerced, for if it was coerced then an element of his conviction would be negated.”); ***Havens v. Johnson***, 783 F.3d 776, 782-83 (10th Cir. 2015) (“An excessive-force claim against an officer is not necessarily inconsistent with a conviction for assaulting the officer. For example, the claim may be that the officer used too much force to respond to the assault or that the officer used force after the need for force had disappeared. . . . Havens pleaded guilty to attempted first-degree assault of Defendant Johnson. A person commits first-degree assault if ‘[w]ith intent to cause serious bodily injury to another person, he causes serious bodily injury to any person by means of a deadly weapon.’ . . . And a person commits *attempted* first-degree assault if ‘acting with the kind of culpability otherwise required for commission of’ an assault (intent to cause serious bodily injury), ‘he engages in conduct constituting a substantial step toward the commission of’ the assault. . . . In short, Havens pleaded guilty to intentionally taking a substantial step toward causing serious bodily injury to Johnson. At Havens’s plea hearing his lawyer partially stated the factual basis for the plea: a police officer was in front of Havens’s car and Havens was gunning the engine in an effort to get away. Havens’s plea is incompatible with his § 1983 claim. His complaint did not allege, and his opening brief does not argue, that Johnson used excessive force in response to an attempted assault by Havens. Rather, he contends that Johnson’s use of force was unreasonable because Havens did not have control of the car, he did not try to escape, he never saw Johnson, he did not drive toward Johnson, and he was hit by police vehicles and shot almost instantly after arriving on the scene. In other words, he did nothing wrong and did not intend or attempt to injure Johnson. This version of events could not sustain the elements of attempted first-degree assault under Colorado law and the factual basis for Havens’s plea. Havens does not present an alternative scenario consistent with his attempted-assault conviction. . . . Because Havens’s only theory of relief is based on his innocence, and this theory is barred by *Heck*, we affirm the district court’s grant of summary judgment to Johnson.”); ***Hayward v. Cleveland Clinic Found.***, 759 F.3d 601, 613-14 (6th Cir. 2014) (“This Court does not pass judgment on whether Defendants’ conduct constituted excessive force. Rather, this Court acknowledges that under current Sixth Circuit precedent, pre-arrest excessive force is an affirmative defense to a charge of resisting arrest in Ohio, and would therefore render invalid a conviction for resisting arrest. Because the factual circumstances in this case indicate that Defendants’ allegedly excessive force occurred during Plaintiff’s resistance to the arrest, the district court properly dismissed Plaintiff Aaron Hayward’s excessive force claim based on *Heck*. . . . If Plaintiff were to succeed on an illegal home entry claim, it would render his arrest unlawful and imply the invalidity of his underlying guilty plea for resisting arrest. Therefore, the district court properly denied this claim as barred under *Heck*.”); ***Green v. Chvala***, 567 F. App’x 458, 459, 460 (7th Cir. 2014) (“Green was convicted of recklessly

endangering others by speeding away from the officer, and an officer may reasonably use deadly force when a suspect ‘poses a threat of serious physical harm, either to the officer or to others.’ *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985); see also *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2021–22 (2014). Thus, *Heck* would bar any allegation that Schroeder used excessive force after Green began driving recklessly under § 941.30(2), the offense of conviction. But *Heck* does not bar Green’s claim here because, construing his allegations liberally, see *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), we understand him to allege that Schroeder used deadly force *before* the reckless driving that led to his conviction. Green alleges that Schroeder fired at him as he slowly drove past Schroeder, before he sped away. *Heck* does not bar that claim because, if it did, then resistance that did not jeopardize safety, such as the low-speed driving that Green describes, would invite the police ‘to inflict any reaction or retribution they choose.’ . . . We caution, though, that Green survives *Heck* only if, as his complaint implies, the conviction is for conduct that occurred after the shooting.”); *Suarez v. City of Bayonne*, 566 F. App’x 181, 184-86 (3d Cir. 2014) (“The District Court held that Suarez’s excessive force and unreasonable seizure claims amounted to a collateral attack on his simple assault conviction, and were therefore barred by the Supreme Court’s decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). We disagree. . . . We have recognized that *Heck* does not automatically bar a § 1983 claim for excessive force against an officer even though the plaintiff was convicted of resisting arrest (or, as here, simple assault) based on the same interaction with police. . . . This is so because law enforcement officers can ‘effectuate[ ] a lawful arrest in an unlawful manner.’ . . . It is important to separate, for purposes of our *Heck* analysis, Suarez’s arrest on East 11th Street and the fracas at police headquarters. The District Court concluded that the East 11th Street incident ‘began the chain of events leading to [Suarez’s] guilty plea for simple assault on Detective Rhodes,’ and therefore a verdict in Suarez’s favor would undermine his conviction. . . . We disagree with this conclusion. If a jury were to credit Suarez’s version of the East 11th Street incident, that would not imply the invalidity of his simple assault conviction based on the incident at police headquarters. Under New Jersey law, Suarez would have been entitled to resist an unlawful use of force by the Detectives, but such a right would have dissipated once he had been taken into custody and the excessive use of force abated. . . . Even if the Detectives employed excessive force on East 11th Street, Suarez’s right to resist would have expired by the time he was searched at police headquarters, and therefore he would still be guilty of simple assault. Hence, the claim is not barred by *Heck*. The analysis is a bit more subtle with respect to the tussle at headquarters. Suarez pleaded guilty to kicking Rhodes in the groin while undergoing the second search. To the extent that Suarez claims either: (1) that he did not kick Rhodes at all and he was beaten wholly without provocation; or (2) that he used a reasonable amount of force when he kicked Rhodes after Rhodes attacked him, his claim is barred by *Heck*. With respect to the former, the reason is that such a theory would undermine the factual basis for his guilty plea insofar as he admitted to kicking Rhodes at his change of plea hearing. With respect to the latter, by pleading guilty to the criminal offense of simple assault, Suarez has conceded that he did not use reasonable force when he kicked Rhodes in response to an excessive and unreasonable use of force. . . . He testified at his deposition, however, that Carey hit him at least twice, on his head and in his ribs, and that Rhodes hit him more than once. . . . Suarez did not plead guilty to any conduct relating to Detective Carey, and thus

if the jury were to credit Suarez's testimony and find that Carey used excessive force in restraining him, his conviction for assaulting Rhodes would not be undermined. Similarly, if the jury found that Rhodes continued to beat Suarez beyond the point necessary to secure him after his brief resistance, the jury could return a verdict in Suarez's favor without undermining his assault conviction. We conclude that the District Court erred in holding that Suarez's excessive force and unreasonable seizure claims are barred by *Heck*, and we will accordingly reverse the District Court's grant of summary judgment to the Detectives on these claims."); *Helman v. Duhaime*, 742 F.3d 760, 762, 763 (7th Cir. 2014) ("In this case, the only viable theory of § 1983 liability is Helman's theory that he did not attempt to draw his weapon until after shots were fired at him. That theory is inconsistent with his conviction for Resisting Law Enforcement under Ind.Code § 35-44-3-3. We begin by considering that criminal provision. The language of Ind.Code § 35-44-3-3 provides that '[a] person who knowingly or intentionally ... forcibly resists, obstructs, or interferes with a law enforcement officer ... while the officer is lawfully engaged in the execution of [his] duties ... commits resisting law enforcement....' Cases interpreting that provision have held that the officer is not 'lawfully engaged in the performance of his duties' if he is employing excessive force, and therefore a person who reasonably resists that force cannot be convicted under that provision. . . Accordingly, Helman would not be criminally liable under that statute if he attempted to draw his weapon in response to excessive force. It follows, then, that the criminal conviction under that statute necessarily entails a finding that at the time he drew his weapon, he did not face the use of excessive force by the officers. Helman's § 1983 action, however, is premised upon the assertion that he drew his weapon only in response to the officers' use of excessive force. Specifically, he asserts that when the flash bang device detonated, he had a cup of coffee and a bottle of water in his hands. He maintains that he did not reach for his gun until after the officers began firing at him, and that they fired at him only because he possessed a weapon, not in response to any action by him in reaching for it. In fact, he argues to this court that the transcript of his guilty plea does not contain any admission that he reached for his gun prior to being shot. The problem is that Helman's version of the facts would necessarily imply the invalidity of his state court conviction for resisting law enforcement. It would have been objectively unreasonable for officers to open fire on a person who was not reaching for a weapon or otherwise acting in a threatening manner, and therefore the officers would have been employing excessive force if they did so. . . If Helman attempted to access the gun only after the officers began firing at him, then Helman would have been attempting to draw a deadly weapon in response to excessive force. Accordingly, under *Heck*, Helman may not pursue a § 1983 claim premised upon that factual scenario. Helman is left, then, with an argument under § 1983 that the officers violated his Fourth Amendment rights in shooting him when he was reaching for his firearm. That claim, however, cannot survive summary judgment because such a response is objectively reasonable. In fact, Helman does not even argue that he could pursue a § 1983 claim under such scenario. The district court properly held that Helman was precluded by his conviction from pursuing this § 1983 action."); *Sharif v. Picone*, 740 F.3d 263, 269 n.5, 270 (3d Cir. 2014) ("District courts in our Circuit have relied upon *Heck* and *Walker* in tandem for the proposition that nolo contendere pleas, and the resulting convictions, bar pleaders from bringing 42 U.S.C. § 1983 claims in certain instances. We need not decide that question because even Appellees

concede that Sharif's claim of excessive force does not amount to a collateral attack on his aggravated assault conviction. They further concede that he did not admit any 'facts which would indicate no civil liability on the part of' the corrections officers. . . Indeed, we held in *Nelson v. Jashurek*, that *Heck* does not bar an excessive force claim because the claim can stand without challenging any element of the conviction. . . Regardless of whether he engaged in assaultive conduct, Sharif remains free to contend that the reaction of the corrections officers was such that it constituted excessive force in comparison to the threat he posed. Thus, *Walker* is distinguishable from this case. District courts within the Third Circuit that have chosen to consider or admit past nolo pleas, have done so largely on the basis of collateral estoppel principles discussed in *Heck*. As explained above, those principles are not applicable in this case, particularly given our holding in *Nelson* that *Heck* does not bar an excessive force claim because such a claim would not negate any element of the conviction. . . Given these considerations, we hold that Rule 410 barred the admission of Sharif's plea of nolo contendere."); *Navejar v. Iyiola*, 718 F.3d 692, 697, 698 (7th Cir. 2013) ("Navejar cannot deny that he disobeyed orders or assaulted Iyiola because those denials would 'necessarily imply' the invalidity of his discipline. . . But Navejar's assault on Iyiola is not necessarily inconsistent with his sworn contention that the guards answered his assault with excessive force *after* they subdued him. . . Without a lawyer for Navejar to advocate the limits of *Heck*, the court mistakenly barred Navejar from arguing that, after he assaulted Iyiola, the guards responded with disproportionate force."); *Daigre v. City of Waveland, Miss.*, 549 F. App'x 283, 286, 287 (5th Cir. 2013) ("Daigre pleaded guilty to violating Mississippi Code § 97–9–73, which prohibits 'any person [from] obstruct[ing] or resist[ing] by force, or violence, or threats, or in any other manner, his lawful arrest.' However, her complaint contains several statements that contradict an admission of guilt under § 97–9–73. For example, Daigre's complaint alleges, 'At no time did [Daigre] physically resist or assault the Defendant Officers in any way, and the force used against her was unnecessary, unreasonable and excessive.' The complaint further states that '[a]t no time during the events described ... was [Daigre] ... a threat to the safety of herself or others, or disorderly.' Bluntly, the complaint says, '[Daigre] committed no criminal offenses.' The complaint elsewhere summarizes, '[T]he Defendant Officers' assault, arrest, and detainment of [Daigre] was illegal, wrongful and false, where [Daigre] had committed no crime, and there was no need for any amount of force—excessive or otherwise—to be administered against her.' The total effect of these statements is clear: Daigre's excessive-force claim is barred because she 'still thinks [she is] innocent.' . Unlike the allegations in *Bush*, Daigre's broad claims of innocence relate to the entire arrest encounter, and not merely a discrete part of it. . . The result is dismissal under *Heck*"); *Schreiber v. Moe*, 596 F.3d 323, 335 (6th Cir. 2010) ("We conclude that under these circumstances, Schreiber's § 1983 excessive-force claim does not challenge his conviction for attempting to resist his arrest. . . The *Heck* doctrine applies only where a § 1983 claim would 'necessarily' imply the invalidity of a conviction. . . To hold otherwise [would be to] cut off [a] potentially valid damages action[ ] as to which [Schreiber] might never obtain favorable termination – [a] suit[ ] that could otherwise have gone forward had [Schreiber] not been convicted.'. Therefore, Schreiber should be permitted to proceed on his claim that Moe used excessive force during the course of the arrest."); *Connors v. Graves*, 538 F.3d 373, 377 (5th Cir. 2008) ("Because section 14:20(2) authorized the use of any force in response to Connors's decision

to fire at the officers, a finding that the officers used excessive force would necessarily mean that Connors had not violated section 14:94(E). Thus, *Heck* bars Connors's excessive force claim because he has not proven that his conviction under section 14:94(E) has been reversed or invalidated."); *Lora-Pena v. F.B.I.*, 529 F.3d 503, 506 (3rd Cir. 2008) ("[C]onvictions for resisting arrest and assaulting officers would not be inconsistent with a holding that the officers, during a lawful arrest, used excessive (or unlawful) force in response to his own unlawful actions."); *Hadley v. Gutierrez*, 526 F.3d 1324, 1331(11th Cir. 2008) ("The parties spend considerable time debating at what point during the encounter Hadley resisted. Because of his guilty plea, we assume he resisted at some point during the night. What we do not definitively know, however, is whether the punch complained about occurred at a time when Hadley was resisting. The resisting arrest count to which Hadley pleaded guilty is general in nature, and offers no insight into the sequence of events surrounding Hadley's arrest, including at what point Hadley resisted. . . It is theoretically possible that Hadley was punched then resisted, or even that he resisted first, but was punched after he stopped resisting. So the question becomes, viewing the evidence in the light most favorable to Hadley, whether a jury could conclude that at some point Officer Ortivero punched Hadley in the stomach when he was not resisting? If so, there is a constitutional violation not barred by *Heck*. The jury is free to disbelieve Hadley's deposition testimony that he never resisted outside of the Publix, yet also believe that he was nonetheless punched at a time when he was not resisting. Under that version of facts . . . there is no *Heck* bar."); *Bush v. Strain*, 513 F.3d 492, 498 (5th Cir. 2008) ("As *Ballard* illustrates, a § 1983 claim would not necessarily imply the invalidity of a resisting arrest conviction, and therefore would not be barred by *Heck*, if the factual basis for the conviction is temporally and conceptually distinct from the excessive force claim. Accordingly, a claim that excessive force occurred after the arrestee has ceased his or her resistance would not necessarily imply the invalidity of a conviction for the earlier resistance. . . In this case, there is conflicting evidence about whether Bush was injured before or after her resistance ceased, and the crux of the dispute is whether the factual basis for Bush's excessive force claim is inherently at odds with the facts actually or necessarily adjudicated adversely to Bush in the criminal proceeding. . . . Because Bush has produced evidence that the alleged excessive force occurred after she stopped resisting arrest, and the fact findings essential to her criminal conviction are not inherently at odds with this claim, a favorable verdict on her excessive force claims will not undermine her criminal conviction. The magistrate judge's contrary conclusion was erroneous."); *Gilbert v. Cook*, 512 F.3d 899, 901, 902 (7th Cir. 2008) ("Just as *Wallace v. Kato*, 127 S.Ct. 1091 (2007), holds that *Heck* does not affect litigation about police conduct in the investigation of a crime, so we hold that *Heck* and *Edwards* do not affect litigation about what happens after the crime is completed. Public officials who use force reasonably necessary to subdue an aggressor are not liable on the merits; but *whether* the force was reasonable is a question that may be litigated without transgressing *Heck* or *Edwards*. . . . Only a claim that 'necessarily' implies the invalidity of a conviction or disciplinary board's sanction comes within the scope of *Heck*. . . . There remains the fact that Gilbert encountered difficulty adhering to an agnostic posture on the question whether he had hit a guard. . . . Instead of insisting that Gilbert confess in open court to striking a guard, the judge should have implemented *Heck* and *Edwards* through instructions to the jury at the start of trial, as necessary during the evidence, and at the close of the evidence. It would have sufficed

to tell the jurors that Gilbert struck the first blow during the fracas at the chuckhole, that any statements to the contrary by Gilbert (as his own lawyer) or a witness must be ignored, and that what the jurors needed to determine was whether the guards used more force than was reasonably necessary to protect themselves from an unruly prisoner. This case must be retried, and Gilbert must be allowed to present evidence about what the guards did to him after he extended his hands through the chuckhole.”); **Dyer v. Lee**, 488 F.3d 876, 879, 881(11th Cir. 2007) (“It is not the case that a successful § 1983 suit by the plaintiff would ‘necessarily imply the invalidity of [her] conviction’ for resisting arrest with violence. . . . Other courts to have addressed the applicability of *Heck* in situations similar to the instant case have emphasized the importance of logical necessity and the limited scope of the *Heck* holding. [collecting cases] . . . [F]or *Heck* to apply, it must be the case that a successful § 1983 suit and the underlying conviction be logically contradictory. Here, that is not the case. . . . *Heck* was not intended to be a shield to protect officers from § 1983 suits. It was intended to protect *habeas corpus* and promote finality and consistency. Provided those goals are met, a § 1983 suit is not barred by *Heck*.”); **Thore v. Howe**, 466 F.3d 173, 180 (1st Cir. 2006) (“A § 1983 excessive force claim brought against a police officer that arises out of the officer’s use of force during an arrest does not necessarily call into question the validity of an underlying state conviction and so is not barred by *Heck*. . . Even the fact that defendant was convicted of assault on a police officer does not, under *Heck*, as a matter of law necessarily bar a § 1983 claim of excessive force. . . In this case Thore asserts two theories. The first is that he was not guilty of assault at all, and so Officer Howe’s use of force was excessive. That theory is plainly barred by *Heck*. The more modest second theory is that his excessive force claim need not impugn his convictions for assault and battery with a dangerous weapon in order to establish that Officer Howe used excessive force. Thore says that even if his car had previously hit the cruisers and brushed Officer Dibara’s body, by the time of the shooting, Thore was stationary in a car, boxed in with nowhere to go, and posed no threat to the officers, who had been told that he had no gun. Just as it is true that a § 1983 excessive force claim after an assault conviction is not necessarily barred by *Heck*, it is also true that it is not necessarily free from *Heck*. The excessive force claim and the conviction may be so interrelated factually as to bar the § 1983 claim. . . Officer Howe argues, relying on *Cunningham*, that this is such a case: that Thore’s third conviction for assault and battery with a dangerous weapon was based on his refusal to obey commands to get out of his car, and on his gunning his engine to start to get away. In doing so, he endangered the two officers: Officer Dibara on foot and Officer Howe in his cruiser. We cannot tell from the record before us whether this is so. While we conclude that *Heck* does not automatically bar consideration of an excessive force claim by an individual who has been convicted of assault, the record before us does not permit a determination of the requisite relatedness.”); **McCann v. Neilsen**, 466 F.3d 619, 622, 623 (7th Cir. 2006) (“The question for us, then, is not whether McCann *could have* drafted a complaint that steers clear of *Heck* (he could have), but whether he did. In other words, does the complaint contain factual allegations that ‘necessarily imply’ the invalidity of his convictions. . . On this question, we find it dispositive that the district court took an ambiguously worded paragraph in the complaint – one that could be read to avoid the *Heck* bar – and construed it in a manner that favored the defendant. In deciding a Rule 12(c) motion, we accept the facts alleged in the complaint in the light most favorable to the plaintiff. . . Giving McCann the benefit of all

reasonable inferences, we conclude that his complaint can reasonably be read in a manner that does not implicate *Heck*. To repeat, the operative paragraph of the complaint states as follows: At the time and date aforesaid, the plaintiff did not pose a threat of violence or great bodily harm to the defendant, was not in the commission of a forcible felony nor was he attempting to resist, escape or defeat an arrest otherwise [sic] acting *so as to justify the use of deadly force by the defendant*. (Emphasis added.) The district court read this paragraph to constitute a categorical denial by McCann that he ever posed a threat of violence to the deputy, or ever attempted to resist or defeat arrest. Given the convoluted syntax employed, this reading is not completely unreasonable, and, so read, this paragraph renders McCann’s allegations arguably inconsistent with his assault and obstruction convictions. But there is an equally plausible construction that avoids inconsistency with McCann’s assault and obstruction convictions. That is, by reference to the concluding and qualifying clause emphasized above, the paragraph can be read as alleging that McCann never posed a threat of violence, attempted escape, or resisted arrest *to a degree* that would have justified the use of deadly force as a response. Read in this way, McCann is not denying his assaultive and obstructive conduct, but is alleging that regardless of what he may have done, the deputy’s use of deadly force as a response was not reasonable. Given our obligation at this stage of the proceedings to construe the complaint in the light most favorable to the nonmoving party, we give the complaint this construction and hold that McCann’s claim is not barred by *Heck*. On remand, McCann should be given an opportunity to file an amended complaint that clarifies and implements this reading of his allegations.”); ***Riddick v. Lott***, No. 05-7882, 2006 WL 2923905, at \*2 (4th Cir. Oct. 12, 2006) (not reported) (“In this case, the record is sparse. Without knowing the factual basis for Riddick’s plea, we cannot determine whether his claim of police brutality would necessarily imply invalidity of his earlier conviction for assaulting an officer while resisting arrest. . . It is not clear from Riddick’s *pro se* complaint whether the officer’s alleged punch preceded, coincided with, or followed Riddick’s resistance and assault. If the officer’s alleged punch caused Riddick to engage in the conduct that undergirds his conviction, then a successful § 1983 suit would necessarily imply invalidity of that conviction, since a person cannot be found guilty of resisting arrest if he is simply protecting himself, reasonably, against an officer’s unprovoked attack or use of excessive force. . . If, however, there is no legal nexus between the officer’s alleged punch and Riddick’s resistance and assault; that is, the alleged punch occurred, independently, either before Riddick resisted arrest, or after his resistance had clearly ceased, then a successful §1983 suit for excessive force would not imply invalidity of the conviction. . . . In analogous cases, courts have ruled that *Heck* does not bar 1983 actions alleging excessive force despite a plaintiff’s conviction for resisting arrest because a ‘state court’s finding that [a plaintiff] resisted a lawful arrest ... may coexist with a finding that the police officers used excessive force to subdue [the plaintiff].’ . . In a similar vein, Riddick’s conviction may coexist with a finding that the officer’s alleged attack was unprovoked and occurred independently of Riddick’s own resistance. Because the timing of the events is unclear, we vacate the district court’s order dismissing Riddick’s action without prejudice pursuant to *Heck* and remand for further proceedings consistent with this opinion.”); ***Swiecicki v. Delgado***, 463 F.3d 489, 495 (6th Cir. 2006) (“The specific language of the Cleveland resisting-arrest ordinance (requiring that the arrest be lawful in order to convict) in combination with the applicable Ohio caselaw (where a finding

of excessive force invalidates the lawfulness of an arrest) dictates the result here. Swiecicki's success on his excessive-force claim would therefore necessarily imply the invalidity of his Ohio state-court conviction for resisting arrest. Thus, the statute of limitations did not begin to run until Swiecicki's state-court conviction was overturned."); **Ballard v. Burton**, 444 F.3d 391, 399, 400 (5th Cir. 2006) ("The Texas statute in *Sappington* and *Hainze* authorized use of deadly force upon reasonable belief that there was imminent danger of serious bodily injury. Those decisions turned on the fact that, because serious bodily injury to the defendant was an element of the § 1983 plaintiff's conviction, it was impossible for the defendant to have used excessive force because the statute authorized use of deadly force to defend against the bodily injury that the § 1983 plaintiff had inflicted upon him. . . . *Hainze* and *Sappington* each involved a conviction for aggravated assault under Texas law where the assault was against a defendant in the § 1983 claim for excessive force. Each of those convictions required proof that the § 1983 plaintiff had caused serious bodily injury. By contrast, Ballard's conviction was for assault, by physical menace, on an officer who is not a defendant in his § 1983 claim. Ballard's conviction did not require proof that he caused bodily injury, serious or otherwise. Not a single element of Ballard's simple assault conviction would be undermined if Ballard were to prevail in his excessive force claim against Burton or Oktibbeha County. For this reason, unlike the *Hainze* and *Sappington* convictions, Ballard's Mississippi conviction for simple assault does not, as a matter of law, necessarily imply that Burton did not use excessive force as alleged in the instant complaint. . . . A finding that Burton's use of force was unreasonable would imply neither that Ballard did not attempt by physical menace to put Boling in fear of imminent bodily harm, nor that Ballard's assault on Boling was in necessary self defense. Although we have distinguished *Sappington*, our method of analysis remains consistent. . . . Based on the events described in the summary judgment record, we conclude that a judgment in Ballard's favor on his § 1983 claim against Burton and Oktibbeha County could easily coexist with Ballard's conviction for simple assault of Boling, without calling into question any aspect of that conviction."); **Hainze v. Richards**, 207 F.3d 795, 796, 797 (5th Cir. 2000) (Where plaintiff had been convicted of aggravated assault under Texas law, court held, *As in Sappington*, the force used by the deputies to restrain Hainze, up to and including deadly force, cannot be deemed excessive."); **Sappington v. Bartee**, 195 F.3d 234, 237 (5th Cir. 1999) (§ 1983 suit barred where plaintiff's criminal conviction "required proof that he caused serious bodily injury to [officer]. [Officer] was justified in using force up to and including deadly force to resist the assault and effect an arrest. As a matter of law, therefore, the force allegedly used by [officer] cannot be deemed excessive."); **Hudson v. Hughes**, 98 F.3d 868, 873 (5th Cir. 1996) ("Because self-defense is a justification defense to the crime of battery of an officer, Hudson's claim that Officers . . . used excessive force while apprehending him, if proved, necessarily would imply the invalidity of his arrest and conviction for battery of an officer.").

*See also Beets v. County of Los Angeles*, 669 F.3d 1038, 1040, 1041, 1044-48 (9th Cir. 2012) ("We hold that *Heck* bars plaintiffs' suit. Plaintiffs seek to show that Deputy Winter used excessive force, but the jury that convicted GPR's accomplice has already determined that the deputy acted within the scope of his employment and did not use excessive force. Accordingly, a verdict in plaintiffs' favor would tend to undermine Morales' conviction. Moreover, Morales, GPR's

accomplice, challenged the propriety of Deputy Winter's actions in her criminal trial, her interests in doing so were in no way inconsistent with plaintiffs' interests, and Morales was convicted by a jury. Under these circumstances, plaintiffs' § 1983 action is barred by *Heck*. . . Morales' conviction for felony resisting arrest and assault with a deadly weapon on a peace officer were under an aiding and abetting theory. As such, the jury had to have found that Rose committed those crimes. The jury was specifically instructed that it could not find that Rose committed the crimes unless it determined that Officer Winter was in the lawful performance of his duties and did not use excessive force. As such, Morales' conviction necessarily rested on the jury's findings as to the actions of Deputy Winter with respect to Rose. That is, the jury found that Deputy Winter was in the lawful performance of his duties and did not use excessive force. . . Plaintiffs raise two issues on appeal. First, they argue that *Heck* should be strictly interpreted and may not be applied to § 1983 actions where the plaintiffs have not been convicted or charged with any crimes. Second, they argue even if *Heck* were applicable, it would not bar their civil action. They argue that they should be allowed to show that Deputy Winter had managed to move to one side of the truck when he shot GPR through a side window, and accordingly Deputy Winter was no longer in danger when he shot, and the shooting occurred subsequent to GPR's criminal activity. We address their arguments in reverse order because our conclusion that *Heck* would otherwise bar this action focuses our consideration of whether the preclusion extends to these plaintiffs who were not criminally prosecuted or convicted. . . . Our reasoning in *Cunningham* is persuasive here. There was no break between GPR's assault with the pickup truck and the police response. Deputy Winter acted during the course of GPR's and Morales' criminal activity and brought that activity to an end. Deputy Winter's actions were 'within the temporal scope of [GPR's and Morales'] crime and [were] part of a single act for which the jury found that[Morales] bears responsibility.' . . There was no separation between GPR's criminal actions and the alleged use of excessive force such as existed in *Smithart* (alleged assault occurred after Smithart got out of the truck) or *City of Hemet* (alleged assault occurred after Smith was detained). Thus, even were it determined that the maroon pickup truck had come to a stop a fraction of a second before Deputy Winter fired, the shots would remain part of the temporal scope of GPR's and Morales' crimes. . . . In sum, the record shows that the jury that convicted Morales determined that Deputy Winter acted within the scope of his duties and did not use excessive force, and that plaintiffs seek to show that the very same act constituted excessive force. Thus, if GPR rather than Morales had been convicted, there is no doubt that this civil action would have to be dismissed pursuant to *Heck*. Similarly, it is clear that Morales' conviction bars her from bringing a § 1983 action based on Deputy Winter's action. . . . The remaining question is whether the *Heck* bar extends to the plaintiffs in this case who were not tried or convicted. . . . Our description of the *Heck* preclusion doctrine in *City of Hemet* references 'a criminal conviction,' not 'the plaintiff's' criminal conviction. . . Our choice of language suggests that the *Heck* preclusion doctrine may apply to civil actions brought by individuals other than the convicted criminal if such application does not otherwise violate any constitutional principles. . . . Plaintiffs argue that they have not had an opportunity to litigate the factual issues underlying their § 1983 action and that Morales' criminal proceedings should not bar them from their day in court. . . . Here, as in *Cunningham*, the first two prongs are satisfied: (1) the issue in Morales' criminal proceeding and in this § 1983 action are identical—whether Deputy Winter used excessive force;

and (2) Morales' conviction constitutes a judgment on the merits—Deputy Winter did not use excessive force. However, plaintiffs were not parties to the criminal prosecution of Morales. Accordingly, *Heck* preclusion can only apply if plaintiffs 'had an identity or community of interest with, and adequate representation by, the losing party in the first action,' and under the circumstances 'should reasonably have expected to be bound by the prior adjudication.' . . . We conclude that under the particular facts of this case, plaintiffs should reasonably have expected to be bound by the jury's decision in Morales' criminal proceeding and because a favorable decision in plaintiffs' civil action would undermine her conviction, the civil action is barred by *Heck*. . . . [W]e hold that where more than one person engages in a concerted criminal act during the course of which one of the criminals is killed by the police, then when the propriety of the officer's action is critical to the conviction of a surviving criminal, and the deceased's interests in the issue are in no way inconsistent with the surviving criminal's interest in the issue, the 'community of interest' is such that the deceased and those asserting claims through the deceased may reasonably be bound by the determination of the issue by a jury in the criminal proceeding." *But see Eberhardinger v. City of York*, 782 F. App'x 180, \_\_\_ n.2 (3d Cir. 2019) ("Officer Smith also argues on appeal that Officer Smith cannot be found to have violated Eberhardinger's constitutional rights under clearly established law because such a conclusion would be inconsistent with Foster having pleaded *nolo contendere* to, among other offenses, reckless endangerment. To support this position, he cites *Heck v. Humphrey*, which held that 'in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed' or otherwise invalidated. . . . But *Heck* concerned the relationship between a prisoner's criminal conviction and his own § 1983 suit, . . . and it has been applied to bar a *third party's* § 1983 suit only where the convict was the third party's accomplice, *see Beets v. County of Los Angeles*, 669 F.3d 1038, 1048 (9th Cir. 2012) (holding that "where more than one person engages in a concerted criminal act during the course of which one of the criminals is killed by the police, then when the propriety of the officer's action is critical to the conviction of a surviving criminal, and the deceased's interests in the issue are in no way inconsistent with the surviving criminal's interest in the issue," the *Heck* doctrine may apply); *see also Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 616 (6th Cir. 2014) ("*Heck* does not apply to third-party § 1983 claims."). That is not the case here, so regardless of whatever relevance Foster's conviction may have at trial, it does not dictate a different result in our review of the District Court's qualified immunity determination."); *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 616 (6th Cir. 2014) ("*Heck* does not apply to third-party § 1983 claims. In *Heck*, the Supreme Court addressed a situation where 'a state prisoner seeks damages in a § 1983 suit' and a "district court [would have to] consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of *his* conviction or sentence.' . . . The Court was concerned that '§ 1983 and the federal habeas corpus statute, 28 U.S.C. § 2254, were "on a collision course.'" . . . Because such a concern does not extend to the civil rights claims of third parties, the district court erred in applying *Heck* to bar Plaintiffs Annie and Essex Hayward's § 1983 claim."); *Thomas v. City of Philadelphia*, No. CV 17-4196, 2019 WL 4039575, at \*9 (E.D. Pa. Aug. 27, 2019) ("[D]efendants ignore a critical distinction between there being an outstanding criminal conviction

of a *plaintiff* versus that of a *third-party witness*. In *Heck*, the Supreme Court explained that ‘when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.’. . . However, ‘if the district court determines that the plaintiff’s action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.’. . . The cases cited by the defendants involved a plaintiff’s claim being barred by his own conviction, not a witness’s testimony being barred by the witness’s conviction, and the Court’s separate research reveals no cases extending *Heck* in such a way.”).

*Compare Lemos v. County of Sonoma*, 5 F.4th 979, 983-87 (9th Cir. 2021) (“The § 1983 plaintiffs in *Beets*, like Lemos here, argued that there were several possible factual bases for the relevant criminal conviction. . . . Therefore, they argued, the conviction was not necessarily based on the same factual basis as the alleged civil rights violations. . . . In *Beets*, as here, the jury instructions in the criminal case required that to convict the defendant, the jury had to find she acted willfully against a police officer who was ‘lawfully performing his duties as a peace officer,’ and that the officer was not ‘using unreasonable or excessive force in his or her duties.’. . . *Beets* reaffirmed and relied on *Smith* to conclude that the jury necessarily determined that during the entire course of the deputy’s conduct, he ‘acted within the scope of his duties and did not use excessive force.’. . . In *Smith*, we distinguished such a jury verdict from a guilty plea: ‘W]here a § 1983 plaintiff has pled guilty or entered a plea of nolo contendere ... it is *not* necessarily the case that the factual basis for his conviction included the whole course of his conduct.’. . . *Beets* reaffirmed this distinction. . . . Because the jury’s verdict in the criminal case necessarily found that the deputy did not use excessive force at any time during the ‘course of the defendant’s conduct,’. . . a verdict in the plaintiffs’ favor on their § 1983 excessive-force claim would have necessarily implied that the underlying criminal conviction was invalid. Therefore, the claim was barred by *Heck*. . . . This comparative analysis of jury verdicts and guilty pleas does not support the proposition, as grossly mischaracterized by the dissent, that this opinion serves as an open invitation for police overreaction, provided that the prosecutor secures a guilty jury verdict as opposed to a guilty plea. Whether the accused wishes to proceed to trial or enter a guilty plea is not the defining factor of *Heck*’s application. Instead, the relevant inquiry is whether the record contains factual circumstances that support the underlying conviction under § 148(a)(1), *not* whether the conviction was obtained by a jury verdict or a guilty plea. . . . [S]o long as evidentiary support for the § 148(a)(1) conviction exists in the record, plea agreements, just like guilty jury verdicts, may establish the criminal defendant’s resistance toward the officers and the officer’s lawful conduct in response. We further acknowledge that *Heck* would not necessarily bar a § 1983 claim for excessive force when the defendant enters into a plea agreement and the conviction and the § 1983 claim are based on different actions taken during one continuous transaction. . . . The jury instructions required that the jury find that Deputy Holton was ‘lawfully performing or attempting to perform his duties as a peace officer,’ and the instructions explained that an officer ‘is not lawfully performing his or her duties if he or she is unlawfully arresting or

detaining someone or using unreasonable or excessive force in his or her duties.’ Therefore, based on the jury instructions and evidence of record before it, the jury verdict established Lemos resisted and the deputy’s conduct was lawful throughout the encounter. . . . Furthermore, in California, the lawfulness of an officer’s conduct is an essential element of the offense of resisting, delaying, or obstructing a peace officer. . . . [T]he dissent is correct in stating that a valid § 148(a)(1) conviction does not necessarily implicate the lawfulness of the officer’s conduct throughout the entirety of his encounter with the arrestee. . . . Simply put, a conviction under § 148(a)(1) is valid only when ‘the officer was acting lawfully *at the time the offense against the officer was committed*.’ . . . While we do not dispute the dissent’s position as a general statement of law, it does not change the fact that the jury unanimously found that Holton acted lawfully throughout the continuous chain of events on June 13, 2015, even when he placed Lemos under arrest. In cases like *Lemos* involving several potential grounds for a § 148(a)(1) violation within a continuous chain of events, courts often take into account certain temporal considerations regarding the individual’s resistance and the officer’s use of force. . . . [C]ontrary to the dissent’s interpretation, the statute does not require jurors to isolate each potential basis for a § 148(a)(1) violation and make piecemeal determinations of the officer’s lawful conduct at each event, as previously acknowledged by this Court. . . . Accordingly, California jurisprudence advises against so-called ‘temporal hairsplitting’ in search of a distinct break between the criminal act and the use of force where none meaningfully exists. . . . While it is correct that the jury had to agree unanimously that Lemos committed at least one of the four violations, it was not required of the jury to expressly identify which of those bases gave rise to the § 148(a)(1) conviction, just as in *Smith*. Viewed in light of binding circuit precedent, the record compels finding the jury determined that the arresting deputy acted within the scope of his duties without the use of excessive force, and that Lemos seeks to show that the same conduct constituted excessive force. Here, as in *Beets*, . . . the jury was instructed that ‘[a] peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties.’ And, the jury was told that it could convict Lemos only if ‘Deputy Marcus Holton was a peace officer lawfully performing or attempting to perform his duties as a peace officer.’ Lemos’s jury considered all parties’ evidence of relevant conduct, including the officers’ body camera footage that’s part of this record. Material factual disputes have been resolved by Lemos’s jury. Therefore, the district court appropriately considered summary disposition of remaining legal issues under *Heck* and its progeny. In reliance, we find that *Smith* and *Beets* control application of the *Heck* bar as found by the district court.”) *with Lemos v. County of Sonoma*, 5 F.4th 979, 987-88, 991-94 , 996-97 (9th Cir. 2021) (Berzon, J., dissenting) (“The majority today holds, in effect, that once a person resists law enforcement, she has invited the police to inflict any reaction or retribution they choose, as long as the prosecutor could get the plaintiff convicted by a jury—and not as the result of a plea—on a charge of resisting, delaying, or obstructing a police officer. In so holding, the majority confidently asserts that a jury’s conviction of a defendant under California Penal Code section 148(a)(1)—unlike conviction under the same section by plea agreement—*necessarily* requires a determination that the officers involved were acting lawfully at all times during the course of the interaction with the defendant, and so, under *Heck v. Humphrey*, 512 U.S. 477 (1994), precludes an excessive force claim for damages under 42 U.S.C. § 1983. But the jury instructions in this case were flatly inconsistent

with that version of what a section 148(a)(1) conviction connotes. Lemos’s jury was instructed that there were four possible factual bases on which it could convict Lemos, and that it could ‘not find the defendant guilty unless you all agree that the People have proved that the defendant committed *at least one* of the alleged acts of resisting, obstructing, or delaying a peace officer who was lawfully performing his or her duties, *and you all agree on which act the defendant committed.*’ . . . Three of the factual bases pertained to acts not at issue in Lemos’s section 1983 claim. Success on her section 1983 claim therefore does not necessarily imply that her conviction is invalid. In concluding nonetheless that *Heck* bars Lemos’s excessive force claim, the majority fundamentally errs. Neither California law nor Ninth Circuit precedent supports or requires this result. And it is likely to encourage the very sort of police overreaction to minor criminal behavior that has led to public outcry and calls for reform in recent years. I emphatically dissent. . . . [A] section 148(a)(1) conviction does not necessarily establish that force used by an officer prior to or after a section 148(a)(1) arrest was reasonable and so not excessive. . . . Application of *Heck* in this context is complicated when, as here, there were several possible factual bases for the section 148(a)(1) conviction, *i.e.*, more than one alleged act of resistance, delay, or obstruction, but it is not clear from the record which particular act or acts form the basis of the conviction. Because the *Heck* bar applies only when a section 1983 claim ‘would *necessarily* imply the invalidity’ of the conviction and not if it only *might* imply the conviction’s invalidity, . . . the *Heck* bar does not apply unless the conduct challenged in the excessive force suit is necessarily the same conduct found lawful in the section 148(a)(1) conviction. . . . Thus, to determine whether a plaintiff’s conviction for resisting arrest bars her excessive force claim under *Heck*, our case law instructs that we must examine the record regarding the factual basis for the conviction. . . . Three key Ninth Circuit decisions—*Smith* and *Hooper*, which held that there was no *Heck* bar, and *Beets v. County of Los Angeles*, 669 F.3d 1038 (9th Cir. 2012), which held that there was—illustrate how this precept works in practice. [discussing cases] In sum, the *Heck* bar does not apply if the record leaves open the possibility that the officer’s lawful conduct supporting the section 148(a)(1) conviction is different from the officer’s alleged unlawful application of excessive force, *see Smith*, 394 F.3d at 699; or that the officer used some force that was reasonable and some force that was excessive, *see Hooper*, 629 F.3d at 1134. The excessive force claim *is* barred if the record conclusively establishes that the conviction and the section 1983 claim are based on the same actions by the officer, as in *Beets*. . . . [I]t is simply not true that the criminal jury *in this case* necessarily concluded that all of the officer’s conduct, including the force used when she was grabbed on the way to her house, taken to the ground, and injured, was lawful—that is, not excessive. The jury, based on the instructions given, could have unanimously decided to convict because of Lemos’s actions while she was at the car attempting to prevent Holton from interacting with Ms. Labruzzo. Whether the instructions given should have been otherwise, as the outdated discussion in *Smith*, repeated in *Beets*, would indicate, simply does not matter. The analysis appropriate under *Heck* depends on what the jury verdict necessarily *actually* determined. Here, the criminal jury was instructed to look at the twelve-minute set of events discretely, not as a whole. And the jury was specifically allowed to convict Lemos under § 148(a)(1) even if it thought Holton’s actions at the time he tackled her to the ground as she was walking to the house were unlawful because the force used was excessive. . . . So, on the facts and very specific instructions

given the jury here regarding discrete bases for conviction, the *Heck* bar does not apply. . . . The majority's fundamental error in reaching the opposite conclusion is that it ignores the critical distinction between the criminal case underlying *Beets* and the conviction here. That distinction, of course, is that here, there was an instruction to the jury that it should *not* regard every interaction between Holton and Lemos that fateful night in June as a single incident, but instead should distinguish among them, unanimously. In *Beets*, in contrast, there was one interaction only in dispute, and no indication the criminal jury was asked to distinguish that incident from any other. . . . In short, under the *specific* jury instructions here, as under the plea agreement discussed in *Smith*, 'it is *not* necessarily the case that the factual basis for [Lemos's] conviction included the whole course of [her] conduct.' . . . The *Heck* bar therefore does not apply. . . . The practical result of the majority's holding is that people who are subjected to excessive force by officials in California, who want to hold those officers to account, and who are charged with misdemeanor resisting arrest under section 148(a)(1) must choose between holding the state to its burden on the criminal charge in a criminal trial and the opportunity to vindicate their rights by bringing an excessive force case. Under the majority's opinion, the only way to guarantee that an excessive force claim is not forfeited by a jury's verdict is to plead guilty on the criminal charge. The Constitution forbids police from using excessive force, and section 1983 provides an avenue to vindicate that right. The majority's opinion undercuts these protections. Because it is unjust and contrary to our case law, I dissent.")

*See also Hooper v. County of San Diego*, 629 F.3d 1127, 1131-34 (9th Cir. 2011) ("The facts of *Smith* allowed us to differentiate cleanly between two phases of the encounter with the police. In the first phase, when Smith stood on his porch and refused the officers' lawful orders, he violated § 148(a)(1) by 'resist[ing], delay[ing], or obstruct[ing]' the police in the performance of their duties. In the second phase, when the police arrested him, Smith may or may not have violated § 148(a)(1), depending on whether the police acted lawfully in effecting the arrest. . . . Four years after *Smith*, the California Supreme Court held that a conviction under § 148(a)(1) can be valid even if, during a single continuous chain of events, some of the officer's conduct was unlawful. *Yount v. City of Sacramento*, 43 Cal.4th 885 (2008). According to the Court, a conviction under § 148(a)(1) requires only that some lawful police conduct was resisted, delayed, or obstructed during that continuous chain of events. In other words, the California Supreme Court interpreted the elements of § 148(a)(1) differently than did the California Court of Appeal in *Susag*, the decision upon which we relied in *Smith*. . . . The Court's decision in *Yount* does not mean that our holding in *Smith* was wrong. But it does mean that our understanding of § 148(a)(1) was wrong. Section 148(a)(1) does not require that an officer's lawful and unlawful behavior be divisible into two discrete 'phases,' or time periods, as we believed when we decided *Smith*. It is sufficient for a valid conviction under § 148(a)(1) that at some time during a 'continuous transaction' an individual resisted, delayed, or obstructed an officer when the officer was acting lawfully. It does not matter that the officer might also, at some other time during that same 'continuous transaction,' have acted unlawfully. We are, of course, bound by the California Supreme Court's interpretation of California law. . . . We therefore apply *Heck* to § 148(a)(1) as the California Supreme Court interpreted it in *Yount*. . . . The question before us is the basic *Heck* question – whether success in

Hooper's § 1983 claim that excessive force was used during her arrest 'would "necessarily imply" or "demonstrate" the invalidity' of her conviction under § 148(a)(1). . . Given California law, as clarified by *Yount*, we hold that it would not. The chain of events constituting Hooper's arrest was, in the words of the Court in *Yount*, 'one continuous transaction.' A holding in Hooper's § 1983 case that the use of the dog was excessive force would not 'negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of [Hooper's] attempt to resist it [when she jerked her hand away from Deputy Terrell].' . . . In so holding, we agree with many of our sister circuits in similar cases. . . . To the extent the state law under which a conviction is obtained differs, the answer to the *Heck* question could also differ. Nonetheless, the decisions of our sister circuits are instructive, for many state statutes that criminalize resisting lawful arrest and other lawful police conduct are very similar. It is thus not surprising that most of the circuit courts that have addressed the *Heck* bar in cases involving such statutes should have given the same answer, and that we, in turn, agree with that answer. In sum, we conclude that a conviction under California Penal Code § 148(a)(1) does not bar a § 1983 claim for excessive force under *Heck* when the conviction and the § 1983 claim are based on different actions during 'one continuous transaction.' In the case now before us, we hold that Hooper's § 1983 excessive force claim is not *Heck*-barred based on her conviction under § 148(a)(1)."); ***VanGilder v. Baker***, 435 F.3d 689, 692 (7th Cir. 2006) ("Here, VanGilder was originally charged with felony battery on a police officer. After plea bargaining, the charge was reduced, and VanGilder was convicted instead of resisting a law enforcement officer, a misdemeanor. Thus, whether this suit is barred by *Heck* hinges on whether an action against Baker for excessive use of force necessarily implies the invalidity of VanGilder's conviction for resisting. The answer is no. Exactly what happened during the blow-by-blow in the St. Elizabeth's emergency room, and thus whether VanGilder is entitled to damages, is a question to be decided at trial. But as a threshold matter, it is clear that a judgment for VanGilder, should he prevail, would not create 'two conflicting resolutions arising out of the same or identical transaction.' . . . VanGilder does not collaterally attack his conviction, deny that he resisted Baker's order to comply with the blood draw, or challenge the factual basis presented at his change of plea hearing. Rather, VanGilder claims that he suffered unnecessary injuries because Baker's response to his resistance – a beating to the face that resulted in bruises and broken bones – was not, under the law governing excessive use of force, objectively reasonable. . . . Were we to uphold the application of *Heck* in this case, it would imply that once a person resists law enforcement, he has invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages. Put another way, police subduing a suspect could use as much force as they wanted – and be shielded from accountability under civil law – as long as the prosecutor could get the plaintiff convicted on a charge of resisting. This would open the door to undesirable behavior and gut a large share of the protections provided by § 1983."); ***Smith v. City of Hemet***, 394 F.3d 689, 696 (9th Cir. 2005) (en banc) ("A conviction based on conduct that occurred before the officers commence the process of arresting the defendant is not 'necessarily' rendered invalid by the officers' subsequent use of excessive force in making the arrest."); ***Washington v. Summerville***, 127 F.3d 552, 556 (7th Cir. 1997) ("Washington's success on either his unlawful arrest or excessive force claim would not have necessarily implied the invalidity of a potential conviction on the murder charge against him."); ***Smithart v. Towery***, 79 F.3d 951, 952 (7th Cir. 1996)

(“Because a successful section 1983 action for excessive force would not necessarily imply the invalidity of Smithart’s arrest or conviction, *Heck* does not preclude Smithart’s excessive force claim.”).

See also *Peterson v. Johnson*, 714 F.3d 905, 911-18 (6th Cir. 2013) (“[W]e are squarely presented with the question of first impression regarding what kind of preclusive effect we must give to the hearing officer’s finding that Peterson grabbed Johnson’s hand and not vice versa. The answer to that question turns first on federal law and then on Michigan law. . . The federal courts in this Circuit have occasionally given preclusive effect to factfinding from Michigan prison hearings. . . . Enter the Supreme Court’s opinion in *University of Tennessee v. Elliott*, which explained that ‘when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency’s factfinding the same preclusive effect to which it would be entitled in the State’s courts.’ . . . *Elliott* addressed a state agency determination that had not been appealed to state court, and found that the agency’s factual determinations were binding in the plaintiff’s collateral § 1983 action. . . Thus, while *Elliott* obviously does not speak directly to Michigan hearing-officer findings, it does establish four criteria for, in the context of a § 1983 case, according preclusive effect to a state administrative agency’s unreviewed factual determination. We take each one in turn. [Court finds all four criteria satisfied] Neither the Michigan Supreme Court nor the Michigan Court of Appeals has yet determined whether preclusive effect should be given to a major misconduct hearing’s factfinding. Thus, we will have to be guided by their standard rules on agency issue preclusion. [Court concludes that “Michigan courts would grant preclusive effect to the hearing officer’s finding that Peterson grabbed Johnson’s hand.”] Sometimes explaining what something is *not* goes a long way toward showing what it is. And because this is an issue of first impression, we wish to make perfectly clear that our preclusion analysis is distinct from two other parallel lines of law. First, we are not suggesting that the hearing officer’s *legal* conclusion that Peterson committed assault and battery has any bearing on whether Johnson treated Peterson with excessive force. It does not. As this Court explained in *Lockett v. Suardini*, 526 F.3d 866, 873 (6th Cir.2008), an assault-and-battery conviction is analytically distinct from an excessive force claim; a prisoner can commit the former and simultaneously be the victim of a guard’s excessive force. Rather, what we hold is that the hearing officer’s *factual* finding that Peterson was the one who grabbed Johnson’s hand precludes a contrary finding in federal court. That being true, the question then becomes whether, on the facts of this case, a reasonable jury could find that Johnson’s brief struggle to free his hand and then return Peterson to his cell was a malicious and sadistic use of excessive force. . . We find that it could not and accordingly affirm the district court. Further, our holding includes only *factual* issues decided by a state agency. Both *Elliott* and the state cases on which we rely were explicit that the preclusive effect they recognized concerned purely factual determinations, and that limitation makes good sense. Had the hearing officer purported to make a *legal* conclusion regarding Peterson’s federal constitutional rights, our analysis would necessarily be different and we could not likely be so deferential. . . Second, we are not relying on the rule from *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997), that rejects a prisoner’s § 1983 claim where vindicating it would necessarily imply the

invalidity of a prison agency's disciplinary determination. That rule applies only where a prisoner's § 1983 challenge 'threatens ... his conviction or the duration of his sentence.' *Muhammad v. Close*, 540 U.S. 749, 751 (2004) (per curiam). Peterson's challenge threatens neither. He does not seek relief for any effect that the assault-and-battery conviction may have had on good-time credits nor does anything in the record show that good-time credits were implicated, and there is no indication that his underlying murder conviction or sentence is in any way affected by his claim. Instead, Peterson seeks solely financial damages for Johnson's alleged excessive force. Thus, the *Heck/Edwards* rule has no relevance here.").

*See also Anderson v. La Penna*, No. 18 C 6159, 2019 WL 1239667, at \*3-4 (N.D. Ill. Mar. 18, 2019) ("On August 28, 2018, plaintiff pled guilty to misdemeanor resisting arrest and was subsequently sentenced to 364 days in the Cook County Department of Corrections. In exchange for his guilty plea on the misdemeanor charge, the felony charges were dismissed *nolle prosequi*. Plaintiff's unlawful detention claim alleges that there was no probable cause for the felony charges of armed habitual offender, aggravated unlawful use of a weapon, aggravated battery to a police officer, and felony resisting arrest. Thus, to avoid his claim being barred by *Heck*, plaintiff will need to prove there was no probable cause for the felony charges without impugning his misdemeanor resisting arrest conviction. The parties agree that the only difference between felony resisting arrest and misdemeanor resisting arrest is that the felony charge requires that the defendant proximately caused an injury to the officer. Defendants argue that this alone shows that a finding that there was no probable cause for the felony charge would impugn plaintiff's misdemeanor conviction. Plaintiff's complaint, however, alleges that the police officer defendants falsified claims of injuries, and that, in fact, plaintiff did not cause any injuries to the officers. At this stage, there is nothing to suggest that a finding that there was no probable cause for the felony resisting arrest charge would necessarily impugn plaintiff's misdemeanor conviction. Nor is there anything to suggest that a finding that there was no probable cause for the other felony charges would necessarily impugn plaintiff's conviction. As currently drafted, however, plaintiff's complaint is inconsistent with his conviction. '[I]f [the plaintiff] makes allegations that are inconsistent with the conviction's having been valid, *Heck* kicks in and bars his civil suit.' . . . In the instant case, even drawing all reasonable inferences in plaintiff's favor, plaintiff's description of the events in his complaint includes language that implies his conviction is invalid. For example, the complaint states '[d]espite his cooperation, Defendant Officers Swoboda and Giovenco ordered Plaintiff William Anderson to place his hands on the squad car and remain in that position.' The complaint goes on to allege '[a]fter standing with his hands on the squad car for a period of time, Plaintiff William Anderson repeatedly expressed his desire to leave, stating that he had done nothing wrong. As Plaintiff William Anderson turned and told this to Defendant Officers Swoboda and La Penna, Defendant Officers Swoboda and La Penna tackled William Anderson to the ground.' Plaintiff's misdemeanor conviction required a showing that he 'knowingly resist[ed] or obstruct[ed] the performance by one known to the person to be a peace officer...of any authorized act within his or her official capacity.' . . . Plaintiff's description of the events is inconsistent with a showing of these elements. Although plaintiff could have drafted his complaint to avoid this inconsistency, as currently drafted, his claims are barred by *Heck*. The

court will allow plaintiff to file an amended complaint to cure this defect.”); *Garrett v. Needleman*, No. 16 CV 1062, 2017 WL 2973481, at \*4–5 (N.D. Ill. July 12, 2017) (“A conviction for assault or battery of a peace officer does not necessarily bar a § 1983 claim of excessive force stemming from the same incident, ‘so long as the § 1983 case does not undermine the validity of the criminal conviction.’ . . . ‘A contention that a guard struck back after being hit is compatible with *Heck*. Otherwise guards (and for that matter any public employee) could maul anyone who strikes them, without risk of civil liability as long as the private party is punished by criminal prosecution or prison discipline for the initial wrong.’ . . . ‘An argument along the lines of “The guards violated my rights by injuring me, whether or not I struck first” does not present the sort of inconsistency’ that warrants application of the *Heck* doctrine. . . . In *Hardrick*, the plaintiff was allowed to proceed on his § 1983 claim that police officers used excessive force after the plaintiff had been subdued and was in custody. . . . Likewise, in *Brengettcy v. Horton*, after having been convicted of battery of a peace officer, the plaintiff filed a civil rights action claiming excessive force alleging that the officer used unnecessary and unreasonable force against him after he struck the officer. . . . Success on such a claim in that case ‘d[id] not undermine [the plaintiff]’s conviction or punishment for his own acts of aggravated battery.’ . . . Where the facts alleged by a § 1983 plaintiff contradict or necessarily imply the invalidity of his conviction, however, *Heck* bars the claim. *Moore v. Mahone*, 652 F.3d 722, 723–24 (7th Cir. 2011). In *Moore*, a prisoner with a battery conviction could not proceed with his § 1983 claim that a correctional officer used excessive force against him; the prisoner asserted that he had committed no battery on the guard to justify any use of force in response. . . . That plaintiff could have argued that officers overreacted to his battery, which might not necessarily have implied the invalidity of his battery conviction. But because the plaintiff asserted and persisted with his claim that he had committed no battery at all to justify any use of force, his claim was barred by *Heck*. . . . It is possible for a plaintiff to remain ‘agnostic’ about the facts supporting his criminal conviction. . . . But ‘a plaintiff is master of his claim and can, if he insists, stick to a position that forecloses relief.’ . . . In this case, plaintiff insists that he was ‘willingly compl[ying]’ with defendant Needleman’s orders when the officer ‘[s]uddenly and without warning . . . pushed [plaintiff] to the ground’ and then struck him in the face several times.’ . . . Regardless of whether plaintiff expressly challenges his convictions, he cannot disavow their factual underpinning without calling into question their validity. . . . Plaintiff’s position that he was in full compliance with defendants’ directives, and that they attacked him without any justification for doing so, requires dismissal of his excessive force claim pursuant to *Heck*. This case presents a scenario very similar to *Tolliver v. City of Chicago*. Therein, the plaintiff, in pleading guilty to aggravated battery to a peace officer, stipulated that the evidence would establish that he had driven his vehicle towards an officer who, in fear for his safety, fired his service weapon at the vehicle. . . . In the plaintiff’s subsequent civil rights action, he maintained that he was paralyzed except for his ‘eyeballs’ at the time, and was therefore unable to intentionally drive the car, which merely rolled in the officer’s general direction. . . . The Court of Appeals affirmed summary judgment in favor of the officer, finding that the plaintiff’s version of events was *Heck*-barred for alleging facts inconsistent with his conviction for aggravated battery of a peace officer. . . . The Court of Appeals found that ‘if the incident unfolded as Tolliver alleges in his civil suit, then he could not have been guilty of aggravated battery of a peace officer because the officer shot him without provocation

and was injured as a result of involuntary and unintentional actions by a paralyzed Tolliver.’. . Defendants’ unrefuted evidence reflects that plaintiff pleaded guilty to two counts of aggravated battery to a peace officer and one count of aggravated unlawful use of a weapon. As part of the plea colloquy, plaintiff stipulated that he had exited the vehicle, made a quick movement, and pulled away when Needleman attempted to perform a protective pat down. He further conceded that he had scratched Needleman’s neck and bitten Peraino on his wrist. Additionally, he admitted that he had drawn a loaded semi-automatic handgun from his waistband. Plaintiff does not contend that defendants resorted to excessive force after he pointed a gun at them or otherwise attempted to harm them; he does not argue that the officers overreacted to his aggressive actions; and he does not suggest that they engaged in force after he was already restrained. Instead, he maintains that the officers took him to the ground and assaulted him without any reason for doing so. Plaintiff’s account contradicts the admissions he made at his plea hearing. If plaintiff’s current version of the incident is true, these facts would necessarily imply that both of his convictions are invalid. . . Under the facts presented, the *Heck* doctrine bars plaintiff’s excessive force claim. A finding that defendants resorted to force for no reason would necessarily impugn plaintiff’s underlying convictions.”); ***Barbosa v. Conlon***, 962 F.Supp.2d 316, 330, (D. Mass. 2013) (“While the First Circuit has not addressed the issue, this court will assume, without deciding, that an admission to sufficient facts and a continuance without a finding ‘constitutes a conviction for the purposes of the *Heck* limitation on subsequent § 1983 actions.’. . Nevertheless, there is nothing in the plaintiffs’ claims for excessive force that conflicts with or challenges the criminal judgments against the plaintiffs. While the plaintiffs’ conduct may be a factor in assessing the defendants’ response, the fact that the plaintiffs may have engaged in unruly conduct does not give the police *carte blanche* to exert unreasonable force against them. The police may still be liable for use of excessive force. . . . [I]n the instant case the plaintiffs’ admissions are not *per se* inconsistent with their claims that the police used force that was unreasonable under the particular circumstances confronting the police at the time of the arrests. Since the plaintiffs’ action, ‘even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff[s],’ their ‘action should be allowed to proceed[.]’. . Consequently, the defendants’ motion for summary judgment on the plaintiffs’ excessive force claim will be denied.”); ***Russo v. DiMilia***, 894 F.Supp.2d 391, 406, 407 (S.D.N.Y. 2012) (“‘It is well established that an excessive force claim does not usually bear the requisite relationship under *Heck* to mandate its dismissal.’. . As the ‘police might well use excessive force in effecting a perfectly lawful arrest[,] ... a claim of excessive force in making an arrest does not require overturning the plaintiff’s conviction even though the conviction was based in part on a determination that the arrest itself was lawful.’. . Here, the excessive force claim does not bear the ‘requisite relationship’ to Plaintiff’s conviction for menacing in the third degree. The jury was instructed that it should convict Plaintiff of menacing DiMilia in the third degree if it found: (1) that Plaintiff ‘by physical menace placed or attempted to place John DiMilia in fear of death or imminent serious physical injury or imminent physical injury’; and (2) that Plaintiff ‘did so intentionally.’. . . ‘[A]n officer’s decision to use deadly force is objectively reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.’. . Because the jury did not specify what exactly Plaintiff did that menaced DiMilia, the Court cannot

rule out the possibility that the jury found that Plaintiff placed DiMilia in fear of ‘imminent physical injury.’ If this is the case, Defendants’ use of force could be found excessive without invalidating Plaintiff’s conviction for menacing, as the use of deadly force to respond to a threat of ‘imminent physical injury,’ as opposed to ‘death or serious physical injury,’ could be found excessive. For this reason, a reasonable jury in this case could find that the shooting of Plaintiff by Algarin and Guedes was an excessive use of force, despite Plaintiff’s conviction for menacing DiMilia.”); *Sekerke v. Kemp*, No. 11cv2688 BTM (JMA), 2013 WL 950706, \*5, \*6 (S.D. Cal. Mar. 12, 2013) (“In several cases, the Ninth Circuit has applied *Heck*’s favorable termination requirement to consider, and sometimes preclude, excessive force claims brought pursuant to 42 U.S.C. § 1983. For example, in *Cunningham*, the Ninth Circuit found § 1983 excessive force claims filed by a prisoner who was convicted of felony murder and resisting arrest were barred by *Heck* because his underlying conviction required proof of an ‘intentional provocative act’ which was defined as ‘not in self defense.’ . . . A finding that police had used unreasonable force while effecting the plaintiff’s arrest, the Court held, would ‘call into question’ the validity of factual disputes which had necessarily already been resolved in the criminal action against him. . . . However, in *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir.2005), the Ninth Circuit considered whether excessive force allegations of a prisoner who pled guilty to resisting arrest pursuant to Cal. Penal Code § 148(a)(1) were also barred by *Heck* and found that ‘Smith’s § 1983 action [wa]s not barred . . . because the excessive force may have been employed against him subsequent to the time he engaged in the conduct that constituted the basis for his conviction.’ . . . Under such circumstances, the Ninth Circuit held Smith’s § 1983 action ‘neither demonstrate[d] nor necessarily implie[d] the invalidity of his conviction.’ . . . *see also Sanford v. Motts*, 258 F.3d 1117, 1120 (9th Cir.2001) (“[I]f [the officer] used excessive force subsequent to the time Sanford interfered with [the officer’s] duty, success in her section 1983 claim will not invalidate her conviction. *Heck* is no bar.”); *cf. Hooper v. County of San Diego*, 629 F.3d 1127, 1134 (9th Cir.2011) (holding that a conviction for resisting arrest under Cal.Penal Code § 148(a) (1) does not ‘bar a § 1983 claim for excessive force under *Heck* [if] the conviction and the § 1983 claim are based on different actions during “one continuous transaction.”’). Here, Defendants have not shown that Plaintiff’s excessive [force] claims against them are necessarily inconsistent with his adjudication of guilt for battery on a peace officer. Thus, this Court cannot say that Plaintiff’s excessive force claims ‘necessarily imply the invalidity’ of his battery conviction under Cal.Code Regs., tit. 15 § 3005(d)(1). . . . The factual context in which the force was used is disputed. Plaintiff’s Complaint and its exhibits contain allegations by both him and a fellow inmate witness that he was nonresistant when Kemp and Andersen entered the office and used force against him. . . . Plaintiff’s own exhibits also contain allegations by Defendants Andersen, Kemp, and Crespo which contradict Plaintiff’s version of events. . . . Thus, while Defendant Savala, the hearing officer presiding over Plaintiff’s CDC 115 hearing, considered this evidence and found it ‘substantiated’ a charge of assault on a peace officer, . . . Defendants Kemp, Andersen and Crespo may still be found liable if, as Plaintiff alleges, they punched, kicked, and beat him with a baton while he lie on the floor ‘on [his] stomach with [his] hands behind [his] back.’ . . . For these reasons, the Court DENIES Defendants’ Motion to Dismiss Plaintiff’s excessive force claims on grounds that they are barred by *Heck*.”); *Michaels v. City of Vermillion*, 539 F.Supp.2d 975, 992-94 (N.D. Ohio

2008) (“The *Swiecicki* court recognized the particularly close relationship between the offense ‘resisting arrest’ and the use of force by the police in accomplishing an arrest. While *Heck* bars excessive force claims that imply the invalidity of a resisting arrest conviction under Ohio law, . . . the use of force that gives rise to an excessive force claim could potentially occur after a lawful arrest was accomplished. Under these circumstances, the excessive force claims do not imply the invalidity of the resisting arrest conviction. The Sixth Circuit thus expressly limited the applicability of *Heck* based on the timing of the alleged excessive force. . . *Heck* only bars § 1983 claims when the force at issue is allegedly used *prior to, or in conjunction with*, the suspect’s resistance. . . When the alleged excessive force is used *after* the suspect ceases resisting arrest, the *Heck* rule does not apply. . . . Taking the facts as set forth by the Plaintiffs, Officer Grassnig allegedly tased Michaels after the arrest had been effectuated, after Michaels had ceased resisting, and while Michaels was fully inside the squad car. Although this is a close question given that the events at issue occurred in quick succession, the Court finds that the Plaintiffs have raised a material issue of fact with respect to whether the tasing incident to Michaels’ lawful arrest is distinct from the gratuitous tasing the Plaintiffs assert as the basis of their excessive force claims. This case thus falls into the narrow category described by the dicta in *Swiecicki*: Because Michaels has alleged that the police tased him gratuitously after he resisted arrest (and after he had ceased resisting arrest), *Swiecicki* does not require the Court to apply the *Heck*-bar.”); ***Bramlett v. Buell***, No. Civ.A.04-518, 2004 WL 2988486, at \*3, \*4 (E.D. La. Dec. 9, 2004) (Distinguishing *Hainze*, *Sappington*, and *Hudson* as cases in which ‘the force used by the officer occurred simultaneously with the force exhibited by the plaintiff.’ Here, Aif the jury were to conclude that the officers’ decision to shoot Bramlett was excessive in light of their asserted goal of protecting the bystanders, that would do nothing to undermine the fact that seconds earlier Bramlett had committed an aggravated battery upon Officer Major.”).

### C. *Heck* Does Not Apply to False Arrest Claims That Might Impugn an Anticipated Criminal Conviction

Prior to the Supreme Court’s decision in *Wallace v. Kato*, 127 S. Ct. 1091(2007), a number of circuits applied *Heck* to claims that, if successful, would necessarily imply the invalidity of an anticipated conviction on a pending criminal charge. *See, e.g., Smith v. Holtz*, 87 F.3d 108, 113 (3d Cir. 1996). *See also Harvey v. Waldron*, 210 F.3d 1008, 1014 (9th Cir. 2000) (“We agree with the Second, Third, Sixth, Seventh, Tenth and Eleventh Circuits and hold that *Heck* applies to pending criminal charges, and that a claim, that if successful would necessarily imply the invalidity of a conviction in a pending criminal prosecution, does not accrue so long as the potential for a conviction in the pending criminal prosecution continues to exist.”); ***Beck v. City of Muskogee Police Dep’t***, 195 F.3d 553, 557 (10th Cir. 1999) (“*Heck* precludes § 1983 claims relating to pending charges when a judgment in favor of the plaintiff would necessarily imply the invalidity of any conviction or sentence that might result from prosecution of the pending charges. Such claims arise at the time the charges are dismissed.”). *Accord Cummings v. City of Akron*, 418 F.3d 676 (6th Cir. 2005); ***Shamaeizadah v. Cunigan***, 182 F.3d 391, 397-99 (6th Cir. 1999); ***Covington v. City of New York***, 171 F.3d 117, 124 (2d Cir. 1999); *But see Brown v. Taylor*, No. 04-51280,

2005 WL 1691376, at \*1 (5th Cir. July 19, 2005) (unpublished) (“To the extent that Brown’s allegations concerned pending criminal charges, however, the district court’s dismissal of his civil-rights complaint under *Heck* was erroneous. Insofar as it remains unclear whether Brown has been tried or convicted on those charges, the district court should have stayed the instant action until the pending criminal case against Brown has run its course. [citing *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir.1995)].”).

*Wallace* now makes clear that the *Heck* doctrine does not bar the filing of *false arrest* claims where there is no outstanding criminal conviction but only an “anticipated future conviction.” The Court explains:

[T]he *Heck* rule for deferred accrual is called into play only when there exists ‘a conviction or sentence that has *not* been ... invalidated,’ that is to say, an ‘outstanding criminal judgment.’ It delays what would otherwise be the accrual date of a tort action until the setting aside of an extant conviction which success in that tort action would impugn. . . . What petitioner seeks, in other words, is the adoption of a principle that goes well beyond *Heck*: that an action which would impugn an anticipated future conviction cannot be brought until that conviction occurs and is set aside. The impracticality of such a rule should be obvious. In an action for false arrest it would require the plaintiff (and if he brings suit promptly, the court) to speculate about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict, . . . all this at a time when it can hardly be known what evidence the prosecution has in its possession.

*Wallace*, 127 S. Ct. at 1098.

#### **Post-*Wallace* Cases:**

*Haas v. Noordeloos*, No. 19-3473, 2020 WL 591565, at \*1 (7th Cir. Feb. 6, 2020) (not reported (“[T]o the extent the district court implied that Haas’s claims are barred by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), we conclude that such a holding is premature. *Wallace v. Kato*, 549 U.S. 384, 393–94 (2007) makes clear that an anticipatory *Heck* bar is not a valid ground for dismissal. Because this case was resolved by the district court at such an early stage, it is difficult to assess precisely what legal theories the pro se plaintiff intends to pursue. To the extent he wishes to collaterally attack his pending criminal prosecution, the appropriate action here is ‘to stay the civil action until the criminal case or the likelihood of a criminal case is ended.’ . . . On remand, the district court should evaluate at an appropriate time what claims Haas intends to pursue and whether they implicate or are ancillary to his pending criminal case. This may also require consideration at some point of the issues of potential claim and issue preclusion, but we are unable to sort those out at this stage. Once the claims are clarified, the civil defendants in this case should be served, and the district court should consider the possibility of a stay pursuant to *Wallace*.”)

***Mills v. City of Covina***, 921 F.3d 1161, 1166 n.1 (9th Cir. 2019) (“Prior to *Wallace*, the rule in this circuit was that a § 1983 action like this one ‘alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned.’ *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000). District courts have expressed confusion over whether this deferred accrual rule survived the Supreme Court’s decision in *Wallace*. . . The deferred accrual rule we announced in *Harvey* for Fourth Amendment claims was based on our more general holding ‘that *Heck* applies to pending criminal charges, and that a claim, that if successful would necessarily imply the invalidity of a conviction in a pending criminal prosecution, does not accrue so long as the potential for a conviction in the pending criminal prosecution continues to exist.’ . . That general holding is ‘clearly irreconcilable’ with *Wallace*’s holding that ‘the *Heck* rule for deferred accrual is called into play only when there exists a conviction or sentence that has *not* been . . . invalidated.’ . . Thus, *Harvey*’s deferred accrual rule has been effectively overruled’ and is no longer good law.”)

***Jordan v. Blount County***, 885 F.3d 413, 415-16 (6th Cir. 2018) (“The question here is whether, as the district court held, Jordan’s claim accrued when his conviction was vacated, or whether instead it accrued upon his later acquittal. . . . The closest common-law analogy to a *Brady* claim is one for malicious prosecution, because that claim, unlike one for false arrest, ‘permits damages for confinement imposed pursuant to legal process.’ . . One element of a malicious-prosecution claim ‘is termination of the prior criminal proceeding in favor of the accused.’ . . A *Brady* claim under § 1983 cannot accrue, therefore, until the criminal proceeding so terminates. Thus, the more specific question here is whether Jordan’s ‘criminal proceeding’ terminated in 2011, when the state court of appeals vacated his conviction and remanded for further proceedings in the trial court. Our decision in *King v. Harwood*, 852 F.3d 568 (6th Cir. 2017), makes clear that the answer is no. . . . The defendants argue that, per our decision in *D’Ambrosio v. Marino*, 747 F.3d 378, 384 (6th Cir. 2014), Jordan’s § 1983 claim accrued as soon as his conviction was vacated. But that reading elides the difference between the vacatur in that case and in this one. There, a federal district court vacated D’Ambrosio’s conviction by means of an unconditional writ of habeas corpus, which by its terms barred the state from retrying him. . . Thus, the vacatur itself terminated the state criminal proceeding, and D’Ambrosio’s claim accrued once that vacatur ‘became final[.]’. . . For that reason our comments about the import of any ‘anticipated future conviction[.]’. . . were merely dicta. Jordan’s claim therefore accrued at the same point D’Ambrosio’s did: when his criminal proceeding ended. The district court’s judgment is reversed, and the case remanded for further proceedings consistent with this opinion.”)

***D’Ambrosio v. Marino***, 747 F.3d 378, 385, 386 (6th Cir. 2014) (“We see no reason not to apply *Wallace*’s pretrial principles to the retrial context, as D’Ambrosio’s position requires the same ‘speculat[ion] about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict’ that was fatal to the petitioner’s position in *Wallace*. . . Contrary to D’Ambrosio’s argument, the possibility that his § 1983 claims

‘might impugn an anticipated future conviction d[oes] not trigger the *Heck* rule for deferred accrual.’ . . . By a similar token, though, defendants improperly ignore the requirement that § 1983 claims like D’Ambrosio’s, which imply the invalidity of a prior conviction, accrue only when the conviction ‘is reversed or expunged.’ . . . Application of this rule to D’Ambrosio’s case is straightforward. Until the vacatur of D’Ambrosio’s state conviction became final, *Heck* barred his § 1983 claims, which clearly implied the invalidity of his conviction. . . . Crucially, a panel of this court held that D’Ambrosio’s state conviction had not been vacated before the grant of the unconditional writ, which occurred—at earliest—in 2010. . . . His § 1983 suit was filed in 2011. Because D’Ambrosio’s civil rights claims did not accrue until his state conviction was vacated and the *Heck* bar was lifted, the two-year statute of limitations does not bar his current claims.”)

*Garza v. Burnett*, 672 F.3d 1217, 1218 (10th Cir. 2012) (“Prior to 2007, this court applied the *Heck* bar to both extant and anticipated convictions. *See Beck v. City of Muskogee Police Dep’t*, 195 F.3d 553, 557 (10th Cir.1999). However, the Supreme Court held in 2007 that *Heck*’s bar and its principle of deferred accrual do not apply to anticipated convictions. *Wallace v. Kato*, 549 U.S. 384, 388 (2007). These shifting authorities have placed appellant Gerardo Thomas Garza in an unusual position. Garza filed a civil-rights complaint just days before the Supreme Court handed down *Wallace*. He contends that under pre- *Wallace* Tenth Circuit precedent, his complaint was timely when it was filed. But Garza concedes that his complaint is now untimely in light of *Wallace*. He argues that this intervening change in the legal landscape entitles him to equitable tolling under Utah law, and moves to certify the equitable tolling question to the Utah Supreme Court. . . . Garza’s complaint was timely under Tenth Circuit precedent at the time of filing, but was rendered untimely by *Wallace*. Accordingly, the equitable tolling issue is dispositive of this appeal. Because it is unclear whether Utah would toll the statute of limitations based on an intervening change in controlling circuit precedent, we grant Garza’s request to certify this issue to the Utah Supreme Court.”) [See *Garza v. Burnett*, 547 F. App’x 908, 910 (10th Cir. 2013) (Pursuant to the Utah Supreme Court’s response to the certified question, Garza is entitled to equitable tolling and the judgment of the United States District Court for the District of Utah is hereby **REVERSED**. The case is **REMANDED** for further proceedings consistent with this order and judgment and the newly stated Utah law.”)]

*Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (“Courts disagree as to whether the *Heck* bar applies to pre-trial programs similar to diversion agreements. *Compare, e.g., S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633, 639 (6th Cir.2008) (holding *Heck* inapplicable to pre-trial diversion agreements); and *Butts v. City of Bowling Green*, 374 F.Supp.2d 532, 537 (W.D.Ky.2005) (same), with *Gilles v. Davis*, 427 F.3d 197, 211-12 (3d Cir.2005) (holding that § 1983 claims of a plaintiff who had participated in pre-trial probationary programs were barred by *Heck*). In our judgment, holding that the *Heck* bar applies to pre-trial diversions misses the mark. The Supreme Court in *Wallace* made clear that the *Heck* bar comes into play only when there is an actual conviction, not an anticipated one.”).

*Zarro v. Spitzer*, 274 F. App'x 31, 2008 WL 1790431, at \*3 (2d Cir. Apr. 18, 2008) (“The State, in its *amicus* brief, suggests that *Heck* bars any claims relating to the July 2003 charges because those charges have not yet been resolved in Plaintiff’s favor. . . While the State may be correct in suggesting that Plaintiff’s Complaint fails to state a claim for malicious prosecution based on the July 2003 charges because those charges have not been resolved in Plaintiff’s favor, . . . *Heck* itself is inapplicable to those charges, as there is no extant conviction that a judgment in Plaintiff’s favor could impugn [*citing Wallace*].”)

*Eidson v. State of Tennessee Dept. of Children’s Services*, 510 F.3d 631, 640, 641 (6th Cir. 2007) (“[I]rrespective of the difference between types of § 1983 claims asserted, the rule of *Heck* cannot be divorced from its post-conviction setting. This is the teaching of *Wallace*. *Wallace* simply cannot be fairly read to imply that the accrual of a § 1983 malicious-prosecution-type claim is necessarily and indefinitely delayed in a pre-conviction setting until there is some accused-favorable resolution of pending or anticipated future prosecution. The *Wallace* court even referred to the ‘*Heck*-required setting aside of the extant conviction’ as it explained the ‘impracticality’ of the urged ‘bizarre extension’ of *Heck* to the pre-conviction setting. . . The court went on to observe that ‘[i]f a plaintiff files a false arrest[-type § 1983] claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.’ . . Recognizing that a § 1983 plaintiff’s right to relief could be preserved in this manner, the *Wallace* court deemed it unnecessary to extend the rule of *Heck* to the pre-conviction setting. The *Wallace* court thus took the same approach employed in this case by the district court, which held first, that the pendency of juvenile court proceedings did not delay the accrual of plaintiff Eidson’s § 1983 cause of action; and second, that plaintiff was required to proceed with his claims within twelve months after they accrued and obtain an abstention-based stay pending resolution of the juvenile court proceedings or suffer dismissal for filing beyond the period of limitation. Plaintiff maintains this approach is not equitable. He observes that *Wallace* refrained from holding that the running of the statute of limitations on the § 1983 action would be equitably tolled during any abstention-based dismissal or stay of the § 1983 action. . . Hence, he argues that *Wallace* affords no assurance that the statute of limitations would be tolled during the pendency of an abstention-based stay. Plaintiff’s protest is overstated. The *Wallace* court did not hold that the running of the limitation period *could* not be tolled; only that tolling is traditionally a matter of state law and that adoption of an ‘omnibus’ federal tolling rule would not be appropriate. . . The *Wallace* court was content to entrust the matter of tolling to abstaining district courts in the exercise of their discretion on a case-by-case basis. Yet, prerequisite to obtaining any such tolling relief, of course, is the timely filing of the § 1983 action that will prompt abstention during the pendency of related state court proceedings. Because plaintiff did not timely file his § 1983 action, he forfeited any hope of such relief. It follows that the district court did not err in refusing to recognize the *Shamaeizadeh* extension of the rule of *Heck*. Although its given reason for doing so is questionable, its decision has been subsequently vindicated by *Wallace* and *Fox*, and we are free to affirm the district court’s ruling on other grounds. . . Accordingly, because we conclude that the

rule of *Heck* does not apply in the pre-conviction setting to delay accrual of plaintiff's due process cause of action, we concur in the district court's ruling that plaintiff's § 1983 claims are time-barred.").

***Fox v. DeSoto***, 489 F.3d 227, 233, 234 (6th Cir. 2007) (“[T]he Supreme Court’s decision in *Wallace*, issued during the pendency of this appeal, effectively abrogates the holding in *Shamaeizadeh* and clarifies that *Heck* has no application to the § 1983 claims in this case. . . . This court, drawing on the reasoning in *Heck* and acknowledging that *Heck* did not resolve the issue, joined other courts in extending application of *Heck* and its effect on the statute of limitations to certain pre-conviction circumstances. . . . In no uncertain terms, however, the Court in *Wallace* clarified that the *Heck* bar has no application in the pre-conviction context. . . . *Wallace* clarifies the distinction between claims of malicious prosecution, such as the one addressed in *Heck*, and claims of false arrest and false imprisonment. As noted above, *Heck* held that a claim of malicious prosecution does not accrue until the underlying conviction is invalidated. . . . and this holding was reaffirmed in *Wallace*. . . . The statute of limitations for a claim for false arrest, however, ‘where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process.’ . . . The *Wallace* Court rejected both the argument that the statute of limitations on a false arrest claim should begin only after ‘an anticipated future conviction . . . occurs and is set aside,’ . . . and that the statute of limitations on such a claim should be tolled until an anticipated future conviction is set aside. . . . Accordingly, the possibility that the plaintiff’s already-accrued § 1983 claims might impugn an anticipated future conviction did not trigger the *Heck* rule for deferred accrual. Thus, we not only affirm the dismissal of the state law claims as time-barred, but also find that the plaintiff’s Fourth Amendment claims were likewise barred by the one-year statute of limitation and should have been dismissed as untimely.”).

***DeLeon v. City of Corpus Christi***, 488 F.3d 649, 652, 656 (5th Cir. 2007) (“This appeal turns on whether a deferred adjudication in Texas is a ‘sentence or conviction’ for the purposes of *Heck*. We hold that it is. . . . We conclude that a deferred adjudication order is a conviction for the purposes of *Heck*’s favorable termination rule. This case does not require that we decide whether a successfully completed deferred adjudication, with its more limited collateral consequences under Texas law, is also a conviction for the purposes of *Heck*, and we do not decide that question.’ [footnotes omitted])

***McClish v. Nugent***, 483 F.3d 1231, 1251 & n.19 (11th Cir. 2007) (“Holmberg’s § 1983 claim arose out of his arrest for allegedly interfering with the ongoing arrest of McClish by Deputies Terry and Calderone. The deputies arrested Holmberg for ‘resisting arrest without violence,’ see Fla. Stat. § 843.02, and the charge was eventually dismissed without prejudice pursuant to Florida’s pretrial intervention program, see Fla. Stat. § 843.02. The district court determined that *Heck* barred Holmberg from bringing a § 1983 claim because of his participation in PTI. Although we have never determined that participation in PTI barred a subsequent § 1983 claim, the district court cited to Second, Third, and Fifth Circuit cases holding that a defendant’s participation in PTI barred subsequent § 1983 claims. Dist. Ct. Order at 19- 20 (citing *Gilles v. Davis*, 427 F.3d 197

(3d Cir.2005); *Taylor v. Gregg*, 36 F.3d 453 (5th Cir.1994); *Roesch v. Otarola*, 980 F.2d 850 (2d Cir.1992)). The district court then concluded that ‘Holmberg’s participation in PTI, which resulted in a dismissal of the charge of resisting arrest without violence, is not a termination in his favor, and therefore, he is barred from bringing a § 1983 claim for false arrest.’ We disagree. *Heck* is inapposite. The issue is not, as the district court saw it, whether Holmberg’s participation in PTI amounted to a favorable termination on the merits. Instead, the question is an antecedent one – whether *Heck* applies at all since Holmberg was never convicted of any crime. The primary category of cases barred by *Heck* – suits seeking damages for an allegedly unconstitutional conviction or imprisonment – is plainly inapplicable. Instead, the district court based its *Heck* ruling on the second, indirect category of cases barred by *Heck*: suits to recover damages ‘for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.’ . . . The problem with using this second *Heck* category to bar Holmberg’s § 1983 suit is definitional – to prevail in his § 1983 suit, Holmberg would not have to ‘negate an element of the offense of which he has been convicted,’ because he was never convicted of any offense. [citing *Heck* and *Wallace*] . . . . Even if we were to assume that *Heck* somehow applies to this case, Holmberg correctly cites to *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F.3d 1298 (11th Cir.2005), for the proposition that the Supreme Court has apparently receded from the idea that *Heck*’s favorable-termination requirement also applies to non-incarcerated individuals. . . . The logic of our reasoning in *Abusaid*, although dicta, is clear: If *Heck* only bars § 1983 claims when the alternative remedy of *habeas corpus* is available, then *Heck* has no application to Holmberg’s claim. Holmberg was never in custody at all, and the remedy of *habeas corpus* is not currently available to him.”).

***Whitehurst v. Harris***, No. 6:14-CV-01602-LSC, 2015 WL 71780, at \*9 (N.D. Ala. Jan. 6, 2015) (“While *Heck* is concerned with state-federal comity in the context of § 1983 claims, it does not in itself dictate that courts stay a third party’s § 1983 suit whenever the defendant still faces the prospect of criminal proceedings in state court.”)

***Wharton v. County of Nassau***, No. 07-CV-2137(RRM)(ETB), 2010 WL 3749077, at \*4 (E.D.N.Y. Sept. 20, 2010) (“For the same reasons announced in *Hargroves*, Plaintiffs in this case are entitled to equitable tolling on their § 1983 false arrest claim. Plaintiffs, through no fault of their own, relied on then-authoritative Second Circuit precedent to their detriment, and strict application of *Wallace* would effectively deprive Plaintiffs of their cause of action. See *Kucharski v. Leveille*, 526 F.Supp.2d 768 (E.D.Mich.2007) (equitably tolling plaintiffs’ false arrest claim in light of the change in law occasioned by *Wallace* ). Moreover, Plaintiffs have acted with reasonable diligence to pursue their claims. Plaintiffs filed suit within thirteen months of obtaining a favorable termination, and while they had approximately ten months after Wharton’s acquittal where the claim would have been timely even under *Wallace*, they could no better predict the upcoming change in law than the *Hargroves* plaintiffs. Finally, although Plaintiffs waited approximately three months after the *Wallace* decision to file their claim, this short delay is insufficient to diminish the extraordinary circumstance for which equitable tolling now applies. Accordingly, this Court finds that Plaintiffs’ § 1983 false arrest claim is timely.”)

*Wilson v. Maxwell*, No. 08-4140 (FLW), 2008 WL 4056364, at \*5 (D.N.J. Aug. 28, 2008) (“Based on the Supreme Court’s language in *Wallace*, it would appear that *Wallace* effectively supersedes the Third Circuit’s reasoning in *Gibson* . . . and that *Heck* is inapplicable here . . . and that *Smith v. Holtz* likewise is abrogated by *Wallace* . . . Thus, under *Wallace*, any Fourth Amendment claim must be brought and, in all likelihood, stayed pending resolution of the underlying charges. . . In the event of a conviction on the underlying charges, the stay may extend for years while post-conviction relief is sought. . . This is not an ideal situation because of the potential to clog the court’s docket with unresolvable cases.”).

*Kamar v. Krolczyk*, No. 1:07-CV-0340 AWI TAG, 2008 WL 2880414, at \*6 (E.D. Cal. July 22, 2008) (“The court finds that the recent Supreme Court case of *Wallace v. Kato*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007), has effectively overruled *Harvey*. In *Wallace*, the plaintiff contended that any civil rights action that would impugn his anticipated future conviction could not be brought until that conviction occurs and is set aside. . . The Supreme Court refused to embrace what the Supreme Court entitled a ‘bizarre extension of *Heck*.’ . . In *Wallace*, the Supreme Court overruled those circuits that had applied the *Heck* to bar Section 1983 claims when criminal charges were *only pending*.”)

*Kennedy v. City of Villa Hills*, No. 07-122-DLB, 2008 WL 650341, at \*5, \*6 (E.D.Ky. Mar. 6, 2008) (“*Wallace* still stands for the principle that courts should refrain from considering alleged § 1983 claims where there are pending or potential state criminal proceedings and resolution of the constitutional tort claims would impugn the integrity of a possible future criminal conviction. The difference, post-*Wallace* versus pre-*Wallace*, is that now the proper procedure is to stay the action rather than dismiss the claims without prejudice pursuant to *Heck*, which is what this Court did in *Kennedy*’s prior action. In light of the Supreme Court’s decision in *Wallace*, this Court’s previous dismissal of Plaintiff’s Complaint without prejudice pursuant to *Heck* and *Shamaeizadeh* may. . .now present statute of limitations problems for Plaintiff that this Court in its prior order stated would not occur. Yet, there is a critical difference between the case now before this Court and the decisions of *Wallace* and *Fox*. In *Wallace* and *Fox*, the plaintiffs did not file their civil complaint in the first instance until after their criminal charges had been dismissed or overturned. Plaintiff here did file his initial Complaint while his disorderly conduct charge was still pending. The Court is not inclined to unilaterally punish *Kennedy* for circumstances not of his own making. The Court ordered *Kennedy*’s claims dismissed as premature based on then binding precedent. Plaintiff relied upon the Court’s directive of when his claims would accrue, and that reliance was not misplaced. Under these circumstances, application of equitable principles is appropriate and has been similarly recognized where a party relied to its detriment upon a court’s order. . . To hold otherwise would unfairly prejudice the Plaintiff in this case. . . Moreover, the *Wallace* decision also reveals that the Supreme Court considered the possibility of a factual situation similar to that before this Court, noting the potential harm to a plaintiff that could result. [citing footnote 4 of *Wallace*] Holding that Plaintiff’s claims herein are now time-barred post- *Wallace* by the applicable statutes of limitation would result in *Heck* ultimately producing immunity for the Defendants, a scenario

the Supreme Court deemed unacceptable. At least a few lower courts have also been faced with similar quagmires. In *Kucharski v. Leveille*, 526 F.Supp.2d 768 (E.D.Mich.2007) the court highlighted this note in *Wallace* as support for its conclusion that plaintiff's claims should not be time-barred despite being filed outside the statute of limitations. . . The *Kucharski* court also looked to equitable tolling in saving plaintiff's claims from a strict application of *Wallace* . On the other hand, in *Sandles v. U.S. Marshal's Service*, No. 04- 72426, 2007 WL 4374080 (E.D.Mich. Oct. 18, 2007) (unpublished decision), the court declined to apply *Wallace*'s footnote 4 exception because the plaintiff had waited ten months after his criminal conviction was reversed before filing his claims. More importantly, these two cases signify *Wallace* considered the possibility that strict application of its holding might produce § 1983 immunity when civil claims with associated criminal proceedings were filed and then dismissed pursuant to *Heck*, 'a result surely not intended.' *Wallace* , 127 S.Ct. at 1099 n. 4. . . . Plaintiff here diligently pursued his rights as evidenced by his first filing. Given the Court's Memorandum Order dismissing his claims and instructing him to refile upon resolution of the criminal proceedings, there was no reason for him to know of any other filing requirement, and there is no true prejudice to Defendants as previously noted herein. Accordingly, for these and all of the other reasons previously discussed herein, the Court finds that Plaintiff's second filing is deemed timely and assertion of his federal claims is not otherwise time-barred.").

***McCray v. City of New York***, 2007 WL 4352748, at \*14 (S.D.N.Y. Dec. 11, 2007) ("Plaintiffs argue that, because they have alleged fraudulent concealment and fabrication of evidence, they are entitled to the equitable tolling of their false arrest and imprisonment claims. . . The doctrine of equitable tolling is to be applied only upon a showing that 'rare and exceptional circumstances' prevented a party from timely asserting his or her claim, and that the party, 'acted with reasonable diligence throughout the period he sought to toll.' . . 'A plaintiff seeking equitable tolling of a limitations period must demonstrate that defendants engaged in a fraud which precluded him from discovering the harms he suffered or the information he needed to file a complaint.' . . In this case, while Plaintiffs have alleged that the Defendants engaged in fraudulent concealment, they have not shown that this fraud precluded them from discovering that they were allegedly falsely arrested and falsely imprisoned. Plaintiffs have not explained why they were unable to assert their federal and state false arrest and imprisonment causes of action when these claims originally accrued. As a result, the Court can find no basis to toll the statute of limitations. Moreover, with respect to § 1983 false arrest actions, accrual governed by the *Heck* delayed accrual rule is limited by *Wallace v. Kato*, 127 S.Ct. 1091 (2007). In *Wallace*, the Supreme Court ruled that, 'the statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process.' . . Here, Plaintiffs claim that their convictions could not have been obtained in the absence of their inculpatory statements, which they allege were products of their false arrest and imprisonment. *Wallace* settles that Plaintiffs' federal claims for false arrest and imprisonment accrued against Defendants no later than April 1989, when Plaintiffs were arraigned on felony complaints for the April 19, 1989 crimes. . . Plaintiffs filed their federal claims in this action in 2003. Because the time limits on their false arrest and false imprisonment

claim accordingly expired three years later, in April 1992, those claims are clearly time-barred and are accordingly DISMISSED WITH PREJUDICE.”)

*Kucharski v. Leveille*, 526 F.Supp.2d 768, 770-75 (E.D.Mich. 2007) (“In its last order, the Court held that the plaintiffs’ complaint was filed out of time because the cause of action accrued at the time of the illegal seizure, not when the state court convictions were overturned. Although the later conclusion was ordained by a well-established line of Sixth Circuit precedent, . . . that precedent was overturned by the Supreme Court in *Wallace*. The Court in *Wallace* held that a false arrest claim accrues when the illegal detention ends – in *Wallace*’s case, when the arrested suspect was taken before a judicial officer. A section 1983 case must be filed, the Court held, within the period of limitations measured from that date. With respect to the complication potentially caused by *Heck*, the Court noted that a district court could ‘stay the civil action until the criminal case or the likelihood of a criminal case is ended.’ . . . Then, ‘[i]f the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* would require dismissal; otherwise, the civil action will proceed, absent some other bar to suit.’ . . . Because the *Wallace* Court did not allow equitable tolling to save the plaintiff’s claim in that case, this Court did not consider the possibility in the present matter. However, just as limitations periods are taken from state law, so are the rules regarding equitable tolling. . . . Michigan courts . . . recognize the concept of equitable tolling to relieve a party of the effect of a statute of limitations in certain circumstances. For instance, the Michigan Supreme Court has allowed tolling, thereby allowing a case to proceed, when the plaintiff’s failure to comply with the statute is a result of the confusing state of the law. . . . Based on the foregoing state court precedents, this Court finds that Michigan recognizes the doctrine of equitable tolling, and that a plaintiff may obtain relief from a statute of limitations thereunder if the delay in filing ‘is the product of an understandable confusion about the legal nature of her claim,’ . . . that confusion is created by the courts themselves, . . . and the delay does not result simply from the plaintiff’s lack of diligence . . . . Moreover, where a specific statute controlling the period of limitation is found to abrogate the common law, courts must resort to the statutory tolling rules. The Court believes that this case qualifies under Michigan law for the application of equitable tolling. First, there is confusion in the jurisprudence that is not clarified by any statutory pronouncement. The confusion results not from the length of the applicable statute of limitations, but from a determination when the statute starts to run. That confusion has been created by the courts themselves, as evidenced by *Wallace*’s overruling of this Circuit’s precedents. *Wallace* altered the understanding of *Heck v. Humphrey*’s effect on the time a section 1983 claim for unlawful arrest accrues. . . . Although *Heck* involved a plaintiff who already had been convicted in state court, most if not all circuits concluded that *Heck* barred a section 1983 claim by a plaintiff with criminal charges pending against him if success in the 1983 suit would be inconsistent with a future conviction. . . . There can be no question that the plaintiffs relied on Sixth Circuit precedent to their prejudice in this case. The untimeliness of the plaintiffs’ complaint results from an understandable confusion about the state of the law as to when their claim accrued. That confusion was created by the courts themselves. The delay did not result from the plaintiffs’ failure to diligently pursue the claim. In fact, the plaintiffs filed their complaint less than one year after their convictions were reversed. Moreover, strict application of *Wallace* to this case effectively deprives

the plaintiffs of their cause of action. If the plaintiffs had filed their case immediately after the search on May 4, 2001, Sixth Circuit precedent would have required dismissal of the case as barred by *Heck*. Once the law changed, the plaintiffs' convictions having been reversed on September 30, 2004, the plaintiffs would be barred by the statute of limitations under *Wallace*. This is 'a result surely not intended.' . . . Rather, this is the unusual case that fits neatly within the doctrine of equitable tolling. The Court concludes that Michigan law tolled the three-year statute of limitations while the plaintiffs' convictions were still viable, and filing this case within three years of the reversal of those convictions does not result in a statute of limitations bar.'").

***Pethtel v. Washington County Sheriff's Office***, 2007 WL 2359765, at \*\*7 -10 (S.D.Ohio, Aug. 16, 2007) ("The holding in *Shamaeizadeh* has been severely undermined by the Supreme Court's recent decision in *Wallace v. Kato* . . . . In *Wallace*, the Court held that the statute of limitations on a § 1983 claim of false arrest accrues on the date the plaintiff appears before a magistrate and is arraigned on the charges filed against him. . . .The Court also held that *Heck's* deferred accrual rule does not apply when the cause of action accrues before a criminal conviction has taken place. . . .Because . . . Plaintiff's § 1983 and *Bivens* claims accrued prior to the date he pleaded no contest to the reduced charge of disorderly conduct, the *Heck* bar does not apply. Moreover, because Plaintiff's sentence consisted of a fine rather than imprisonment, a habeas remedy was never available to him. As the Sixth Circuit has noted, five justices of the Supreme Court are of the belief that the *Heck* bar, requiring a plaintiff to have his sentence or conviction invalidated before filing a § 1983 suit, does not apply when the plaintiff has not been sentenced to a term of imprisonment. . . . For all of these reasons, the Court rejects Defendants' argument that Plaintiff's claims are barred by *Heck*.' Court goes on to find all claims barred by statute of limitations after *Wallace*)

***Curry v. Hennessey***, 2007 WL 1394531, at \*2 (N.D. Cal. May 10, 2007) ("After *Wallace*, the Ninth Circuit's holding that *Heck* applies to cases directed to pending criminal charges is limited to the situation where there is an extant conviction at the time the federal case is filed. In cases such as this one, where there is no extant conviction, it is appropriate to follow the Supreme Court's suggestion and stay the case.")

***Lopez v. Unknown Galveston Police Officer #1***, No. G-06-0371, 2007 WL 1108736, at \* 5 (S.D. Tex. Apr. 11, 2007) ("Despite Fifth Circuit decisions that previously held otherwise, *see Price*, 431 F.3d at 892, and *Brandley*, 64 F.3d at 196, the Supreme Court's decision in *Wallace* establishes that regardless of the potential effect on pending or future criminal proceedings, a plaintiff must file a § 1983 action within the relevant limitations period.")

***Jackim v. City of Brooklyn***, No. 1:05 cv 1678, 2007 WL 893868, at \*26, \*27 & n.41 (N.D. Ohio Mar. 22, 2007) ("Until February 21, 2007 the law was fairly settled, in this Circuit and most others, that application of the principle in *Heck* required a dismissal of all claims subject to the bar arising therefrom. . . . On February 21, 2007 the Supreme Court altered the landscape surrounding the interplay between § 1983 claims and *Heck*. In *Wallace*, . . .in the context of determining when the statute of limitations for a § 1983 claim for false arrest begins to run, the Supreme Court concluded

that the principle of *Heck* technically only applies to ‘extant’ convictions – i.e., those which have been entered and have not been set aside. Thus, the Court concluded that *Heck* does not prevent an action from being instituted under § 1983 where a conviction is no more than a future possibility. . . . Thus, while the Supreme Court does not seem to agree with the Sixth Circuit that it is *Heck* that bars consideration of § 1983 claims in the face of ongoing state criminal proceedings, it does make clear that it does not contemplate that such civil proceedings will proceed in those circumstances. Rather, the Supreme Court indicated that a stay of civil proceedings should be imposed pending a resolution of pending criminal charges, and, presumably, any appeals or *habeas corpus* proceedings attendant thereto. Indeed, the majority’s decision made it clear that a stay of proceedings is likely the only just way to deal with potentially conviction – impugning § 1983 claims when it went on to find that *Heck* never tolls the statute of limitations on such § 1983 claims – whether they be mere future possibilities, or even extant convictions still subject to attack. Thus, whether this Court is bound by existing Sixth Circuit precedent which applies *Heck* to future convictions (because the Supreme Court did not overturn any specific Circuit decision so holding) or is correct in concluding that the *Wallace* decision effectively overrules that authority by its express discussions of *Heck*, the result is the same – Bruce Jackim’s remaining claims may not proceed while the criminal charges are still pending. As to those remaining claims, all further proceedings in this matter are stayed pending further order of this Court. . . . The inefficiency of this result is not lost on the Court. In this era where district courts are judged, in substantial measure, by how efficiently they resolve or dispose of cases on their docket, an order which could potentially stall a case (or many such cases) for years to come makes little practical sense.”).

*Watts v. Epps*, 475 F.Supp.2d 1367, 1369 (N.D. Ga. 2007) (“Despite several lower court decisions that have previously held otherwise, [citing cases from circuits], the Supreme Court’s decision in *Wallace* makes clear that tolling under *Heck* does not apply in the pre-conviction context. . . . Regardless of its potential effect on pending or future criminal proceedings, a plaintiff must file a § 1983 action within the relevant limitations period. . . . *Wallace* teaches that it is the issuance of a stay – and not the tolling of an action – that is the appropriate prophylactic device to prevent federal courts from undercutting state criminal convictions by preordaining in § 1983 actions the constitutionality of arrests or seizures.”)

#### **D. Fabrication-of-Evidence Claims: *McDonough v. Smith***

*McDonough v. Smith*, 139 S. Ct. 2149, 2154-61 & n.10 (2019) (“Relying in part on this allegedly fabricated evidence, Smith secured a grand jury indictment against McDonough. McDonough was arrested, arraigned, and released (with restrictions on his travel) pending trial. Smith brought the case to trial a year later, in January 2012. He again presented the allegedly fabricated testimony during this trial, which lasted more than a month and ended in a mistrial. Smith then reprosecuted McDonough. The second trial also lasted over a month, and again, Smith elicited allegedly fabricated testimony. The second trial ended with McDonough’s acquittal on all charges on December 21, 2012. On December 18, 2015, just under three years after his acquittal, McDonough sued Smith and other defendants under § 1983 in the U. S. District Court for the Northern District

of New York. Against Smith, McDonough asserted two different constitutional claims: one for fabrication of evidence, and one for malicious prosecution without probable cause. The District Court dismissed the malicious prosecution claim as barred by prosecutorial immunity, though timely. It dismissed the fabricated-evidence claim, however, as untimely. McDonough appealed to the U. S. Court of Appeals for the Second Circuit, which affirmed. . . . The statute of limitations for a fabricated-evidence claim like McDonough's does not begin to run until the criminal proceedings against the defendant (*i.e.*, the § 1983 plaintiff) have terminated in his favor. This conclusion follows both from the rule for the most natural common-law analogy (the tort of malicious prosecution) and from the practical considerations that have previously led this Court to defer accrual of claims that would otherwise constitute an untenable collateral attack on a criminal judgment. . . . Although courts look to state law for the length of the limitations period, the time at which a § 1983 claim accrues 'is a question of federal law,' 'conforming in general to common-law tort principles.' *Wallace v. Kato*, 549 U. S. 384, 388 (2007). That time is presumptively 'when the plaintiff has "a complete and present cause of action,"' . . . though the answer is not always so simple. . . . Where, for example, a particular claim may not realistically be brought while a violation is ongoing, such a claim may accrue at a later date. . . . Though McDonough's complaint does not ground his fabricated-evidence claim in a particular constitutional provision, the Second Circuit treated his claim as arising under the Due Process Clause. . . . McDonough's claim, this theory goes, seeks to vindicate a "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer." . . . We assume without deciding that the Second Circuit's articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those separate questions. . . . McDonough is correct that malicious prosecution is the most analogous common-law tort here. . . . We follow the analogy where it leads: McDonough could not bring his fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution. As *Heck* explains, malicious prosecution's favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments. . . . The requirement likewise avoids allowing collateral attacks on criminal judgments through civil litigation. . . . These concerns track 'similar concerns for finality and consistency' that have motivated this Court to refrain from multiplying avenues for collateral attack on criminal judgments through civil tort vehicles such as § 1983. . . . Because a civil claim such as McDonough's, asserting that fabricated evidence was used to pursue a criminal judgment, implicates the same concerns, it makes sense to adopt the same rule. . . . This case differs from *Heck* because the plaintiff in *Heck* had been convicted, while McDonough was acquitted. Although some claims do fall outside *Heck*'s ambit when a conviction is merely 'anticipated,' *Wallace*, 549 U. S., at 393, however, McDonough's claims are not of that kind[.]. . . . As articulated by the Court of Appeals, his claims challenge the validity of the criminal proceedings against him in essentially the same manner as the plaintiff in *Heck* challenged the validity of his conviction. And the pragmatic considerations discussed in *Heck* apply generally to civil suits within the domain of habeas corpus, not only to those that challenge convictions. . . . The principles and reasoning of *Heck* thus point toward a corollary result here: There is not ' "a complete and present cause of action,"' . . . to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing. Only once the criminal proceeding has

ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*, . . . will the statute of limitations begin to run. . . . Smith suggests that stays and ad hoc abstention are sufficient to avoid the problems of two-track litigation. Such workarounds are indeed available when claims falling outside *Heck*'s scope nevertheless are initiated while a state criminal proceeding is pending, . . .but Smith's solution is poorly suited to the type of claim at issue here. When, as here, a plaintiff's claim 'necessarily' questions the validity of a state proceeding, . . . there is no reason to put the onus to safeguard comity on district courts exercising case-by-case discretion—particularly at the foreseeable expense of potentially prejudicing litigants and cluttering dockets with dormant, unripe cases. . . The accrual rule we adopt today, by contrast, respects the autonomy of state courts and avoids these costs to litigants and federal courts. In deferring rather than inviting such suits, we adhere to familiar principles. The proper approach in our federal system generally is for a criminal defendant who believes that the criminal proceedings against him rest on knowingly fabricated evidence to defend himself at trial and, if necessary, then to attack any resulting conviction through collateral review proceedings. McDonough therefore had a complete and present cause of action for the loss of his liberty only once the criminal proceedings against him terminated in his favor. . . . Smith is correct that *Heck* concerned a plaintiff serving a sentence for a still-valid conviction and that *Wallace* distinguished *Heck* on that basis, but *Wallace* did not displace the principles in *Heck* that resolve this case. A false-arrest claim, *Wallace* explained, has a life independent of an ongoing trial or putative future conviction—it attacks the arrest only to the extent it was without legal process, even if legal process later commences. . . That feature made the claim analogous to common-law false imprisonment. . . By contrast, a claim like McDonough's centers on evidence used to secure an indictment and at a criminal trial, so it does not require 'speculat[ion] about whether a prosecution will be brought.' . . It directly challenges—and thus necessarily threatens to impugn—the prosecution itself. . . Second, Smith notes (1) that a fabricated-evidence claim in the Second Circuit (unlike a malicious prosecution claim) can exist even if there is probable cause and (2) that McDonough was acquitted. In other words, McDonough theoretically could have been prosecuted without the fabricated evidence, and he was not convicted even with it. Because a violation thus could exist no matter its effect on the outcome, Smith reasons, 'the date on which that outcome occurred is irrelevant.' . . Smith is correct in one sense. One could imagine a fabricated-evidence claim that does not allege that the violation's consequence was a liberty deprivation occasioned by the criminal proceedings themselves. . . To be sure, the argument for adopting a favorable-termination requirement would be weaker in that context. That is not, however, the nature of McDonough's claim. As already explained, McDonough's claim remains most analogous to a claim of common-law malicious prosecution, even if the two are not identical. . . *Heck* explains why favorable termination is both relevant and required for a claim analogous to malicious prosecution that would impugn a conviction, and that rationale extends to an ongoing prosecution as well: The alternative would impermissibly risk parallel litigation and conflicting judgments. . . If the date of the favorable termination was relevant in *Heck*, it is relevant here. It does not change the result, meanwhile, that McDonough suffered harm prior to his acquittal. The Court has never suggested that the date on which a constitutional injury first occurs is the only date from which a limitations period may run. . . To the contrary, the injury caused by a classic malicious prosecution likewise first occurs as

soon as legal process is brought to bear on a defendant, yet favorable termination remains the accrual date. . . Third and finally, Smith argues that the advantages of his rule outweigh its disadvantages as a matter of policy. In his view, the Second Circuit’s approach would provide more predictable guidance, while the favorable-termination approach fosters perverse incentives for prosecutors (who may become reluctant to offer favorable resolutions) and risks foreclosing meritorious claims (for example, where an outcome is not clearly ‘favorable’). These arguments are unconvincing. We agree that clear accrual rules are valuable but fail to see how assessing when proceedings terminated favorably will be, on balance, more burdensome than assessing when a criminal defendant ‘learned that the evidence was false and was used against him’ and deprived him of liberty as a result. . . And while the risk of foreclosing certain claims and the potential incentive effects that Smith identifies could be valid considerations in other contexts,<sup>10</sup> [fnote 10: Because McDonough’s acquittal was unquestionably a favorable termination, we have no occasion to address the broader range of ways a criminal prosecution (as opposed to a conviction) might end favorably to the accused. . . To the extent Smith argues that the law in this area should take account of prosecutors’ broad discretion over such matters as the terms on which pleas will be offered or whether charges will be dropped, those arguments more properly bear on the question whether a given resolution should be understood as favorable or not. Such considerations might call for a context-specific and more capacious understanding of what constitutes ‘favorable’ termination for purposes of a § 1983 false-evidence claim, but that is not the question before us.] they do not overcome the greater danger that plaintiffs will be deterred under Smith’s theory from suing for redress of egregious misconduct, . . . nor do they override the guidance of the common law and precedent. . . The statute of limitations for McDonough’s § 1983 claim alleging that he was prosecuted using fabricated evidence began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted at the end of his second trial. The judgment of the United States Court of Appeals for the Second Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.”)

*McDonough v. Smith*, 139 S. Ct. 2149, 2161-62 (2019) (Thomas, J., with whom Kagan, J. and Gorsuch, J. join, dissenting) (“We granted certiorari to decide when ‘the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run.’ . . . McDonough, however, declined to take a definitive position on the ‘threshold inquiry in a [42 U. S. C.] § 1983 suit’: ‘“identify[ing] the specific constitutional right” at issue.’ . . . Because it is only ‘[a]fter pinpointing that right’ that courts can proceed to ‘determine the elements of, and rules associated with, an action seeking damages for its violation,’ . . . we should have dismissed this case as improvidently granted. McDonough’s failure to specify which constitutional right the respondent allegedly violated profoundly complicates our inquiry. McDonough argues that malicious prosecution is the common-law tort most analogous to his fabrication-of-evidence claim. But without ‘“identify[ing] the specific constitutional right” at issue,’ we cannot adhere to the contours of that right when ‘applying, selecting among, or adjusting common-law approaches.’ . . . McDonough also contends that his suit is timely because he suffered a continuing constitutional violation, but this argument is similarly difficult to evaluate without identifying precisely what that violation was. Moreover, because the constitutional basis for McDonough’s claim is unclear, we

are unable to confirm that he has a constitutional claim at all. In my view, it would be both logical and prudent to address that antecedent question before addressing the statute of limitations for that claim. McDonough also urges us to resolve the question presented by extending *Preiser v. Rodriguez*, 411 U. S. 475 (1973), and *Heck v. Humphrey*, 512 U. S. 477 (1994). But the analysis under both cases depends on what facts a § 1983 plaintiff would need to prove to prevail on his claim. . . And McDonough declines to take a position on that issue as well. . . Further complicating this case, McDonough raised a malicious-prosecution claim alongside his fabrication-of-evidence claim. The District Court dismissed that claim on grounds of absolute immunity. McDonough has not fully explained the difference between that claim and his fabrication claim, which he insists is both analogous to the common-law tort of malicious prosecution and distinct from his dismissed malicious-prosecution claim. . . Additionally, it appears that McDonough’s fabrication claim could face dismissal on absolute-immunity grounds on remand. . . The Court, while recognizing that it is critical to ascertain the basis for a § 1983 claim when deciding how to ‘handl[e]’ it, . . . attempts to evade these issues by ‘assum[ing] without deciding that the Second Circuit’s articulations of the right at issue and its contours are sound.’ . . But because the parties have not accepted the Second Circuit’s view that the claim sounds in procedural due process, . . . that claim as ‘articulated by the Court of Appeals’ might be different from the claim McDonough actually brought. . . The better course would be to dismiss this case as improvidently granted and await a case in which the threshold question of the basis of a ‘fabrication-of-evidence’ claim is cleanly presented. Moreover, even if the Second Circuit were correct that McDonough asserts a violation of the Due Process Clause, it would be preferable for the Court to determine the claim’s elements before deciding its statute of limitations. . . McDonough asks the Court to bypass the antecedent question of the nature and elements of his claim and first determine its statute of limitations. We should have declined the invitation and dismissed the writ of certiorari as improvidently granted. I therefore respectfully dissent.”).

### **Post-McDonough Cases**

#### **First Circuit**

*Jordan v. Town of Waldoboro*, 943 F.3d 532, 545-46 (1st Cir. 2019) (“Jordan argues that the magistrate erred in granting summary judgment for the defendants on his federal constitutional claims for malicious prosecution. The parties agree that to make out a claim for malicious prosecution, Jordan must show that ‘the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff’s favor.’ . . The district court held that -- even assuming Jordan could meet the first two requirements -- he could not show that the criminal proceedings terminated in his favor, and it therefore concluded that summary judgment was appropriate. It was recently a live question in our circuit whether post-*Hernandez-Cuevas* Supreme Court precedent rendered the favorable termination element ‘an anachronism.’ . . But the Supreme Court arguably resolved this question when it reiterated that a plaintiff cannot bring a section 1983 fabricated-evidence claim that is analogous to the common-law tort of malicious prosecution ‘prior to favorable termination of [the]

prosecution.’ *McDonough v. Smith*, — U.S. —, 139 S. Ct. 2149, 2156, 204 L.Ed.2d 506 (2019). And in any event, Jordan’s brief to this court accepts the *Hernandez-Cuevas* elements, and Jordan has therefore waived any argument that he need not satisfy the favorable termination element of a malicious prosecution claim. . . So, we face the question of whether the state criminal proceedings against Jordan terminated in Jordan’s favor. . . Jordan concedes that, to satisfy the favorable termination element, a plaintiff must show that the prosecution was terminated in such a way as to imply the plaintiff’s innocence. . . The district attorney dismissed the criminal proceedings against Jordan because ‘[t]he victim and key witness in the case for the State, Scott Jordan[,] Sr[.], ha[d] died.’ . . . Jordan’s criminal case was dismissed because the death of the key witness made the prosecution impracticable. Therefore, the dismissal was not sufficiently favorable to the accused, and Jordan cannot satisfy the favorable termination element under *Hernandez-Cuevas*[.]”)

***Jordan v. Town of Waldoboro***, 943 F.3d 532, 550-55 (1st Cir. 2019) (Barron, J., concurring) (“Scott Jordan, Jr. brings a pair of claims under 42 U.S.C. § 1983 for damages that target the pretrial criminal detention that he allegedly endured in violation of the Fourth Amendment of the federal Constitution. He styles his first such § 1983 claim, which targets the pretrial detention that followed his initial warrantless arrest, as one for ‘false arrest.’ He styles his second such § 1983 claim, which targets the pretrial detention that, it appears, followed a criminal complaint and summons, as one for ‘malicious prosecution.’ Without assessing the relative strength of the underlying alleged Fourth Amendment violations, we hold that this ‘false arrest’ § 1983 claim may proceed but that this ‘malicious prosecution’ § 1983 claim may not. The question that prompts this concurrence thus arises: how can our different treatment of these two § 1983 claims be justified? Our answer relies on Jordan’s concession that a ‘favorable termination’ requirement applies to this ‘malicious prosecution’ § 1983 claim but not to this ‘false arrest’ § 1983 claim. . . Because the criminal proceedings ended upon the alleged victim’s death before the criminal trial and not after, say, an acquittal, Jordan cannot satisfy that requirement. . . I thus join our opinion in full. I write separately, however, to register my doubt that the ‘favorable termination’ requirement applies to a § 1983 claim that targets a pretrial criminal seizure simply because it is made pursuant to an arrest warrant, as some of the precedent that Jordan cites in support of his concession appears to indicate. . . Even an arrest pursuant to a warrant violates the Fourth Amendment if law enforcement secures it by tricking the magistrate into finding probable cause. . . I am thus not convinced that a plaintiff must show that any follow-on criminal proceedings ended in his favor when he seeks damages under § 1983 for a seizure pursuant to an arrest warrant. Or, at least, I am not convinced that a plaintiff should have to make that showing even when the challenged seizure occurs so early in the criminal case that it precedes a grand jury handing up an indictment or a prosecutor filing a criminal information. . . For, as our treatment of Jordan’s ‘false arrest’ § 1983 claim demonstrates, a plaintiff need not make that showing when he seeks damages for the harm caused by a similarly early-stage *warrantless* seizure. . . . Jordan’s ‘false arrest’ § 1983 claim borrows its elements from the common-law tort of false arrest, which permits recovery for an unlawful seizure without legal process and which does not impose the ‘favorable termination’ requirement. . . . Because both the § 1983 and common-law types of ‘false arrest’ claims target seizures that precede any criminal

process, moreover, it makes sense that no ‘favorable termination’ requirement applies. Neither the seizure’s lawfulness nor the harm that it inflicts turns on how any follow-on criminal proceedings end. There is, however, another type of Fourth Amendment-based § 1983 claim that also takes aim at a seizure that occurs early in a criminal case and thus before even, say, a grand jury has handed up an indictment or a prosecutor has filed a criminal information. . . . But, this type of Fourth Amendment-based § 1983 claim targets a seizure that is made pursuant to at least some legal process, as it targets a seizure that is made pursuant to an arrest warrant. Thus, in accord with how plaintiffs often style such § 1983 claims, the common-law tort of malicious prosecution, which is subject to a ‘favorable termination’ requirement, is often thought to supply the proper common-law analog for this type of § 1983 claim, as our precedent has also indicated. . . . But, although this type of § 1983 claim, like the claim for the common-law tort of malicious prosecution, seeks recovery for a seizure pursuant to legal process, the two types of claims differ in important ways. A claim for the common-law tort of malicious prosecution focuses on whether ‘criminal proceeding[s]’ have been initiated or continued with malice and without probable cause. . . . [T]he initiation of the criminal process -- and the stigma inherent in its initiation -- is the source of the injury for the common-law tort of malicious prosecution. Thus, such a claim for that tort ‘always involves defamation’ while ‘detention or confinement is no part of the issue,’ . . . and ‘any damages recoverable’ must be based ‘on the wrongful use of judicial process rather than detention itself[.]’ . . . The source of the injury for a Fourth Amendment-based § 1983 claim that seeks recompense for a *seizure* pursuant to legal process, however, is the detention itself, not the legal process used to effect it. . . . Thus, per Congress’s instruction in 42 U.S.C. § 1988, we likely must look beyond the common-law tort of malicious prosecution to determine this type of § 1983 claim’s requirements. . . . *Manuel* also supports our doing so. The plaintiff contended there that his pretrial detention violated the Fourth Amendment because the magistrate’s finding of probable cause relied on evidence that law enforcement authorities had fabricated. . . . *Manuel* permitted that Fourth Amendment-based § 1983 claim, even though the plaintiff had styled it as one for ‘malicious prosecution,’ to proceed, without referring to the § 1983 claim at issue as one for ‘malicious prosecution.’ . . . *Manuel* ultimately left open whether a ‘favorable termination’ requirement applied to the claim there at issue, . . . and, prior to *Manuel*, we did state that the ‘favorable termination’ requirement applied to such a claim, *see Hernandez-Cuevas*, 723 F.3d at 99 n.8. But, *Hernandez-Cuevas* declined to borrow the requirements of the common-law tort of malicious prosecution wholesale in defining the requirements for that Fourth Amendment-based § 1983 claim, even though it involved a seizure made pursuant to an arrest warrant. . . . And, after *Manuel*, we suggested that the ‘favorable termination’ might not apply to such a Fourth Amendment-based § 1983 claim, notwithstanding that it seeks recompense for a seizure made pursuant to legal process. *See Pagán-González*, 919 F.3d at 602; *id.* at 605-11 (Barron, J., concurring) (discussing the possible need for adjustment of the probable-cause and favorable-termination elements). . . . But, while all these signs point away from applying the ‘favorable termination’ requirement to this type of Fourth Amendment-based § 1983 claim for damages from a seizure pursuant to an arrest warrant, there is one important sign that arguably does not. In *McDonough*, the Supreme Court recently held that the ‘favorable termination’ requirement did apply to the ‘malicious prosecution’ § 1983 claim at issue there, even though the plaintiff sought damages, in part, for

restraints on his liberty that he attributed to his pretrial seizure. . . Thus, I must address whether *McDonough* calls for a different analysis than the one that, in *Pagán-González*, I suggested would be proper. I do not think that *McDonough* does. The Court described the § 1983 claim in that case as one that targeted “the integrity of *criminal prosecutions* undertaken “pursuant to legal process”” rather than only the plaintiff’s initial seizure pursuant to an arrest warrant. . . Nor did *McDonough* indicate that -- like the claims in *Manuel* and *Pagán-González*, and like the claim that Jordan brings -- the § 1983 claim there was based on the Fourth Amendment as opposed to, for example, the federal constitutional right to procedural due process. Moreover, while *McDonough* did identify practical reasons for applying a ‘favorable termination’ requirement to the § 1983 claim before it, I am not convinced that these practical reasons apply equally to all purely Fourth Amendment-based § 1983 claims that seek damages for the harm caused by a warrant-based seizure. *McDonough* invoked the need to prevent a ‘ticking limitations clock on criminal defendants as soon as they become aware that fabricated evidence has been used against them,’ given ‘practical problems in jurisdictions where prosecutions regularly last nearly as long as -- or even longer than -- the relevant civil limitations period’ and thus where ‘criminal defendants could face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them.’. . But, that concern would not necessitate the imposition of a ‘favorable termination’ requirement if such a Fourth Amendment-based § 1983 claim would not accrue until the assertedly unlawful detention terminates. Such termination could occur upon either the plaintiff’s release from detention (including bail conditions) or the emergence of a separate legal basis for the detention -- whether that separate legal basis takes the form of a subsequent lawful arrest warrant, the handing up of an indictment by a grand jury, or a prosecutor’s filing of a criminal information -- and thus would have nothing to do with the way that any follow-on criminal proceedings end. *McDonough* also explained that the ‘favorable termination’ requirement ‘avoid[s] parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.’. . But, the Fourth Amendment’s warrant requirement stems from concerns about trusting law enforcement to assess probable cause for itself. . . Thus, a Fourth Amendment-based § 1983 claim for damages from a warrant-based arrest -- at least when that seizure precedes a grand jury’s indictment or a prosecutor’s filing of a criminal information -- poses no greater inherent risk of interfering with follow-on state criminal proceedings than does a § 1983 claim that targets an equally early-stage warrantless arrest. Yet, ‘in accord with [the] common practice,’ a federal court that faces a § 1983 claim of that latter, warrantless-seizure-based sort may simply ‘stay the civil action until the criminal case or the likelihood of a criminal case is ended.’. . *McDonough* did also emphasize that ‘clear accrual rules are valuable.’. . A termination requirement such as I have described, however, would not appear to be unduly hard to administer. That is especially so, given how uncertain even the ‘favorable termination’ requirement itself can be. . . The time that a criminal defendant may spend in pretrial detention after a warrant-based arrest but before a prosecutor files a criminal information or a grand jury hands up an indictment may be brief. But then, so too is the time that a criminal defendant may spend in such early-stage detention after a warrantless arrest. The brevity of that detention has never been thought to justify conditioning a plaintiff’s right to recover damages under § 1983 for that detention on his capacity to show that any criminal

proceedings that may thereafter ensue ended in his favor. That is why we permit Jordan’s ‘false arrest’ § 1983 claim to proceed. But, for that very reason, I am not convinced that a plaintiff should have to make that ‘favorable termination’ showing to obtain such recompense under § 1983 when he seeks damages for the harm caused by an equally early-stage unconstitutional seizure just because it is made pursuant to an arrest warrant. For, brief though the detention caused by that seizure may have been, there are few protections more basic than the right to be free from unjustified imprisonment, and thus there are few that are more in need of the kind of fulsome remedy that Congress supplied in § 1983 -- even if the common law itself does not supply one, too.”)

*Jordan v. Town of Waldoboro*, 943 F.3d 532, 551 n.10 (1st Cir. 2019) (Barron, J., concurring) (“I focus in this concurrence on whether, just because a seizure is made pursuant to an arrest warrant, the ‘favorable termination’ requirement applies to a Fourth Amendment-based § 1983 claim for damages from that seizure. Jordan’s ‘malicious prosecution’ § 1983 claim does not, however, involve a seizure made pursuant to an arrest warrant. Rather, according to the stipulated facts, following his warrantless arrest on November 21, 2014, law enforcement personnel served Jordan with a Uniform Summons and Complaint that same day for a violation of Me. Stat. tit. 17-A, § 353.1A.2 by unauthorized taking/transfer. Law enforcement then transported Jordan to Two Bridges Jail, from which Jordan was released that same day on bail with conditions of release pursuant to a bail bond. It thus appears that this Fourth Amendment-based § 1983 claim -- unlike his Fourth Amendment-based ‘false arrest’ § 1983 claim -- seeks damages for a period of detention that followed some legal process, in which that legal process took the form of the issuance of a mere criminal complaint and summons, which, under Maine law, may occur even without the involvement of a prosecutor and simply upon the action of a law enforcement officer. . . I do not address whether detention that follows that kind of relatively informal legal process -- unlike detention that follows legal process that takes the form of an indictment, a criminal information filed by a prosecutor, or some comparable charging event -- justifies subjecting a Fourth Amendment-based § 1983 claim to a ‘favorable termination’ requirement to ensure that its pursuit will not interfere with any state criminal prosecution that may ensue. . . I also do not address whether the seizure that grounds this claim ended upon Jordan’s release on bail or instead only upon the termination of certain bail conditions that restricted his liberty.”)

## **Second Circuit**

*Kee v. City of New York*, 12 F.4th 150, 162-63, 165, 169-70 (2d Cir. 2021) (“On appeal, the defendants do not dispute that the dismissal of Kee’s criminal prosecution on speedy trial grounds is a favorable termination under state law in the context of his state tort claim for malicious prosecution. We agree and reiterate that, under New York State law, dismissal of a criminal prosecution on speedy trial grounds . . . is generally a favorable termination for the purpose of a New York tort claim for malicious prosecution. . . The dispute on appeal as to this element is whether, as a matter of *federal* law, a speedy trial dismissal satisfies the favorable termination element for purposes of a malicious prosecution claim brought under Section 1983. Kee challenges

the district court’s determination that, under federal law, a dismissal on speedy trial grounds does not qualify as a favorable termination. Specifically, he asserts that under general principles of traditional common law, and following the precedent of our Circuit, speedy trial dismissals are favorable. In contrast, defendants assert that the district court correctly granted them summary judgment on Kee’s Section 1983 malicious prosecution claim because, under federal law, a plaintiff must show that the underlying prosecution terminated in a manner indicating innocence and that the dismissal of Kee’s prosecution on speedy trial grounds is merely ‘neutral as to innocence and equally consistent with guilt.’. . . The district court, as well as defendants, support their analysis by relying upon our decision in *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018). As discussed below and in *Lanning*, New York state tort law has diverged from traditional common law with respect to what qualifies as a favorable termination. This divergence has unfortunately been the source of some confusion in Section 1983 litigation, and district courts in the Circuit have reached different conclusions regarding the impact of our decision in *Lanning* on the question of whether a speedy trial dismissal is a favorable termination in the context of a federal malicious prosecution claim. Compare *Blount v. City of New York*, 15-CV-5599 (PKC) (JO), 2019 WL 1050994, at \*5 (E.D.N.Y. Mar. 5, 2019) (“*Lanning* makes clear that, as the Circuit consistently held pre-*Lanning*, dismissals on speedy trial grounds are terminations in the favor of the accused.”), with *Minus v. City of New York*, 488 F. Supp. 3d 58, 66 (S.D.N.Y. 2020) (concluding, after reviewing *Lanning* and prior case authority, that “a speedy trial dismissal is not a favorable termination for purposes of a Section 1983 claim without an affirmative indication of the accused’s innocence”); see generally *Herrera-Amador v. N.Y.C. Police Dep’t*, 16-CV-5915 (NGG) (VMS), 2021 WL 3012583, at \*4 (E.D.N.Y. July 16, 2021) (collecting cases). We now clarify that *Lanning* did not modify, but rather re-affirmed, the longstanding ‘indicative of innocence’ standard for Section 1983 malicious prosecution claims under which this Court has repeatedly held, and holds again today, that a speedy trial dismissal generally constitutes a ‘favorable termination.’. . . Therefore, we again hold that *Murphy* is good law and binding precedent—namely, a speedy trial dismissal is generally a favorable termination for purposes of a malicious prosecution claim under Section 1983. In clarifying that a dismissal on speedy trial grounds is *generally* a favorable termination, we note the qualifier. Although such dismissals are generally (or presumed to be) favorable, the defendant may attempt to present evidence to rebut this presumption. Thus, as explained in *Murphy*, a plaintiff will prevail on this ‘favorable termination’ element as a matter of law when there was a speedy trial dismissal unless the defendant produces evidence of a ‘non-merits-based explanation for the failure to pursue the prosecution’ of the plaintiff. . . . Even though defendants acknowledge that a fair trial claim is cognizable even in the absence of a trial under *Frost*, they argued in their brief that Kee still must satisfy a ‘favorable termination’ requirement that is identical in its scope to that same element in the context of a malicious prosecution claim, and they asserted Kee failed to meet that requirement. The Supreme Court recently held that a fair trial claim based on fabricated evidence does not accrue until the underlying criminal proceeding terminates in the plaintiff’s favor. See *McDonough v. Smith*, — U.S. —, 139 S. Ct. 2149, 2158–61, 204 L.Ed.2d 506 (2019). Moreover, in *McDonough*, the Supreme Court suggested that there may be a need ‘for a context-specific and more capacious understanding of what constitutes “favorable” termination for purposes of a § 1983 false-evidence

claim.’ . . . However, because the plaintiff’s acquittal on the underlying criminal charges ‘was unquestionably a favorable termination,’ the Supreme Court had ‘no occasion to address the broader range of ways a criminal prosecution ... might end favorably to the accused’ in the fair trial context. . . . As an initial matter, because we have already concluded that Kee has met the ‘favorable termination’ requirement mandated for a malicious prosecution claim, defendants’ argument is moot because, even if that identical standard were to be applied to a fair trial claim, Kee would still satisfy that requirement. In any event, in *Smalls v. Collins*, — F.4th —, 2021 WL 3700194 (2d Cir. Aug. 20, 2021), we recently addressed this issue in the wake of *McDonough* and rejected the precise argument asserted by the defendants here . . . . Instead, we held that ‘[w]here the plaintiff asserts a section 1983 fair-trial claim based on fabricated evidence, all that is required is that the underlying criminal proceeding be terminated in such a manner that the lawsuit does not impugn an *ongoing* prosecution or *outstanding* conviction.’ . . . Applying that standard here, because Kee’s underlying criminal proceeding was dismissed on speedy trial grounds, his fair trial claim does not impugn an ongoing prosecution, nor would it potentially invalidate any outstanding conviction if he were to prevail. Accordingly, this dismissal on speedy trial grounds constitutes a favorable termination under the standard articulated in *Smalls*, which is necessary for the accrual of a fair trial claim based upon fabricated evidence under *McDonough*.”)

*Smalls v. Collins*, 10 F.4th 117, 131-40 (2d Cir. 2021) (“The plaintiffs argue on appeal that the district courts erred in granting the defendants’ motions because (1) *McDonough* does not require plaintiffs asserting section 1983 fair-trial claims based on fabricated evidence to demonstrate that their underlying criminal proceedings terminated in a manner indicative of innocence; and (2) their underlying criminal proceedings were terminated in such a way that satisfies *McDonough*’s accrual rule. For the reasons explained below, we agree. . . . In contrast to malicious prosecution claims, which require a plaintiff to demonstrate ‘that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence,’ *Lanning*, 908 F.3d at 22, we have long held ‘that Section 1983 liability attaches for knowingly falsifying evidence even where there simultaneously exists a lawful basis for [the] deprivation of liberty’ that the plaintiff suffered. . . . The same is true of other types of section 1983 fair-trial claims, such as those alleging the withholding of exculpatory or other impeachment material in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). . . . This is because malicious-prosecution and fair-trial claims ‘arise out of different constitutional rights, protect against different constitutional injuries, and implicate different constitutional concerns.’ . . . Malicious-prosecution claims ‘essentially allege[ ] a violation of the plaintiff’s right under the Fourth Amendment to be free from unreasonable seizure,’ the ‘touchstone’ of which is ‘reasonableness.’ . . . A section 1983 fair-trial claim, by contrast, will not be defeated by evidence of probable cause because it ‘cover[s] kinds of police misconduct not addressed by ... malicious prosecution claims’ and vindicates a different constitutional right – the right to due process protected by the Fifth and Fourteenth Amendments. . . . The due process clauses of the Fifth and Fourteenth Amendments prohibit the government from ‘depriv[ing] any person of life, liberty, or property, without due process of law,’ U.S. Const. amend. XIV, § 2; *accord* U.S. Const. amend. V, and thus, unlike a plaintiff asserting a Fourth Amendment violation, a plaintiff may assert a violation of her due process rights even where the relevant deprivation was otherwise

‘[ ]reasonable,’ U.S. Const. amend. IV. ‘Like a prosecutor’s knowing use of false evidence to obtain a tainted conviction, a police officer’s fabrication and forwarding to prosecutors of known false evidence works an unacceptable “corruption of the truth-seeking function of the trial process,” and deprivation of life, liberty, or property under such circumstances violates the accused’s right to due process. . . . ‘No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee.’ . . . We have therefore never required that a plaintiff alleging a section 1983 fair-trial claim establish a favorable termination indicative of innocence. . . . In *Heck*, the Supreme Court announced an accrual rule for section 1983 actions involving an underlying criminal conviction. . . . In *McDonough*, the Supreme Court extended the rule announced in *Heck* to ongoing criminal prosecutions. . . . Relying extensively on its prior decision in *Heck*, the Court found it useful to analogize *McDonough*’s fabricated-evidence claim to the common-law tort of malicious prosecution, noting that malicious prosecution’s favorable-termination requirement ‘is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting judgments.’ . . . The Court explained that ‘similar concerns for finality and consistency’ had motivated it to limit the ‘avenues for collateral attack on criminal judgments through civil tort vehicles such as § 1983’ and to adopt *Heck*’s ‘favorable-termination requirement.’ . . . Although *McDonough* differed from *Heck* because the plaintiff in *Heck* had been convicted while the plaintiff in *McDonough* was acquitted, the Court reasoned that *McDonough*’s claims challenged the validity of the criminal proceedings against him ‘in essentially the same manner’ as the plaintiff in *Heck*. . . . A criminal defendant therefore cannot ‘bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing.’ . . . ‘Only once the criminal proceeding has ended in the defendant’s favor, or a resulting conviction has been invalidated within the meaning of *Heck*, will the statute of limitations begin to run.’ . . . Applying this newly formulated rule, the Court reversed the judgment of the Second Circuit, concluding that the statute of limitations for *McDonough*’s section 1983 fabricated-evidence claim did not begin to run until the criminal proceedings against him ‘terminated in his favor – that is, when he was acquitted at the end of his second trial.’ . . . *McDonough* did, however, announce a new accrual rule for fabricated-evidence claims. Relying on *Heck*’s ‘favorable-termination requirement,’ the Supreme Court concluded that ‘[t]here is not a complete and present cause of action to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are *ongoing*.’ . . . To bring a fabricated-evidence claim, a plaintiff must therefore establish – as a condition precedent to suit – that the claim has accrued within the meaning of *McDonough*. The core question at the heart of these appeals is what constitutes a favorable termination sufficient to trigger *McDonough*’s accrual rule for fabricated-evidence claims. The defendants point out that *McDonough*’s accrual rule for fabricated-evidence claims was premised on an analogy to malicious-prosecution claims and argue that *McDonough*’s favorable-termination requirement should thus be interpreted to be coextensive with malicious prosecution’s favorable-termination requirement, under which a plaintiff must establish that the proceeding ended in a manner indicative of innocence. This argument is inconsistent with the reasoning and holding of *McDonough* and, we think, lacks merit. . . . Notably, *Heck*’s analogy to malicious prosecution did not result in the Supreme Court’s adoption of a termination-indicative-of-innocence

requirement for all section 1983 claims premised on an underlying conviction. Rather, to guard against parallel litigation and promote finality and consistency, the Court adopted an accrual rule designed to avoid inconsistent results and new avenues of collateral attack. . . Under the *Heck* Court’s favorable-termination requirement, . . . if a section 1983 plaintiff establishes – before bringing suit – that the ‘action, even if successful, will *not* demonstrate the invalidity of any *outstanding* criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.’ . . . A plaintiff may satisfy this requirement by demonstrating ‘that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.’ . . . None of these resolutions requires an affirmative showing of innocence. . . . [T]he *McDonough* Court found itself confronted with a set of facts that raised concerns similar to those present in *Heck* and simply extended *Heck*’s reach to section 1983 lawsuits brought during pending criminal prosecutions. . . . Although the *McDonough* plaintiff’s claims did not fall within *Heck* because, unlike the plaintiff in *Heck*, he had been acquitted and there was therefore no outstanding conviction, the Supreme Court decided that the ‘pragmatic considerations’ underlying the *Heck* rule apply with equal force to ‘*ongoing*’ criminal proceedings. . . . In reaffirming the *Heck* rule while extending it to ongoing prosecutions, *McDonough* no more required an affirmative indication of innocence than *Heck* did. Indeed, the notion that *McDonough* established malicious prosecution’s favorable-termination requirement as the accrual rule for section 1983 fair-trial claims is inconsistent with the rule announced in *McDonough*. The Supreme Court phrased its accrual rule disjunctively, making clear that invalidation of a conviction within the meaning of *Heck* or termination of an ongoing criminal proceeding in the defendant’s favor would be sufficient to trigger the statute of limitations. . . . Further, while the Court had ‘no occasion to address the broader range of ways a criminal prosecution (as opposed to a conviction) might end favorably to the accused’ because the plaintiff’s ‘acquittal was unquestionably a favorable termination,’ it suggested that a ‘context-specific and more capacious understanding of what constitutes “favorable” termination’ might be appropriate for fabricated-evidence claims in light of prosecutors’ broad discretion over ‘the terms on which pleas will be offered or whether charges will be dropped[.]’. . . This language undercuts any suggestion that *McDonough*’s accrual rule is merely coextensive with malicious prosecution’s favorable-termination requirement. Requiring a plaintiff alleging fabricated-evidence claims to establish that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence would also be fundamentally inconsistent with our longstanding distinction between section 1983 fair-trial and malicious-prosecution claims. As noted above, malicious-prosecution and fair-trial claims assert the violation of different constitutional rights and protect against different constitutional injuries. It makes sense to require a favorable termination indicative of innocence in the context of malicious prosecution claims where the essence of such a claim ‘is the alleged groundless prosecution[.]’. . . Absent affirmative indications of innocence, the termination of the proceeding does not necessarily mean that the government lacked reasonable grounds for initiating the prosecution; a favorable termination indicative of innocence is therefore critical to determining whether the plaintiff has a viable claim. . . . A section 1983 fair-trial claim,

by contrast, focuses on the constitutionality of the process and addresses a different constitutional injury – deprivation of life, liberty, or property due to corruption of due process by official misconduct. . . Whether the proceeding was terminated in a manner indicative of innocence therefore is not dispositive in the context of a section 1983 fair-trial claim, and we have never required that a plaintiff alleging such a claim establish a favorable termination indicative of innocence. Accordingly, *McDonough*'s accrual rule does not import malicious prosecution's favorable-termination requirement onto section 1983 fair-trial claims. Where the plaintiff asserts a section 1983 fair-trial claim based on fabricated evidence, all that is required is that the underlying criminal proceeding be terminated in such a manner that the lawsuit does not impugn an *ongoing* prosecution or *outstanding* conviction. . . This requirement may be satisfied where a criminal conviction has been invalidated or a criminal prosecution has been terminated in the criminal defendant's favor because, in such circumstances, there is no risk that a section 1983 plaintiff's claim will impugn an existing conviction or the basis for an ongoing prosecution. . . . Smalls's section 1983 fabricated-evidence claim poses no risk of demonstrating the invalidity of any outstanding criminal judgment because there is no such judgment. And his lawsuit does not run parallel to, nor does it impugn, any pending prosecution or existing conviction because there is no conviction and there are no pending charges. Smalls has therefore satisfied *McDonough* and there is no bar to his suit")

*Smalls v. Collins*, 10 F.4th 117, 140-44 (2d Cir. 2021) ("Relying on *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), the *Daniel* defendants argue that, even if a termination indicative of innocence is not required under *McDonough*, Daniel's claim – which involves a pretrial deprivation of liberty – is governed by the Fourth Amendment and therefore collapses into a malicious-prosecution claim. According to the *Daniel* defendants, this means that Daniel must demonstrate that his underlying criminal case was resolved in a manner indicative of innocence as is required for malicious-prosecution claims. The *Daniel* defendants essentially assert that, in *Manuel*, the Supreme Court categorically precluded due process fabricated-evidence claims seeking damages for pretrial detention. They argue that the Supreme Court held that such claims may only be brought under the Fourth Amendment and that, as a result, a fabricated-evidence claim seeking damages for pretrial detention is subsumed under the elements of a malicious-prosecution claim. But in *Manuel*, the Supreme Court granted certiorari to decide only whether a section 1983 claim based on a 'pretrial detention following the start of legal process' could 'give rise to a Fourth Amendment claim.' . . The Court answered this question in the affirmative. . . We have held that *Manuel* did not rule out the possibility that, in such circumstances, the Constitution also permits a due process claim that the plaintiff was deprived of life, liberty, or property as a result of the use of fabricated evidence. In *Frost v. New York City Police Department*, 980 F.3d 231 (2d Cir. 2020), we concluded that the district court erred in granting the defendants' motion for summary judgment as to Frost's section 1983 fair-trial claim, which was premised on his pretrial detention. . . In reaching this conclusion, the majority rejected the dissent's argument that Frost's claim failed as a matter of law because, under *Manuel*, it arose under the Fourth Amendment and there was 'ample probable cause for Frost's arrest, [pretrial] detention, and prosecution.' . . The dissent – like the *Daniel* defendants – essentially argued that Frost's fair-trial claim was more

accurately described as arising under the Fourth Amendment, rather than the Due Process Clause, because the allegedly fabricated evidence was only used to initiate pretrial proceedings against Frost (and was not, in fact, introduced at trial). . . The majority found this argument unpersuasive, concluding that our precedent established that, in this context, ‘the (perhaps imprecisely named) fair trial right protects against deprivation of liberty that results when a police officer fabricates and forwards evidence to a prosecutor that would be likely to influence a jury’s decision, *were that evidence presented to the jury.*’. . Accordingly, ‘[n]otwithstanding the nomenclature, a criminal defendant’s right to a fair trial protects more than the fairness of the trial itself[;] [i]ndeed, a criminal defendant can bring a fair trial claim even when no trial occurs at all.’. . The majority in *Frost* reconciled this result with *Manuel*, explaining:

The Supreme Court’s holding in *Manuel v. City of Joliet* ... does not compel a different result. In *Manuel*, the Supreme Court held that a § 1983 plaintiff could challenge his pretrial detention based on purportedly fabricated evidence under the Fourth Amendment, even after a judge determined that this evidence constituted probable cause. But just as a Fourth Amendment claim survives the initiation of “legal process,” our precedents establish that a fair trial claim under the Due Process Clause may accrue before the trial itself. Accordingly, the holding of *Manuel* does not preclude Frost’s fair trial claim.

*Id.* at 251 n.14 . . . The defendants’ argument is therefore foreclosed by *Frost*. Under our precedent, Daniel may assert a fabricated-evidence claim related to his pretrial detention under the Due Process Clause. . . . It is therefore an open question as to whether the dismissal of Daniel’s charges pursuant to an ACD constitutes a favorable termination for purposes of *McDonough*. The pragmatic concerns animating *McDonough* counsel in favor of concluding that it does. As explained above, *McDonough* extended *Heck* to section 1983 fabricated-evidence claims filed during an ongoing prosecution because allowing such suits would impugn the basis for a pending prosecution and ‘impermissibly risk parallel litigation and conflicting judgments.’. . These concerns are not implicated where, as here, the charges against the plaintiff are dismissed pursuant to an ACD. When a defendant accepts an ACD in New York state court, his criminal prosecution is ‘adjourn[ed] ... without [a] date ordered’ for it to resume. . . While the government retains the right to move to ‘restore the case to the calendar,’ it must make such a motion within ‘six months’ – or in some cases ‘one year’ – after the defendant accepts the ACD. . . If the government does not move within the prescribed time period, ‘the accusatory instrument is, at the expiration of such period, deemed to have been dismissed by the court in furtherance of justice’ and ‘the arrest and prosecution shall be deemed a nullity.’. . In such circumstances, there is no risk of parallel litigation because the charges have been dismissed. Nor is there any risk of conflicting judgments because no determination of guilt or innocence was made, and no judgment was entered. Rather, once the charges against Daniel were dismissed, any concerns about the possibility of ‘two-track litigation’ dissipated. . . This conclusion is reinforced by the rationales underlying our enduring distinction between malicious-prosecution and fair-trial claims. While a termination indicative of innocence is necessary in the context of malicious-prosecution claims to ensure that there were no reasonable grounds for the prosecution, *see Lanning*, 908 F.3d at 28, depriving an individual of life, liberty, or property by fabricating evidence violates due process regardless of whether there was probable cause because ‘[n]o arrest, no matter how lawful or objectively reasonable, gives an

arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee.’ . . . In contrast to a malicious-prosecution claim, which focuses on the validity of the initiation of the prosecution, a section 1983 fair-trial claim predicated on fabricated evidence guards against the deprivation of life, liberty, or property as a result of the corruption of due process, . . . and therefore does not require a favorable termination indicative of innocence. . . . Consistent with this distinction, it is well-settled that acceptance of an ACD bars a malicious-prosecution claim because it leaves the question of innocence or guilt unanswered and is thus not a termination indicative of innocence. . . . And it was similarly well-accepted, prior to *McDonough*, that an ACD did not preclude a fair-trial claim. . . . *McDonough* did not impose malicious prosecution’s favorable-termination requirement onto fair trial claims or overrule our precedent concerning the contours of fabricated-evidence claims. . . . Rather, as explained above, *McDonough* simply extended *Heck*’s favorable termination requirement to ongoing prosecutions under circumstances that implicate *Heck*’s pragmatic concerns for finality and consistency. Such concerns are not present where, as here, the charges against Daniel were dismissed pursuant to an ACD. . . . The dismissal of Daniel’s charges pursuant to an ACD therefore constituted a favorable termination within the meaning of *McDonough* and *McDonough* poses no bar to suit.”)

*Ashley v. City of New York*, 992 F.3d 128, 139-42 (2d Cir. 2021) (“Civil contends that under *McDonough v. Smith*, 139 S. Ct. 2149 (2019), plaintiffs asserting a fabricated-evidence claim must establish that the underlying prosecution terminated in their favor. He asserts that, because Ashley has not shown a favorable termination, any possible errors in the jury instructions were harmless. We hold, however, that Ashley’s criminal case did terminate favorably to him. Our favorable-termination analysis here relies on our precedents regarding favorable termination in the malicious-prosecution context. The Supreme Court explained in *McDonough* that fabricated-evidence claims might merit a ‘context-specific,’ and indeed ‘more capacious,’ understanding of what constitutes a favorable termination. . . . But even assuming, *arguendo*, that the favorable termination requirement for fabricated-evidence claims is identical to that used for malicious prosecution claims, we believe that our malicious prosecution precedents compel the conclusion that Ashley’s prosecution terminated in his favor. In the malicious prosecution context, we have held that, to be deemed a favorable termination, the prosecution’s ‘final disposition [must be] such as to indicate the accused is not guilty.’ *Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980). This requirement is most easily met with a judgment of acquittal. But we have long recognized that a termination may be favorable when, although the termination is ‘not based on the merits, . . . the failure to proceed implies a lack of reasonable grounds for the prosecution.’ . . . This principle, which we have repeatedly and consistently recognized, . . . is stated most clearly in *Murphy v. Lynn*, 118 F.3d 938 (2d Cir. 1997). There, we explained that whether a non-merits termination is ‘indicative of innocence depends on the nature and circumstances of the termination; the dispositive inquiry is whether the failure to proceed implies a lack of reasonable grounds for the prosecution.’ . . . And although we held in *Murphy* that, as a ‘general[ ]’ matter, ‘certain types of dispositions’—such as dismissals for facial insufficiency in which the prosecution has ‘fail[ed] to allege sufficient facts to support the charge’—do not qualify as favorable terminations, we

emphasized that the determination is context-specific. . . Here, the circumstances surrounding the termination of Ashley’s prosecution show favorable termination, even though the disposition was denoted as a dismissal for facial insufficiency. . . [T]he problem with the prosecution’s case did not stem from a deficiency in the pleading, but rather from the court’s sense that the prosecution’s case without more simply did not support a charge of unlawful possession of marijuana against Ashley. Indeed, although the prosecution was offered multiple opportunities to strengthen its case and supersede the deficient pleading, it declined to do so. . . It follows that the prosecution’s dismissal would ‘indicate [that Ashley is] not guilty.’ . . As a result, we need not decide whether and how the favorable-termination standard for fabricated-evidence claims may be ‘more capacious’ than the favorable-termination standard for malicious prosecution claims, . . . because we hold that in the circumstances before us, Ashley’s state criminal case terminated favorably to him even under our malicious prosecution precedents.”)

*McDonough v. Smith*, 783 F. App’x 91, \_\_\_ & n.1 (2d Cir. 2019) (“This case is before us on remand from the Supreme Court, which reversed our decision in *McDonough v. Smith*, 898 F.3d 259 (2d Cir. 2018), and remanded for further proceedings consistent with the Supreme Court’s opinion. *See McDonough v. Smith*, 139 S. Ct. 2149, 204 L. Ed. 2d 506 (2019). We now **VACATE** the judgment of the district court and **REMAND** for further proceedings consistent with the opinion of the Supreme Court. . . We express no view as to whether Smith has waived or forfeited the argument that absolute immunity bars McDonough’s fabricated-evidence claim. *See Brown v. City of New York*, 862 F.3d 182, 187-88 (2d Cir. 2017).”)

#### **Fourth Circuit**

*Burley v. Baltimore Police Department*, No. CV ELH-18-1743, 2019 WL 6253251, at \*24 (D. Md. Nov. 22, 2019) (“The ruling of the Supreme Court was consistent with decisions of several circuits, concluding that a fabricated evidence claim begins to run when the criminal proceedings resolve in the defendant’s favor. *See Floyd v. Attorney Gen.*, 722 F. App’x 112, 114 (3d Cir. 2018); *Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017); *Bradford v. Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015); *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008); *Castellano v. Fragozo*, 352 F.3d 939, 959-60 (5th Cir. 2003) (*en banc*). . . In light of the Supreme Court’s ruling in *McDonough*, I conclude that the limitations period as to plaintiffs’ fabricated evidence claim began to run when the criminal proceedings against them terminated in their favor, that is, when their convictions were vacated in December 2017. Therefore, plaintiffs’ due process/fabricated evidence claim in Count I was timely filed.”)

#### **Sixth Circuit**

*Hamann v. Township of Van Buren*, No. 20-10849, 2021 WL 534487, at \*6 (E.D. Mich. Feb. 11, 2021) (“*McDonough* does not alter the principle that a plaintiff has a complete and present cause of action and can file suit and obtain relief for an unlawful search and seizure at the time the search occurs. *See Heck*, 512 U.S. at 487 n.7. It follows, then, that the three-year statute of limitations on

the plaintiffs' claims attacking the 2015 search-and-seizure expired well before they file their complaint in 2020.”)

*Friskey v. Bracke*, No. CV 2:17-056-WOB, 2020 WL 465026, at \*9–11, \*13 (E.D. Ky. Jan. 28, 2020) (“[T]here is a split amongst the Circuit Courts of Appeal regarding the viability of a fabrication of evidence claim after an acquittal. For example, in *Saunders-El v. Rohde*, the United States Court of Appeals for the Seventh Circuit recognized that a plaintiff’s claim based on allegations that ‘the prosecutor and investigators conspired “to manufacture false evidence and bring trumped-up charges,”’ was foreclosed by the plaintiff’s acquittal. . . In contrast, in *Black v. Montgomery Cty.*, 835 F.3d 358, 371 (3d Cir. 2016), *as amended* (Sept. 16, 2016), the United States Court of Appeals for the Third Circuit held that ‘an acquitted criminal defendant may have a stand-alone fabricated evidence claim against state actors under the due process clause of the Fourteenth Amendment if there is a reasonable likelihood that, absent that fabricated evidence, the defendant would not have been criminally charged.’ . . . Consistent among the courts that recognize that a fabrication of evidence claim may survive a criminal defendant’s acquittal is that the plaintiff asserting the claim must show some sort of connection between the alleged fabrication of the evidence and a due process ‘injury.’ . . . A causation requirement is also consistent with the United States Supreme Court’s decision in *McDonough*, which found that, like malicious prosecution (which the Court found was the most analogous common-law tort), the tort of fabrication of evidence requires the plaintiff ‘to show that the criminal proceedings against him – and consequent deprivations of his liberty – were caused by [Defendant’s] malfeasance in fabricating evidence.’ . . . Thus, assuming (without deciding) that Friskey’s fabrication of evidence claim is still viable after his acquittal, he must still point to some causal connection between the allegedly fabricated evidence and consequent deprivations of his liberty resulting from the criminal proceedings against him. This Friskey simply does not do, as Friskey fails to point to any specific deprivation of his liberty at any point during the criminal proceedings (either resulting from his arrest, his criminal prosecution, or his sentence imposed after his conviction for drug manufacturing) caused by the alleged alterations to the rifle. Nor could he, as any ‘deprivation of liberty’ derived from Friskey’s arrest and/or prosecution could not have been ‘caused’ by the alleged alterations. . . . It is true that the Sixth Circuit recognized in *Stemler* that a fabrication of evidence claim ‘does not require a conclusion that the state did not have probable cause to prosecute the claimant.’ . . . However, this does not require the Court to ignore as irrelevant Friskey’s admitted drug manufacturing activities and the abundance of other evidence found with the CN-Romarm rifle when evaluating whether the alleged post-seizure/pre-trial alterations to the rifle ‘caused’ Friskey to be deprived of liberty by virtue of his arrest and prosecution. Friskey does not argue that, absent the alleged alterations to the rifle, he would have never been arrested or prosecuted. Nor could he credibly do so, in light of the abundance of evidence against Friskey (*i.e.*, the .22 rifle, the ammunition, 571 marijuana plants, equipment for cultivating marijuana, and \$8015), his own admissions to criminal activity prior to trial, and the fact that he was, indeed, convicted of manufacturing 100 plants or more of marijuana, a charge that was independent of his possession of the CN-Romarm rifle. In these circumstances, it simply cannot be said that the allegedly fabricated evidence (the alterations made to the rifle prior to trial) ‘caused’ his arrest or

prosecution, as he certainly would have been arrested and prosecuted for his significant drug activities without it. . . . In summary, Friskey cannot show that he suffered from any deprivations of his liberty (or any other injury) as a result of the alleged alterations to the CN-Romarm rifle, which he must do to succeed on a tort claim for fabrication of evidence. *McDonough*, 139 S.Ct. at 2156. Nor has Friskey pointed to any probative evidence suggesting that Muse is the individual who removed the scope and bi-pod from the CN-Romarm rifle prior to trial, much less that he ‘knowingly fabricated’ the CN-Romarm rifle before it was introduced into evidence at Friskey’s trial. Rather, Friskey is left with only his own speculation and conclusory allegations, which are simply insufficient to withstand summary judgment. For all of these reasons, Muse is entitled to summary judgment on Friskey’s fabrication of evidence claim.”)

***Pippin v. City of Reynoldsburg***, No. 2:17-CV-598, 2019 WL 4738014, at \*6-7 (S.D. Ohio Sept. 27, 2019) (“Nothing in the logic of *McDonough* is necessarily limited to a deprivation of liberty claim and therefore this Court finds the analogy applies to Plaintiff’s claim for unconstitutional taking of property. By the logic in *McDonough*, Plaintiff’s claim accrued when the prosecutor entered the *nolle prosequi* in December 2016. His Complaint, filed seven months later, was therefore timely. On the face of the Complaint, this Court cannot rule out the possibility that Plaintiff’s claim for unconstitutional taking of property would have been barred by *Heck* because a judgment in his favor would have undermined the then-valid conviction. . . . This Court concludes that, whether under the Fourth Amendment or under the Fifth Amendment, Plaintiff has properly stated a claim for relief, alleging that Defendants unconstitutionally seized or effected a taking of his personal property. This claim accrued when the proceedings against him terminated in his favor with the *nolle prosequi*. Therefore, his Complaint was timely filed. Defendants’ Motions to Dismiss are denied. . . . *Wallace* concluded that ‘the standard rule’ is that a plaintiff’s § 1983 claim accrues ‘when the plaintiff has a complete and present cause of action.’ . . . Courts must first ‘identify the specific constitutional right at issue.’ . . . In *McDonough*, the plaintiff’s fabricated-evidence claim was understood to arise under the Due Process Clause of the Fifth Amendment. . . . The *McDonough* court concluded that a plaintiff has a ‘complete and present cause of action...only once the criminal proceedings against him terminated in his favor.’ . . . With *McDonough* as with *Knick*, this Court informed the parties at a telephonic status conference that the outcome of the case had the potential to be dispositive in this matter. . . . In their supplemental brief filed after this Court resumed consideration of this matter, Defendants attempt to argue that *McDonough* does not apply to the instant matter because Plaintiff has not asserted a fabricated evidence claim. . . . To the contrary, this Court finds Plaintiff has done exactly this, stating in his Amended Complaint that ‘Mauger, alone and/or with others including Downard, caused false search warrants to be presented to judges..., executed search warrants he knew to be based on false information, including the Pippin search warrant...’. . . . And because *McDonough* squarely addresses the statute of limitations in fabricated-evidence cases, this Court finds *McDonough* controls the analysis here.”)

## **Seventh Circuit**

**Brown v. City of Chicago**, No. 20-CV-03599, 2021 WL 6102980 (7th Cir. Dec. 22, 2021) (not reported) (“[W]e agree with the district court that Brown’s Fourth Amendment claims—which relate to whether he was arrested and detained without probable cause—are untimely. There is a two-year statute of limitations for an Illinois-based § 1983 claim. . . And Brown’s claims accrued when his pretrial detention ended, decades before his complaint in 2020. *See Manuel v. City of Joliet, Ill.*, 903 F.3d 667, 669–670 (7th Cir. 2018) (Fourth Amendment claim of unlawful pretrial detention accrues when detention ends), *enforcing* 137 S. Ct. 911, 920–22 (2017). With respect to Brown’s claim of unlawful posttrial detention, however, we agree with Brown that the dismissal here was too hasty. In his amended complaint, Brown directly attacks the procedure and evidence used to convict him and send him to prison. According to the complaint, he was convicted and imprisoned because police presented a ‘false and incomplete version of events to prosecutors,’ wrote false reports, and gave false statements and testimony, while the prosecutors knew what the police were doing and, rather than intervening, happily played along. This set of allegations is properly characterized as a Due Process claim because, after a criminal conviction, ‘the Fourth Amendment drops out,’ and a challenge to the conviction or ensuing incarceration arises under the Due Process Clause. *Manuel v. City of Joliet, Ill.*, 137 S. Ct. at 920 n.8; *see also Lewis v. City of Chicago*, 914 F.3d 472, 480 (7th Cir. 2019). This type of claim did not accrue along with the Fourth Amendment challenge to the arrest and pretrial detention. Under the Supreme Court’s decisions in *Heck v. Humphrey*, 512 U.S. 477 (1994), and *McDonough v. Smith*, 139 S. Ct. 2149 (2019), Brown could not pursue a § 1983 claim about his prosecution while his convictions remained valid because, if he succeeded, the integrity of the convictions would necessarily be called in to doubt. As Brown argues, his Due Process claim was barred until his convictions were vacated based on later developments in the law. Contrary to the district court’s ruling, moreover, our decision in *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020) (en banc), makes clear that a federal claim’s similarity to the state-law tort of malicious prosecution is not fatal. The plaintiff in *Savory* was pardoned after spending 30 years in prison; he then brought § 1983 claims that ‘strongly resemble[d] the common law tort of malicious prosecution.’ . . . We concluded that, until his pardon, those claims—which were premised on harms the plaintiff suffered after his criminal conviction—were barred by *Heck* . . . Brown, too, challenges not just his arrest but his postconviction detention. And like the plaintiff in *Savory*, and for that matter in *Heck*, he therefore raises cognizable federal claims.”)

**Smith v. City of Chicago**, 3 F.4th 332, 333-42 (7th Cir. 2021) (“‘Better late than never’ is not a phrase typically heard in a federal courthouse. Even meritorious claims brought outside their statute of limitations must be dismissed. Keith Smith sued the City of Chicago and two of its police officers under 42 U.S.C. § 1983 for violating the Fourth Amendment, claiming unlawful pretrial detention based on fabricated evidence. Rather than resolve the appeal on the merits, we must decide whether Smith timely filed his complaint, a question which depends on when his claim accrued. Smith argues that happened when he was acquitted at trial. If it did, then his complaint was timely. But our precedent establishes that a Fourth Amendment claim such as Smith’s accrues when he is released from detention, and the Supreme Court’s recent decision in *McDonough v. Smith*, — U.S. —, 139 S. Ct. 2149, 204 L.Ed.2d 506 (2019), has not

disturbed that conclusion. Smith was released on bond on March 29, 2014, so if his claim accrued then, under the applicable two-year limitations period his lawsuit, filed on July 18, 2018, was untimely. Alternatively, Smith contends his claim was timely because his bond conditions constituted an ongoing Fourth Amendment seizure, so he was not released from custody until he was acquitted. Squarely reaching this issue for the first time in this circuit, we hold that requirements to appear in court for a hearing and to request permission before leaving the state—taken together or separately—do not amount to Fourth Amendment seizures. Smith’s accrual date remains the date he was released on bond, and because his claim was untimely, we affirm the district court’s dismissal of his complaint. . . . The application of *Manuel II* to Smith’s claims is straight-forward. Assuming for now that Smith’s release from custody occurred when he was released on bond, *Manuel II* suggests that Smith’s limitations period began to run on March 29, 2014. This would mean Smith’s claim is time-barred because he filed this lawsuit more than four years later, on July 18, 2018. Smith argues that the legal picture is not so clear, however. He contends that the Supreme Court’s recent decision in *McDonough* implicitly overruled *Manuel II*, establishing that the accrual date for Smith’s claim occurred at the favorable termination of his legal proceedings, not when he was released on bond. . . . Smith contends his fabricated evidence claim mirrors the one in *McDonough*. According to Smith, *McDonough* established a general rule that all § 1983 claims based on fabrication of evidence accrue at the favorable termination of the proceedings against the plaintiff. For Smith, it follows then that the accrual date for his claims should be when he was acquitted—July 21, 2016. The ‘threshold inquiry in a § 1983 suit’ is to ‘identify the specific constitutional right at issue.’ . . . In *McDonough*, the Court ‘assume[d] without deciding that the Second Circuit’s articulations of the right at issue and its contours [were] sound’ and the Second Circuit had construed the plaintiff’s claim as one under the due process clause of the Fourteenth Amendment. . . . The Court further noted that it ‘express[ed] no view as to what other constitutional provisions (if any) might provide safeguards against the creation or use of fabricated evidence.’ . . . Smith’s unlawful pretrial detention claim does not stem from the Fourteenth Amendment’s due process clause, like the claim in *McDonough*, but from the Fourth Amendment. . . . The allegedly fabricated evidence may have led to Smith’s pretrial detention, but its use is not a freestanding claim under § 1983. A claim that an official employed fabricated evidence against a plaintiff must be tethered to a specific constitutional provision. . . . Here, Smith proceeds under the Fourth Amendment. Because the constitutional provisions in *McDonough* differ from those here, *McDonough*’s analogy to the tort of malicious prosecution as a rationale for the favorable-termination rule is distinguishable. Indeed, *Manuel II* already rejected that analogy for Fourth Amendment claims. . . . and *McDonough* does not conflict with that holding. . . . Things get more complicated when we examine some of the specific reasoning of *McDonough*. Particularly, the Supreme Court noted that *McDonough* would have been unable to bring his claims before the favorable termination of legal proceedings because ‘his claims challenge the validity of the criminal proceedings against him in essentially the same manner as the plaintiff in *Heck* . . . challenged the validity of his conviction.’ . . . The Court refined this principle in *Wallace v. Kato*[.] . . . The plaintiff in *Wallace* brought a § 1983 claim for false arrest and the question before the Court was when the statute of limitations began to run. . . . Likening his claim to the common law tort of false imprisonment, the Court held that the

limitations period began to run when the plaintiff was brought before a judge at the start of legal process, the same time the tort of false imprisonment accrued at common law. . . The *Heck* rule did not require a later accrual time, the Court noted, because that bar applied only to ‘extant convictions.’ . . If a plaintiff brought a false arrest claim at the start of legal process, the Court reasoned, then that claim would at most call into question an anticipated future—not present—conviction or sentence. . . *McDonough* appears to expand the reach of the *Heck* bar. The Court recognized that *McDonough* ‘differ[ed] from *Heck*’ because the plaintiff in *McDonough* was acquitted and was not challenging an existing conviction. . . Nevertheless, the Court concluded that the ‘pragmatic considerations’ underlying *Heck* still applied. . . These considerations included concerns about parallel federal and state litigation over the validity of the same prosecutions, as well as the prospect of a federal court holding an ongoing state prosecution invalid. . . The Court stated that ‘some claims do fall outside *Heck*’s ambit when a conviction is merely anticipated,’ but concluded that the plaintiff’s claim was one that necessarily called into question the entire state prosecution. . . This meant that *Heck*’s concerns would not allow him to bring the claim, and therefore the limitations period could not accrue, until he was acquitted. . . After *McDonough*, *Heck* applies not only to a challenge to an extant criminal conviction or sentence, but also to a claim that ‘necessarily threatens to impugn...the prosecution itself.’ . . Smith argues that his Fourth Amendment claim would have necessarily impugned his prosecution, urging us to conclude—as the Court did for the plaintiff in *McDonough*—that he could not have brought his claim until the favorable termination of his proceedings. For Smith, this means the statute of limitations could not begin to run before his acquittal. . . *Manuel II* does not answer this question on its own, though. There, the plaintiff was released from custody a day after the charges were dropped against him. . . Here, even if we assume Smith’s custody ended when he was let out on bond, charges remained pending against him. In other words, in *Manuel II*, by the time the plaintiff was released, there was no prosecution that his § 1983 suit could impugn and therefore nothing that could bring the *Heck* rule into play. But here, Smith was still being prosecuted when he was released on bond. When determining whether the *Heck* bar applies, we must focus on the contours of the constitutional right that provides a plaintiff’s claim. ‘[T]he wrong’ Smith alleges here “is the detention rather than the existence of criminal charges.’ . . A Fourth Amendment violation can happen when there is an unreasonable search or seizure before the start of the legal process. . . But a violation can also occur when ‘a judge’s probable-cause determination is predicated solely on a police officer’s false statements.’ . . And even though it occurred after the start of legal process, like the plaintiff in *Wallace*, Smith alleges he was ‘confined without constitutionally adequate justification’ and the ensuing legal process ‘has done nothing to satisfy the Fourth Amendment’s probable-cause requirement.’ . . In contrast, *McDonough* involved no detention. Instead, that plaintiff alleged he was generally deprived of liberty without due process. This claimed deprivation was not limited to a probable cause determination by a judge, as it also included the plaintiff’s court hearings and trials. . . In *McDonough*, the plaintiff’s claim therefore related directly to the existence of the criminal charges against him and any attack on those charges necessarily impugned a future conviction. This, the Court reasoned, implicated *Heck*. . . Although similarities exist between the due process claim in *McDonough* and the Fourth Amendment claim for unlawful pretrial detention here, the differences are significant enough to warrant dissimilar

treatment under *Heck*. As the Court noted in *McDonough*, *Heck* does not apply to claims where a conviction is ‘merely anticipated.’ . . . Smith’s claim, like other Fourth Amendment claims, falls within this category; at the time of his release on bond, he had been charged but not convicted. True, the statute of limitations for Smith’s Fourth Amendment claim and those the Court in *Wallace* concluded did not violate the *Heck* bar begin to run at different times. . . . But this does not undermine the recognition in *Wallace* that Fourth Amendment claims are not subject to the *Heck* bar because they ‘merely anticipate’ convictions and can accrue when the Fourth Amendment harm has ended. . . . And although *McDonough* took pains to distinguish *Wallace*, it did not purport to overrule this portion of *Wallace*. . . . As shown above, the claim the Court faced in *McDonough* would undermine an ongoing prosecution in a way that neither the false arrest claim in *Wallace* nor Smith’s claim here would. To see why Fourth Amendment claims like Smith’s ‘merely anticipate’ a future conviction—and do not represent the same threat to an existing prosecution as the due process case in *McDonough*—we can analogize Smith’s claim to other Fourth Amendment claims. For example, we have noted that, under *Wallace*, a plaintiff’s § 1983 claim based on an illegal stop accrues, and is not necessarily barred by *Heck*, when the stop occurs. . . . That claim could theoretically impugn aspects of the future prosecution, but it does not necessarily call the entire prosecution into doubt. The state may attempt to use evidence from an allegedly illegal stop in a future prosecution of the plaintiff, but even if a court agrees with the plaintiff that the stop was illegal, all that determination would undermine is the use of that evidence, not the prosecution’s entire case. Likewise, Smith’s claim can be separated from his overall prosecution. In fact, the district court noted that the allegedly fabricated evidence in Smith’s case was not used at his trial, and nothing in his complaint suggests that it was. So *Heck* would not require a court to bar Smith’s claim if he had brought it immediately upon his release on bond. . . . We hold that even when charges remain outstanding, a Fourth Amendment claim for unlawful pretrial detention accrues upon the plaintiff’s release from detention, and not upon the favorable termination of the charges against the plaintiff. Smith’s claim is more like the claim in *Wallace* than the claim in *McDonough*. . . . Smith’s claim should accrue when the Fourth Amendment wrong ends. Different types of Fourth Amendment claims accrue at different times. In the search case, the illegal search is completed when that search occurs. . . . But in the pretrial detention context here, the wrong ends when the detention ends. . . . Now there is a concern about federal courts interfering with ongoing state criminal prosecutions by permitting § 1983 claims based on Fourth Amendment violations, even if those claims do not call into doubt the entire prosecution. *Wallace*, however, addressed this concern by pointing to the ability of courts to stay actions pending the resolutions of the state processes. . . . The Court in *McDonough* rejected this proposition for a due process claim. . . . Yet, as discussed, a due process claim differs in kind from a Fourth Amendment claim. A due process claim attacks the whole prosecution, while the Fourth Amendment claim—whether about a search, arrest, or pretrial detention—can sometimes be severed from the rest of the prosecution. At bottom, the Court in *McDonough* did not explicitly overrule *Wallace*’s holding that a Fourth Amendment claim is not barred by *Heck* even if it could possibly affect a future prosecution. We will not do so, either. . . . Because we hold that Smith’s claim accrued upon his release from custody, we must reach his argument that his bond conditions constituted a seizure. If they did, then Smith was in custody until his acquittal,

and his claim was timely. This court has previously reserved the question whether bond conditions can ever amount to a Fourth Amendment seizure. . . We now conclude that the standard bond conditions that Smith experienced did not constitute a continuing seizure. . . . Requirements to appear in court and to request permission before leaving the state—Smith’s bond conditions here—do not fit within the historical and judicially recognized framework of what constitutes a seizure. . . . Other circuits have had mixed reactions to Smith’s argument that standard bond conditions constitute a Fourth Amendment seizure. . . . We adopt a case-by-case approach on this issue, and we do not foreclose the possibility that a bond condition might constitute a Fourth Amendment seizure. A condition might involve the present and significant restriction of freedom that traditionally characterizes a Fourth Amendment seizure. But any challenged condition must fall within the traditionally-defined scope of what constitutes a seizure. Smith’s requirements that he appear in court and request permission before travel, analyzed either separately or together, do not fall within that definition. . . Applying these principles to Smith’s case, his claim accrued when he left detention and he was released on bond, March 29, 2014. So his filing of this case on July 18, 2018, was outside the two-year statute of limitations and thus untimely. We therefore AFFIRM the district court’s dismissal of his complaint.”)

*Sanders v. St. Joseph County, Indiana*, 806 F. App’x 481, \_\_\_ & n.2 (7th Cir. 2020) (“Under the Supreme Court’s decisions in *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997), Sanders could not have used § 1983 to contest his custody while it was ongoing. So his claim of unlawful detention accrued, at the earliest, when he was released from jail.<sup>2</sup> See *Manuel*, 903 F.3d at 670; *Tobey v. Chibucos*, 890 F.3d 634, 645 (7th Cir. 2018). . . . If, however, a conclusion that Sanders’s confinement was unconstitutional would imply the invalidity of an ongoing criminal proceeding or a prior criminal conviction, then *Heck* would continue to bar Sanders’s claim after his release and until either those proceedings terminated in his favor or the conviction was vacated. See *McDonough v. Smith*, 139 S. Ct. 2149 (2019); *Savory v. Cannon*, 947 F.3d 409, 414 (7th Cir. 2020).”)

*Camm v. Faith*, 937 F.3d 1096, 1110-11 & n.3 (7th Cir. 2019) (“Our conclusion that the *Brady* claim may proceed in part requires us to address the defendants’ argument that the claim is barred by the statute of limitations. Unlike the Fourth Amendment limitations issue, the defendants preserved an untimeliness defense below in opposition to the *Brady* claim. Nonetheless, it’s a nonstarter under circuit precedent. In *Johnson v. Dossey*, 515 F.3d 778, 782 (7th Cir. 2008), we held that a similar *Brady* claim accrued when the defendant was finally acquitted. We relied heavily on the Supreme Court’s decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), which bars a criminal defendant from seeking damages for an allegedly unlawful conviction unless and until the criminal proceedings have terminated in his favor. . . . The Supreme Court recently reached the same conclusion in a closely related context. In *McDonough v. Smith*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2149, 204 L.Ed.2d 506 (2019), a special prosecutor was accused of fabricating evidence and using it against a criminal defendant at two trials. The first ended in a mistrial; the second ended with an acquittal. The Court held that the limitations period for a claim of that nature does not begin to run until the criminal proceedings

against the defendant have terminated in his favor with a final acquittal. . . To be clear, no *Brady* claims were at issue, and the Court emphasized that it was not expressing any opinion about the accrual of anything but the claim before it. . . But much of the Court’s reasoning lends support to what we held in *Johnson*. Most importantly, the Court emphasized *Heck*’s ‘pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.’. . In the same vein, the Court stressed that ‘[t]here is not a complete and present cause of action to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing.’. . Both considerations have just as much force in the *Brady* context. We therefore reiterate once more that the statute of limitations for a *Brady* claim does not accrue until the criminal proceedings terminate in the defendant’s favor. Here, as in *Johnson*, the proceedings did not terminate until Camm was finally acquitted. He filed his complaint just one year after that, so his *Brady* claim is timely.”)

*Cusick v. Gualandri*, No. 20-CV-06017, 2021 WL 5447041, at \*5–6 (N.D. Ill. Nov. 22, 2021) (“Count II alleges unlawful pretrial detention in violation of the Fourth and Fourteenth Amendments. In *Lewis v. City of Chicago*, 914 F.3d 472, 475, 478 (7th Cir. 2019), the Seventh Circuit relied on *Manuel* . . . to hold that the ‘Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pretrial detention.’. . Cusick acknowledges *Lewis* but argues that the Supreme Court’s decision in *McDonough* has upset that precedent. In *McDonough*, the Court assumed without deciding that pretrial confinement can serve as a deprivation of liberty under the Due Process Clause. . . The Court explicitly declined to offer an opinion on this assumption, limiting itself to the statute of limitations issue on which it had granted certiorari. . . Since *McDonough*, the Seventh Circuit has affirmed its holding in *Lewis* without necessarily requiring an analysis of *McDonough*. . This Court acknowledges the uncertain viability of a Fourteenth Amendment unlawful detention claim in this Circuit, and that district courts here are divided about how to handle these claims. However this Court agrees with other district courts that have declined to dismiss on the pleadings a Fourteenth Amendment unlawful detention claim brought in conjunction with a Fourth Amendment claim. . . . Considering the allegations in this case and having reviewed the parties’ briefs and the case authority, the Court believes the better course in this case is to allow the claims to proceed as pled. The requests to dismiss the Fourteenth Amendment claim in Count II is denied. . . . Cusick filed this lawsuit on October 8, 2020. He contends that his claim accrued on December 13, 2019, when he was acquitted at trial. This would put him comfortably within the statute of limitations. The defendants, meanwhile, assert that the clock started running on March 3, 2017, when Cusick posted bond and was released from pretrial detention. In that case, Cusick’s claim would be untimely. Defendants argue that the Seventh Circuit’s recent decision in *Smith*, 3 F.4th 332 controls. *Smith* was arrested in 2013, detained for seven months, released on bond in 2014, and acquitted in 2016. He filed suit in 2018, bringing an unlawful pretrial detention claim. . . *Smith* alleged that ‘the officers violated § 1983 by using fabricated evidence to place him in custody in violation of the Fourth Amendment.’. . The Seventh Circuit held that his claim accrued upon his release from custody and therefore was untimely. . . The Court identified the ‘contours of the constitutional right’ of *Smith*’s claim—the ‘wrong...is the detention rather than the existence of criminal charges.’.

. *Smith* distinguished *McDonough*, . . . which held that a § 1983 fabrication of evidence claim accrued upon acquittal. *Smith*'s claim could 'be separated from his overall prosecution'; indeed the allegedly fabricated evidence in his case 'was *not* used at his trial, and nothing in his complaint suggests that it was.' . . . The Seventh Circuit explained that '[a] due process claim attacks the whole prosecution, while the Fourth Amendment claim—whether about a search, arrest, or pretrial detention—can *sometimes* be severed from the rest of the prosecution.' . . . *Smith* is easily distinguishable from the allegations in the present case. Count II 'attacks the whole prosecution'. Unlike in *Smith*, where Plaintiff alleged only that officers used fabricated evidence to place him in custody, Cusick alleges that Defendants fabricated evidence and presented false information to the grand jury to obtain an indictment *and* at his trial to convict him. . . . In *Savory v. Cannon*, 2021 WL 1209129, at \*6 (N.D. Ill. Mar. 31, 2021), on remand from the Seventh Circuit, the court explained that '*McDonough* makes clear that a plaintiff must wait until the favorable termination of the criminal proceedings to bring a § 1983 claim that, if successful, would be incompatible with his guilt.' The plaintiff in *Savory* challenged the integrity of the criminal prosecution itself, and the court found his Fourth Amendment claim timely because it did not accrue until his pardon by the Governor—9 years after his release from prison. . . . Here, a fair reading of the complaint shows Cusick challenges the integrity of the whole prosecution. His claim did not accrue until he was acquitted on December 13, 2019.'")

***Ochoa v. Lopez***, No. 20-CV-02977, 2021 WL 4439426, at \*5-8 (N.D. Ill. Sept. 28, 2021) ("*Johnson* predates *McDonough* and several judges in this District have questioned its continued viability. [collecting cases] Instead of distinguishing *Johnson*, Ochoa insists that *Brown*, 2019 WL 4694685, at \*1, a post-*Johnson* case is highly instructive. . . . In reviewing Ochoa's claims, the Court finds that the above-referenced cases, especially *Brown*, support Ochoa's position. True, as Officer Defendants claim, unlike the plaintiffs in some of these cases, Ochoa was never acquitted . . . , but acquittal is not the *sine qua none* of deferred accrual under *Heck*, and making such a nuanced distinction ignores Supreme Court and Seventh Circuit precedent. Officer Defendants invite the Court to ignore *McDonough* and apply *Wallace*, . . . a pre-*McDonough* case, instead. . . . The Court declines the invitation. It cannot be disputed that the principles that emanate from *McDonough* and its Seventh Circuit progeny stand for the proposition that a criminal defendant/Section 1983 plaintiff cannot initiate certain Section 1983 constitutional claims which call into question the validity of his conviction until his criminal proceedings are over. Notably, but perhaps not surprisingly, Officer Defendants' motion fails to mention *McDonough* or *Savory*. The Court finds that Ochoa's Section 1983 compelled self-incrimination claim, which necessarily implicated the validity of his conviction, did not begin to accrue until October 23, 2019, when the State of Illinois dismissed all charges against him. . . . Accordingly, his self-incrimination claim is timely. . . . Officer Defendants argue that Ochoa's Fourth Amendment claim for wrongful pre-trial detention is also time-barred. . . . Ochoa counters that his claim is not time-barred, as a Fourth Amendment claim for wrongful pretrial detention accrues when the wrongful conviction ends. . . . The Court agrees. In *Manuel II* . . . on remand, the Seventh Circuit stated that under the Fourth Amendment, 'there *is* a constitutional right not to be held in custody without probable cause. Because the wrong is the detention rather than the existence of criminal charges, the period of

limitations also should depend on the dates of the detention.’ . . The court further rationalized its holding based on the principle that a claim cannot accrue until the potential plaintiff is entitled to sue, but the detention itself forbids a suit for damages contesting that detention’s validity. Based on this reasoning, the court held that the claim accrued when detention ends. . . However, as Officer Defendants point out, the Fourth Amendment is no longer a basis for relief for post-conviction detention once a defendant is convicted of a criminal offense. . . Once a defendant is convicted, if he challenges the sufficiency of the evidence to support his conviction and any ensuing incarceration, he must do so under the Due Process Clause of the Fourteenth Amendment. . . Yet, Officer Defendants concede that Ochoa could proceed with his Fourth Amendment claim of prolonged pretrial detention for the period between when his conviction was reversed on February 15, 2017 . . . and when he was released on October 23, 2019. . . . The Court disagrees with Officer Defendants that Ochoa has not specifically pled this claim, as the time period of February 25, 2017 through October 23, 2019 is accounted for in Count IV. For the time period prior to February 15, 2017, during Ochoa’s post-conviction detention and before the Illinois Appellate Court reversed his second conviction, Ochoa still has a valid claim under the Due Process Clause of the Fourteenth Amendment. Missing from Officer Defendants’ Reply is any authority that holds that the statute of limitations has expired for Ochoa’s claim as it relates to this time period. Officer Defendants suggest that the clock started ticking when Ochoa’s pretrial detention ended, and his post-trial custody began. But, as the court in *Hill v. Cook Cnty.* noted, the Seventh Circuit has rejected this approach because it would essentially leave Ochoa out of luck. . . . A criminal defendant cannot use Section 1983 to contest his custody while it is ongoing, and a claim of unlawful detention can only accrue once he is released from jail. . . . At no point was Ochoa released from custody following his initial arrest in 2002 until his release in 2019. Because Ochoa was not released from custody until October 23, 2019 . . . , his Fourth Amendment and Fourteenth Amendment claims did not begin to accrue until that date. Again, because Ochoa filed his complaint on May 19, 2020, less than a year after October 23, 2019, Count IV is not time-barred by the statute of limitations.”)

***Jackson v. City of Chicago***, No. 20 C 5886, 2021 WL 3883111, at \*3–5 (N.D. Ill. Aug. 31, 2021) (“The Seventh Circuit recently observed that *Manuel II* does not, on its own, answer the question of whether a favorable termination of criminal proceedings is necessary for a statute of limitations to accrue on a Fourth Amendment Claim. *See Smith v. City of Chi.*, 3 F.4th 332, 340 (7th Cir. 2021) (noting that in *Manuel II*, by the time the plaintiff was released there was no prosecution his Section 1983 suit could impugn and therefore nothing that could bring the *Heck* rule into play). In *Smith*, the court explicitly held that ‘even when charges remain outstanding, a Fourth Amendment claim for unlawful pretrial detention accrues upon the plaintiff’s release from detention, and not upon the favorable termination of the charges against the plaintiff.’ . . *Smith* noted the distinction between a due process claim and a Fourth Amendment claim: ‘[a] due process claim attacks the whole prosecution, while the Fourth Amendment claim—whether about a search, arrest, or pretrial detention—can sometimes be severed from the rest of the prosecution.’ . . ‘At bottom, the court said, ‘the Court in *McDonough* did not explicitly overrule *Wallace*’s holding that a Fourth Amendment claim is not barred by *Heck* even if it could

possibly affect a future prosecution. We will not do so, either.’ . . . In the Court’s view, however, *Smith* is distinguishable on its facts and does not dictate the result in this case. In *Smith*, the Seventh Circuit pointed out the plaintiff’s Fourth Amendment claim could be separated from the overall prosecution. . . . The allegedly fabricated evidence in the plaintiff’s case was not used at his trial, and therefore ‘*Heck* would not require a court to bar *Smith*’s claim if he had brought it immediately upon his release on bond.’ . . . In contrast, Jackson’s conviction is inextricably tied up in his Fourth Amendment claim. The Court finds persuasive Judge Feinerman’s analysis in *Culp v. Flores*, 454 F. Supp. 3d 764 (N.D. Ill. 2020). In *Culp*, the plaintiff’s Fourth Amendment claim alleged that the plaintiff committed no crime, that the defendants did not have any reason to believe the plaintiff violated any law, and that the defendants ‘based the arrest, detention and/or prosecution of [the plaintiff] on their false allegations, testimony and fabricated police reports.’ . . . These allegations are akin to those presented in this case. Citing *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020), and *Sanders v. St. Joseph Cnty.*, 806 F. App’x 401 (7th Cir. 2020), Judge Feinerman concluded that success on the plaintiff’s Fourth Amendment claim ‘would be incompatible with a conviction on the charges for which *Culp* was arrested, detained, and prosecuted,’ and therefore ‘there is no logical way to reconcile the claim with a valid conviction.’ . . . So too, here. Any legal challenge to Jackson’s Fourth Amendment claim ‘would have automatically implicated the validity of [Jackson’s] criminal convictions because both injuries are premised on the same set of facts.’ . . . Accordingly, the statute of limitations on Jackson’s Fourth Amendment claim did not begin to run until the criminal proceedings terminated in his favor. But when did that occur in this case? Defendants advocate for September 20, 2018, the date Jackson’s motion for a new trial was granted following an appeal process. Jackson, on the other hand, asserts his claim accrued on October 18, 2018, the date the circuit court issued a disposition of *nolle prosequi*. The Court agrees with Jackson. . . . In the Court’s view, prevailing on a motion for a new trial does not complete the story. Jackson was still subject to pending charges; the case against him was not conclusively terminated. Accordingly, Jackson’s claim did not accrue until the entry of the *nolle prosequi* disposition, at which time the criminal proceedings were *fully* terminated. . . . Therefore, the Officer Defendants’ Motion to Dismiss Count I is denied. . . . The parties do not appear to dispute that the statute of limitations on Jackson’s Due Process claim began to run at the time the criminal proceedings were terminated in Jackson’s favor. Given the Court’s conclusion regarding the *nolle prosequi* disposition, the Officer Defendants’ Motion to Dismiss Count II is also denied.”)

***Fulton v. Bartik***, No. 20 C 3118, 2021 WL 2712060, at \*9 (N.D. Ill. July 1, 2021) (“Here, a judgment for plaintiffs on the unlawful pretrial detention claim would have undermined the validity of their convictions because both their pretrial detention and convictions were based on the same allegedly fabricated evidence. Therefore, a judgment in plaintiffs’ favor on the unlawful pretrial detention claims ‘directly challenges—and thus necessarily threatens to impugn—the prosecution itself.’ *McDonough*, 139 S. Ct. at 2159 (citing *Heck*, 512 U.S. at 486– 487). ‘There is no logical way to reconcile th[e] claim[ ] with a valid conviction.’ *Savory*, 947 F.3d at 417. While City Defendants urge this court to follow *Brown v. City of Chicago*, No. 18 C 7064, 2019 WL 4694685, at \*3 (N.D. Ill. Oct. 8, 2019), in which the court concluded that *McDonough* did not save a plaintiff’s unlawful detention claim, that decision predated *Savory* and *Sanders* and did not have

the benefit of their guidance on whether an unlawful pretrial detention claim can operate as a collateral attack on a criminal conviction. City Defendants offer no argument that success on this claim does not run into *Heck*. Instead, they recast the claim as ‘essentially a false arrest claim’ . . . but that is not correct. . . Count III stands.”)

***Camm v. Clemons***, No. 4:14-cv-00123-TWP-DML, 2021 WL 2661626, at \*7-8 (S.D. Ind. June 29, 2021) (“In this case, Camm’s Fourth Amendment claim for wrongful detention necessarily implies the invalidity of his conviction, so his claim accrued when he obtained a favorable termination of the underlying criminal proceedings against him. This follows the direction from the Supreme Court in *McDonough* and *Heck* and is consistent with the Seventh Circuit’s recent decision in *Savory*. Relying on language from the Supreme Court’s decision in *Heck*, the Defendants contend that Camm obtained a favorable resolution when his first criminal conviction was reversed on direct appeal on August 10, 2004. While the reversal by the Indiana Court of Appeals was a favorable decision, it was not a favorable termination of the criminal proceedings against Camm. When reversing the first conviction, the Indiana Court of Appeals explicitly noted that Camm was subject to being retried, and the State continued to pursue the criminal charges against him all the way through two more trials. This Court agrees with the district court in *Savory*: ‘[b]ecause the State elected to re-try [the plaintiff] after the state appellate court’s [ ] reversal of the convictions entered at his first trial, [the plaintiff] remained fully subject to pending criminal charges. Those are precisely the circumstances in which, according to *McDonough*, a § 1983 claim has not yet accrued.’ . . On October 24, 2013, Camm was acquitted of all the criminal charges against him, and he was released from custody. It was at that point that Camm obtained a favorable termination of the underlying criminal proceedings against him. Therefore, Camm’s Fourth Amendment claim for wrongful arrest and detention accrued on October 24, 2013, and he brought the claim one year later on October 24, 2014. Thus, Camm’s Fourth Amendment claim was timely filed and is not barred by the statute of limitations. The Defendants’ Joint Motion for Partial Summary Judgment based on the statute of limitations argument is denied.”)

***Cruz v. City of Chicago***, No. 20-CV-250, 2021 WL 2645558, at \*10 (N.D. Ill. June 28, 2021) (“After *McDonough*, the Seventh Circuit had the chance to abandon its ruling in *Lewis*. But instead of overturning *Lewis*, the Court of Appeals doubled down. In *Camm v. Faith*, 937 F.3d 1096, 1105 (7th Cir. 2019), the Seventh Circuit reiterated that the Fourth Amendment, not the Due Process Clause, governs a claim about an unlawful pretrial detention. . . .The same result applies here. Micaela Cruz invokes both the Fourth and Fourteenth Amendments, but the claim ‘is really one for wrongful arrest and detention in violation of the Fourth Amendment.’ . . The Fourteenth Amendment does not govern unlawful pretrial detention claims, so Count II is dismissed.”)

***Grayer v. City of Chicago***, No. 20-CV-00157, 2021 WL 2433661, at \*1-3 (N.D. Ill. June 15, 2021) (“No party disputes that the Fourth Amendment applies to claims arising from pretrial detention. But the Fourteenth Amendment comes into play only for claims that arise following a criminal conviction. Because Plaintiffs were never convicted of a crime, the Fourteenth Amendment plays no permissible role in Plaintiffs’ complaint. Accordingly, Defendants’ partial motion to dismiss is

granted. . . . Plaintiffs allege they were subjected to pretrial detention without probable cause in violation of their Fourth and Fourteenth Amendment rights. . . . No party disputes that a Section 1983 claim alleging wrongful pretrial detention arises under the Fourth Amendment. . . . But the question remains: can a challenge to pre-trial incarceration also arise under the Fourteenth Amendment? In short, the answer is no. . . . In the wake of *Manuel I* and *II*, the Seventh Circuit has further clarified that the pre/post-conviction line permits no equivocation: pretrial claims arise under the Fourth Amendment, and post-conviction claims arise under the Fourteenth Amendment. . . . Despite this precedent, Plaintiffs argue that *Lewis* is contrary to the Supreme Court’s decision in *McDonough v. Smith*[.] . . . This Court respectfully disagrees. Contrary to Plaintiffs’ suggestion, *McDonough* did not hold that ‘unlawful pretrial detention can also sound in the Fourteenth Amendment.’. . . *McDonough*, rather, addressed when the statute of limitations for a fabricated evidence claim begins to run. . . . Acknowledging that ‘the Second Circuit treated [the plaintiff’s claim] as arising under the Due Process Clause,’ the Supreme Court pointedly noted that ‘[w]e assume without deciding that the Second Circuit’s articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those separate questions.’. . . In view of this qualification, this Court cannot find that *Lewis*—which directly applied *Manuel I*—and later on-point Seventh Circuit cases were abrogated by implication through *McDonough*. . . . Moreover, this conclusion is bolstered by the Seventh Circuit’s post-*McDonough* application of *Manuel I* and *Lewis* in *Kuri* and *Young*—neither of which mention *McDonough*. . . . Plaintiffs attempt to avoid the effect of *Lewis* and related decisions by distinguishing, for claim-accrual purposes, between allegations of fabricated evidence (*e.g.*, *McDonough*) and those involving unlawful detention (*e.g.*, *Lewis* and *Manuel I*). . . . This distinction does not make a difference—at least not in this case. Although Plaintiffs cite some decisions explaining that a later date of accrual should apply to fabrication of evidence claims, . . . at issue here is the legal basis of the claimed right of action, not the marker for when that action accrues. And on that score, the law is against Plaintiffs: *Lewis* rejected any distinction between pretrial fabrication of evidence claims and those based on wrongful pretrial detention. *Lewis*, 914 F.3d at 479 (“all § 1983 claims for wrongful pretrial detention— whether based on fabricated evidence or some other defect—sound in the Fourth Amendment”). . . . Because that rule is the controlling law in this circuit, Plaintiffs’ reliance upon the Fourteenth Amendment is foreclosed.”)

***Weston v. City of Chicago***, No. 20 C 6189, 2021 WL 2156459, at \*5 (N.D. Ill. May 27, 2021) (“The Seventh Circuit did not specifically address the accrual of the coerced-confession due process claim, and on remand in *Savory*, the defendants maintained that the claim was untimely because it accrued at the time of the coerced confession. The district court explained that the argument ‘presents the difficult question whether *Moore* ...survived *McDonough*, which holds that the *Heck* bar applies when a claim, as pleaded, would necessarily imply the invalidity of criminal proceedings or a conviction.’. . . The court saw no reason to ‘run to ground’ this challenge to the due process claim at the pleading stage because ‘discovery on the Fourteenth Amendment coerced confession claim will be no broader than discovery on the Fifth Amendment claim’ asserting a violation of the plaintiff’s self-incrimination privilege. . . . Therefore, it denied the motion to dismiss, without prejudice to renewal at summary judgment. . . . This case is similar to *Savory*, and

the Court is inclined to follow the same approach that the district court followed on remand there. It will not significantly change the scope of discovery in this case to put off this ‘difficult question,’ given that plaintiff has raised a similar coerced-confession claim under the Fifth Amendment. And putting the question off may prove to simplify it, when it is considered in the light of a full factual record and any intervening authority that might arise in the interim. Defendants’ motion is denied as to the due process coerced-confession claim, without prejudice to renewing the argument at summary judgment.”)

*Jordan v. City of Chicago*, No. 20-CV-4012, 2021 WL 1962385, at \*3–4 (N.D. Ill. May 17, 2021) (“Defendants rely on a dictum in *Knox v. Curtis*, 771 F. App’x 656, 658 (7th Cir. 2019), for the proposition that a Fourth Amendment claim based on fabrication of evidence accrues when a person is released from custody or convicted. . . This court finds the *Knox* dictum unpersuasive in light of the Supreme Court’s accrual analysis in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), and the Seventh Circuit’s en banc accrual analysis in *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 251 (2020). The Supreme Court analyzed a very similar accrual question in *McDonough*, except that the plaintiff brought a claim under the due process clause rather than the Fourth Amendment. The Court held that ‘[t]he statute of limitations for a fabricated-evidence claim...does not begin to run until the criminal proceedings against the defendant (*i.e.*, the § 1983 plaintiff) have terminated in his favor.’ . . The Seventh Circuit similarly held in *Savory*, 947 F.3d at 418, that the plaintiff’s fabricated evidence claim under the due process clause accrued not when he was released from custody, but when the then-governor of Illinois later pardoned him. The Seventh Circuit expressly declined to decide when the plaintiff’s Fourth Amendment claim accrued and left the question for the district court on remand. . . . Although *McDonough* and *Savory* considered when a due process claim accrued, the reasoning of both cases parallels the Seventh Circuit’s analysis of the accrual date of the plaintiff’s Fourth Amendment claim in *Manuel II*. As the *Manuel II* court explained, under ordinary accrual principles ‘a claim does not accrue before it is possible to sue on it.’ . . . In both *McDonough* and *Savory*, the court held that the plaintiff’s claim accrued when the plaintiff was released and *Heck* ceased to bar his § 1983 civil suit. . . . Significantly, the Supreme Court did not phrase the accrual rule it adopted in *McDonough* in terms of the source of the constitutional right the plaintiff invoked. The Court’s opinion set out an accrual rule for ‘fabricated-evidence claim[s].’ . . . As the district court recognized on remand in *Savory*, a § 1983 suit alleging evidence fabrication calls the validity of the criminal charges into question and triggers the *Heck* bar—regardless of whether the claim is brought under the Fourth or Fourteenth Amendment. . . . This court therefore holds that under *Manuel II*, a Fourth Amendment evidence fabrication claim accrues when (1) the defendant is released from custody, and (2) *Heck* no longer bars the plaintiff’s § 1983 claim. With favorable inferences, Jordan alleges that his Fourth Amendment pretrial detention claim would have called the validity of his conviction into question, making it *Heck*-barred until the prosecutor dismissed the charges against him and he was released in December 2019. . . . Because Jordan filed his complaint within two years of that date, his Fourth Amendment pretrial detention claim is timely.”)

*Savory v. Cannon*, No. 17 C 204, 2021 WL 1209129, at \*3-6 (N.D. Ill. Mar. 31, 2021) (“Before proceeding, the court pauses to describe what the Seventh Circuit did and did not resolve regarding the various limitations issues implicated by Savory’s claims. In its 2017 dismissal order, this court held, based on the Seventh Circuit’s then-prevailing understanding of the *Heck* doctrine, that Savory’s claims accrued in December 2011, when he was released from state custody upon the termination of his parole. . . . Because the limitations period for § 1983 claims in Illinois is two years, . . . this court dismissed Savory’s § 1983 claims—which he did not file until January 11, 2017—as time-barred. . . . The Seventh Circuit reversed, ruling that ‘a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.’ . . . Thus, as a general matter, Savory’s claims accrued only when the Governor pardoned him on January 12, 2015, just under two years before he filed suit. . . . The ‘as a general matter’ hedge in the preceding sentence reflects that the Seventh Circuit expressly left open for this court’s consideration three questions that might possibly result in a different accrual date for some of Savory’s claims. The first question concerns when Count III—which, as noted, alleges malicious prosecution and wrongful pretrial detention under the Fourth and Fourteenth Amendments—accrued insofar as it states an otherwise viable cause of action. . . . As the Seventh Circuit observed, . . . answering that question requires attention to *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), and its own opinion on remand from that decision, *Manuel v. City of Joliet*, 903 F.3d 667 (7th Cir. 2018). The second question concerns whether there are two accrual dates for Savory’s claims—one in April 1980, when the state appellate court reversed Savory’s convictions at his first trial, and the other in January 2015, when the Governor pardoned him for the convictions at his second trial—or just one accrual date, the day of the pardon. . . . [A]nswering that question requires consideration of whether *McDonough v. Smith*, 139 S. Ct. 2149 (2019), overruled in pertinent part *Johnson v. Winstead*, 900 F.3d 428 (7th Cir. 2018). The third question, related to the first, is whether ‘*McDonough* dictates—contrary to [the Seventh Circuit’s] 2018 *Manuel* opinion—that [Savory’s] claim for unlawful detention after legal process accrued at the same time as all of his other claims, specifically at the time of his pardon.’ . . . *McDonough* held that *Heck* barred a plaintiff whose first trial ended in a mistrial, and who was then retried and acquitted, from bringing a fabricated evidence claim until ‘the underlying criminal proceedings ha[d] resolved in [his] favor,’ meaning until his acquittal—which in turn means that the claim did not accrue until that time. . . . To support its holding, the Supreme Court invoked ‘pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.’ . . . The Court explained that the contrary result would impose upon ‘[a] significant number of criminal defendants . . . an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them,’ adding that ‘the parallel civil litigation that would result if plaintiffs chose the second option would run counter to core principles of federalism, comity, consistency, and judicial economy.’ . . . The dual-accrual rule of *Johnson* cannot be reconciled with the Supreme Court’s analysis in *McDonough*, at least under the circumstances of this case. Because the State elected to re-try him after the state appellate court’s April 1980 reversal of the convictions entered at his first trial, Savory remained fully subject to pending criminal charges. Those are precisely the circumstances in which, according to *McDonough*, a § 1983 claim has not

yet accrued— circumstances where, if the claim had accrued in April 1980, Savory would have been compelled to bring parallel civil litigation involving the facts of his criminal case against the very persons who were the moving force behind his continued prosecution, and where there would have been a risk of conflicting judgments if Savory prevailed in the civil case and the State prevailed in the criminal case. . . . It follows that Savory’s Fifth Amendment coerced confession claim accrued only once, when he received his pardon, because only then did the criminal proceedings fully resolve in his favor. In sum, Savory’s Fifth Amendment coerced confession claim is timely in its entirety, having been filed within two years of his pardon that, after nearly four decades, terminated the criminal proceedings in his favor. . . . Defendants correctly contend that no malicious prosecution claim may be grounded in the federal constitution or pursued under § 1983. . . . As the Seventh Circuit has made clear, ‘when a plaintiff alleges that officials held him in custody before trial without justification, “[m]alicious prosecution is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify the detention.”’ . . . The § 1983 malicious prosecution claim accordingly is dismissed with prejudice. As for the Fourth Amendment unlawful detention claim, Defendants contend that it is untimely, having accrued, at the latest, when Savory’s pretrial detention ended in May 1981 upon his second conviction. . . . In support, Defendants rely on the Seventh Circuit’s decision on remand in *Manuel*, which held that a pretrial detention claim accrues ‘when the detention ends.’ . . . Defendants could just as well have argued that Savory’s unlawful detention claim accrued when he was released from prison in December 2006, or from parole in December 2011. Savory contends that *McDonough* compels the conclusion that his unlawful detention claim accrued only when he was pardoned. . . . Savory is correct. As noted, *McDonough* makes clear that a plaintiff must wait until the favorable termination of the criminal proceedings to bring a § 1983 claim that, if successful, would be incompatible with his guilt. . . . That describes Savory’s unlawful detention claim, for his allegation that he was detained without probable cause and ‘in spite of the fact that [the officers] knew [he] was innocent,’ . . . ‘challenge[s] the integrity of [the] criminal prosecution[.]’ and ‘directly challenges—and thus necessarily threatens to impugn—the prosecution itself,[.]’ . . . Because Savory’s unlawful detention claim did not accrue until his pardon, it is timely. *See Sanders v. St. Joseph Cnty.*, 806 F. App’x 481, 484 n.2 (7th Cir. 2020) (recognizing that an unlawful detention claim “that impl[ies] the invalidity of an ongoing criminal proceeding or a prior criminal conviction” is *Heck*-barred even “after [the plaintiff’s] release and until either those proceedings terminated in his favor or the conviction was vacated”); *Culp v. Flores*, 454 F. Supp. 3d 764, 769 (N.D. Ill. 2020) (same).”)

***Spencer v. Village of Arlington Heights***, No. 18-CV-00528, 2020 WL 4365640, at \*2 (N.D. Ill. July 30, 2020) (“Defendants argue that Spencer’s only remaining claim, Count 3, is barred by the applicable statute of limitations. . . . Count 3 is a claim for unlawful pretrial detention based on the Fourth Amendment. . . . Spencer filed the complaint on January 23, 2018. . . . If Spencer’s claim accrued upon his release from jail on August 15, 2015, the claim is untimely. . . . If Spencer’s claim accrued when the criminal charges were dismissed on January 25, 2016, the claim is timely. . . . Defendants appropriately cited authority that existed when they filed their briefs, but since then the Seventh Circuit and district courts in this district have issued additional decisions in this area.

After *McDonough*, the Seventh Circuit stated, in the context of a claim for unlawful pretrial detention, that the plaintiff's 'claim of unlawful detention accrued, at the earliest, when he was released from jail.' . . . The Seventh Circuit further explained: 'If, however, a conclusion that Sanders's confinement was unconstitutional would imply the invalidity of an ongoing criminal proceeding or a prior criminal conviction, then *Heck* [*v. Humphrey*, 512 U.S. 477 (1994)] would continue to bar Sanders's claim after his release and until either those proceedings terminated in his favor or the conviction was vacated.' . . . Applying those principles, the question is whether Spencer's claim would imply the invalidity of the criminal proceedings. Spencer's claim is premised on his allegations that he committed no crime. . . . Spencer alleges that the defendant officers filed a false complaint under oath and committed perjury. . . . Spencer alleges that, as a result of the complaint, 'he was illegally detained and jailed.' . . . If successful, the claim would imply the invalidity of the criminal proceedings. . . . Thus, Spencer's claim did not accrue until the proceedings terminated in his favor, in other words, until the charges were dismissed on January 25, 2016. . . . Spencer filed the claim on January 23, 2018, within the two-year statute of limitations.")

***Barnett v. City of Chicago***, No. 18 C 7946, 2020 WL 4336063, at \*2–4 (N.D. Ill. July 28, 2020) ("Although Barnett purports to base his claim in the Fourteenth Amendment, he cannot successfully raise a Fourteenth Amendment due process fabrication of evidence claim. While it is beyond doubt that 'a police officer who manufactures false evidence against a criminal defendant violates due process,' that violation becomes actionable only 'if that evidence is later used to deprive the defendant of her liberty in some way.' . . . Barnett was only subject to pretrial detention and bond conditions; he does not allege any post-trial deprivation of liberty. . . . As the Seventh Circuit recently clarified, 'all § 1983 claims for wrongful pretrial detention—whether based on fabricated evidence or some other defect—sound in the Fourth Amendment.' . . . To state a claim for fabrication of evidence sounding in the Fourth Amendment, Barnett must allege that Kulisek knowingly, intentionally, or with reckless disregard for the truth made false statements that were necessary to the probable cause determination. . . . Barnett alleges that Kulisek made false statements in the police report and that those statements formed the basis for the probable cause determination. Therefore, Barnett has sufficiently pleaded a Fourth Amendment fabrication of evidence claim against Kulisek. . . . A Fourth Amendment claim for wrongful pretrial detention accrues when the wrongful detention ends. . . . Because Barnett has alleged that false statements provided the basis for the probable cause determination against him, he has alleged that his detention remained wrongful even after he was formally charged. . . . In such cases, wrongful detention claims based on falsified probable cause accrue upon the detainee's release. . . . Barnett's amended complaint reveals that he was released from custody on October 1, 2016, more than two years before he filed his complaint. But the Court must also consider the effect of the ongoing criminal proceedings on Barnett's ability to bring suit on his wrongful detention claim. Under *Heck v. Humphrey*, Barnett could not bring a § 1983 suit concerning his confinement until the criminal proceedings terminated in his favor if the suit would 'necessarily imply' the invalidity of an outstanding criminal conviction or sentence. . . . In *McDonough*, the Supreme Court emphasized that the *Heck* bar extends to a fabrication of evidence claim based on evidence used to secure an

indictment given that such a claim ‘directly challenges—and thus necessarily threatens to impugn—the prosecution itself.’ . . . Although *McDonough* concerned a Fourteenth Amendment fabrication of evidence claim, rather than one based in the Fourth Amendment, its application of *Heck* applies to Barnett’s Fourth Amendment claim. . . . Here, Barnett alleges that the Chicago Police ‘had no information to lead them to believe that Barnett had committed a crime,’ aside from the false assertions in the arrest report. . . . Barnett’s wrongful detention claim ‘centers on evidence used to secure an indictment and at a criminal trial’ and so ‘directly challenges—and thus necessarily threatens to impugn—the prosecution itself.’ . . . This means that the claim did not accrue until Barnett’s acquittal on December 2, 2016, making the filing of his complaint on December 3, 2018 timely. . . . Therefore, the statute of limitations does not bar Barnett’s wrongful detention claim based on fabrication of evidence.”)

*Hill v. City of Chicago*, No. 19 C 6080, 2020 WL 4226672, at \*2–3 (N.D. Ill. July 23, 2020) (“Seventh Circuit law governing Fourth Amendment pretrial detention claims has changed in recent years. In *Manuel v. City of Joliet*, the Supreme Court overturned Seventh Circuit precedent and held that the Fourth Amendment governs claims for unlawful pretrial detention both before and after the initiation of formal legal process (i.e. when a criminal defendant has been brought before a judge). . . . The Supreme Court declined to decide when such claims accrue, leaving that question for the Seventh Circuit. . . . On remand, the Seventh Circuit held that unlawful pretrial detention claims accrue on the date the detention ends. . . . But because the charges against the plaintiff in *Manuel II* were dismissed, the Seventh Circuit did not have occasion to consider whether a conviction (and thus the end of the pretrial detention) triggers accrual. *Knox v. Curtis*, 771 F. App’x 656 (7th Cir. 2019), appeared to provide some insight on that question. In *Knox*, the plaintiff sued a witness and a police officer after he was convicted of improperly communicating with the witness about his alleged criminal activity, blaming their false statements for his arrest and ultimate conviction. The Seventh Circuit held that the plaintiff’s Fourth Amendment unlawful pretrial detention claim was timely and that it accrued either when he was released on bond or when he was convicted. . . . In rejecting the Defendant officer’s argument that *Heck* barred the plaintiff’s claim, the *Knox* court stated that ‘[t]o the extent that [plaintiff] challenges his post-conviction detention, *Heck* indeed bars his § 1983 suit. However, [plaintiff] also challenges his pretrial (pre-bond) detention, the unlawfulness of which does not have “any necessary effect on the validity of [his] conviction.”’ . . . Plaintiffs contend that the *Knox* court’s statement was specific to the facts of that case (i.e. that *Heck* applies to some Fourth Amendment pretrial detention claims, it just did not apply there). While that may be true, so far as the Court can tell, *Knox* alleged that his arrest, pretrial detention, and conviction were based on the same false statements, which is exactly what Plaintiffs allege here (nor does Plaintiffs’ motion explain where the difference in the facts lies). Accordingly, because the facts in *Knox* were similar to the facts here, the Court found the decision persuasive (albeit not binding) and concluded that Plaintiffs’ pretrial detention claims accrued upon their convictions. . . . Following the Court’s ruling, however, the Seventh Circuit clarified the impact of *Heck* on pretrial detention claims in *Sanders v. St. Joseph’s County*, 806 F. App’x 481 (7th Cir. 2020). In *Sanders*, the Seventh Circuit reversed the district court’s dismissal of the plaintiff’s unlawful pretrial detention claim on statute of limitations grounds, holding that

his claim accrued, at the earliest, when he was released from jail. . . In so holding, the court qualified that ‘[i]f, however, a conclusion that [plaintiff’s] confinement was unconstitutional would imply the invalidity of an ongoing criminal proceeding or a prior criminal conviction, then *Heck* would continue to bar [plaintiff’s] claim after his release and until either those proceedings terminated in his favor or the conviction was vacated.’ . . Defendants correctly point out that *Sanders* is not precedential, but the analysis still addresses the accrual question here. And since *Sanders* was decided, several district courts have held that unlawful pretrial detention claims are subject to *Heck*. See *Culp v. Flores*, 2020 WL 1874075, at \*2-3 (Apr. 15, 2020); *Hill v. Cook County*, 2020 WL 2836773, at \*11 (N.D. Ill. May 31, 2020); *Serrano v. Guevara*, 2020 WL 3000284, at \*18 (N.D. Ill. June 4, 2020). The Court finds the reasoning in those decisions persuasive. Here, Plaintiffs allege that they were ‘arrested, charged, and incarcerated’ as a result of ‘Defendants’ false allegations and fabricated evidence.’ . . In turn, the only fabricated evidence the complaints discuss is the stories the Defendant officers allegedly made up by manipulating Harris and McKinnie. . . The complaints also allege that at trial ‘Harris’s and McKinnie’s statements were the only evidence linking [Plaintiffs] to the shooting’ and the ‘judge convicted [Plaintiffs] on the basis of Harris[’s] and McKinnie’s pretrial statements,’ which were ‘entirely the result of Defendants’ fabrication.’ . . Because Plaintiffs allege that Defendants used the same evidence to support their pretrial detention that also secured their convictions, a finding that their detentions were unconstitutional would necessarily imply the invalidity of those convictions. As such, *Heck* barred Plaintiffs’ Fourth Amendment claims until their convictions were overturned in September 2018. . . Because Plaintiffs filed their claims within two years of that date, they are timely.”)

***Hill v. Cook County***, No. 18-CV-08228, 2020 WL 2836773, at \*9-11 (N.D. Ill. May 31, 2020) (“Drawing upon *McDonough*, the Seventh Circuit recently expounded on when a claim accrues in *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020). The plaintiff in *Savory* claimed that the government had suppressed and fabricated evidence. . . The Seventh Circuit found that ‘no section 1983 claim could proceed until the criminal proceeding ended in the defendant’s favor or the resulting conviction was invalidated within the meaning of *Heck*.’ . . Savory was released from state custody in 2011 with a conviction on his record. . . The Seventh Circuit held that his claim accrued only ‘when the governor of Illinois pardoned him,’ not when he was released. . . ‘Until that moment, his conviction was intact and he had no cause of action under section 1983.’ . . The pardon started the statute-of-limitations clock ticking. Here, Defendants try to make the same argument that failed in *Savory*. They argue that the clock started ticking when Hill’s pretrial detention ended (and his post-trial custody began). . . But the ‘rule urged by the defendants would result in claims being dead on arrival in virtually all section 1983 suits brought in relation to extant convictions.’ . . By their logic, Hill’s section 1983 claim would have accrued upon his conviction, ‘even though preclusion rules would effectively prevent [him] from bringing any claim inconsistent with’ his criminal conviction. . . Under Defendants’ approach, Hill could never bring an unlawful detention claim. If he filed after his conviction, but before his conviction was overturned, he would file too soon. But if he filed after dismissal of the indictment, he would file too late. It would create a heads-I-win-tails-you-lose dynamic against criminal defendants. And

in *Savory*, the Seventh Circuit flatly rejected the notion that criminal defendants are simply out of luck. In *Sanders v. St. Joseph County*, 2020 WL 1531354 (7th Cir. 2020), the Seventh Circuit returned to the issue of when a pretrial detention claim accrues. Sanders himself brought an unlawful detention claim. . . The Seventh Circuit held that Sanders ‘could not have used § 1983 to contest his custody while it was ongoing,’ and his ‘claim of unlawful detention accrued, at the earliest, when he was released from jail.’ . . The Court qualified its ruling in two footnotes. First, if the plaintiff ‘meant to challenge the legitimacy of his initial seizure, any claim related to his arrest that does not implicate the ensuing custody expired two years after the arrest.’ . . That is, when a plaintiff challenges the initial detention, and a finding in his favor wouldn’t undermine the later incarceration, then the claim accrues when the initial detention ends. . . Second, if the claim does implicate a conviction and ensuing incarceration, then the claim accrues only if the criminal defendant ultimately prevails:

If, however, a conclusion that [plaintiff’s] confinement was unconstitutional would imply the invalidity of an ongoing criminal proceeding or a prior criminal conviction, then *Heck* would continue to bar [plaintiff’s] claim after his release and until either those proceedings terminated in his favor or the conviction was vacated.

. . . Hill bases his Fourth Amendment claim on the assertion that he did nothing wrong. He claims that the Robbins Defendants made up a story that he was the getaway driver, coerced witnesses into implicating him, suppressed exculpatory evidence, and fabricated other evidence. . . The Robbins Defendants then passed off their investigation to the Cook County Sheriff Defendants. . . The Cook County Sheriff Defendants relied on the tainted investigation, and then proceeded to suppress exculpatory evidence and coerce false statements from witnesses. . . Defendants based Hill’s arrest, detention, and prosecution on falsified police reports and fabricated evidence. . . To secure his conviction, they used the same evidence that supported his pretrial detention. . . If Hill had brought his pretrial detention claim while incarcerated for murder, and prevailed, that finding would imply that he was innocent. Much like the plaintiffs in *Heck* and *Savory*, Hill ‘assert[s] the suppression of exculpatory evidence and the fabrication of false evidence in order to effect a conviction.’ . . ‘There is no logical way to reconcile those claims with a valid conviction.’ . . Another court in this district recently addressed this very issue. *See Culp v. Flores*, 2020 WL 1874075 (N.D. Ill. 2020). In *Culp*, the plaintiff claimed that he was arrested and charged without probable cause, and that his subsequent detention was based on fabricated police reports prepared by the arresting officers. . . The defendants argued that *Culp*’s claims were time-barred because he was released from prison in 2013, two years before he brought suit. . . Judge Feinerman analyzed *Culp*’s claims under the Seventh Circuit’s framework in *Savory* and *Sanders*, and held that ‘given the nature of his Fourth Amendment claim, a finding that *Culp*’s detention in jail was unconstitutional would imply the invalidity of the charges against him, [and] *Heck* barred that claim until those charges were dismissed.’ . . ‘[S]uccess on that claim would be incompatible with a conviction on the charges for which *Culp* was arrested, detained, and prosecuted,’ so the claim ‘did not accrue until the charges against him were dismissed.’ . . The same analysis applies here. Hill’s unlawful detention claim didn’t accrue until the Circuit Court of Cook County dismissed the indictment in December 2017. He filed this lawsuit one year later. So he satisfied the statute of limitations, with one year to spare.”)

**Moore v. City of Chicago**, No. 19 CV 3902, 2020 WL 3077565, at \*4 (N.D. Ill. June 10, 2020) (“*Heck*’s favorable termination rule applies to plaintiff’s unlawful detention claims. Those claims turn on allegations of fabricated evidence. And those allegations of fabricated evidence necessarily would have implied the invalidity of plaintiff’s ongoing criminal prosecution. Last year the Supreme Court applied the favorable termination rule to a claim of fabricated evidence. Plaintiffs who bring such claims ‘challenge the integrity of criminal prosecutions undertaken pursuant to legal process.’ [citing *McDonough*] They ‘challenge the validity of the criminal proceedings against him in essentially the same manner as the plaintiff in *Heck* challenged the validity of his conviction.’ . . . The Court thus held: ‘There is not a complete and present cause of action to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing. Only once the criminal proceeding has ended in the defendant’s favor, or a resulting conviction has been invalidated within the meaning of *Heck*, will the statute of limitations begin to run.’ . . . Defendants argue that *Heck* has nothing to do with unlawful pretrial detention claims brought under the Fourth Amendment. They argue that plaintiff’s claims expired almost a decade ago, two years after he was released on bond. Not so. Plaintiff claims that he was unlawfully detained based solely on fabricated evidence. His claims ‘directly challenge[ ]—and thus necessarily threaten[ ] to impugn — the prosecution itself.’ . . . His claims thus could not have accrued until his sentence was vacated and his charges were dismissed.”)

**Culp v. Flores**, No. 17 C 252, 2020 WL 1874075, at \*2-3 (N.D. Ill. Apr. 15, 2020) (“The Fourth Amendment claim alleges that Defendants ‘lacked probable cause to criminally charge and prosecute’ Culp and that they ‘based the arrest, detention and/or prosecution of [him] on their false allegations, testimony and fabricated police reports.’ . . . The statute of limitations for this claim is two years. . . . Citing *Manuel v. City of Joliet*, 903 F.3d 667 (7th Cir. 2018), and *Mitchell v. City of Elgin*, 912 F.3d 1012 (7th Cir. 2019), for the proposition that a Fourth Amendment pretrial detention claim accrues when the seizure ends, Defendants contend that Culp’s claim is time-barred because he was released from jail on April 30, 2013, well over two years before he filed suit. . . . Citing the Supreme Court’s subsequent decision in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), Culp argues under the *Heck* doctrine that his Fourth Amendment claim did not accrue until January 12, 2016, when the criminal case was dismissed. . . . In the alternative, he argues that because his bond conditions were severe enough under the standard articulated in *Mitchell* to effectuate a continued seizure, his claim did not accrue until those restrictions were lifted upon the dismissal of his criminal case. . . . The law governing the accrual date for § 1983 claims like Culp’s has been fluid, and both sides present reasonable and cogent arguments. Culp’s position prevails based on the understanding of *McDonough* and *Heck* expressed by the en banc Seventh Circuit in *Savory*. Two aspects of the Seventh Circuit’s analysis are pertinent here. First, *Savory* observes that *McDonough* establishes that the *Heck* doctrine applies to § 1983 claims brought not only by plaintiffs who have standing convictions, but also by plaintiffs who have not been convicted and are subject to ongoing criminal proceedings. . . . Second, *Savory* explains that when a plaintiff subject to ongoing criminal proceedings brings a § 1983 claim that, if successful, would be incompatible with a conviction on those charges, *McDonough* establishes that, under *Heck*, the

claim does not accrue ‘until the criminal proceeding end[s] in the [plaintiff’s] favor.’. Culp’s Fourth Amendment claim is premised on the complaint’s allegations that he committed no crime, . . . that Defendants ‘did not have any reason to believe that [he] had violated . . . any city, state or federal law,’ . . . and that Defendants ‘based the[ir] arrest, detention and/or criminal prosecution of [him] on their false allegations, testimony and fabricated police reports[.]’ . . . Because success on that claim would be incompatible with a conviction on the charges for which Culp was arrested, detained, and prosecuted, ‘[t]here is no logical way to reconcile th[e] claim[ ] with a valid conviction.’ . . . It follows under *Savory’s* understanding of *McDonough* and *Heck* that Culp’s Fourth Amendment unlawful detention claim—even if that claim were limited to the time he spent in jail, and did not extend through the time he was on bond—did not accrue until the charges against him were dismissed on January 12, 2016. This, in turn, renders that claim—brought one year later—timely under the two-year statute of limitations. This result finds strong support in *Sanders v. St. Joseph Cnty.*, \_\_\_ F. App’x \_\_\_, 2020 WL 1531354 (7th Cir. Mar. 31, 2020). The plaintiff in *Sanders* brought an unlawful detention claim, presumably under the Fourth Amendment, alleging that he was wrongfully jailed for several months. . . . The district court dismissed the claim on statute of limitations grounds, and the Seventh Circuit reversed. . . . Citing *Manuel*, the Seventh Circuit held that the plaintiff ‘could not have used § 1983 to contest his custody while it was ongoing,’ and therefore that his ‘claim of unlawful detention accrued, at the earliest, when he was released from jail.’ . . . Standing alone, that passage in *Sanders* supports Defendants’ position that Culp’s Fourth Amendment wrongful detention claim accrued upon his release from jail. In a footnote, however, the Seventh Circuit added this qualification:

If, however, a conclusion that [the plaintiff’s] confinement was unconstitutional would imply the invalidity of an ongoing criminal proceeding . . . , then *Heck* would continue to bar [his] claim after his release and until either those proceedings terminated in his favor or the conviction was vacated. *See McDonough v. Smith*, 139 S. Ct. 2149 (2019); *Savory v. Cannon*, 947 F.3d 409, 414 (7th Cir. 2020).

*Id.* at \*2 n.2. This analysis directly answers the accrual issue here: Because, given the nature of his Fourth Amendment claim, a finding that Culp’s detention in jail was unconstitutional would imply the invalidity of the charges brought against him, *Heck* barred that claim until those charges were dismissed. And because Culp’s wrongful detention claim is timely even if it is limited to the time he spent in jail, it is unnecessary at this juncture to decide whether, under *Mitchell*, his seizure continued for Fourth Amendment purposes while he was on bond. . . . As with the Fourth Amendment claim, the parties’ arguments regarding the Fourteenth Amendment claim are reasonable and cogent, but unlike the question of when the Fourth Amendment claim accrued, Seventh Circuit case law does not conclusively answer whether Culp has a viable Fourteenth Amendment claim. Resolving that very difficult question would have no impact on this case at this juncture because, regardless of its answer, the case will remain in federal court (as the Fourth Amendment claim survives), and because discovery on the Fourth and Fourteenth Amendment claims will be coextensive (as both rest on the same factual predicate). Accordingly, the court declines to dismiss the Fourteenth Amendment claim on the pleadings, knowing that it will have an opportunity to address the claim when Defendants renew their challenge at summary judgment.”)

*Hill v. City of Chicago*, No. 19 C 6080, 2020 WL 509031, at \*4 (N.D. Ill. Jan. 31, 2020) (“[T]he *Heck* bar does not toll the statute of limitations on Fourth Amendment unlawful pretrial detention claims. . . . *McDonough v. Smith*, 139 S. Ct. 2149 (2019), does not change this result. As *Brown* points out, *McDonough* was concerned with avoiding ‘collateral attacks on criminal judgments through civil litigation.’ *Brown*, 2019 WL 4958214, at \*3 (quoting *McDonough*, 139 S. Ct. at 2157). And ‘unlike fair trial claims, Fourth Amendment claims as a group do not necessarily imply the invalidity of a criminal conviction, and so such claims are not suspended under the *Heck* bar to suit.’ *Dominguez v. Hendley*, 545 F.3d 585, 589 (7th Cir. 2008). Rather, the Seventh Circuit recently clarified that a wrongful pretrial detention claim accrues upon conviction (if not sooner). *Knox v. Curtis*, 771 Fed. Appx. 656, 658 (7th Cir. 2019) (“[plaintiff’s] claim that he was arrested and detained without probable cause accrued either in August 2017 (when he was released on bond), or in November 2017 (when he was convicted).”) (internal citations omitted); see also *Brown*, 2019 WL 4958214, at \*3 (concluding the same). Accordingly, the Plaintiffs’ wrongful pretrial detention claims accrued no later than January 31, 2013, and the statute of limitations has long since run. Defendants’ motion to dismiss Count II of the complaints is granted.”)

*Andersen v. City of Chicago*, No. 16 C 1963, 2019 WL 6327226, at \*5–6 (N.D. Ill. Nov. 26, 2019) (“The Seventh Circuit has said that ‘a Fourth Amendment claim for wrongful detention accrues when the detention ends.’. . . Defendants argue, based on this premise, that Andersen’s pretrial detention ended in 1982, when he was convicted, and he should have brought his claim within two years of that date. Further, Defendants note, Andersen was released from any detention in 2007 (when he was released from prison), which is also more than two years before he brought suit. . . . In response, Andersen argues that *Heck* applies to his Fourth Amendment claim—to challenge his pretrial detention would impugn his conviction because it would challenge his confession and other evidence withheld and destroyed. Therefore, he asserts, he could not have brought his Fourth Amendment claim until favorable termination of his conviction. . . . Defendants’ argument that this claim accrued when Andersen was convicted is unsupported. Andersen’s detention did not end when he was convicted. In *Camm*, the Seventh Circuit discussed, without deciding, a similar statute of limitations issue. . . . In that case, the plaintiff had been held pretrial, convicted, then retried twice ending in an acquittal. The Court allowed the plaintiff’s Fourth Amendment claim to move forward based on the initial probable-cause affidavit issued in the case. Though the defendant had been convicted (twice) after the submission of that affidavit, at no point did the Court suggest that the claim accrued at the time of conviction. . . . Although not binding for that purpose, *Camm* indicates that the Seventh Circuit’s understanding is not that all Fourth Amendment claims accrue at the time of conviction. But that would only get Andersen to 2007, still too late to bring his claim. Even if a court were to determine that his detention ended at the end of his supervised release in 2010, he would still come up short. That is where *Heck* comes in. Although Defendants argue that *Heck* has no place in the pre-conviction context, in certain situations, *Heck* applies to ongoing prosecutions. . . . In some cases, the harm is distinct and accrues without regard to *Heck*, because at that point whether a prosecution will be brought is merely

speculative. See *Wallace v. Kato*, 549 U.S. 384, 390–91 (2007) (claim for arrest without a warrant accrues once detention is pursuant to legal process); see also *McDonough*, 139 S. Ct. at 2159 (“A false-arrest claim, *Wallace* explained, has a life independent of an ongoing trial or putative future conviction—it attacks the arrest only to the extent it was without legal process, even if legal process later commences.”). . . A claim, however, that ‘centers on evidence used to secure an indictment and at a criminal trial...does not require speculation about whether a prosecution will be brought....It directly challenges—and thus necessarily threatens to impugn—the prosecution itself,’ thereby implicating the concerns addressed in *Heck*. . . Andersen’s Fourth Amendment claim centers on the argument that he was wrongfully detained based on a coerced confession that implicated withheld and/or destroyed evidence. That confession was used to secure the charges against him, proceed with his prosecution, and convict him at trial. As such, *Heck* applies to his Fourth Amendment claim. To bring the claim earlier would have impermissibly challenged an extant conviction. Andersen’s Fourth Amendment claim, therefore, accrued with the favorable termination of his case and is timely.”)

***Brown v. City of Chicago***, No. 18 C 7064, 2019 WL 4958214, at \*3 (N.D. Ill. Oct. 8, 2019) (“Count VI states a claim for federal malicious prosecution. The court dismissed this count in its ruling on the City’s motion to dismiss because the Seventh Circuit does not recognize such a claim. . . The Estate Defendants have also moved to dismiss Count VI to the extent Plaintiff has restated the claim as one for pretrial detention without probable cause. But the court also rejected Plaintiff’s attempt to restate this count as a Fourth Amendment claim in its earlier ruling. . . Moreover, any unlawful pretrial detention claim that Plaintiff might have asserted would be time-barred under Seventh Circuit precedent holding that such a claim is not subject to the delayed accrual rule from *Heck*. . . Plaintiff’s reliance on *Manuel v. City of Joliet*, 903 F.3d 667 (7th Cir. 2018) (“*Manuel II*”), is misplaced. While the Seventh Circuit in *Manuel II*, 903 F.3d at 670, held that a claim for pretrial detention without probable cause begins to accrue when the pretrial detention ends, *Knox*, 771 Fed. Appx. at 658, clarified that pretrial detention can be considered as ending upon conviction. . . Thus, Plaintiff’s Fourth Amendment claims for his detention before his 1990 and 2008 trials needed to be filed in 1992 and 2010, respectively. *McDonough* does not save Plaintiff’s claim for pretrial detention without probable cause either. As already noted, *McDonough*, 139 S. Ct. at 2157, is grounded in a concern for avoiding ‘collateral attacks on criminal judgments through civil litigation.’ A Fourth Amendment claim does not constitute such a collateral attack. See *Dominguez v. Hendley*, 545 F.3d 585, 589 (7th Cir. 2008) (“Even if no conviction could have been obtained in the absence of the violation, the Supreme Court has held that, unlike fair trial claims, Fourth Amendment claims as a group do not necessarily imply the invalidity of a criminal conviction, and so such claims are not suspended under the *Heck* bar to suit.”). The delayed accrual embraced by the Supreme Court in *McDonough* is not implicated here.”)

***Brown v. City of Chicago***, No. 18 C 7064, 2019 WL 4694685, at \*5 (N.D. Ill. Sept. 26, 2019) (“Although the *McDonough* plaintiff had never been convicted, the Court held that *Heck* applies because a fabricated-evidence claim brought before a favorable termination in the criminal

proceedings could result in ‘conflicting civil and criminal judgments’ and ‘collateral attacks on criminal judgments through civil litigation.’. . . Concluding otherwise would mean that ‘[a] significant number of criminal defendants would face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them.’. . . Not only does that second option ‘risk[ ] tipping [a plaintiff’s] hand as to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context,’ but such parallel litigation also ‘run[s] counter to core principles of federalism, comity, consistency, and judicial economy.’. . . This same reasoning from *McDonough* was embraced by the Seventh Circuit in its recent decision in *Camm*, 2019 WL 4267769, at \*10–11, in which the court held that a *Brady* claim did not accrue until after the plaintiff in that case—who, like Mr. Brown, had been convicted at two trials—was acquitted at the third trial. The outcome in *Winstead*, like the one that Defendant advocates, would have required Plaintiff to file his claims related to his 1990 trial and convictions in 2005 when he was granted a new trial. In other words, according to Defendant, Mr. Brown should have filed his suit at the same time that the State was preparing to prosecute him again—the exact situation *McDonough* cautioned against. . . . The court concludes that Defendant’s motion to dismiss Counts I through V of Brown’s complaint, as they relate to the 1990 trial and convictions, must be denied. Count I states a fabrication-of-evidence claim—specifically, that the Individual Defendants fabricated a number of items of evidence, including Plaintiff’s confession, depriving Mr. Brown of a fair trial. As in *McDonough*, . . . Plaintiff’s fabrication-of-evidence claim regarding the 1990 trial and convictions did not begin to accrue until 2017, when his convictions were vacated and the charges against him were finally dropped. This complaint, filed less than a year later, states a timely fabrication claim.”) [*Accord, Brown v. City of Chicago*, 2019 WL 4958214 (N.D. Ill. Oct. 8, 2019) (applying same reasoning in refusing to dismiss claims against Estate Defendants)]

*Switzer v. Village of Glasford, Ill.*, No. 1:18-CV-1421, 2019 WL 3291519, at \*2-5 (C.D. Ill. July 22, 2019) (“The Supreme Court has held that pretrial detention without probable cause is actionable under § 1983 as a violation of the Fourth Amendment. . . . However, the Court left open the question of when the claim accrues. . . . Although *Manuel v. City of Joliet* (“*Manuel II*”), 903 F.3d 667 (7th Cir. 2018), determined that a claim for unlawful pretrial detention under the Fourth Amendment accrues when the detention ends, the Seventh Circuit declined to decide whether a plaintiff’s pretrial release on bond constitutes a prolonged seizure within the meaning of the Fourth Amendment. That is the core of the case at hand. On June 20, 2019, the Supreme Court held that the statute of limitations for a fabricated-evidence claim does not begin to run until the criminal proceedings against the defendant (i.e., the § 1983 plaintiff) have terminated in his favor. *See McDonough v. Smith*, 139 S. Ct. 2149 (June 20, 2019). . . . Initially, Defendants assert Plaintiff was never seized as contemplated by the Fourth Amendment because his pretrial release restrictions were not an onerous restriction on travel, nor a significant restriction on liberty. Plaintiff’s pretrial release conditions are provided as follows: Plaintiff must (1) appear for future hearings; (2) submit to the orders and process of the court; (3) not depart the state without leave; (4) give written notice of any change of address; and (5) not violate any criminal statutes. . . .

Defendants further argue Plaintiff was never actually housed or incarcerated, but rather, he was arrested ‘at such a late time that Plaintiff did not arrive to the jail until the early morning hours of the next day[.] Plaintiff was simply booked and released on October 1, 2015.’ . . . Here, the totality of the circumstances indicate that a seizure did, in fact, occur. While Defendants focus on the travel restrictions stipulation, it is not the only factor the Court considers. Plaintiff was pulled over, arrested, physically placed into a police car, taken to Peoria County Jail, required to bond out of jail, and also had travel restrictions placed upon him. . . . Under the *Mendenhall* standard, Plaintiff surely did not feel he was free to leave the backseat of a police vehicle—let alone leave the jail where law enforcement was currently booking him for a crime—even if he did understand that he could request permission to leave the state while on pretrial release. Defendants’ specific emphasis on ‘onerous travel restrictions’ as the threshold for a seizure overlooks the fact of his initial detention. Moreover, the Court assesses the entirety of the restrictive situation, not just the pretrial release travel restrictions. A plaintiff’s liberty may certainly be restrained in other ways, as it was here. . . . Additionally, Defendants seem to incorrectly equate a seizure with spending time in jail. The Supreme Court has previously offered examples of circumstances that might indicate a seizure without physical incarceration. Such examples include, but are not limited to, ‘the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.’ . . . Since the Supreme Court has not specified that a Fourth Amendment seizure must physically incarcerate the seized individual, Defendants’ argument is unpersuasive. . . . Next, Defendants argue that any recognizable seizure must be limited in time and scope to any actual detention that did occur. From Defendants’ perspective, Plaintiff did not remain seized within two years of the date of the filing of his original Complaint, and thus his claims fall outside the statute of limitations. Plaintiff was arrested late in the evening of September 30, 2015, released on bond on October 1, 2015, and filed his original Complaint more than two years later on November 21, 2018. . . . Because a seizure did occur as alleged in Count I, the question in this case becomes when the statute of limitations begins to run—either upon Plaintiff’s pretrial release on October 1, 2015, or when the charges were dismissed on December 7, 2017. . . . It is true that the concept of a ‘continuing seizure’ has been previously rejected by the Seventh Circuit. . . . However, several ‘sister circuits have adopted the minority approach that ‘pretrial release might be construed as a “seizure” for Fourth Amendment purposes if the conditions of that release impose significant restrictions on liberty.’ . . . Such significant restrictions have been broadly defined. [collecting cases] Understanding this position is the minority, there is still ‘out-of-circuit support for the proposition that the concept of “seizure” under the Fourth Amendment extends beyond physical detention.’ . . . Here, in order to prevent alleged police misconduct from escaping Fourth Amendment oversight, it is appropriate to find that Plaintiff’s pretrial release on bond is classified as a significant restriction on liberty. Accordingly, pretrial release on bond is included in the definition of a Fourth Amendment seizure. . . . In June 2019, the Supreme Court faced a similar predicament in *McDonough v. Smith*, 139 S. Ct. 2149 (June 20, 2019), which is dispositive to the issue presented here. Similar to how Burgess allegedly falsely swore in a complaint and falsely testified, the defendant in *McDonough* fabricated evidence and presented fabricated testimony. The Court held that the statute of limitations for a fabricated-evidence claim, and ultimately for

a § 1983 plaintiff, does not begin to run until the criminal proceedings against the defendant have terminated in his favor. . . This favorable termination requirement ‘applies whenever “a judgment in favor of the plaintiff would necessarily imply” that his prior conviction or sentence was invalid.’ . . In sum, under the *McDonough* standard, the statute of limitations for a § 1983 plaintiff begins to run ‘when the criminal proceedings against him are terminated in his favor.’ . . For *McDonough*, that meant when he was acquitted at the end of his second trial; for Plaintiff, that means when his charges were dismissed on December 7, 2017. Applying the two-year statute of limitations to the accrual date of December 7, 2017, Plaintiff’s Complaint is timely so far as it was brought before December 7, 2019. Plaintiff’s claim is therefore timely as his original Complaint was filed on November 21, 2018. Here, for the aforementioned reasons, Plaintiff’s pretrial release on bond can be classified as a significant restriction on liberty and, since the Supreme Court has now provided favorable authority, is thus included in the definition of a Fourth Amendment seizure. Accordingly, Defendants’ Motion to Dismiss with respect to Count I is DENIED.”)

*Mayo v. Lasalle County*, No. 18 CV 01342, 2019 WL 3202809, at \*3 n.3 (N.D. Ill. July 15, 2019) (“Following *Manuel I*, the Seventh Circuit has held that the Fourth Amendment is the *exclusive* ground for a claim of unlawful pretrial detention, even when based on allegations of fabrication of evidence. . . In *McDonough v. Smith*, 139 S. Ct. 2149 (2019), however, the Supreme Court addressed the question of the accrual date for a pretrial due process claim based on allegations of fabrication of evidence and involving pretrial restrictions on liberty. The Court assumed without deciding that the framing of the claim as implicating the Due Process Clause was appropriate. . . That assumption seems to cast some doubt on the Seventh Circuit’s view that *Manuel I* foreclosed grounding a claim of pretrial restriction of liberty based on the use of fabricated evidence on the Due Process Clause in addition to the Fourth Amendment. But the plaintiffs have not defended their complaint by asserting that they have a fabrication of evidence due process claim and even if they had, this Court could not disregard the Seventh Circuit’s interpretation of *Manuel I* based on the Court’s mere assumption—rather than holding—that such a claim is viable.”)

*Mayo v. Lasalle County*, No. 18 CV 01342, 2019 WL 3202809, at \*4 n.5 (N.D. Ill. July 15, 2019) (“The Supreme Court’s holding in *McDonough* again bears noting. In *McDonough*, the Court held that that *Heck* *does* apply to toll the accrual date of a due process claim for fabrication of evidence (assuming such a claim exists) until termination of the charges in the civil plaintiff/criminal defendant’s favor because until that time, a fabrication of evidence claim impugns the integrity of the prosecution or conviction. That is understandable; as the Seventh Circuit observed in *Lewis*, a conviction ‘premised on deliberately fabricated evidence will always violate the defendant’s right to due process.’ . . Pursuing such a claim before a criminal proceeding has been terminated in a manner consistent with the claim would contravene *Heck*’s principle that civil actions are not the appropriate means for contesting the validity of a criminal prosecution or conviction. But *McDonough*’s holding has no bearing here, because Mayo and Burt, like the plaintiffs in *Wallace* and unlike the plaintiffs in *McDonough*, challenge the validity of their detention on

Fourth Amendment grounds; they do not challenge the validity of a subsequent prosecution in terms of Due Process or assert a fabrication of evidence claim.”)

### **Eighth Circuit**

*Martin v. Julian*, No. 20-3309, 2021 WL 5365255, at \*2–3 (8th Cir. Nov. 18, 2021) (“[T]he Supreme Court has not clearly decided whether there is a § 1983 cause of action for malicious prosecution under either the Fourth Amendment or the Due Process Clause. See *McDonough v. Smith*, — U.S. —, 139 S. Ct. 2149, 2155-58, 204 L.Ed.2d 506 (2019), reviewing when the statute of limitations begins to run on a § 1983 fabricated-evidence claim; *Wallace*, 549 U.S. at 390 n.2, 127 S.Ct. 1091, noting the Court ‘ha[s] never explored the contours of a Fourth Amendment malicious prosecution suit under § 1983.’ As the district court recognized, we have held that ‘an allegation of malicious prosecution without more cannot sustain a civil rights claim under § 1983.’. . . This means that Defendants’ alleged wrongful conduct must also infringe ‘some provision of the Constitution or federal law.’. . . Here, the alleged Fourth Amendment violations -- false imprisonment and seizure of property based on fabricated evidence -- occurred before legal process began and are time-barred, despite Plaintiffs’ claim that the unlawful seizures continued even after the criminal charges were *nolle prossed*. . . The only due process claim alleged in the complaint was failure to disclose evidence (the recruitment of confidential informant Miller) in violation of *Brady*. Plaintiffs do not contest the dismissal of their *Brady* claims on appeal. Nor did they include § 1983 malicious prosecution claims in the substantive Counts of their complaint. On this record, we conclude the district court did not abuse its discretion in declining to vacate or set aside its initial dismissal Order because Plaintiffs failed to state plausible § 1983 malicious prosecution claims under controlling Eighth Circuit precedent.”)

### **Ninth Circuit**

*Bonelli v. Grand Canyon University*, No. 20-17415, 2022 WL 729277, at \*3–7 (9th Cir. Mar. 11, 2022) (“ The general rule is that a civil rights claim accrues under federal law ‘when the plaintiff knows or has reason to know of the injury which is the basis of the action.’. . . We have held that this traditional accrual rule applies to the constitutional and statutory violations that Bonelli asserts here. For Fourth Amendment violations, ‘federal law holds that a cause of action for illegal search and seizure accrues when the wrongful act occurs ... even if the person does not know at the time that the search was warrantless.’. . . By his allegations, Bonelli knew that he was wrongfully detained, and his student ID wrongfully seized, on the days that each incident occurred. The statute of limitations on Counts 1 and 2, both § 1983 claims premised on Fourth Amendment violations, thus began to run on February 19, 2017 and July 25, 2017, respectively. We have likewise applied the traditional accrual rule to § 1983 claims alleging First Amendment violations, including First Amendment retaliation. . . . Thus, Bonelli’s Count 3 § 1983 claim alleging First Amendment violations also accrued on February 19, 2017. . . . We have explained that the usual accrual rule—that a claim “accrues under federal law when the plaintiff knows or has reason to know of the actual injury”—governs § 1981 claims alleging racial discrimination, as well as federal civil rights

claims generally. . . . We thus conclude that Bonelli had ‘complete and present cause[s] of action’ by August 24, 2017, at the latest. . . . But Bonelli did not file his complaint until January 20, 2020, more than two years later. Under traditional accrual principles, his action is untimely. . . . Resisting this, Bonelli invokes *Heck* to argue that his claims did not accrue until August 29, 2018, when GCU rescinded Bonelli’s disciplinary warning. But we conclude that *Heck* does not apply to Bonelli’s claims. . . . *Heck* analogized to the common law tort of malicious prosecution, one element of which ‘is termination of the prior criminal proceeding in favor of the accused.’ . . . It is this aspect of *Heck* that Bonelli latches onto. He argues we should apply *Heck*’s deferred accrual rule so that his claims did not accrue until GCU rescinded his disciplinary warning, which was less than two years before he filed suit. Bonelli’s reliance on *Heck* is misplaced. . . . As we have explained, ‘[w]here there is no “conviction or sentence” that may be undermined by a grant of relief to the plaintiffs, the *Heck* doctrine has no application.’ . . . Bonelli cannot show how his § 1983 claims would be at odds with any conviction or sentence. By its terms, *Heck* does not apply here. . . . To the extent that Bonelli seeks not the direct application of *Heck*, but a *Heck*-like rule of delayed accrual, his argument fares no better. If a plaintiff has a ‘complete and present cause of action,’ his claim accrues under federal law. . . . Bonelli’s more subtle reliance on *Heck* consists of attempting to analogize his claims to the tort of malicious prosecution, which *Heck* also invoked by way of analogy. . . . Malicious prosecution has a favorable-termination requirement, . . . and Bonelli suggests that his claims likewise required the favorable termination of his university disciplinary warning. The problem for Bonelli is that his claims are not properly analogized to the tort of malicious prosecution, either factually or legally. Sections 1981 and 2000d protect against racial discrimination; neither of these claims sounds in malicious prosecution. The same is true with Bonelli’s § 1983 claims. None of Bonelli’s claims depended on GCU rescinding the disciplinary warning. Bonelli knew or had reason to know of his claimed injuries—alleged seizures of his person and property, curbing of his First Amendment rights and related retaliation, and discrimination—when those acts occurred. Based on the allegations of his complaint, the disciplinary warning was perhaps an outgrowth of these same incidents. But the tort of malicious prosecution ‘challenge[s] the integrity of criminal prosecutions undertaken “pursuant to legal process.”’ *McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019) (quoting *Heck*, 512 U.S. at 484). And that is not the nature of Bonelli’s claims. Setting aside that this lawsuit is not about criminal prosecutions, Bonelli challenges not the process that was brought to bear against him through the disciplinary warning, but discrete incidents that allegedly produced immediate injuries. It is not apparent that any of his claims would necessarily imply the invalidity of his disciplinary warning, either. . . . Of course, even in a ‘classic malicious prosecution’ situation, the injury ‘first occurs as soon as legal process is brought to bear on a defendant.’ *McDonough*, 139 S. Ct. at 2160. And in that context the law steps in and does provide for a later accrual only upon the favorable termination of the prosecution. . . . But the reason for that customized accrual rule is important, and it shows why Bonelli’s attempted analogy to malicious prosecution is unpersuasive. As the Supreme Court explained in *McDonough*, we impose a favorable-termination requirement for malicious prosecution based on ‘pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.’ . . . Whatever facial similarities that might exist between a university disciplinary

process and a state criminal prosecution, Bonelli has not explained how the ‘core principles’ reinforcing the malicious prosecution analogy—‘federalism, comity, consistency, and judicial economy,’ . . . support extending this analogy to the collegiate code-of-conduct inquiry alleged in his complaint. Bonelli cites no case taking that approach. . . . If Bonelli had filed suit during the pendency of GCU’s review of his disciplinary warning, the district court could have considered whether to stay the case pending completion of that process. . . . But Bonelli’s position on appeal would mean he would have no cognizable § 1983 claim at all, unless and until that process terminated in his favor. . . . Although that would conveniently prevent Bonelli’s own claims from now being untimely, it would likely forestall many other § 1983 claims, without adequate legal justification. And it would do so in a context much different than *Heck* or *McDonough*. Here, the implication of Bonelli’s argument is that if his university disciplinary warning had not been rescinded (*i.e.*, favorably terminated), he might have no further recourse at all. We do not think the malicious prosecution analogy can be stretched to impose such a hard bargain in the context before us.”)

*Manansingh v. United States*, No. 2:20-CV-01139-DWM, 2021 WL 2080190, at \*4-5 & nn. 2, 3 (D. Nev. May 24, 2021) (“Plaintiffs first argue that their claims would have been barred by *Heck* had they pursued them prior to the June 21, 2018 dismissal of Manansingh’s indictment. The argument is unpersuasive. ‘*Heck* established the now well-known rule that when an otherwise complete and present § 1983 cause of action would impugn an extant conviction, accrual is deferred until the conviction or sentence has been invalidated.’ *Bradford v. Scherschligt*, 803 F.3d 382, 386 (9th Cir. 2015). While the Ninth Circuit determined at one point that the *Heck* bar extended to pending criminal proceedings, . . . the Supreme Court subsequently held in *Wallace*, that ‘*Heck* applies only when there is an extant conviction and is not implicated merely by the pendency of charge[.]’. . . Here, no conviction was ever obtained, let alone invalidated, so *Heck* does not apply. ‘Consequently, the resolution of this [case] hinges on traditional rules of accrual and not on the extension of *Heck* to [these] proceedings.’ *Bradford*, 803 F.3d at 386. . . . Plaintiffs’ substantive due process claim (Claim 4) includes a properly pled Fifth Amendment fabricated evidence claim. . . . That claim is also timely, as it did not accrue until ‘the criminal proceedings against [Manansingh] terminated in his favor.’ *McDonough v. Smith*, 139 S. Ct. 2149, 2161 (2019). Here, the criminal case against Manansingh was dismissed by order of the district court on June 21, 2018. Although it was not a final assessment of innocence, courts have held that dropping charges or a *nolle prosequi* is an affirmative choice to terminate criminal proceedings *for purposes of claim accrual*. [citing cases] Because Plaintiffs brought their fabrication claim within two years of the dismissal of the criminal charges against Manansingh, that claim is timely. . . . ‘Favorable termination’ in this context is not necessarily concomitant with the ‘favorable termination’ element of malicious prosecution. *See Roberts v. City of Fairbanks*, 947 F.3d 1191, 1202 n.12 (9th Cir. 2020) (malicious prosecution claim may require termination ‘dispositive of the defendant’s innocence’). . . . Apart from a dispute over what qualifies as ‘favorable termination,’ the parties do not appear to dispute that this claim is timely under *McDonough*.”)

*Caldwell v. City of San Francisco*, No. 12-CV-01892-DMR, 2020 WL 6270957, at \*5–7 & n.3 (N.D. Cal. Oct. 26, 2020) (“*McDonough* did not address whether a plaintiff must show favorable termination of a criminal case in order to prevail on a constitutional claim challenging the use of fabricated evidence in that case. Instead, *McDonough* considered the question of when the statute of limitations begins to run on a section 1983 fabricated evidence claim. . . . Relying on its decision in *Heck*, and noting that it was ‘follow[ing] the analogy [to malicious prosecution claims] where it leads,’ the Court concluded that the plaintiff ‘could not bring his fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution.’. . . *McDonough* discussed *Heck* at length. It explained that in *Heck*, the Court held that ‘in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid,’ a section 1983 plaintiff must prove that his or her conviction had been invalidated. . . . A plaintiff may do so by showing that the conviction ‘has been [1] reversed on direct appeal, [2] expunged by executive order, [3] declared invalid by a state tribunal authorized to make such determination, or [4] called into question by a federal court’s issuance of a writ of habeas corpus.’. . . *McDonough* reasoned that ‘malicious prosecution’s favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil judgments’ and ‘avoids allowing collateral attacks on criminal judgment through civil litigation.’. . . The Court then concluded that ‘[b]ecause a civil claim such as *McDonough*’s, asserting that fabricated evidence was used to pursue a criminal judgment, implicates the same concerns, it makes sense to adopt the same rule.’. . . Therefore, a statute of limitations on a fabricated evidence claim begins to run ‘once the criminal proceeding has ended in the defendant’s favor, or a resulting conviction has been invalidated within the meaning of *Heck*[.]’ . . . Here, Defendants distort *McDonough* by asserting that it imposed a ‘favorable termination’ requirement for fabricated evidence claims that is identical to the requirement for malicious prosecution claims. *See* Mot. 10 (citing *Mills v. City of Covina*, 921 F.3d 1161, 1170-71 (9th Cir. 2019) (malicious prosecution claim requires a termination reflecting plaintiff’s innocence)). According to Defendants, *Caldwell* cannot allege that the criminal proceedings terminated in his favor as he was never acquitted or declared innocent of the charges. Defendants are wrong. *McDonough* made no such ruling. Instead, it decided the question of when a claim for fabricated evidence accrues; it noted that it was not deciding the ‘contours’ of such a claim, and it did not hold that such a claim is identical to a malicious prosecution claim. . . . In fact, Defendants’ interpretation of *McDonough* contradicts the express ruling in *McDonough* that a fabricated evidence claim does not accrue until ‘the criminal proceeding has ended in the defendant’s favor, or a resulting conviction has been invalidated within the meaning of *Heck*[.]’ . . . In a recent opinion, the Ninth Circuit examined this exact language and held that ‘[b]y posing the favorable-termination rule and invalidation under *Heck* disjunctively,’ ‘*McDonough* firmly undermines the . . .insinuation that they are coterminous.’. . . Here, it is undisputed that *Caldwell*’s conviction was ‘invalidated within the meaning of *Heck*’ because it was ‘declared invalid by a state tribunal authorized to make such determination.’. . . *Roberts* is directly on point here. It held that the favorable termination rule applicable to malicious prosecution claims is distinct from the ‘four means of favorable termination’ articulated in *Heck*. In *Roberts*, the Ninth Circuit addressed

the question of ‘whether § 1983 plaintiffs may recover damages if the convictions underlying their claims were vacated pursuant to a settlement agreement.’ . . . The settlement agreement provided that the parties would ask a court to vacate the plaintiffs’ convictions, and specifically recognized that ‘[t]he parties have not reached agreement as to [the plaintiffs’] actual guilt or innocence.’ . . . After a state court vacated the plaintiffs’ convictions and they were released from prison, the plaintiffs filed a section 1983 action alleging deprivation of liberty, malicious prosecution, and several other claims. . . . The district court dismissed their claims as barred by *Heck*, holding that the ‘vacatur of convictions pursuant to a settlement agreement was insufficient to render the convictions invalid[.]’. . . The Ninth Circuit reversed, holding that the *Heck* bar was inapplicable because the plaintiffs’ convictions were vacated and the underlying indictments had been dismissed. The court ruled that in the absence of a criminal judgment or charges pending against the plaintiffs, *Heck* did not apply as a bar to the subsequent civil rights action. . . . The defendants argued that even though the convictions were vacated, they had not been ‘declared invalid’ as required by *Heck* because the settlement did not establish the plaintiffs’ innocence and thus did not meet the ‘favorable-termination’ rule for a malicious prosecution claim. . . . The Ninth Circuit rejected this argument as improperly conflating ‘the favorable-termination rule in the tort of malicious prosecution with *Heck*’s four distinct means of favorable termination.’ . . . It expressly found that ‘*Heck*’s favorable-termination requirement is distinct from the favorable-termination element of a malicious-prosecution claim.’ . . . According to *Roberts*, the argument forwarded by the defense (which is the same argument asserted by Defendants in this case) ‘contravenes the plain language of *Heck*’ because convictions can be invalidated on the grounds set forth in *Heck* without ‘indicat[ing] the innocence of the accused,’ as is required for a malicious prosecution claim. . . . It noted that ‘[c]onvictions “called into question by a federal court’s issuance of a writ of habeas corpus” routinely terminate in a manner that could not sustain a malicious-prosecution action.’ . . . Defendants acknowledge that in *Roberts*, the Ninth Circuit clearly stated that the favorable termination element of a malicious prosecution claims should not be conflated with the favorable termination requirement of *Heck*, and that *Heck* does not bar a 1983 suit unless the plaintiff could succeed in a malicious prosecution action. But Defendants go on from there to pronounce that ‘[t]he converse...is also true—a plaintiff cannot succeed in a malicious prosecution or fabrication of evidence action merely by overcoming the *Heck* bar.’ . . . Defendants cite two cases which purportedly support their pronouncement, but neither do. *Mills v. City of Covina*, 921 F.3d 1161, 1170-71 (9th Cir. 2019) discusses the elements of a malicious prosecution claim, including the favorable termination element, but says nothing about fabrication of evidence claims. In *Bradford v. Scherschligt*, 803 F.3d 382, 386-89 (9th Cir. 2015), the court held that a *Devereaux* claim for fabrication of evidence accrues when the conviction or sentence is invalidated, but in the retrial context, it accrues on the date the plaintiff is acquitted in a retrial. *Bradford* does not hold that a fabrication of evidence claim requires a favorable termination. . . . In sum, *Roberts* considered and rejected the exact position taken by Defendants here. . . . Accordingly, Caldwell does not have to plead that the underlying criminal proceedings terminated in his favor in order to proceed with his section 1983 due process claim against Crenshaw.”)

**E. *Edwards v. Balisok***

In *Edwards v. Balisok*, 520 U.S. 641 (1997), the Supreme Court extended the principle of *Heck* to prisoners' § 1983 challenges to prison disciplinary proceedings, claiming damages for a procedural defect in the prison administrative process, where the administrative action taken against the plaintiff resulted in the deprivation of good-time credits. Where prevailing in the challenge would necessarily affect the duration of confinement, by restoration of good-time credits, the § 1983 claim will be dismissed and plaintiff will have to invalidate the disciplinary determination through appeal or habeas corpus before pursuing a damages action. *Id.* at 648. The prisoner in *Edwards* also sought prospective injunctive relief, "requiring prison officials to date-stamp witness statements at the time they are received." The Court recognized that "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983." However, because neither the Ninth Circuit nor the District Court considered the claim for injunctive relief, the Supreme Court left the matter for consideration by the lower courts on remand. 520 U.S. at 648, 649. Compare, e.g., *Clarke v. Stalder*, 154 F.3d 186, 189-91 (5th Cir. 1998) (*en banc*) ("[U]nlike the sort of prospective relief envisioned by the Supreme Court in *Edwards* that may have only an 'indirect impact' on the validity of a prisoner's conviction, . . . the type of prospective injunctive relief that Clarke requests in this case – a facial declaration of the unconstitutionality of the 'no threats of legal redress' portion of Rule 3 – is so intertwined with his request for damages and reinstatement of his lost good-time credits that a favorable ruling on the former would 'necessarily imply' the invalidity of his loss of good-time credits.") *with id.* at 194 (Reynaldo G. Garza, J., dissenting) ("The majority must remember that Justice Scalia in *Heck* established that if a federal judicial action would 'necessarily imply' the invalidity of a prison conviction the court may not act. . . . Justice Scalia's words are 'necessarily imply' not 'possibly imply' or 'probably imply.'").

See also *Moskos v. Hardee*, 24 F.4th 289, 295-96 (4th Cir. 2022) ("Moskos alleges that the defendants violated his substantive and procedural due process rights by conducting a sham investigation, following which he was convicted of several disciplinary infractions and lost good-time credits. Moskos brought his suit under 42 U.S.C. § 1983, which provides a cause of action for individuals seeking damages for constitutional violations. But § 1983 does not provide a cause of action in the circumstances present here. The Supreme Court has long held that 'habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement' and that this 'specific determination must override the general terms of § 1983.' . . . This principle applies just as clearly to prison disciplinary convictions resulting in the loss of good-time credits as it does to other convictions, since the restoration of good-time credits is 'within the core of habeas corpus in attacking the very duration of [the prisoner's] physical confinement itself.' . . . It has long been settled law, therefore, that a plaintiff may not challenge the validity of a disciplinary conviction through a damages suit under § 1983. In particular, 'when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.' . . . If so, 'the

complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence already has been invalidated,’ whether on direct appeal, by executive order, by a state tribunal, or by a federal court’s issuance of a writ of habeas corpus. . . In *Edwards v. Balisok*, . . . the Supreme Court made clear that this rule applies not merely to substantive challenges to convictions, but also to those challenges to internal prison procedures that would be ‘such as necessarily to imply the invalidity of the judgment.’ . . . And *Balisok* was emphatic as to how the courts should handle such claims: ‘[A] claim is either cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed.’ . . . Here, as in *Balisok*, Moskos brings a due process challenge to the disciplinary investigation conducted against him, which resulted in the loss of good-time credits. Here, as in *Balisok*, Moskos has not invalidated his disciplinary convictions. And here, for virtually identical reasons as in *Balisok*, Moskos’s due process challenge would ‘necessarily imply the invalidity of the punishment imposed.’ . . . After all, the gravamen of Moskos’s due process argument is that the defendants falsified information, because of which ‘Moskos was ultimately found guilty of three prison disciplinary offenses that he did not commit,’ causing him to lose good-time credits. . . [A] conclusion that prison staff fabricated evidence to cover up their involvement clearly would imply that Moskos’s disciplinary convictions were invalid. Indeed, Moskos states repeatedly that he was wrongfully convicted ‘based solely’ on the due process violations he alleges. . . . Because his claims would necessarily imply the invalidity of the judgment, they must be dismissed under *Balisok*. If Moskos believes that he has been wrongfully convicted of these disciplinary infractions, he is of course free to seek legal recourse. But if he seeks to do so in federal court, he must use the channel that Congress has provided for such claims. That path is through a habeas petition, subject to those statutory requirements that Congress carefully crafted to respect the finality of state judgments. In law, unlike in history, not all roads lead to Rome. Since Moskos did not take a proper road, we affirm the district court as to his due process claim.”); *Colvin v. LeBlanc*, 2 F.4th 494, 499 (5th Cir. 2021) (“Colvin maintains that he should be released in 2023, not 2052, and challenges the methodology used to calculate his release date. Regardless of whether Colvin challenges the application of good time credit or the failure to credit his state sentence with federal time served, his claim ultimately challenges a single issue: the duration of his state sentence. A claim for speedier release is actionable by writ of habeas corpus. . . . and a § 1983 damages action predicated on the sentence calculation issue is barred by *Heck* because success on that claim would necessarily invalidate the duration of his incarceration.”); *Lennear v. Wilson*, 937 F.3d 257, 267, 276-77 (4th Cir. 2019) (“On March 6, 2017, Petitioner filed a habeas petition under 28 U.S.C. § 2241 in the United States District Court for the Eastern District of Virginia. . . . on grounds that the disciplinary review process violated his due process rights because he was denied access to and official consideration of video surveillance evidence of the incident, citing *Wolff v. McDonnell*, 418 U.S. 539 (1974). . . . In *Edwards v. Balisok*, 520 U.S. 641 (1997), the Supreme Court expressly rejected the use of *Hill*’s ‘some evidence’ standard in the procedural due process context. In particular, the Court held that *Hill*’s ‘some evidence’ standard addresses the ‘*evidentiary requirements of due process*’ but ‘in no way abrogate[s] the due process requirements enunciated in *Wolff*.’ . . . Accordingly, *Hill*’s ‘some evidence’ standard is ‘irrelevant’ in determining whether a denial of procedural due process is harmless. . . . Rather than applying *Hill*’s ‘some evidence’ standard, courts tasked with determining whether prison officials’

failure to disclose or consider testimonial or documentary was harmless have considered whether the excluded evidence could have ‘aided’ the inmate’s defense. . . Accordingly, we hold that in evaluating whether prison officials’ failure to disclose or consider evidence was harmless, courts must determine whether the excluded evidence could have aided the inmate’s defense.”); **James v. Pfister**, 708 F. App’x 876, \_\_\_ (7th Cir. 2017) (“We agree with James that the district court erred in relying on *Heck* as a reason to dismiss his lawsuit. *Heck* and *Edwards* do not bar review of prison disciplinary proceedings under § 1983 unless that review could imply the invalidity of the plaintiff’s continued custody. . . As we explained in *Simpson*, . . . *Heck* and *Edwards* are ‘beside the point’ for inmates whose infractions are punished by disciplinary segregation or restrictions on recreation, since neither penalty ‘is a form of “custody” under federal law.’ In contrast, *Heck* and *Edwards* will be an obstacle for an inmate who tries using § 1983 to regain good time that was revoked after a disciplinary hearing, since he remains in ‘custody.’ But James did not lose good time, a fact confirmed by an attachment to his appellate brief.”); **LaFountain v. Harry**, 716 F.3d 944, 950 (6th Cir. 2013) (“In substance, LaFountain’s claim based on his misconduct charges is a claim that the defendants entrapped him. But entrapment is generally a complete defense. . . Thus, if true, the prison should not have convicted LaFountain of the misconduct charges that resulted in the loss of his good-time credits. Moreover, LaFountain alleged that Barbier ‘purposefully falsified evidence in order to assure that [LaFountain] would be found guilty[.]’ This allegation, too, implies the invalidity of the prison’s misconduct findings and thus the deprivation of LaFountain’s good-time credits. . . And the duration of LaFountain’s confinement is directly affected by the loss of his good-time credits. . . Thus in this appeal, as in an earlier one, ‘LaFountain’s challenges to his misconduct hearings and the resultant loss of “good time” credits[ ] affect the length of his sentence and ... are barred under *Edwards* and *Heck*.’ . . LaFountain tries to circumvent *Heck* by citing *Thomas v. Eby*, 481 F.3d 434 (6th Cir.2007). There, the court allowed a prisoner to proceed with a retaliation claim based on a misconduct charge even though the prisoner was convicted of the misconduct. But *Thomas* involved disciplinary credits, not good-time credits. And ‘disciplinary credits ... do not determine when a sentence ... is completed[.]’ . . Here, in contrast, the prison deprived LaFountain of good-time credits, which do result in a reduction of a prisoner’s sentence. . . *Thomas* is therefore inapposite.”); **White v. Fox**, 294 F. App’x 955, \_\_\_ (5th Cir. 2008) (“A ‘conviction,’ for purposes of *Heck*, includes a ruling in a prison disciplinary proceeding that results in a change to the prisoner’s sentence, including the loss of good-time credits. . . . A claim for damages based on a failure to receive a written statement of the evidence relied on in a prison disciplinary proceeding is cognizable under § 1983. Therefore, the district court in this case erred in dismissing White’s § 1983 claim in its entirety. . . . On remand, the district court should decide White’s § 1983 claim to the extent that White seeks damages for the disciplinary board’s failure to provide him with a written statement of the evidence relied on during the disciplinary proceeding. The court should also consider the ‘snitch’ claim and the alleged harm that resulted from this designation. We caution, however, that the damages cannot encompass the ‘injury’ of being deprived of good-time credits, and must stem solely from ‘the deprivation of civil rights.’”)

*Compare Yarbrough v. Decatur Housing Authority*, 941 F.3d 1022, 1028-30 (11th Cir.

2019) (“[T]he precedents holding that procedural due process prohibits decisions predicated on no evidence must not be understood to license review of the correctness of an agency decision. Instead, these precedents establish only that a procedure that permits decisions founded on no evidence violates the Due Process Clauses. . . .As the Supreme Court explained in *Hill*, the form of minimal evidentiary review mandated in some contexts by procedural due process requires only ‘some evidence’ that ‘supports the decision’ in question. . . . The decision to terminate Yarbrough’s voucher satisfies this standard. The Authority’s decision was based on testimony from Gray, two grand jury indictments, arrest records, and testimony from Yarbrough herself. As noted, Yarbrough admitted the arrests and did not deny that she had sold prescription medications to an undercover informant or otherwise dispute the factual basis of the charges. This evidence supported the conclusion reached by the Authority, . . . namely, that Yarbrough had engaged in drug-related criminal activity. . . .As we have explained, no procedural due process violation follows from an agency’s failure to introduce evidence sufficient under the applicable standard of proof. Although due process may require a particular standard of proof in a certain kind of proceeding, . . . the Due Process Clauses do not forbid garden-variety errors in applying standards of proof, regardless of the legal source of those standards. As a result, we conclude that the decision to terminate Yarbrough’s voucher easily passes muster under the ‘some evidence’ standard. Yarbrough argues that procedural due process prohibits a housing authority from rendering a termination decision based solely on unreliable and non-probative hearsay, but we need not reach that issue. Nor must we decide whether procedural due process requires some assessment of the reliability and probative value of hearsay evidence. Yarbrough’s indictments and arrest records, especially in the light of her own testimony, bear sufficient indicia of reliability and are adequately probative to constitute ‘some evidence’ in support of the Authority’s decision.”) *with Yarbrough v. Decatur Housing Authority*, 941 F.3d 1022, 1031 (11th Cir. 2019) (Martin, J., concurring) (“In my view, due process requires more than *Hill*’s ‘some evidence’ standard for the voucher-termination decision. The Majority Opinion suggests that Supreme Court ‘precedents establish *only* that a procedure that permits decisions founded on *no* evidence violates the Due Process Clauses.’ . . . But this statement overlooks the additional requirements described in *Wolff*[.] . . . As the Supreme Court clarified, *Hill* ‘in no way abrogated’ *Wolff*; rather, *Hill* should be considered ‘in addition to’ the earlier *Wolff* decision. . . . So, in addition to ‘some evidence,’ due process in this voucher-termination case also requires: (1) advance ‘written notice of the charges’; and (2) ‘a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action.’ . . . I therefore concur in the Majority’s judgment that the Authority did put forth some evidence to support its decision to terminate Yarbrough’s Section 8 housing voucher, but not in the Majority Opinion’s propositions that *Hill* rejected the ‘substantial evidence’ standard and that the due process requirements in *Hill* are exhaustive.”)

*See also Elder v. McCarthy*, 967 F.3d 113, 124, 126, 129-30 (2d Cir. 2020) (“[A] sentence requiring an inmate to serve time in the SHU represents a substantial loss of liberty even for a lawfully imprisoned person. As noted above, the confinement is much more restrictive and other conditions, such as unrelenting light and lack of exercise, are harsh. Accordingly, our prior rulings have left no room to doubt that ‘certain due process protections must be observed before an inmate

may be subject to confinement in the SHU.’ . . . These protections include providing the inmate with ‘advance written notice of the charges; a fair and impartial hearing officer; a reasonable opportunity to call witnesses and present documentary evidence; and a written statement of the disposition, including supporting facts and reasons for the action taken.’ . . . As the Supreme Court has observed, ‘[c]hief among the[se] due process minima ... [i]s the right of an inmate to call and present witnesses ... in his defense before the disciplinary board.’ . . . An inmate’s request to call witnesses may be denied due to ‘irrelevance or lack of necessity,’ or where ‘granting the request would be unduly hazardous to institutional safety or correctional goals.’ . . . The burden to defend such a denial, however, ‘is not upon the inmate to prove the official’s conduct was arbitrary and capricious, but upon the official to prove the rationality of the position.’ . . . Due process principles require prison authorities ‘to provide assistance to an inmate in marshaling evidence and presenting a defense when he is faced with disciplinary charges.’ . . . When the inmate is confined before the hearing, ‘the duty of assistance is greater because the inmate’s ability to help himself is reduced.’ . . . Such required assistance includes ‘gathering evidence, obtaining documents and relevant tapes, and interviewing witnesses.’ . . . This constitutional obligation is violated by a ‘failure to ... interview an inmate’s requested witnesses without assigning a valid reason.’ . . . As with the failure to make witnesses available at a disciplinary hearing, ‘[t]he burden is not upon the inmate to prove the [assistant’s] conduct was arbitrary and capricious, but upon the [assistant] to prove the rationality of his position.’ . . . The Supreme Court instructed in 1985 that due process prohibits disciplinary action affecting an inmate’s liberty interest without ‘some evidence’ of guilt. . . . A reviewing court’s application of this standard ‘does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence.’ . . . Rather, the court considers ‘whether there is *any evidence* in the record that could support the conclusion reached by the disciplinary board.’ . . . Read at its most expansive, the Court’s 1985 articulation suggests a low standard indeed. In this Circuit, however, we have not ‘construed the phrase “any evidence” literally.’ Rather, we have required that such disciplinary determinations be supported by some ‘*reliable* evidence’ of guilt. . . . [W]e conclude that Kling’s findings that Elder was guilty of both forgery and theft were not supported by some *reliable* evidence. . . . Although the record demonstrates that Kling inspected the Lawrence disbursement forms and concluded that the handwriting on those forms was similar to the handwriting on Elder’s documents, the entire proceeding rested on the assumption—one unsupported by any direct evidence and supported by McCarthy’s report only by inference—that forgery and theft had occurred. The hearing record lacked any direct evidence that Lawrence had complained of theft or forgery, or that money was withdrawn from Lawrence’s account against his will. Further, the hearing record before Kling contained no samples of withdrawal forms submitted by Lawrence in the past, or any reliable sample of Lawrence’s signature to suggest that the targeted forms were in fact forgeries. Thus, in the absence of a reliable sample of Lawrence’s signature on a withdrawal form, Elder was accused of forgery based merely on the fact that the written signatures on the targeted forms looked similar to his handwriting. This unusual aspect of the record persuades us that, in the circumstances of this case, the evidence before Kling was insufficient to find Elder guilty of theft and forgery.”)

**F. *Muhammad v. Close***

In *Muhammad v. Close*, 540 U.S. 749 (2004) (per curiam), the Supreme Court confirmed the view of a majority of the circuits that ‘*Heck*’s requirement to resort to state litigation and federal habeas before § 1983 is not . . . implicated by a prisoner’s challenge that threatens no consequence for his conviction or the duration of his sentence.’ *Id.* at 751. Thus, assuming a challenge to such disciplinary administrative determinations raises no implication for the underlying conviction and has no impact on the duration of the sentence through revocation of good-time credits, the *Heck* favorable-termination rule will not apply. *Id.* at 754, 755. See also *Taylor v. United States Probation Office*, 409 F.3d 426, 427(D.C. Cir. 2005) (“Because Taylor’s complaint challenges only the fact that he was confined at one facility rather than another and, thus, does not challenge the fact or duration of his confinement, the rule of *Heck* is inapplicable.”); *Martinez v. Lunes*, No. 1:04-cv-6469-LJO-DLB PC, 2007 WL 4539010, at \*2 (E.D.Cal. Dec. 19, 2007) (“In this action, plaintiff challenges the validity of his disciplinary weapon conviction; however, as he points out in his opposition, the conviction does not affect the validity of his confinement or its duration because he did not lose good time credits as a result of the conviction. Plaintiff alleges in his amended complaint, and defendants do not dispute, that as a result of the weapons conviction, plaintiff received a ten-month SHU term and loss of privileges. Because the punishment imposed at the disciplinary hearing does not affect the duration of plaintiff’s sentence, this action is not barred by *Heck v. Humphrey*, 512 U.S. 477, 487-88 (1994) or *Edwards v. Balisok*, 520 U.S. 641 (1997).”).

Compare *Peralta v. Vasquez*, 467 F.3d 98, 100 (2d Cir. 2006) (“What is not clear, however, is whether a prisoner who was subject to a single disciplinary proceeding that gave rise to two types of sanctions – one that affected the duration of his custody and the other that affected the conditions of his confinement – can, without needing to satisfy the favorable termination rule, maintain a § 1983 action aimed solely at the second type of sanction. We now resolve this open question and hold that, in ‘mixed sanctions’ cases, a prisoner can, without demonstrating that the challenged disciplinary proceedings or resulting punishments have been invalidated, proceed separately with a § 1983 action aimed at the sanctions or procedures that affected the conditions of his confinement. But we also hold that he may only bring such an action if he agrees to abandon forever any and all claims he has with respect to the sanctions that affected the length of his imprisonment.”); *Pollard v. Romero*, No. 07-cv-00399-EWN-KLM, 2008 WL 1826187, at \*6, \*7 (D. Colo. Apr. 23, 2008) (“[T]he single disciplinary proceeding in this case gave rise to a mixed sanction (*i.e.*, segregation) that affects both the conditions of Mr. Pollard’s confinement and its terms. . . Mr. Pollard has not introduced any evidence that his disciplinary conviction has been invalidated. . . Therefore, the magistrate judge concluded that his claim should be dismissed. . . This conclusion poses a more pressing question which is now before me, namely, whether and under what circumstances a prisoner may employ section 1983 in a mixed sanctions case to challenge the conditions rather than the terms of his confinement. Neither the Supreme Court of the United States nor the Tenth Circuit has answered this question yet. However, the Second circuit in *Peralta v. Vasquez*, 467 F.3d 98, 104 (2d Cir.2006) has addressed the issue. . . . The magistrate

judge considered the *Peralta* court's approach but rejected it without analysis. I disagree and find the Second Circuit's reasoning persuasive. Therefore, considering the state court's pending decision concerning the validity of Plaintiff's disciplinary conviction and considering the possibility that Plaintiff would be willing to abandon his duration claim, . . . staying this proceeding is more appropriate because it will allow Plaintiff to pursue his claim related to the conditions of confinement (assuming he meets the requirements).") with *Haywood v. Hathaway*, 842 F.3d 1026, 1028-30 (7th Cir. 2016) ("[N]o matter what a prisoner demands, or waives, § 1983 cannot be used to contest the fact or duration of confinement. See *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). From its outset, this suit has been a quest for money damages. That's not all. The holding of *Heck* and *Edwards* is that a claim under § 1983 does not accrue as long as it would imply the invalidity of a conviction or disciplinary sanction that affects the duration of custody. If the claim has not accrued, it cannot matter what relief a prisoner seeks. Yet if it is possible to seek damages while waiving other relief, this must mean that the claim accrues immediately and the statute of limitations runs from the time of the events said to be wrongful. That would surprise the many prisoners who wait patiently until they are entitled to sue under *Heck*, for if Haywood is right the time to do so could have expired. Haywood relies on *Peralta v. Vasquez*, 467 F.3d 98 (2d Cir. 2006), which held that a prisoner who foreswears any contest to the length of his confinement may use § 1983 to seek damages. The Second Circuit understood 'the purpose of the *Heck* favorable termination requirement [to be] to prevent prisoners from using § 1983 to vitiate collaterally a judicial or administrative decision that affected the overall length of their confinement'. . . . To disavow any collateral attack on the conviction or revocation of good-time credits is to take the situation outside *Heck*, the court concluded. We do not agree with that conclusion, which no other circuit has adopted (though none has expressly rejected it, either). *Heck* and *Edwards* say that a challenge is not possible as long as it is inconsistent with the validity of a conviction or disciplinary sanction. . . . This is a version of issue preclusion (collateral estoppel), under which the outstanding criminal judgment or disciplinary sanction, as long as it stands, blocks any inconsistent civil judgment. . . . It is a rationale considerably different from the one that *Peralta* attributed to the Court. . . . Nothing in *Heck*, *Edwards*, or any of the Court's later decisions suggests that the 'favorable termination' element that the Court thought essential can be elided by a plaintiff's disavowing a kind of relief that *Preiser* holds is never available under § 1983 in the first place. The approach taken in *Peralta* is incompatible with *Heck* and its successors; *Peralta* is functionally what would happen if the whole sequence were overruled and only *Preiser* left standing. *Peralta* is incompatible not only with the Supreme Court's decisions but also with *McCurdy v. Sheriff of Madison County*, 128 F.3d 1144 (7th Cir. 1997), which held that a plaintiff cannot sidestep *Heck* by conceding a conviction's validity. Our decision in *Burd v. Sessler*, 702 F.3d 429, 435-36 (7th Cir. 2012), which holds that a prisoner cannot avoid *Heck* by waiting until the sentence expires and it is too late to file a collateral attack, also is irreconcilable with the Second Circuit's view that a § 1983 suit for damages is permissible whenever it cannot end in a decision that changes the length of a person's confinement. We decline to follow *Peralta*, which did not mention *McCurdy* and therefore created a conflict among the circuits, perhaps unintentionally. We shall stick with the established law of this circuit.")

See also *Santos v. White*, 18 F.4th 472, 476-77 (5th Cir. 2021) (“Because *Heck* applies to the duration of confinement, it applies not just to criminal convictions but also to prison disciplinary rulings that ‘result[ ] in a change to the prisoner’s sentence, including the loss of good-time credits.’ *Clarke v. Stalder*, 154 F.3d 186, 189 (5th Cir. 1998) (en banc). *Heck* therefore bars claims that would, if accepted, ‘negate’ a prison disciplinary finding that had resulted in the loss of good-time credits. . . . Meanwhile, *Heck* is not ‘implicated by a prisoner’s challenge that threatens no consequence for his conviction or the duration of his sentence.’ . . . Rather, a claim is barred only if granting it ‘requires negation of an element of the criminal offense or proof of a fact that is inherently inconsistent with one underlying the criminal conviction.’ . . . The resulting inquiry is ‘fact-intensive’ and dependent on the precise nature of the disciplinary offense. . . . It is unclear, from the record, whether any of Santos’s claims are barred by *Heck*. In his disciplinary proceeding, Santos was found guilty of nine rules violations: three ‘Defiance’ violations, four ‘Aggravated Disobedience’ violations, one ‘Property Destruction’ violation, and one ‘Unauthorized Area’ violation. Though the disciplinary reports list factual findings, the elements required to find a prisoner guilty of those violations do not appear anywhere in the record. It is thus impossible to determine which facts were *necessary* to the disciplinary board’s conclusions. It may be that the elements of, for instance, aggravated disobedience would be logically incompatible with some of Santos’s claims of excessive force, but the record does not currently permit that inference. Furthermore, not all of the disciplinary board’s findings implicate *Heck*. The board imposed a forfeiture of 180 days of good time for one count each of aggravated disobedience, defiance, and property destruction, all arising from Santos’s assault on Wells in the Fox-6 D-Tier area of the prison; his other violations, including all of those in the shower, resulted in sanctions such as loss of canteen and phone privileges. Disciplinary sanctions of that type bear on the ‘circumstances of confinement,’ rather than on that confinement’s ‘validity’ or ‘duration,’ and are thus not barred by *Heck*. . . . Moreover, the disciplinary board imposed no sanctions at all on Santos for actions after the administration of the chemical agent in the shower, and it noted that he ‘complied with orders’ after that point. Thus, *Heck* does not bar Santos’s claims from that point onward. It is not sufficient to deem Santos’s claims to be ‘intertwined’ with his loss of good-time credits. Rather, in applying *Heck*, a court must bar only those claims that are ‘necessarily at odds with’ the disciplinary rulings, and only with those rulings that resulted in the loss of good time credits. . . . The defendants have thus not met their burden for summary judgment on the current record. Whether the board’s findings related to the assault on Wells bar the corresponding claims by Santos must be determined by a fact-specific analysis informed by the elements necessary to establish those violations.”); *Santos v. White*, 18 F.4th 472, 477-79 (5th Cir. 2021) (Willett, J., concurring in the judgment) (“This case involves an all-too-common set of facts: Appellant (a prisoner) claims that Appellees (prison officers) spontaneously and unlawfully abused him. Appellees, on the other hand, insist they used lawful force to control Appellant’s misbehavior. Though the majority opinion reaches the correct conclusion—the district court erred in its unqualified dismissal under *Heck*—I write to emphasize two points of departure. . . . First, my colleagues punt on *Heck* when a hand-off is warranted. Could the record have more information? Absolutely. Do we *need* more? No. *Heck* does not categorically compel an element-by-element inquiry, and the majority opinion needlessly complicates things by concluding that the record

precludes analysis. This case is *Aucoin* redux. . . Appellant maintains he was subject to unprovoked, unlawful violence at every stage of the encounter. . . But if true, he ‘cannot be guilty of [the offenses for which he lost good-time credit]—in direct conflict with his disciplinary conviction.’ . . So we need not dwell on the component elements of Appellant’s conviction to determine that most of his claims are incompatible with the disciplinary board’s findings. Take the claims arising from the pre-shower salvo. The majority implies that some of these claims may not be *Heck* barred. . . Sure, *Heck* is not ‘implicated by a prisoner’s challenge that threatens no consequence for . . . the duration of his sentence.’ . . But all of Appellant’s pre-shower claims turn on the same narrative: He was attacked without provocation. This is fundamentally inconsistent with the officers’ account, which prompted Appellant’s loss of good-time credit for property destruction, aggravated disobedience, and defiance. Most of Appellant’s suit thereby ‘challenges the factual determination that underlies his conviction[s],’ . . . meaning most of his claims fail. But most does not mean all. A portion of Appellant’s suit alleged violence unrelated to any supposed need to gain control. Appellant pleaded an excessive-force claim against Captain Wells for ordering him to ‘spread his butt cheeks’ and spraying him ‘in the anus with pe[p]per spray.’ Appellant also pleaded that Captain Wells threatened and cut him with a knife after he was ‘no longer resisting or attempting to flee or, otherwise, commit any crime.’ These are not trivial details. Neither the incident report nor any other summary-judgment evidence provides an iota of justification for this alleged force. We are thus left with no circumstance where these claims, if proven true, would conflict with Appellant’s disciplinary conviction—let alone those portions that impacted the duration of his confinement. . . This is not to say that the elements underlying an administrative offense are categorically irrelevant under *Heck*. . . But no case, until today, suggests this information is an analytical prerequisite. . . I nonetheless join the judgment because, as was the case in *Aucoin*, ‘the district court erred in dismissing all of [Appellant’s] claims under *Heck*.’”); ***Gray v. White***, 18 F.4th 463, 468-69 (5th Cir. 2021) (“The record is insufficient to determine whether, or which of, Gray’s claims are barred by *Heck*. The disciplinary reports list various factual findings but do not state which of these findings were *necessary* to his convictions. It is unclear, for instance, whether commission of ‘aggravated disobedience,’ as defined by the disciplinary board, would still leave room for the possibility that the officers’ use of force in response to Gray’s disobedience violated his Eighth Amendment rights—or, to put it differently, whether ‘it is possible for [Gray] to have [committed all ten rule violations] *and* for [the officers’ use of force] to have’ been applied maliciously and sadistically to cause harm. . . If so, ‘*Heck* does not bar [his] claim.’ . . Moreover, not all of Gray’s disciplinary violations resulted in the loss of good time credits. The reports of the disciplinary board indicate that he forfeited ninety days’ good time as a cumulative sanction for several of his defiance and aggravated-disobedience infractions, all of which were based on conduct occurring within the shower, but that his sanctions for intoxication, contraband, and property destruction instead resulted in fines and loss of privileges. Disciplinary sanctions of this type bear on the ‘circumstances of confinement’ rather than that confinement’s ‘validity’ or ‘duration’ and thus are not barred by *Heck*. . . Because it remains possible reasonably to infer the compatibility of Gray’s claims and those findings of the disciplinary board necessary to find Gray guilty of the violations resulting in loss of good time, the defendants have not met their burden for summary judgment with regard to the *Heck* bar.

Whether Gray’s claims within the shower are in fact barred on the basis of the disciplinary board’s findings of defiance and aggravated disobedience must be determined by a fact-specific analysis informed by the elements necessary to establish those violations.”); *Gray v. White*, 18 F.4th 463, 470-71 (5th Cir. 2021) (Willett, J., concurring in judgment alone) (“I concur in the judgment for the same reasons discussed in my concurrence today in *Santos v. White*, No. 20-30048, — F.4th —, 2021 WL 5346744 (5th Cir. 2021). Rather than reiterate my reservations in a footnote, however, I write separately to address the points of departure unique to this case. . . The majority opinion overlooks two critical facts. First, not all of Appellant’s disciplinary violations resulted in the loss of good-time credits. Appellant forfeited 90 days of good-time credit as a cumulative sanction for several of his defiance and aggravated-disobedience infractions, all of which were based on conduct *occurring within the shower*. But other sanctions—namely, those in his cell for intoxication and contraband—resulted in fines and loss of privileges. This ameliorates any conflict between Appellant’s in cell account of unprovoked violence and the Appellees’ recollection. Even had these offenses impacted his confinement, Appellant’s claim (that Captain Wells used unlawful force) does not contradict the offenses (intoxication and contraband) for which he was found guilty. . . Second, Appellant also alleged that Captain Wells unlawfully assaulted him while en route *to the shower*. Neither the incident reports nor any coordinate administrative violation provides a justification for this alleged use of force of force. I therefore see no basis to conclude that this facet of Appellant’s claim ‘squarely challenges [any] factual determination’ of the prison disciplinary board. . . As such, I would hold that these claims can proceed and REVERSE.”)

*See also Morgan v. Schott*, 914 F.3d 1115, 1117-22 (7th Cir. 2019) (“Prisoners cannot make an end run around *Heck* by filing an affidavit waiving challenges to the portion of their punishment that revokes good-time credits. We recently addressed that very tactic and found it incompatible with the *Heck* line of cases. *Haywood v. Hathaway*, 842 F.3d 1026 (7th Cir. 2016). *Morgan* provides no reason to question *Haywood*, and we reaffirm its reasoning. *Morgan*’s attempt to analogize his case to *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), and *Skinner v. Switzer*, 562 U.S. 521, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011), misunderstands those decisions. Judgment in *Morgan*’s favor would necessarily imply the invalidity of his prison discipline. Thus, no § 1983 claim has accrued. This suit is premature and must be dismissed without prejudice. . . . As part of *Morgan*’s strategy to avoid the *Heck* bar, he filed an affidavit purporting to ‘abandon any and all present and future challenges’ and ‘waiv[e] for all times all claims’ pertaining to the portion of his punishment that impacted the duration of his confinement. He preserved only ‘claims challenging the sanctions affecting the conditions of [his] confinement.’ *Morgan* argued that his affidavit rendered *Heck* inapplicable, citing the Second Circuit’s decision in *Peralta v. Vasquez*, 467 F.3d 98 (2d Cir. 2006). The magistrate judge concluded that *Heck* barred *Morgan*’s suit and entered summary judgment for *Schott* and *Veath*, dismissing *Morgan*’s due-process claim with prejudice. The judge rejected *Morgan*’s attempt to use strategic waiver to ‘dodge’ *Heck*. He said *Morgan*’s due-process claim ‘call[s] into question the validity of the prison discipline[ ] because to accept that claim necessarily implie[s] that the discipline was somehow invalid.’ . . . *Morgan* relies on *Peralta v. Vasquez*, 467 F.3d 98, in which the Second Circuit considered the mixed-sanctions scenario and chose to embrace strategic waiver as a means

of removing the *Heck* bar. The court held that a prisoner facing condition-of-confinement sanctions and duration-of-confinement sanctions could challenge the former under § 1983 without complying with *Heck*'s favorable-termination requirement. . . All the prisoner must do is 'abandon, not just now, but also in any future proceeding, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking.' . . We rejected *Peralta* in *Haywood v. Hathaway*, 842 F.3d 1026. The approach Morgan urges us to adopt rests on a misunderstanding of *Heck*. The favorable-termination rule is more than a procedural hurdle that plaintiffs can skirt with artful complaint drafting or opportunistic affidavits. Rather, it is grounded in substantive concerns about allowing conflicting judgments. As we explained in *Haywood*, the *Heck* rule is 'a version of issue preclusion (collateral estoppel), under which the outstanding criminal judgment or disciplinary sanction, as long as it stands, blocks any inconsistent civil judgment.' . . Neither *Peralta* nor Morgan can account for this aspect of *Heck*. Endorsing Morgan's arguments would undercut another feature of the Court's favorable-termination jurisprudence. *Heck* held that 'a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence *does not accrue* until the conviction or sentence has been invalidated.' . . Morgan's argument is incompatible with that holding. If a prisoner's challenge to a disciplinary hearing implies the invalidity of the resulting sanctions, no § 1983 claim has accrued. And '[i]f the claim has not accrued, it cannot matter what relief a prisoner seeks.' *Haywood*, 842 F.3d at 1028. Selective waiver simply doesn't alter the analysis. Morgan concedes that *Haywood* controls his case and asks us to overrule it. But we do not reverse our precedents lightly; we need 'compelling reasons' to do so. . . The Supreme Court has not cast doubt on *Haywood*, and it does not represent a minority approach among our sister circuits. . . Moreover, we remain convinced that '*Peralta* is incompatible with *Heck* and its successors.' . . State prisoners cannot avoid the favorable-termination rule by engaging in strategic waiver. If judgment for a § 1983 plaintiff would necessarily imply the invalidity of his punishment, the *Heck* rule applies and favorable termination of the underlying proceeding is a prerequisite to relief. . . It's worth noting that Morgan could have challenged the Board's ruling in other ways. . . . And after exhausting state review, he could have sought relief under the federal habeas corpus statute. Instead he immediately sued for money damages under § 1983—and ran directly into *Heck*. Although Morgan does not currently have a cognizable § 1983 claim, it is at least possible that he could convince a state court to provide the favorable termination required by *Heck*. Illinois courts apply a six-month limitations period to certiorari actions, but a court might hear a late certiorari action if no 'public detriment or inconvenience would result from [the] delay.' . . *Heck*-barred claims must be dismissed. . . But given the possibility of future state-court proceedings, Morgan's claim should have been dismissed *without* prejudice. . . We modify the judgment to reflect a dismissal without prejudice. As modified, the judgment is affirmed.")

*See also Minter v. Bartruff*, 939 F.3d 925, 929 (8th Cir. 2019) ("In this case, the Complaint alleged that Defendants' unconstitutional conduct deprived Plaintiffs 'of their statutory right to accrue earned-time credit ... [and] of receiving a reduction of sentence upon their completion of the SOTP.' Plaintiffs requested damages and an order requiring 'Defendants to recalculate ... the Plaintiffs' accrued earned-time credit under Iowa Code section 903A.2 to reflect each day that the

Plaintiffs demonstrated good conduct and a willingness [to participate] despite the IDOC's decision to not place [them] into the SOTP.' Without question, this is a claim for restoration of earned-time credits, so habeas corpus is the exclusive federal remedy. The district court properly concluded this claim is *Heck*-barred. However, the Complaint also included an Eighth Amendment claim that necessary medical care is being unconstitutionally denied, and claims for prospective injunctive relief to remedy allegedly unconstitutional procedures in administering the SOTP program. 'Ordinarily, a prayer for such prospective relief will not "necessarily imply" the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983.' . The district court did not consider these issues in dismissing the entire case without prejudice, and the record on appeal is inadequate to resolve them.")

### G. *Hill v. McDonough; Nelson v. Campbell*

*Hill v. McDonough*, 126 S. Ct. 2096, 2101, 2103 (2006) ("In the case before us we conclude that Hill's § 1983 action is controlled by the holding in *Nelson*. Here, as in *Nelson*, Hill's action if successful would not necessarily prevent the State from executing him by lethal injection. The complaint does not challenge the lethal injection sentence as a general matter but seeks instead only to enjoin the respondents 'from executing [Hill] in the manner they currently intend.' . . The specific objection is that the anticipated protocol allegedly causes 'a foreseeable risk of ... gratuitous and unnecessary' pain. . . . Hill's challenge appears to leave the State free to use an alternative lethal injection procedure. Under these circumstances a grant of injunctive relief could not be seen as barring the execution of Hill's sentence. . . . Any incidental delay caused by allowing Hill to file suit does not cast on his sentence the kind of negative legal implication that would require him to proceed in a habeas action."); *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) ("A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself – by simply altering its method of execution, the State can go forward with the sentence.").

*See also Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 865 (11th Cir. 2017) ("Following *Nelson* and *Hill*, we have entertained method-of-execution challenges to specific aspects of a state's lethal injection protocol pursuant to § 1983.); *Adams v. Bradshaw*, 644 F.3d 481, 482, 483 (6th Cir. 2011) ("Relying on *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006), the Warden argued that federal courts lack jurisdiction to consider Adams's lethal-injection claim under § 2254 and that such a claim is cognizable only under 42 U.S.C. § 1983. The district court denied the motion, and we granted the Warden's petition for leave to file this interlocutory appeal. . . . The Warden's contention that *Hill* 'holds that a challenge to the particular means by which a lethal injection is to be carried out is non-cognizable in habeas' is too broad. Nowhere in *Hill* or *Nelson* does the Supreme Court state that a method-of-execution challenge is not cognizable in habeas or that a federal court 'lacks jurisdiction' to adjudicate such a claim in a habeas action. Whereas it is true that certain claims that can be raised in a federal habeas petition cannot be raised in a § 1983 action, . . . it does not necessarily follow that any claim that can be raised in a § 1983 action cannot be raised in a habeas petition, *see Terrell v. United*

*States*, 564 F.3d 442, 446 n. 8 (6th Cir.2009). Moreover, *Hill* can be distinguished from this case on the basis that Adams has not conceded the existence of an acceptable alternative procedure. . . Thus, Adams’s lethal-injection claim, if successful, could render his death sentence effectively invalid. Further, *Nelson*’s statement that ‘method-of-execution challenges [ ] fall at the margins of habeas,’ 541 U.S. at 646, 124 S.Ct. 2117, strongly suggests that claims such as Adams’s can be brought in habeas.”)

*Compare Nance v. Commissioner, Georgia Department of Corrections*, 981 F.3d 1201, 1203, 1209-11 (11th Cir. 2020) (“Nance complains that the Constitution bars Georgia from executing him by *any* method of lethal injection, regardless of the protocol. The Supreme Court has mentioned the possibility of a complaint like Nance’s on three occasions and warned that it might not be cognizable under section 1983. *See Bucklew v. Precythe*, — U.S. —, 139 S. Ct. 1112, 1128, 203 L.Ed.2d 521 (2019); *Hill v. McDonough*, 547 U.S. 573, 582, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006); *Nelson*, 541 U.S. at 644, 124 S.Ct. 2117. We now decide it is not. Because the injunction Nance seeks would necessarily imply the invalidity of his death sentence, his complaint must be reconstrued as a habeas petition. And because that petition is second or successive, we vacate and remand with instructions to dismiss for lack of jurisdiction. . . . Because Nance’s requested relief would prevent the State from executing him, implying the invalidity of his death sentence, it is not cognizable under section 1983 and must be brought in a habeas petition. This conclusion follows from the decisions in *Heck v. Humphrey* . . .and *Edwards v. Balisok*, . . .in which the Supreme Court distinguished between complaints under section 1983 and habeas petitions. Although the *Heck* line of cases involved civil-rights actions for damages, the Supreme Court has suggested that the logic of *Heck* also applies in the context of method-of-execution challenges. In both *Nelson* and *Hill*, the Supreme Court made clear that its decision was ‘consistent with *Heck*’s and *Balisok*’s approach to damages actions that implicate habeas relief,’ . . . and suggested that the parallel analysis between the two fields followed from the fact that ‘civil rights damages actions . . ., like method-of-execution challenges, fall at the margins of habeas[.]’ . . .In *Heck*, the Supreme Court proceeded from the fact ‘that [section] 1983 creates a species of tort liability,’ . . . and explained that the relationship of section 1983 to the common law of torts comes with limitations on the kinds of claims cognizable under it. Citing ‘the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments,’ . . . the Court held that ‘when a state prisoner seeks damages in a [section] 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence’ and, if so, dismiss the complaint unless the plaintiff showed a favorable termination of the underlying criminal proceeding[.]’ . . . The Court clarified this principle in *Balisok*, where it held that a ‘claim for declaratory relief and money damages, based on allegations . . . that necessarily imply the invalidity of the punishment imposed, is not cognizable under [section] 1983.’ . . .In the light of the principle distilled in *Heck* and *Balisok*, the Supreme Court in *Hill* described the inquiry for determining whether a method-of-execution claim is cognizable under section 1983 as being ‘whether a grant of relief to the inmate would *necessarily* bar the execution.’ . . . The word ‘necessarily’ is key to the *Heck* inquiry, and it explains why Nance’s complaint is different from the prisoners’ complaints in *Nelson* and *Hill*.

We have noted that the concept of ‘logical necessity ... is at the heart of the *Heck* opinion,’ . . . and explained that this ‘emphasis on logical necessity is a result of the Court’s underlying concern in *Heck*: that [section] 1983 and the federal habeas corpus statute ... were on a collision course[.] . . . The *Heck* inquiry prevents prisoners from making ‘an “end-run” around habeas,’ but when there is no necessary logical connection between relief under section 1983 and the negation of a conviction or sentence, there is no concern about an end-run and no need to apply *Heck*. . . Both *Nelson* and *Hill* are examples of decisions that did not implicate the concern expressed in *Heck* about end-runs around the habeas statutes. The Supreme Court allowed the complaints under section 1983 in *Nelson* and *Hill* to proceed because the relief sought in each case did not *necessarily* imply the invalidity of the prisoner’s death sentence, even if, as the State argued in *Hill*, the claim would ‘frustrate the execution as a practical matter.’ . . . The requested injunction against the use of a cut-down procedure for venous access in *Nelson* . . . did not necessarily imply the invalidity of the prisoner’s death sentence because the fact ‘[t]hat venous access is a necessary prerequisite [to carrying out a death sentence] does not imply that a particular means of gaining such access is likewise necessary[.]’ . . . The State could potentially carry out the death sentence with a different method of venous access. And the requested injunction against the use of an allegedly inadequate anesthetic as part of the injection protocol in *Hill* . . . did not necessarily imply the invalidity of the prisoner’s death sentence because the ‘obvious necessity’ of ‘the injection of lethal chemicals’ does not by itself mean that a particular combination of drugs chosen by the State is a necessary prerequisite to carrying out a death sentence[.] . . . That is, the injunction would not ban the state from carrying out the death sentence using a different injection protocol.

In this appeal, unlike in *Nelson* and *Hill*, a judgment in Nance’s favor *would* imply the invalidity of his death sentence—not only as a practical matter, but as a matter of logical necessity. In his complaint, Nance asked the district court to ‘[g]rant injunctive relief to enjoin the [State] from proceeding with [his] execution ... by a lethal injection.’ Lethal injection is necessary to carry out any death sentence in Georgia, because lethal injection is the *only* method of execution authorized under Georgia law. . . . Unlike the injunctions in *Nelson* and *Hill*, the injunction Nance seeks would prevent his execution from being carried out, necessarily implying the invalidity of his death sentence. There is no way to read Nance’s complaint to avoid the collision between section 1983 and habeas that the Supreme Court contemplated in *Heck*, and given that conflict, the specific terms of the habeas statute must override the general terms of section 1983. . . . Habeas and section 1983 are mutually exclusive. . . . And based on the lines drawn by the Supreme Court in *Heck*, *Nelson*, and *Hill*, Nance’s claim falls beyond the outer border of section 1983 and is cognizable only in habeas. To be sure, a judgment in Nance’s favor implies the invalidity of his sentence as a matter of logical necessity only if we take Georgia law as fixed. Even if Nance prevails in this suit, the State could respond by enacting a law authorizing execution by firing squad. And Nance does not contest—at least for now—that the State could constitutionally carry out his death sentence if it did so. But section 1983 complaints are ‘civil tort actions,’ which means that they are not ‘appropriate vehicles for challenging the validity of outstanding criminal judgments.’ . . . So it is not our place to entertain complaints under section 1983 that ask us to force a State to fundamentally overhaul its system of capital punishment. . . . For purposes of determining whether a method-of-execution challenge sounds in section 1983 or habeas, a federal court must

accept as fixed a state law providing a facially constitutional method of execution. That is particularly so when a would-be section 1983 complainant insists that the State resort to a method of execution that it has already determined is less humane than the alternatives. . . . If we sanction Nance’s decision to proceed under section 1983 by refusing to take the State’s law as fixed, we must effectively interpret Nance’s complaint as a request for an injunction directing the State to either enact new legislation or vacate his death sentence. By doing so, we invite a collision with more than the habeas statute. . . . No matter how you read it, Nance’s complaint attacks the validity of his death sentence. It is cognizable only as a habeas petition, and we must evaluate it as such.”) *with Nance v. Commissioner, Georgia Department of Corrections*, 981 F.3d 1201, 1214-23 (11th Cir. 2020) (Martin, J., dissenting) (“Michael Wade Nance is a Georgia prisoner who has been sentenced to die for his crime. Georgia law establishes a protocol for taking Mr. Nance’s life by lethal injection. For death penalty cases, one would expect federal courts to respect precedent and deliver predictability. Yet the majority’s ruling offers chaos instead—not only for Mr. Nance, but for everyone on death row in Georgia, Alabama, and Florida. This opinion creates chaos because it plainly violates at least two principles firmly established by Supreme Court and Eleventh Circuit precedent. Specifically the majority opinion violates the well-established principles from our precedent that: (1) require method of execution claims to be brought as claims pursuant to 42 U.S.C. § 1983; and (2) instruct federal courts of appeals not to anticipate that the Supreme Court has overruled its own precedent, but instead to wait for the Court to expressly tell us it has done so. Surely it is the role of the courts to provide predictable and reliable processes for those facing their death at the hands of the State. We have failed to perform that role here. Mr. Nance brought suit under 42 U.S.C. § 1983 seeking to have the District Court order the Defendants, the Commissioner of the Georgia Department of Corrections and the Warden of Georgia Diagnostic and Classification Prison, not to execute him using Georgia’s current execution policies, because doing so would violate his Eighth and Fourteenth Amendment rights. Mr. Nance alleges there is a substantial risk that executing him according to Georgia’s lethal injection protocol will ‘lead [ ] to a prolonged execution that will produce excruciating pain’ because his veins are ‘extremely difficult to locate through visual examination, and those veins that are visible are severely compromised and unsuitable for sustained intravenous access.’. . . . On its own, the majority raised the issue of whether Mr. Nance’s § 1983 claim challenging Georgia’s lethal injection protocol is actually a challenge to the fact of his sentence such that it must be construed as a habeas petition. The correct answer is a resounding no. Mr. Nance is not saying he should not be executed. He has apparently accepted his fate. Rather, he is merely asking our court to direct the State to execute him by a different method because the State’s lethal injection method violates his constitutional rights. The majority opinion makes several related errors in ruling on Mr. Nance’s action that result in the creation of a new category of cases—subject to new procedural rules—not recognized by the Supreme Court. The majority does away with the established line of demarcation between a § 1983 civil rights action and a habeas petition. . . . In doing so, it calls this Court’s decision in *Ledford v. Commissioner, Georgia Department of Corrections*, 856 F.3d 1312 (11th Cir. 2017), ‘erroneous[ ],’ and proceeds to dismiss *Ledford*’s substantive analysis in an effort to support its procedural conclusion. . . . But for all the majority’s talk of distinguishing the substantive requirements of Eighth Amendment claims from the rights and remedies in § 1983 actions, the

majority can point to no concrete holding—in any decision by the Supreme Court or this Circuit—that supports today’s decision requiring Mr. Nance to bring his Eighth Amendment method-of-execution claim by way of a habeas petition. . . . [N]othing in *Bucklew*, nor in any other Supreme Court case I am aware of, says that when a plaintiff points to an alternative method of execution not expressly codified under state law, that plaintiff’s case *must* sound in habeas. . . . The Supreme Court has simply never ruled that method-of-execution claims must—or even should—be brought by way of a habeas petition. Nevertheless the majority appears to have carved out a new procedural requirement based on this parenthetical citation in *Bucklew*. In so doing, the majority ignores at least two key principles. First, courts may not anticipate that the Supreme Court will overrule its own precedent. Second, *Bucklew* (parenthetical included) does not require method-of-execution claims to be brought in habeas. . . . The majority opinion will sow confusion. A prisoner can no longer be certain about the proper procedure for bringing a method-of-execution claim. The majority’s holding will also invite new litigation—if a plaintiff’s attorney previously brought a method of execution claim in a § 1983 suit, will the attorney now be found to have been ineffective? I know of no basis for this panel to take the drastic action of holding that Mr. Nance’s claim should have been brought in a habeas petition when no Supreme Court precedent directs him to. . . . But for the majority’s strained effort to justify a new category of method-of-execution claims based on an obscure parenthetical in the Supreme Court’s opinion in *Bucklew*, Mr. Nance would win this appeal. . . . I can think of no more consequential act of a government than to take the life of one of its citizens. Mr. Nance is facing that fate in Georgia. The role of federal courts in the process of the taking of Mr. Nance’s life is limited. Our job in Mr. Nance’s case was merely to apply straightforward and well-established rules to determine whether, as Mr. Nance claims, the District Court erred by making findings of fact and weighing allegations in ruling on the State’s motion to dismiss. The majority opinion fails to undertake this job. More worrisome, the majority’s decision to change the rules governing the procedure by which death row prisoners must bring a method of execution claim introduces chaos into this area of the law. People facing their death at the hands of the State deserve more reliable treatment from their federal courts. I dissent.”)

#### H. *Wilkinson v. Dotson*

In *Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005), the Court held that *Heck* and *Edwards* did not apply to a prisoner’s challenge to the procedures used for determining parole eligibility. As the Court pointed out, success for plaintiff would not mean immediate release from confinement or a shorter stay in prison; success meant at most new eligibility review, which at most will speed consideration of a new parole application.’ *Id.* at 1248. *See also Dimmick v. Bourdon*, No. 18-4051, 2019 WL 1849044, at \*3 (10th Cir. Apr. 25, 2019) (not reported) (“As we understand it, Dimmick’s goal in seeking a new parole revocation hearing is not so much to obtain earlier release but to obtain a new decision from the parole board that does not stigmatize him as a rapist or sex offender. But even if he seeks a new parole revocation hearing in the hope of eventually being returned to parole, *Wilkinson* indicates he may pursue a claim under § 1983 so long as the Board retains discretion to grant or deny release as a result of any such hearing (and there is no indication that it does not). . . . We therefore reverse the district court’s dismissal of this aspect of Dimmick’s

complaint.”); *Sampson v. Garrett*, 917 F.3d 880, 881-82 (6th Cir. 2019) (“Whether *Heck* applies to an access-to-the-court claim alleging state interference with a direct criminal appeal is a new question for us. That it is a new question, however, does not necessarily make it a hard question. Because the right of access is ‘ancillary to [a lost] underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court,’ a successful access claim requires a prisoner to show that the defendants have scuttled his pursuit of a ‘nonfrivolous, arguable’ claim. . . . Sampson maintains that he is entitled to damages because the defendants prevented him from using the trial transcripts and other materials in his direct—and unsuccessful—appeal. He could prevail on that claim only if he showed that the information could make a difference in a nonfrivolous challenge to his convictions. He could win in other words *only* if he implied the invalidity of his underlying judgment. *Heck* bars this kind of claim. We are not alone in seeing it this way. [collecting cases] *Fuller v. Nelson*, 128 F. App’x 584 (9th Cir. 2005), it’s true, went the other way. It held that *Heck* does not bar an access-to-the-court claim alleging that state officials kept a prisoner from filing an appeal. . . . As the Ninth Circuit saw it, *Heck* does not apply where ‘[t]he remedy for the unconstitutional deprivation . . . would not be immediate release.’ . . . The Ninth Circuit gestured at *Wilkinson v. Dotson* . . . for that idea. . . . That reflects a crabbed reading of *Heck* as well as *Wilkinson*. *Wilkinson* held that *Heck* does not bar a due process challenge to state parole-eligibility procedures. . . . While the Court noted that the prisoners were not requesting release, but rather new procedures in mere hopes of swifter parole, it did not consider *Heck* inapplicable *only* because the claims’ success would not mean release. . . . The Court emphasized that the new parole procedures (or even a grant of parole for that matter) would not imply the invalidity of the prisoners’ original sentences. . . . By contrast, a favorable judgment on Sampson’s access-to-the-court claim *would* necessarily bear on the validity of his underlying judgment, because that is exactly what he says the defendants kept him from contesting fairly. All of this may explain why the Ninth Circuit’s unpublished decision in *Fuller* does not even appear to have force in the Ninth Circuit. *See Pineda v. Nev. Dep’t of Prisons*, 459 F. App’x 675, 675 (9th Cir. 2011) (per curiam) (*Heck* bars access-to-the-court claim concerning forced absence from pretrial evidentiary hearing). That takes care of the access claim.”); *Davis v. U.S. Sentencing Com’n*, 716 F.3d 660, 666 (D.C. Cir. 2013) (“Because the Supreme Court has knocked out three of the pillars on which *Razzoli* rests, we now allow that holding to fall. . . . Adopting *Wilkinson*’s habeas-channeling rule, we hold that a federal prisoner need bring his claim in habeas only if success on the merits will ‘necessarily imply the invalidity of confinement or shorten its duration.’ . . . Otherwise, he may bring his claim through a variety of causes of action. . . . And so it is with Davis. Success with his equal protection challenges to Amendment 706 or Amendment 750 will not ‘necessarily imply the invalidity of [his] confinement or shorten its duration.’ . . . Success would do no more than allow him to seek a sentence reduction, which the district court retains the discretion to deny. . . . His claim for declaratory relief avoids the habeas-channeling rule we announce today, and its dismissal was improper.”); *Bogovich v. Sandoval*, 189 F.3d 999, 1004 (9th Cir. 1999) (not all challenges to parole board’s policy implicate invalidity of continued confinement); *Anyanwutaku v. Moore*, 151 F.3d 1053, 1055-56 (D.C. Cir. 1998) (noting that “a majority of our sister circuits have held that challenges to state parole procedures whose success would not necessarily result in immediate or speedier release need not be brought in habeas corpus,

even though the prisoners filed their suits for the very purpose of increasing their chances of parole. [citing cases]”). *But see Burd v. Sessler*, 702 F.3d 429, 432, 434, 435 (7th Cir. 2012) (“Mr. Burd submits that the favorable termination requirement does not bar his claim for monetary damages because, in this situation, such a judgment would not necessarily call into question the validity of his conviction or sentence. He further argues that the unavailability of collateral relief at this point in the litigation makes *Heck*’s favorable termination requirement inapplicable. We shall examine each of these arguments in turn. . . We address first Mr. Burd’s contention that the favorable termination requirement of *Heck* and its progeny is inapplicable because an award of damages for having been denied an opportunity to research his motion to withdraw his plea or his right to appeal his sentence would not necessarily imply that his conviction or sentence is invalid. Mr. Burd submits that his situation is analogous to those presented to the Supreme Court in *Wilkinson v. Dotson* . . . and in *Skinner v. Switzer*. . . The approach of *Nance* and *Hoard* establish the path that we must follow today. Because the underlying claim for which Mr. Burd sought access to the prison law library was the opportunity to withdraw his guilty plea, he cannot demonstrate the requisite injury without demonstrating that there is merit to his claim that he should have been able to withdraw the plea. Such a showing necessarily would implicate the validity of the judgment of conviction that he incurred on account of that guilty plea. The rule in *Heck* forbids the maintenance of such a damages action until the plaintiff can demonstrate his injury by establishing the invalidity of the underlying *judgment*. Accordingly, we conclude that Mr. Burd has not established a basis for recovering any type of damage relief under § 1983.”); *Goodwin v. Ghee*, 330 F.3d 446 (6th Cir. 2003) (en banc) (evenly divided en banc court affirming district court’s application of *Heck* to bar prisoner’s § 1983 claim that Parole Board’s decision was in retaliation for his exercise of First Amendment rights).

*See also Hill v. Snyder*, 878 F.3d 193, 208-11 (6th Cir. 2017) (“The *Heck* doctrine instructs that no matter how a § 1983 claim is couched, if its success would necessarily affect the length of a sentence, the litigant must rely on habeas relief. Even if Plaintiffs frame their challenge as one to the sentencing process, Count II functionally asks us to declare sentences of life without parole for juvenile offenders unconstitutional. Such a ruling would necessarily implicate the duration of Plaintiffs’ impending sentences by imposing a ceiling, and *Heck* therefore requires Plaintiffs to follow a different legal path to obtain the relief. Fortunately, multiple avenues remain open for Plaintiffs to challenge life imprisonment without parole, including direct appeal and habeas. But because Count II necessarily implicates the length of their impending sentences, it is not cognizable under § 1983. The district court properly dismissed Count II. . . . The reasoning in *Wilkinson* and *Wershe* applies with equal force here, where the Plaintiffs do not seek direct release from prison or a shorter sentence, but instead seek an examination of the “Defendants’ policies and procedures governing access to prison programming and parole eligibility, consideration and release.” This circuit has already expressly found such challenges cognizable under § 1983. Following this clear precedent, we hold that *Heck* does not warrant dismissal of Count IV. . . . At least two key *Heck* cases squarely address the interplay between good time credits and § 1983 challenges. Under the credit system at issue in *Preiser*, the restoration of credits would have automatically resulted in the deduction of time from the challenged sentence. . . Success on

the § 1983 claim necessarily implicated the duration of confinement and was therefore not cognizable. . . . By contrast, in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), the Supreme Court evaluated a challenge to prison officials' revocation of good time credits by means of constitutionally infirm disciplinary proceedings. The Court found that the challenge was cognizable under § 1983 because the prisoners could obtain prospective relief—the implementation of valid disciplinary proceedings—without necessitating restoration of their good time credits. . . . Because success did not mean earlier release, the § 1983 claim could proceed. . . . The differing outcomes of *Preiser* and *Wolff* show that the critical question is whether restoring credits automatically results in earlier release. Under Michigan's parole system, credits deducted from a term-of-years sentence do not automatically result in earlier release; they merely hasten the date on which prisoners fall within the jurisdiction of the Michigan Parole Board. Even after an inmate falls within its jurisdiction, the Board retains discretion to grant or deny parole. . . . Success on Count V would not, therefore, necessarily shorten the duration of confinement, rendering this case similar to the cognizable § 1983 claim in *Wolff*. . . . *Heck* does not bar Count V. . . . *Heck* does not bar claims that implicate the *constitutionality* of a sentence; it bars claims that necessarily implicate the *length or duration* of a sentence. Just as the *Wolff* petitioners could use § 1983 to obtain constitutionally sound disciplinary procedures without running afoul of *Heck*, Plaintiffs may use Count VI to seek better rehabilitative programming without necessarily expediting their release. Count VI seeks to make the period of confinement more meaningful, which may indirectly result in speedier release. But that indirect result flows from the discretion of the Michigan Parole Board; it does not automatically follow from success on Count VI. Accordingly, Count VI is cognizable under § 1983. In holding that *Heck* does not bar Counts IV, V, and VI, we adhere to the lines carefully drawn by the Supreme Court and this circuit. We must look to the possible results when determining what remedies are open to prisoners bringing constitutional challenges. Where vindication of a constitutional right would necessarily allow a prisoner to walk free before his sentence expires, *Heck* instructs that he must pursue his claims via habeas. But where success would not automatically result in speedier release, *Wilkinson*, *Wolff*, and this court's decision in *Wershe* demonstrate that § 1983 remains an available remedy. Because the Michigan Parole Board retains discretion to deny parole to those who are or become eligible, success on Counts IV, V, and VI would not automatically spell speedier release for Plaintiffs. Accordingly, these claims may proceed under § 1983.”); *Terrell v. U.S.*, 564 F.3d 442, 445-49 (6th Cir. 2009) (“Terrell commenced his claim by petitioning the district court to enter an order, pursuant to 28 U.S.C. § 2241, to require the Commission to give him a live in-person parole hearing. Terrell contends that the Commission violated statutory law and his constitutional right to due process when it denied his request for an in-person hearing. He does not contend that remedying the Commission's procedural violation will necessarily entitle him to an earlier release from custody. Release on parole is discretionary. In 1977, in *Wright v. U.S. Bd. of Parole*, 557 F.2d 74 (6th Cir.1977), we held that a federal prisoner could challenge the process used to make his denial of parole determination as part of a § 2241 habeas petition. . . . Before and since that time, the Supreme Court has made a number of decisions regarding the relationship between habeas and § 1983, starting in 1973 with *Preiser v. Rodriguez*, 411 U.S. 465 (1973), and continuing with *Wolff v. McDonnell*, 418 U.S. 539 (1974), *Heck v. Humphrey*, 512 U.S. 477 (1994), *Edwards v. Balisok*,

520 U.S. 641 (1997), and *Wilkinson v. Dotson*, 544 U.S. 74 (2005), *aff'g*, 329 F.3d 463 (6th Cir.2003) (en banc). The Court in *Preiser*, *Heck*, and *Balisok* held that a challenge, respectively, of a prisoner's underlying conviction or sentence, that necessarily demonstrated the invalidity of the confinement's legality, or that would result in the restoration of good-time credits which necessarily shortens the duration of confinement, can only be brought under habeas. . . In *Wolff* and *Dotson*, the Court held that challenges by state prisoners to procedures that would only lead to new proceedings, discretionary and not necessarily spelling immediate release or a shorter duration of confinement, may be brought under § 1983. . . A question that arises from this line of cases is whether habeas and § 1983 (or the equivalent for a federal prisoner) are mutually exclusive actions. The circuits appear to be in conflict on this question. In *Wright*, we held that the claim before us could be brought as a § 2241 habeas action. In *Dotson*, the Supreme Court held that a claim, a constitutional challenge to parole procedures that would at most order a new discretionary hearing, akin to the claim before us, was properly brought under § 1983. If the *Preiser* line of cases, decided since *Wright*, also indicated that the actions are mutually exclusive, then we must conclude that we lack jurisdiction to entertain Terrell's habeas petition. . . . [T]he Ninth Circuit envisions 'a class of suits outside of the core habeas claims identified in *Preiser*.' . . Of course, such claims would be § 2241 claims challenging the execution of the prisoner's sentence, not 28 U.S.C. § 2255 claims challenging the imposition or duration of the prisoner's sentence. That captures the dispute between the Seventh Circuit and the Ninth Circuit. The Seventh Circuit considers the claims the Supreme Court held *must* be brought as habeas actions pursuant to the *Preiser* line of cases – whether under § 2255 or § 2241 – as coextensive with the claims that *can* be brought under habeas in its totality. In other words, there are no 'suits outside of the core habeas claims identified in *Preiser*,' . . . for which jurisdiction might overlap with § 1983 (or the APA). The Supreme Court's opinion affirming our en banc decision in *Dotson* captures this debate. The majority held that challenges to parole procedures that would not 'necessarily spell speedier release' and claimed '*future* relief (which, if successful, [would] not necessarily imply the invalidity of confinement or shorten its duration)' were 'yet more distant' from the 'core' of habeas within which habeas is the exclusive available action. . . Therefore, the challenge could be brought under § 1983. . . . Under the view Justice Scalia shares with the Seventh Circuit, habeas is the exclusive available action for the domain over which habeas is available, which is for claims that would change the level of custody, shorten its duration, or terminate it completely. The majority left open the question we have here of whether the procedural challenge could be brought under both § 1983 and habeas. Our cases have held that the action before us can both be brought under habeas and the equivalent civil action. The upshot of this is that neither the Seventh Circuit's reasoning nor Justice Scalia's reasoning concurring in *Dotson* applies here because both would deny the existence of the situation before us where a challenge to procedures used in the administration of discretionary parole falls under habeas. Assuming such a situation, the Ninth Circuit is correct that nothing in the *Preiser* line of cases suggests that *Wright* has been overruled for the mere reason that the Court has decided that the claim before us also falls under the equivalent of § 1983 for federal prisoners. Thus, we conclude we have jurisdiction to entertain Terrell's habeas petition.'"); *Docken v. Chase*, 393 F.3d 1024, 1031(9th Cir. 2004) (holding that when prison inmates seek only equitable relief in challenging aspects of their parole review that,

so long as they prevail, *could* potentially affect the duration of their confinement, such relief is available under the federal *habeas* statute. Whether such relief is *also* available under § 1983 depends on the application of *Heck*'s favorable termination rule in this case, an issue not before us and one that we do not decide.' (emphasis original)).

*See also Thornton v. Brown*, 757 F.3d 834, 838, 841-46 (9th Cir. 2014) ("The Supreme Court has not directly considered the application of the *Heck* doctrine to §1983 actions that challenge conditions of parole. Among the courts of appeals, only the Seventh Circuit has done so, in *Drollinger v. Milligan*, 552 F.2d 1220 (7th Cir.1977), and *Williams v. Wisconsin*, 336 F.3d 576 (7th Cir.2003). Consistent with Supreme Court precedent and that of our sister circuit, we hold that such an action is not barred by *Heck* if it is not a collateral attack on *either* the fact of a parolee's confinement as a parolee *or* the parolee's underlying conviction or sentence. Because we conclude that Petitioner's action is not such an attack, we reverse and remand. . . . Here, we hold that Plaintiff's claims, which challenge two parole conditions, do not fall within that [*Heck*'s] exception, because a judgment enjoining enforcement of his GPS [monitoring requirement and residency restrictions will neither affect] the 'fact or duration' of his parole nor 'necessarily imply' the invalidity of his state-court conviction or sentence. . . . Here, Plaintiff does not challenge his status as a parolee or the duration of his parole, and even if he succeeds in this action, nearly all of his parole conditions will remain in effect. Those conditions include drug and alcohol testing and treatment; psychiatric and behavioral counseling; limitations on travel, employment, association with certain individuals, patronage of certain businesses, and the use of motor vehicles; a curfew; numerous sex-offender registration requirements; a duty not to contact his robbery victim; and other restrictions. In these circumstances, we hold that his challenge to two parole conditions does not threaten his 'confinement' as a parolee. . . .Moreover, because Plaintiff challenges only the discretionary decisions of the Department in imposing the GPS monitoring and residency restrictions, his success would not imply the invalidity of his conviction or sentence. . . . Even if successful, Plaintiff's claims will have no effect on his criminal sentence, including the duration of his parole. . . . Because his challenge to discretionary decisions of the Department will not affect his court-imposed prison term or result in release from parole, Plaintiff's possible success in this action would not 'necessarily imply' the invalidity of any state-court judgment. . . .We need not and do not decide whether we would reach a different result had the Department merely implemented a parole condition that was required by statute as a direct consequence of a court's judgment of conviction or sentence. . . . In sum, we hold that a state parolee may challenge a condition of parole under § 1983 if his or her claim, if successful, would neither result in speedier release from parole nor imply, either directly or indirectly, the invalidity of the criminal judgments underlying that parole term. Because Plaintiff challenges just two parole conditions, which were imposed through a discretionary decision of the Department, his success would do neither, and *Heck* does not bar him from proceeding under § 1983."); *Thornton v. Brown*, 757 F.3d 834, 846, 848(9th Cir. 2014) (Ikuta, J., dissenting) ("As a matter of California law, Thornton's challenges, if successful, would necessarily demonstrate that a portion of his underlying sentence was invalid. Because the Supreme Court has held such challenges must be brought in a habeas petition, not under § 1983, I would affirm the district court. In holding otherwise, the majority misunderstands California law,

misapplies Supreme Court precedent, and creates a circuit split with the Seventh Circuit. . . . Because Thornton was sentenced under § 1170 for his 2010 robbery offense, his sentence necessarily included the term and conditions of parole set by the CDCR, Cal.Penal Code § 3000(a)(1), (b)(7). In challenging his parole conditions, then, Thornton is challenging a statutorily mandated component of his sentence, and if he is successful, it would necessarily imply the invalidity of a portion of his sentence. Therefore, under the rules explained in *Dotson*, he may not bring this challenge under § 1983.”); *Ford v. Washington*, 2007 WL 1667141, at \*3, \*4 (D. Ore. June 1, 2007) (“Neither the Supreme Court nor the Ninth Circuit has specifically addressed whether a parolee’s challenge to the conditions of his parole fits within the core of habeas corpus. Courts that have addressed the issue generally distinguish between situations where (1) the parolee challenges the conditions of his parole in the context of his parole being revoked for violation of those conditions and (2) the parolee preemptively challenges the conditions of his parole even though his parole has not been revoked. Courts have found challenges to parole conditions in the context of revocation for a violation of those conditions are, in effect, challenges of the validity of the parole-revocation decision or the plaintiff’s continued imprisonment. Under *Heck*, therefore, the revocation decision must be found invalid in separate proceedings before a parolee can properly bring a § 1983 action. . . In cases in which there has not been a parole revocation, however, courts have been less consistent.[discussing cases] Although none of these cases is binding on this Court, the Court finds the reasoning of the *Yahweh* court persuasive especially in light of the Supreme Court’s opinion in *Wilkinson v. Dotson* . . . Applying the Supreme Court’s reasoning and adopting the analysis in *Yahweh*, this Court concludes parole conditions are not part of Plaintiff’s sentence. Accordingly, Plaintiff may bring a challenge under § 1983 as to the parole condition of taking polygraph tests.”) *Accord Lee v. Jones*, 2006 WL 44188 (D. Ore. 2006).

*See also Murphy v. Raoul*, No. 16 C 11471, 2019 WL 1437880, at \*12–13 (N.D. Ill. Mar. 31, 2019) (“[T]he plaintiffs’ case is about fair procedure and not release from incarceration, although as a remedial matter they might end up there. . . Here, the plaintiffs are neither challenging their sex-crimes convictions nor their sentences, which include their MSR terms of three years to life. Put a little differently, the plaintiffs do not seek to invalidate the fact or duration of their confinement. Rather, they seek to change the processes used in determining the penultimate condition of their confinement—location. In *Wilkinson v. Dotson*, the Supreme Court held that a civil rights plaintiff may seek a constitutional change in the parole procedures used to adjudicate his confinement status. . . The Court reasoned that, because neither prisoner sought an injunction ordering his immediate or speedier release into the community, a remedy in their favor would mean *at most* new eligibility for review. . . That might have sped up the consideration of their release, but it did not automatically follow that that the inmates would in fact be released. . . The Court analyzed *Heck*’s use of the word ‘sentence’ to mean not prison procedures, but ‘substantive determinations as to the length of confinement.’. . That led to the conclusion that prisoners may bring § 1983 challenges to prison administrative decisions. . .The Seventh Circuit has followed suit. . . It is the defendants’ position that the plaintiffs are challenging a condition of their confinement because they are ‘seeking a different program or location or environment,’ turning the question into whether what they ask for amounts to a ‘quantum change in the level of

custody.’. . . Beginning in *Graham*, the Court of Appeals recognized that ‘[t]he difficult intermediate case is where the prisoner is seeking not earlier freedom, but transfer from a more to a less restrictive form of custody.’. . . The critical distinction from that work-release case to this one is that here, unlike there, the plaintiffs are not claiming entitlement to release. . . Instead, the plaintiffs in this case dispute the procedures used in host site review. . . . The statutory scheme here ‘in no way affects the duration, much less the fact, of confinement. [Their] supervised release will still be in place, and it will last just as long.’. . . Accordingly, a straightforward application of *Richmond* carries the day. ‘[A] challenge to rules that affect placement in community confinement [shall be treated] the same way as rules that affect placement in parole systems.’. . . The defendants were wrong to frame the question as prison versus supervised release, but even if they were right, the plaintiffs’ claims nonetheless land in § 1983’s net. . . . The plaintiffs have been consistent since day one in not directly requesting release but asking for a constitutional application of the relevant law and policy to their situations. . . . Thus, the plaintiffs properly brought their claims under § 1983.”); ***Murphy v. Madigan***, No. 16 C 11471, 2017 WL 3581175, at \*6 (N.D. Ill. Aug. 18, 2017) (“Plaintiffs do not allege unlawful acts of the decision makers that would necessarily overturn the decision denying them housing like Edwards’ deceit and bias claim. Instead, Plaintiffs allege that the procedure for determining housing is unconstitutional and, like Edwards’ claim for injunctive relief, that claim is properly brought under § 1983. . . . Should Plaintiffs prevail, some of the Plaintiffs may, hypothetically, be released on MSR because under constitutional procedures because the Defendants may be more likely approve proposed host sites. The possibility of this outcome, however, does not necessarily imply the validity of their sentences and therefore the claims are not barred by the *Heck* doctrine. . . . Defendants do not clarify the distinction between the two but suggest that under *Graham* ‘claims of entitlement to probation, bond, parole fall within the *Heck* rule,’ and therefore Plaintiffs’ claims are barred. . . . However, Plaintiffs do not claim ‘entitlement’ to parole or MSR. Plaintiffs claim entitlement to a constitutional process in determining whether they will be released on MSR, not to release on MSR. *Richmond v. Scibana* clarifies the distinction first outlined in *Graham*: ‘a prisoner claiming a right to *release* on parole must use § 2241 (or § 2254 for a state prisoner); but a prisoner claiming that parole officials are apt to use incorrect rules when resolving a future application must use the APA (or 42 U.S.C. § 1983 for a state prisoner).’ 387 F.3d 602, 605 (7th Cir. 2004). Here, Plaintiffs do not claim a right to release but instead that officials are using unconstitutional rules. Therefore, *Graham* and *Richmond* support Plaintiffs’ claims as properly brought under § 1983.”)

## **I. Challenges to Extradition Procedures**

There are conflicts in the Circuits as to the applicability of *Heck* to challenges to extradition procedures. *See, e.g., Weilburg v. Shapiro*, 488 F.3d 1202, 1204, 1206 (9th Cir. 2007) (“The issue presented is whether the United States Supreme Court’s ruling in *Heck v. Humphrey*, 512 U.S. 477 (1994), bars prospective plaintiffs, who have not otherwise successfully challenged their underlying convictions, from bringing section 1983 actions that are based upon a violation of extradition law. . . . We conclude that *Heck v. Humphrey* is not a bar to the present action. . . . Here, the gravamen of the complaint is that the defendants returned Weilburg to Illinois in violation

of state and federal law, by ignoring established extradition procedures and effectively kidnapping Weilburg. Such allegations, if proven, would not invalidate Weilburg's incarceration in Illinois."); *Harden v. Pataki*, 320 F.3d 1289, 1301, 1302 (11th Cir. 2003) ("We hold that a claim filed pursuant to 42 U.S.C. § 1983 seeking damages and declaratory relief for the violation of a state prisoner's federally protected extradition rights is not automatically barred by *Heck*. We also hold that such a claim is not barred by *Heck*, where the specific allegations are that law enforcement officials failed to provide an extradited prisoner with a pretransfer habeas corpus hearing or a signed warrant by the governor of the asylum state, or released him into the hands of a private extradition service instead of government agents."), disagreeing with Seventh Circuit's analysis in *Knowlin v. Thompson*, 207 F.3d 907 (7th Cir.2000).

## J. Suits Seeking DNA Testing

There are also conflicts regarding suits seeking access to evidence for purposes of DNA testing. See *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2318, 2319 (2009) (noting that '[e]very Court of Appeals to consider the question since *Dotson* has decided that because access to DNA evidence . . . does not "necessarily spell speedier release," *ibid.*, it can be sought under § 1983[,] but not resolving 'this difficult issue.' Court 'assume[s] without deciding that the Court of Appeals was correct that *Heck* does not bar Osborne's § 1983 claim.' On merits, Court refuses to 'recognize a freestanding [substantive due process] right to DNA evidence untethered from the liberty interests [Osborne] hopes to vindicate with it.' *Id.* at 2322.); *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2331 n. 1(2009) (Stevens, J., joined by Ginsburg, J., Breyer, J., and Souter, J. (as to Part I), dissenting) ("Because the Court assumes *arguendo* that Osborne's claim was properly brought under 42 U.S.C. § 1983, rather than by an application for the writ of habeas corpus, I shall state only that I agree with the Ninth Circuit's endorsement of Judge Luttig's analysis of that issue. See 423 F. 3d 1050, 1053-1055 (2005) (citing *Harvey v. Horan*, 285 F. 3d 298, 308-309 (CA4 2002) (opinion respecting denial of rehearing en banc)); see also *McKithen v. Brown*, 481 F. 3d 89, 98 (CA2 2007) (agreeing that a claim seeking postconviction access to evidence for DNA testing may be properly brought as a § 1983 suit); *Savory v. Lyons*, 469 F. 3d 667, 669 (CA7 2006) (same); *Bradley v. Pryor*, 305 F. 3d 1287, 1290-1291 (CA11 2002) (same)."). But see *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2325, 2326 (2009) (Alito, J., joined by Kennedy, J., concurring) ("What respondent seeks was accurately described in his complaint – the discovery of evidence that has a material bearing on his conviction. Such a claim falls within 'the core' of habeas. . . . We have never previously held that a state prisoner may seek discovery by means of a § 1983 action, and we should not take that step here. I would hold that respondent's claim (like all other *Brady* claims) should be brought in habeas.").

The Supreme Court has resolved a conflict in the circuits by deciding the issue it left open in *Osborne*. See *Skinner v. Switzer*, 131 S. Ct. 1289, 1293, 1300 (2011) ("Adhering to our opinion in *Dotson*, we hold that a postconviction claim for DNA testing is properly pursued in a § 1983 action. Success in the suit gains for the prisoner only access to the DNA evidence, which may

prove exculpatory, inculpatory, or inconclusive. In no event will a judgment that simply orders DNA tests ‘necessarily impl[y] the unlawfulness of the State’s custody.’ . . . We note, however, that the Court’s decision in *Osborne* severely limits the federal action a state prisoner may bring for DNA testing. *Osborne* rejected the extension of substantive due process to this area, 557 U.S., at \_\_\_ (slip op., at 19), and left slim room for the prisoner to show that the governing state law denies him procedural due process, see *id.*, at \_\_\_ (slip op., at 18). . . . Unlike DNA testing, which may yield exculpatory, incriminating, or inconclusive results, a *Brady* claim, when successful postconviction, necessarily yields evidence undermining a conviction: *Brady* evidence is, by definition, always favorable to the defendant and material to his guilt or punishment. . . . Accordingly, *Brady* claims have ranked within the traditional core of habeas corpus and outside the province of § 1983.”)

*But see Skinner v. Switzer*, 131 S. Ct. 1289, 1304 (2011) ( (Thomas, J., joined by Kennedy, J., and Alito, J., dissenting) (“This Court has struggled to limit § 1983 and prevent it from intruding into the boundaries of habeas corpus. In crafting these limits, we have recognized that suits seeking ‘immediate or speedier release’ from confinement fall outside its scope. . . . We found another limit when faced with a civil action in which ‘a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.’ *Heck, supra*, at 487. This case calls for yet another: due process challenges to state procedures used to review the validity of a conviction or sentence. Under that rule, *Skinner*’s claim is not cognizable under § 1983, and the judgment of the Court of Appeals should be affirmed. I respectfully dissent.”)

*See also Reed v. Goertz*, 995 F.3d 425, 430 (5th Cir. 2021), *pet. for cert. filed*, No. 21-442 (U.S. Sept. 20, 2021) (“This case is no different than *Skinner*. In state court, Reed asserted that he was entitled to post-conviction DNA testing of certain evidence. . . . The Court of Criminal Appeals rejected Reed’s request for post-conviction DNA testing. In these proceedings, Reed challenges ‘the constitutionality of [Chapter] 64 both on its face and as interpreted, construed, and applied’ by the state court. Like in *Skinner*, Reed does not challenge the Court of Criminal Appeals’ decision itself. Instead, he targets ‘as unconstitutional the Texas statute [that the Court of Criminal Appeals’ decision] authoritatively construed.’ . . . If Reed were to succeed in his § 1983 claims, the Court of Criminal Appeals’ decision would remain intact. Reed has therefore asserted an ‘independent claim’ that would not necessarily affect the validity of the state-court decision.”); *In re Pruett*, 784 F.3d 287, 290-91(5th Cir. 2015) (“In *Skinner v. Switzer*, 562 U.S. 521, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011), the Supreme Court held that a judgment in favor of the plaintiff in his § 1983 suit for an order requiring DNA testing ‘would not “necessarily imply” the invalidity of his conviction’ because the results might prove exculpatory, inconclusive, or might further incriminate the prisoner. . . . In concluding that it lacked jurisdiction, the district court held that Pruett’s complaint was not properly brought under § 1983 because a judgment granting the relief he sought would necessarily imply the invalidity of his sentence. Relying on *Skinner*, Pruett argues that his complaint is properly brought under § 1983 because he challenges neither his conviction nor sentence, but only the State’s authority to carry out an execution at this time. He asserts that a ruling in his favor would not invalidate his sentence, but would only be a finding that the Eighth

Amendment will not allow his execution to proceed at this time because the State's failure to properly preserve evidence is presently preventing him from challenging his conviction. He maintains that when the DNA technology develops in such a manner as to permit him to demonstrate his actual innocence notwithstanding the State's negligent handling of the physical evidence, he will, at that time, be permitted to attack the legality of his conviction in a habeas application. Pruett does not provide any evidence that such technology is likely to develop or, if so, when. In fact, he admits that it is unknown whether it will ever be possible to generate a DNA profile from the torn pieces of the disciplinary report. Thus, he is essentially asking for an indefinite stay of execution based on nothing but speculation. Unlike Skinner, who sought DNA testing, Pruett has already had DNA testing performed using the most current technology presently available. He seeks '[a] declaratory judgment that [his] execution would be in violation of the Eighth and Fourteenth Amendments because the State's negligently handling the evidence made it impossible for Pruett to prove his innocence.' We agree with the district court that this is a direct challenge to the validity of his sentence and, therefore, cannot be maintained under § 1983. Because Pruett has already unsuccessfully challenged his conviction and sentence in an earlier federal habeas proceeding, his current complaint is successive. Accordingly, the district court correctly determined that it did not have jurisdiction to consider it in the light of the fact that Pruett did not obtain our prior authorization pursuant to § 2244(b)(3)."); *Newton v. City of New York*, 779 F.3d 140, 147-54, 158 (2d Cir. 2015) ("The City does not genuinely dispute that New York law conferred on Newton 'a liberty interest in demonstrating his innocence with new evidence.' . . . Newton retains such an interest even without the City's concession. For the purpose of determining whether a liberty interest exists in this case, we think the New York statute that Newton invokes is materially indistinguishable from the Alaska statute upon which Osborne relied. . . . Moreover, the State's explicit statement on the importance of DNA testing—reflected in its enactment of Section 440.30(1-a) in 1994—only strengthens the case for State recognition of a liberty interest. . . . Fundamental adequacy does not mean that State procedures must be flawless or that every prisoner may access the DNA evidence collected in his case. Nor does it mean that DNA evidence must be stored indefinitely. It means only that when State law confers a liberty interest in proving a prisoner's innocence with DNA evidence, there must be an adequate system in place for accessing that evidence that does not 'offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgress [ ] any recognized principle of fundamental fairness in operation.' . . . Considering the similarities and differences between the two statutes, we conclude that the liberty interest created by New York law is no narrower than that created by Alaska law; procedures for vindicating this interest therefore should also be evaluated under the standard described in *Osborne*. . . . Unlike McKithen, Newton readily concedes that the State's statutory procedures are adequate. Instead, he contends that the *City*, not the State, provided him with fundamentally inadequate process by undermining the State's procedures by its recklessly chaotic evidence management system. Having demonstrated that (in contrast to Osborne and McKithen) he diligently and repeatedly tried the State's procedures for obtaining the necessary DNA evidence, Newton claims that the NYPD's evidence management system was so inadequate as to nullify those procedures. This appeal and Newton's arguments thus present an issue that we have yet to address relating to the interaction

between State law and local government in the context of post-conviction relief. We are unaware of precedent that prevents Newton from challenging a municipal custom or practice that, he contends, undermines otherwise adequate State procedures. *McKithen* certainly does not do so, and so the District Court erred insofar as it held that *McKithen* squarely foreclosed Newton's claims. Moreover, by pointing out Osborne's failure to avail himself of Alaska's procedures, *Osborne* appears to have contemplated precisely such as-applied challenges by plaintiffs who attempt unsuccessfully to invoke State post-conviction relief procedures. . . The procedures created by Section 440.30(1-a) require the State, upon a defendant's motion, to 'show what evidence exists and whether the evidence is available for testing.' . . In essence, Section 440.30(1-a) creates an 'essential' corollary procedural right to a faithful accounting of evidence. . . In New York, local government appears to play an integral role in this process. . . and a failure of local government in carrying out its role can nullify the adequacy of State procedures and expose the municipality to constitutional liability. This is hardly a new concept. In other contexts we have permitted plaintiffs to pursue claims against municipalities for deprivations of State-created interests. . . If procedures followed by a municipality rather than a State prove to be constitutionally inadequate, even in the context of facially adequate State procedures, then a defendant may sue the municipality for violating his due process rights on the ground that the municipality's implementation of State procedures is inadequate. Even in the realm of municipal (rather than State) inadequacy, however, we must take care to avoid 'suddenly constitutionaliz[ing]' the area of DNA testing and thereby 'plac[ing] the matter outside the arena of public debate and legislative action.' . . At least three factors help us avoid that pitfall here. . . First, reinstating the § 1983 verdict against the City will not impair the validity of, or expand the rights provided by, Section 440.30(1-a)(a). As noted, this case presents a challenge to the City's *execution* of State law, not to the law itself. . . Second, when, as here, a municipality promulgates policies or practices that affect the criminal procedure laws of the State, those policies or practices may fail to reflect the considered judgment of the State legislature. A local pattern, custom, or practice may frustrate or even obstruct otherwise adequate State law procedures. In those instances, it seems to us, neither *Osborne* nor *Medina* mandates the same level of deference to local government as they do to State legislative action. Third, the procedural right at issue here is quite narrow: Newton was not entitled to the preservation of evidence under State law, but only to a faithful accounting of the evidence in the City's possession. We do not decide what specific City procedure is necessary to manage and track evidence. We simply reinstate a jury verdict that found that the then-existing system was inadequate and that the City, through its agents, servants, or employees, intentionally or recklessly administered an evidence management system that was constitutionally inadequate and that prevented Newton from vindicating his liberty interest in violation of his Fourteenth Amendment right to due process. . . Nevertheless, the City argues that there was insufficient evidence to support the jury's findings that the City's evidence management system was fundamentally inadequate, and that the City officials' failures and misconduct relating to that system reflected a practice or custom. . . In sum, Newton presented evidence that thousands of sometimes decades-old yellow invoices at the Bronx property clerk's office—out of a total of not more than 3200 such invoices per year—were in old out-to-court folders that had improperly never been closed out; evidence listed as 'out-to-court' for over twenty years was lost; the PCD had lost track of and was unable to retrieve evidence in

an unreasonably large number of cases (involving evidence older than five years); several high-level officials tasked with supervising the NYPD's evidence management system were unfamiliar with the PCD's procedures; and the PCD's dysfunction had an unconstitutionally deleterious effect on case closings in a large number of cases, including, obviously, Newton's. The problem in Newton's case was with the retrieval of evidence that was sitting there all along. Despite the preservation of the evidence that proved crucial in exonerating Newton, the PCD was unable to locate it from 1994 to 2005 and inaccurately represented that it had been destroyed either in a fire or pursuant to a regular disposal procedure that may not even have existed. Had Newton accepted the City's recklessly erroneous representations about the evidence at face value, he might have remained in prison far longer than he did. Taken together, this evidence supports a finding that the City, through the poor administration of its evidence management system, perpetuated a practice or custom that was wholly inadequate. . . . [H]ad the City destroyed his DNA evidence according to a legitimate procedure that conformed with State law, Newton would have no claim under § 1983. Without deciding a question not before us, we do not see how an incarcerated defendant (or even a person like Newton) without exonerating evidence obtained by invoking State procedures would have a due process claim for relief under § 1983 based on our holding today. In contrast to *Youngblood*, the issue here is whether a municipality may be held liable for its reckless maintenance of a system that made it impossible to retrieve evidence that *had been* preserved, that State law recognized as particularly significant, and that ultimately exonerated the defendant.”); ***Durr v. Cordray***, 602 F.3d 731, 736, 737 (6th Cir. 2010) (“We . . . conclude that Durr’s request to seek DNA evidence was cognizable under § 1983. But we find that we cannot grant Durr a stay of his execution for these very same reasons: success on his claim would do no more than yield access to the evidence, it would have no direct effect on the validity of his conviction or death sentence, and he would have to bring another, separate action in order to even challenge the conviction or sentence. That is, *even if* Durr were to prevail on his § 1983 action (and obtain the necklace for DNA testing), success in that action would not directly invalidate or undermine his conviction or sentence. Consequently, there is no nexus between the merits of Durr’s underlying claim and his pending execution, so this claim – no matter its merit – cannot justify our interference with the State’s enforcement of an otherwise uncontested judgment of conviction and sentence.”); ***Blaine v. Klein***, No. CV 10-9038 CJC (VBK), 2011 WL 5313488, at \*3, \*4 (C.D. Cal. Dec. 17, 2010) (“It appears that Plaintiff is attempting to claim that Defendants denied him access to evidence for DNA testing. Plaintiff’s claims are foreclosed by the Supreme Court’s decision in *District Attorney’s Office for the Third Judicial District v. Osborne* \_\_\_ U.S. \_\_\_, 129 S.Ct. 2308, 2319-23,174 L.Ed.2d 38 (2009), in which the Court held there was no federal constitutional right to obtain post-conviction access to the state’s evidence for DNA testing. In particular, a prisoner has no substantive due process right to obtaining DNA evidence after his conviction. . . . Rather, a person claiming a due process violation with regard to post-conviction DNA testing must show that he has a protected liberty interest created by the laws of his state ‘to prove his innocence even after a fair trial has proved otherwise.’ . . . If he makes such a showing, he must then show that the state’s procedure for obtaining DNA evidence is constitutionally inadequate because it ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation.’ . . .

Because a convicted prisoner has a lesser liberty interest than a criminal defendant who had not yet been convicted, the state correspondingly has more flexibility in demanding what procedural protections to afford in the context of a criminal trial. Here, Plaintiff has failed to allege that he requested the DNA evidence in the California state courts prior to filing the within action in the Federal Court. California Penal Code Section 1405 provides an elaborate scheme under which a person in prison may seek and obtain DNA testing of evidence. . . . Plaintiff has failed to allege that Penal Code Section 1405 offends some fundamental principle of justice or is fundamentally unfair so as to violate due process. . . . As a result, the alleged facts, when liberally construed and viewed in a light most favorable to Plaintiff, do not state a claim that Defendants violated his constitutional right to due process by denying his post-conviction request for evidence for DNA testing.”)

*See also Summers v. Eidson*, No. 06-70047, 2006 WL 3071226, at \*2 (5th Cir. Oct. 25, 2006) (“Summers argues that the relief sought, namely that this court require that William Spaulding’s parole records be turned over to Summers, would not necessarily imply the invalidity of his conviction or sentence because a *habeas* court would then have to determine whether the failure to disclose these records constituted a *Brady* violation and therefore whether or not to overturn his conviction. *Kutzner*, however, forecloses this argument.”); *Bounds v. United States District Court*, No. 06-0233, 2007 WL 1169377, at \*3 (W.D. La. Apr. 18, 2007) (“As correctly identified by Magistrate Judge Hornsby, an action to disclose evidence that may permit an inmate to challenge his conviction, even if a separate *habeas* action is required to invalidate the conviction, necessarily implies that the conviction was invalid for purposes of *Heck* in the Fifth Circuit. . . . A decision granting the disclosure of the Rule 35(b) motion would permit Bounds to adjudicate whether a *Brady* violation occurred and whether his conviction was unlawfully obtained. Therefore, the Court will not compel disclosure of the Rule 35(b) motion and related documents.”).

**K. *Spencer v. Kemna: Heck’s Applicability When Habeas Corpus is Unavailable***

Finally, there are conflicting opinions on the question of whether and under what circumstances *Heck* applies when *habeas* is unavailable. In *Spencer v. Kemna*, 523 U.S. 1 (1998), the Court addressed the question of whether a petition for a writ of *habeas corpus* for the purpose of invalidating a parole revocation was made moot by the plaintiff’s having completed the term of imprisonment underlying the challenged parole revocation. One of plaintiff’s “collateral consequences” arguments was that under the doctrine of *Heck*, he would be precluded from seeking damages under § 1983 for the alleged wrongful parole revocation unless he could establish the invalidity of the revocation through the *habeas* statute. In an opinion authored by Justice Scalia, the Court noted the following:

[Petitioner] contends that since our decision in *Heck* . . . would foreclose him from pursuing a damages action under 42 U.S.C. § 1983 unless he can establish the invalidity of his parole revocation, his action to establish that invalidity cannot be moot. This is a great non sequitur, unless one believes (as we do not) that a § 1983

action for damages must always and everywhere be available. It is not certain, in any event, that a § 1983 damages claim would be foreclosed. If, for example, petitioner were to seek damages ‘for using the wrong procedures, not for reaching the wrong result,’ . . . and if that procedural defect did not ‘necessarily imply the invalidity of’ the revocation, . . . then *Heck* would have no application all.

523 U.S. at 17.

A majority of the Justices, in *dicta*, expressed the view that *Heck* has no applicability where the plaintiff is not “in custody” and, thus, habeas corpus is unavailable. See *Spencer v. Kemna*, 523 U.S. 1, 20, 21 (1998) (Souter, J., joined by O’Connor, Ginsburg, and Breyer, JJ., concurring) (“[W]e are forced to recognize that any application of the favorable-termination requirement to § 1983 suits brought by plaintiffs not in custody would produce a patent anomaly: a given claim for relief from unconstitutional injury would be placed beyond the scope of § 1983 if brought by a convict free of custody (as, in this case, following service of a full term of imprisonment), when exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas. The better view, then, is that a former prisoner, no longer ‘in custody,’ may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy. Thus, the answer to Spencer’s argument that his habeas claim cannot be moot because *Heck* bars him from relief under § 1983 is that *Heck* has no such effect. After a prisoner’s release from custody, the habeas statute and its exhaustion requirement have nothing to do with his right to any relief.”) and *id.* at 25 n.8 (Stevens, J., dissenting) (“Given the Court’s holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under § 1983.”).

Compare *Teagan v. City of McDonough*, 949 F.3d 670, 678-79 (11th Cir. 2020) (“[T]here is an open question as to whether *Heck* applies to situations where, as here, a § 1983 plaintiff may no longer seek habeas relief because she is no longer in custody. . . . It is unclear whether *Heck* would apply here, as the length of imprisonment was so short ‘that a petition for habeas relief could not have been filed and granted while [Ms. Teagan] was unlawfully in custody.’ *Morrow v. Fed. Bureau of Prisons*, 610 F.3d 1271, 1272 (11th Cir. 2010). See also *id.* at 1273 (Anderson, J., concurring) (“[S]everal circuits have recognized an exception from the *Heck* favorable termination requirement for plaintiffs no longer in custody that were precluded from obtaining habeas relief.”) with *Teagan v. City of McDonough*, 949 F.3d 670, 684 (11th Cir. 2020) (Tjoflat, J., specially concurring) (“I concur in the judgment of the Court. I write separately to state that I believe Teagan’s 42 U.S.C. § 1983 claims are barred under *Heck v. Humphrey*, . . . which requires Teagan to prove that her ‘conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus’ before her claims are cognizable under § 1983. . . . Because Teagan has not offered such proof, the

City is entitled to summary judgment on her § 1983 claims regardless of whether the actions of the municipal court could be attributed to the City under *Monell*.”)

*See also Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1096 (10th Cir. 2009) (“Because we have determined that the Kansas pre-trial diversion agreements are not outstanding convictions and therefore these § 1983 claims impugning their validity are not barred by *Heck*, we need not decide whether *Heck* applies when the plaintiff lacks an available remedy in habeas. Although we implied in *Butler* in dicta that *Heck* does not apply when a habeas remedy is lacking, 482 F.2d at 1278-81, we decline to reach this issue which the Supreme Court has not resolved, *see Close*, 540 U.S. at 752 n. 2, and on which the circuits are split. [footnote collecting cases]”); *Hanks v. Prachar*, 457 F.3d 774, 776 (8th Cir. 2006) (“We agree with Hanks that *Heck v. Humphrey*, 512 U.S. 477 (1994), likely did not apply, given that he had already served his sentence on the 1998 charges when he filed the instant lawsuit, *see Jiron v. City of Lakewood*, 392 F.3d 410, 413 n. 1 (10th Cir.2004) (suggesting *Heck* does not apply when plaintiff is no longer in custody for offense)[.]”); *Jiron v. City of Lakewood*, 392 F.3d 410, 413 n.1 (10th Cir.2004) (noting that *Heck* might not apply where plaintiff is no longer “in custody” for offense and therefore “has no vehicle, such as a petition for a writ of *habeas corpus*, available to her by which she could seek to challenge the underlying felony menacing conviction.”).

In *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002), the plaintiff had fully served the period of incarceration imposed as a result of the deprivation of good-time credits and the imposition of administrative segregation, and his release made habeas unavailable. The Ninth Circuit joined the Second, *see Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001), and Seventh Circuits, *see DeWalt v. Carter*, 224 F.3d 607, 616-18 (7th Cir. 2000) [*But see Savory v. Cannon, infra*], concluding that, under such circumstances, where the unavailability of *habeas* was due to mootness caused by release from the period of incarceration imposed, which incarceration a successful civil suit would impugn, a § 1983 action was not barred by *Heck*. *Nonnette*, 316 F.3d 872, 876, 877 n.6 (9th Cir. 2002).

*See also Covey v. Assessor of Ohio Cnty.*, 777 F.3d 186, 197-98 & n.11 (4th Cir. 2015) (“[A] civil-rights claim does not necessarily imply the invalidity of a conviction or sentence if (1) the conviction derives from a guilty plea rather than a verdict obtained with unlawfully obtained evidence and (2) the plaintiff does not plead facts inconsistent with guilt. . . This is the case here. Mr. Covey never contested his guilt. Nor did he ever seek to suppress the evidence underlying his conviction. Thus, relief under § 1983 or *Bivens* for the alleged illegal searches does not implicate the propriety of Mr. Covey’s conviction, and *Heck* acts as no bar. On the other hand, some of Mr. Covey’s claims *would* imply the conviction’s invalidity. For example, in a portion of the complaint, Mr. Covey alleges that he was falsely imprisoned and deprived of his liberty. . . We construe this allegation as pertaining to Mr. Covey’s period of home confinement. As to Mr. Covey, but not necessarily Mrs. Covey, . . . relief for this ‘injury’ would necessarily imply the invalidity of Mr. Covey’s conviction. . . That conclusion alone, however, does not end our inquiry. We have held once—in an unpublished opinion—that *Heck* bars a claim that implies the invalidity

of a conviction or sentence even if the claimant is no longer in custody, . . . but only if the claimant could have practicably sought habeas relief while in custody and failed to do so. . . . At this stage, it is unclear whether Mr. Covey actually pursued or was practicably able to pursue habeas relief for his conviction. Mr. Covey pleaded guilty on March 30, 2010, and was thereafter sentenced to home confinement for a period of not less than one year and no more than five years. The Coveys filed this action on October 20, 2011, after Mr. Covey completed his term of home confinement. If Mr. Covey was unable to pursue habeas relief because of insufficient time or some other barrier, then *Heck* is wholly inapplicable to the Coveys' § 1983 and *Bivens* claims. Because we cannot make this determination on the record, we hold that *Heck* does not bar any of Mr. Covey's claims for purposes of the defendants' motions to dismiss. We leave it to the district court on remand to decide at summary judgment whether *Heck* bars *any* of Mr. Covey's claims. . . . Because of inadequate briefing by the parties on this issue, we do not address whether a *Heck* bar properly applies to a person formerly in custody, even if the person could have practicably sought habeas relief. We simply note that the binding precedent from the Supreme Court and in this Circuit does not clearly impose a 'practicable diligence' requirement for former prisoners."); *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 614-16 (6th Cir. 2014) ("In *S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633, 638-39 (6th Cir.2008), this Court applied *Powers* to hold that *Heck's* favorable termination requirement does not apply where, due to the length of a sentence, a petitioner was unable to assert a habeas claim. *Powers* logically extends to situations in which petitioners elect to participate in pretrial diversion programs to avoid trial and possible jail time. . . . In the instant case, Plaintiff Aaron Hayward pleaded guilty to resisting arrest and paid a fine rather than spending an extensive amount of time in jail. He was ineligible for habeas review because he did not serve a sentence long enough to assert a claim challenging his conviction. Therefore, he claims that *Powers* means *Heck* is inapplicable to his case. . . . Although application of *Powers* in this case is a question of law, it is not an issue for which resolution is clear beyond doubt, and a district court should have had the opportunity to consider the facts in this case to determine whether *Powers* applies. Plaintiff has failed to demonstrate any exceptional circumstances that prevented him from asserting this argument before the district court. Plaintiff is not a *pro se* litigant. He was represented by counsel before the district court, and he continues to be represented by counsel on appeal. He had every opportunity to raise his *Powers* argument in any one of his three amended complaints or other filings before the district court, yet he failed to do so. As this Court has found waiver in far more sympathetic cases and Plaintiff fails to assert that he is entitled to application of an exception, this Court declines consideration of Plaintiff's *Powers* argument."); *Morris v. Noe*, 672 F.3d 1185, 1193 n.2 (10th Cir. 2012) ("[T]he *Heck* bar does not apply to plaintiffs who have no available habeas corpus remedy. *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir.2010); see also *Spencer v. Kenna*, 523 U.S. 1(1998) (five justices agreeing that *Heck's* favorable termination requirement did not apply to "a former prisoner, no longer in custody"). Because *Morris* was never in custody, but merely received a citation, *Heck* does not bar Plaintiff's unlawful arrest claim. See *Klen v. City of Loveland, Colo.*, 661 F.3d 498, 515 (10th Cir.2011)."); *Klen v. City of Loveland, Colo.* 661 F.3d 498, 515, 516 (10th Cir. 2011) ("The *Heck* issue is slightly more complicated than plaintiffs suggest. While Ed Klen paid a fine, he also received a deferred judgment and sentence that required him to 'keep the Court advised of

his current business and residential addresses and telephone numbers’ and to ‘commit no other violations of Title 15 of the Loveland Municipal Code during the deferred period.’ . . . In the event of a breach of any of these conditions, the Loveland Municipal Court was empowered to enter judgment and impose sentence on his no-contest pleas. . . . According to plaintiffs, such a sentence could include incarceration of up to one year on each count. . . . While the restrictions imposed on Ed Klen as a result of his plea required him to do more than pay a fine, they do not appear to qualify as a significant restraint on his liberty sufficient to permit him to invoke a habeas remedy. Thus, his § 1983 claims concerning his conviction are not barred by *Heck*.”); ***Cohen v. Longshore***, 621 F.3d 1311, 1316, 1317 (10th Cir. 2010) (“Under these circumstances, and in light of the fact that *Heck* involved a petitioner who was still incarcerated, we are not persuaded that *Heck* must be applied to petitioners without a habeas remedy. We are instead persuaded by the reasoning of the Second, Fourth, Sixth, Seventh [But see *Savory v. Cannon*, *infra*], Ninth, and Eleventh Circuits that we are free to follow the five-Justice plurality’s approach in *Spencer* on this unsettled question of law. We are also persuaded that the *Spencer* plurality approach is both more just and more in accordance with the purpose of § 1983 than the approach of those circuits that strictly apply *Heck* even to petitioners who have been released from custody. If a petitioner is unable to obtain habeas relief – at least where this inability is not due to the petitioner’s own lack of diligence – it would be unjust to place his claim for relief beyond the scope of § 1983 where ‘exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas.’ *Spencer*, 523 U.S. at 21 (Souter, J., concurring). We thus adopt the reasoning of these circuits and hold that a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a § 1983 claim. The district court therefore erred in holding that Plaintiff’s false imprisonment claim lacked merit where Plaintiff’s prior attempt to obtain a favorable termination in habeas was dismissed based on mootness.”); ***Morrow v. Federal Bureau of Prisons***, 610 F.3d 1271, 1273, 1274 (11th Cir. 2010) (Anderson, J., concurring specially) (unpublished) (“Drawing on Justice Souter’s concurrence in *Spencer v. Kemna*, 523 U.S. 1, 18, 118 S.Ct. 978, 988 (1998) (Souter, J., concurring), several circuits have recognized an exception from the *Heck* favorable termination requirement for plaintiffs no longer in custody that were precluded from obtaining habeas relief. [collecting cases] Although other circuits have disagreed, I believe the cases from the Second, Sixth, and Ninth Circuits define a sensible application of the favorable termination requirement based on Justice Souter’s concurrence in *Spencer* to plaintiffs that are no longer in custody and who, despite due diligence, could not have obtained habeas corpus relief.” [footnotes omitted]); ***S.E. v. Grant County Bd. of Educ.***, 544 F.3d 633, 638, 639 (6th Cir. 2008) (“Plaintiffs convincingly assert that *Powers v. Hamilton County Public Defender Commission*, 501 F.3d 592,603 (6th Cir.2007) [FN3], *cert. denied*, \_\_ S.Ct. \_\_, 77 U.S.L.W. 3019 (U.S. Oct. 6, 2008) (No. 07-1318), supports their position that *Heck* poses no bar to the instant suit, because A.E. was never in custody, was not convicted or sentenced, and was never eligible for habeas corpus relief. Accordingly, they argue she was improperly prohibited from ‘seek[ing] vindication of her federal rights.’ . . . Given the facts of this case, where the plaintiff was neither convicted nor sentenced and was habeas-ineligible, we hold that *Heck* is inapplicable, and poses no bar to plaintiffs’ claims.”); ***Wilson v. Johnson***, 535 F.3d 262, 267, 268 & n.8 (4th Cir. 2008) (“Both parties readily recognize that the circuits are split on

this issue. Four circuits regard the five justice plurality in *Spencer* as *dicta*, and continue to interpret *Heck* as barring individuals from filing virtually all § 1983 claims unless the favorable termination requirement is met. . . . On the other hand, five circuits have held that the *Spencer* plurality's view allows a plaintiff to obtain relief under § 1983 when it is no longer possible to meet the favorable termination requirement via a *habeas* action. . . . As evidenced by the circuit split, the Supreme Court has yet to conclusively decide if a former inmate can file a § 1983 claim when his habeas avenue to federal court has been foreclosed. . . . Because Wilson's § 1983 claim seeks damages for past confinement, he does not fall squarely within the holdings of *Preiser*, *Wolff*, *Heck* or *Spencer*. Thus, while Supreme Court *dicta* in *Heck* and *Spencer* provides grist for circuits on both sides of this dilemma, we are left with no directly applicable precedent upon which to rely. We believe that the reasoning employed by the plurality in *Spencer* must prevail in a case, like Wilson's, where an individual would be left without any access to federal court if his § 1983 claim was barred. Indeed, the reach and intent of the habeas remedy would not be circumscribed by Wilson's § 1983 claim since he filed it after the expiration of his sentence. . . . If a prisoner could not, as a practical matter, seek habeas relief, and after release, was prevented from filing a § 1983 claim, § 1983's purpose of providing litigants with 'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nations,' . . . would be severely imperiled. Barring Wilson's claim would leave him without access to any judicial forum in which to seek relief for his alleged wrongful imprisonment. Quite simply, we do not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right – freedom – should be left without access to a federal court. . . . While Wilson concedes that filing a petition for habeas corpus was theoretically possible, he argues that complying with habeas' administrative exhaustion requirement during the additional confinement was impossible."); ***Erlandson v. Northglenn Municipal Court***, 528 F.3d 785, 787, 789 n.2 (10th Cir. 2008) ("Mr. Erlandson alleges that his municipal court conviction [for littering his own property] resulted only in a monetary fine. However, the imposition of a fine, by itself, does not satisfy the custody requirement. . . . Therefore, because Mr. Erlandson is not in custody, the habeas corpus claims he raises seeking to overturn his conviction must be dismissed. . . . . Because we are relying on the *Rooker-Feldman* doctrine to dispose of any claims asserted by Mr. Erlandson under § 1983, we do not need to decide whether the Supreme Court's 'favorable-termination requirement' . . . applies in cases such as this one where the party seeking relief from a state-court conviction, through no fault of his own, does not have a remedy available under the federal habeas statute. We note, however, that there is currently a split among our sister circuits on this issue. *See, e.g., Powers v. Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 601-03 (6th Cir.2007) (discussing circuit split); ***Mendoza v. Meisel***, No. 07-4627, 2008 WL 726860, at \*1 (3rd Cir. Mar. 19, 2008) (per curiam) ("The District Court reasoned that Mendoza is barred from asserting a § 1983 claim until the convictions on his challenged motor vehicle offenses are set aside or have otherwise terminated in his favor. . . . We disagree with the District Court that *Heck* applies to a case such as Mendoza's. *Heck* does not bar a § 1983 claim where the plaintiff is unable to challenge his conditions of confinement through a petition for federal *habeas corpus*. . . . Because Mendoza was never incarcerated, or otherwise in custody, federal *habeas* relief has never been available to him and, therefore, *Heck* cannot apply."); ***Powers v. Hamilton County Public Defender Com'n***,

501 F.3d 592, 601-03 (6th Cir. 2007) (“Drawing on Justice Souter’s *Heck* and *Spencer* pronouncements, Powers argues that the favorable-termination requirement is inapplicable to his claims because he has been released from prison. As an initial matter, Powers misstates the nature of the *Heck* limitation that Justice Souter has theorized. What is dispositive in Powers’s situation is not that he is no longer incarcerated, but that his term of incarceration – one day – was too short to enable him to seek habeas relief. It seems unlikely that Justice Souter intended to carve out a broad *Heck* exception for all former prisoners. The better reading of his analysis is that a § 1983 plaintiff is entitled to a *Heck* exception if the plaintiff was precluded ‘as a matter of law’ from seeking habeas redress, but not entitled to such an exception if the plaintiff could have sought and obtained habeas review while still in prison but failed to do so. . . .To date, neither we, nor the Supreme Court, have conclusively resolved whether *Spencer* should be construed as limiting the reach of *Heck* such that a § 1983 claimant in Powers’s shoes is excepted from the favorable-termination requirement. . . . Although we have not yet definitively weighed in on the interplay between *Heck* and *Spencer*, our sister circuits are divided on the question. Four circuits, including the First, Third, Fifth, and Eighth Circuits, have rejected Justice Souter’s analysis and instead have held that § 1983 claimants must comply with *Heck*’s favorable-termination requirement even if habeas relief was unavailable to them. These courts have reasoned that to recognize an exception to *Heck* along the lines sketched by Justice Souter would amount to an impermissible deviation from Supreme Court precedent. . . .We disagree with the reasoning of our sister circuits who have decreed themselves bound by *Heck* to the exclusion of Justice Souter’s comments in his *Heck* and *Spencer* concurrences. . . . We are persuaded by the logic of those circuits that have held that *Heck*’s favorable-termination requirement cannot be imposed against § 1983 plaintiffs who lack a habeas option for the vindication of their federal rights. Most analogous to Powers’s case is *Leather v. Ten Eyck*, in which the Second Circuit concluded that the plaintiff’s § 1983 suit could proceed despite noncompliance with the favorable-termination requirement because the plaintiff had been assessed only a monetary fine in his criminal proceeding and thus was ineligible for habeas relief. . . .The Ninth and Eleventh Circuits also have dispensed with the favorable-termination requirement where habeas is unavailable. . . . These Circuits have the better-reasoned view. Powers was fined for his reckless-driving misdemeanor and then imprisoned for at least one, but not more than thirty, days for his failure to pay the fine. Under these circumstances, there is no way that Powers could have obtained habeas review of his incarceration. This is precisely the kind of situation that Justice Souter had in mind when he argued in *Heck* and *Spencer* that the favorable-termination requirement could not be deployed to foreclose federal review of asserted deprivations of federal rights by habeas-ineligible plaintiffs. Accordingly, we join the Second, Ninth, and Eleventh Circuits in holding that the favorable-termination requirement poses no impediment to Powers’s § 1983 claims.”).

*See also Sevy v. Barach*, No. 17-13789, 2019 WL 3556706, at \*5 (E.D. Mich. Aug. 5, 2019) (“In this case, Sevy’s retaliation claim clears any *Heck* bar. For one, Sevy’s First Amendment retaliation claim is consistent with his no contest plea. Sevy says Barach and Marshall used force against him because of his protected speech, not that they arrested him for it (or that he was eventually charged and convicted of a minor offense as a pretext). . . . Thus, because Sevy

might have been both lawfully arrested for disturbing the peace and yet unlawfully subjected to force because of his speech, his First Amendment retaliation claim is consistent with his conviction. In addition, Sevy could not seek habeas review after he pleaded no contest and paid a fine because he was never in custody and so was precluded from challenging his conviction by way of a petition for a writ of habeas corpus. Thus, *Heck* does not bar his § 1983 claim for First Amendment retaliation.”); *Echavarría v. Roach*, No. 16-CV-11118-ADB, 2017 WL 3928270, at \*6–7 (D. Mass. Sept. 7, 2017) (“Defendants Hollow and the City of Lynn argue in their reply brief that Plaintiff should not be protected by *Heck* because Plaintiff became ineligible for federal habeas corpus relief by 2000. . . This argument is unsupported by caselaw, and Defendants have not stated a clear reason to impose a Catch-22 upon Plaintiff whereby any § 1983 suit that implicated the validity of his conviction would have been barred by *Heck* prior to the date his motion for a new trial was granted, but also foreclosed after that point because it was too late to file a moot habeas corpus petition. Defendants cite *Figueroa* for the proposition that ‘the impugning of an allegedly unconstitutional conviction in a separate, antecedent proceeding [is] a prerequisite to a resultant section 1983 action for damages,’ but they fail to note that this quotation comes from a section discussing the appellants’ attempt to ‘collapse the habeas proceedings into their section 1983 action, thereby creating a legal chimera through which they seek simultaneously to invalidate [the] conviction and to recover damages,’ and involves a case where the criminal defendant’s conviction had not been reversed or vacated but could no longer be challenged through a habeas corpus petition because he was deceased. . . Here, Plaintiff’s conviction was vacated, and he has not attempted to conflate a habeas corpus petition with a § 1983 suit. To the extent Defendants intend to argue that the filing of a timely habeas corpus petition should be a prerequisite to obtaining the protection of *Heck*, they have not cited cases or other persuasive sources . . . to support this assertion. Furthermore, the Court notes that, pursuant to *Heck*, Petitioner’s cause of action did not accrue until his motion for a new trial was granted; therefore, the issue is not whether equitable tolling applies, as Defendants imply, but rather, when his cause of action came into being. . . Accordingly, Plaintiff’s suit is not barred by the statute of limitations. Plaintiff’s claims did not accrue until, at the earliest, the date his motion for a new trial was granted, April 30, 2015.”); *D.D. v. Scheeler*, No. 1:13-CV-504, 2015 WL 892387, at \*8 (S.D. Ohio Mar. 3, 2015) (“The Court also rejects Defendants’ argument that S.D.’s claim is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). The *Heck* rule prohibits § 1983 actions that necessarily require the court to find the conviction underlying an action was invalid. Defendants rely upon *S.E. v. Grant County Bd. of Educ.*, 522 F.Supp.2d 826, 831 (E.D.Ky.2007), *aff’d*, 544 F.3d 633 (6th Cir.2008) for their argument that S.D.’s participation in a diversion program constitutes a conviction and bars her § 1983 claim pursuant to *Heck*. In that case, the district court found that there was no material difference between a diversion program entered into by plaintiff, which it deemed was not a favorable termination, and a conviction resulting in probation. . . As discussed, it is disputed whether S.D. participated in a diversion program. But even if she did, Defendants ignore Sixth Circuit case law. On appeal, the Sixth Circuit expressly rejected the Defendants’ argument and district court’s analysis in *S.E. Grant* and stated, ‘where the plaintiff was neither convicted nor sentenced and was habeas-ineligible, we hold that *Heck* is inapplicable, and poses no bar to plaintiffs’ claims.’ . . Accordingly, Defendants’ argument that *Heck* precludes S.D.’s § 1983 claims

is inconsistent with Sixth Circuit precedent and must be rejected.”); **Kirk v. Muskingum County Ohio**, No. 2:09-cv-0583, 2010 WL 3719286, at \*4 (S.D. Ohio May 24, 2010) (“Like the plaintiff in *Powers*, Plaintiff was not ‘in custody’ long enough to have obtained habeas review within his short period of incarceration. . . Consequently, the *Heck* doctrine does not apply to Plaintiff’s claims in this case. See *Ballanger v. City of Lebanon*, No. 1:07-CV-00256, 2008 WL 4279583 at \*4-5 (S.D. Ohio 2008) (holding that the *Heck* doctrine did not apply to a plaintiff incarcerated for forty-five days.”); **Medeiros v. Clark**, No. CV-F-09-1177 OWW/GSA, 2010 WL 1812641, at \*12 (E.D. Cal. May 5, 2010) (“Here, because Plaintiff was never convicted of any crime, he could not challenge the misdemeanor pretrial diversion through appeal or habeas corpus. Plaintiff was never incarcerated and suffers no collateral consequences as a result of the misdemeanor pretrial diversion. See *Nickerson v. Portland Police Bureau*, 2008 WL 4449874 at \*8 (D.Or., Sept.30, 2008): “With no habeas remedy available, and no allegations of any collateral consequences stemming from a traffic conviction, *Heck* does not bar plaintiff’s section 1983 equal protection claim.”); see also *Cole v. Doe I Thru 2 Officers of the City of Emeryville Police Dep’t.*, 387 F.Supp.2d 1084, 1092-1093 (N.D.Cal.2005). Defendants’ motion to dismiss the First Cause of Action as barred by *Heck* is DENIED.”); **Ferrell v. Seagraves**, No. 4:07-cv-35, 2008 WL 4763435, at \*1 (E.D. Tenn. Oct. 29, 2008) (“As in *Powers*, Plaintiff was sentenced to only thirty days in jail. . . The length of his sentence effectively precluded him from seeking any resolution to his challenges to his incarceration through federal habeas corpus. . . Accordingly, under the law as it stood at the time of the Court’s November 2, 2007 Memorandum and Order, none of Plaintiff’s claims were barred by *Heck*.”); **Nickerson v. Portland Police Bureau**, No. 08-217-HU, 2008 WL 4449874, at \*8 (D. Or. Sept. 30, 2008) (“*Guerrero* underscores the need to examine why habeas relief is unavailable to a section 1983 plaintiff whose claim would, if successful, necessarily invalidate an underlying conviction. As the *Guerrero* court explained, if habeas relief is unavailable because of a plaintiff’s failure to timely pursue habeas remedies, *Heck* will still bar the section 1983 claim. . . . The facts in the instant case are analogous to those in *Nonnette*, not *Guerrero* or *Cunningham*. Here, the allegations in the Amended Complaint indicate that plaintiff was fined upon conviction of the traffic offense for which Officer Hart cited him, but he was never incarcerated. Thus, he has no habeas remedy available to him. Moreover, the unavailability of habeas is not related to a lack of diligence on plaintiff’s part. With no habeas remedy available, and no allegations of any collateral consequences stemming from a traffic conviction, *Heck* does not bar plaintiff’s section 1983 equal protection claim.”); **El Badrawi v. Department of Homeland Sec.**, 579 F.Supp.2d 249, 273 (D. Conn. 2008) (“*Heck* also does not bar El Badrawi’s actions based on his false arrest and initial detention. *Heck*’s logic is rooted in the recognition that prisoners need to exhaust their habeas remedies. . . Accordingly, *Heck* will not bar an action when the prisoner was never in state confinement, and hence never had any remedy in habeas corpus in which he could challenge his conviction or confinement. . . By the same logic, *Heck* does not bar a claim when the prisoner was in custody for such a brief period of time that any available habeas remedy would have been pointless.”); **Ballinger v. City of Lebanon**, No. 1:07-CV-00256, 2008 WL 4279583, at \*5 (S.D. Ohio Sept. 18, 2008) (“The Sixth Circuit has recently held that ‘*Heck*’s favorable-termination requirement cannot be imposed against § 1983 plaintiffs who lack a habeas option for the vindication of their federal rights.’ . . That is precisely the case here. In the instant

case, plaintiff was incarcerated for forty-five days then released. Like the plaintiff in *Powers* who was fined for a misdemeanor and imprisoned for at least one, but not more than thirty days for his failure to pay the fine, ‘there is no way that [plaintiff] could have obtained habeas review of his incarceration.’ . . . A person convicted of a crime in state court can obtain a writ of habeas corpus only if he is ‘in custody’ pursuant to the unlawful judgment of that court. . . . Since plaintiff was not ‘in custody’ long enough to seek habeas corpus relief, *Heck*’s favorable termination requirement is not a bar to plaintiff’s Section 1983 action.”); ***Sanabria v. Martins***, 568 F.Supp.2d 220, 224-26 (D. Conn. Mar. 26, 2008) (“In *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir.1999), the Second Circuit reasoned that, where a § 1983 plaintiff was never incarcerated for a prior offense and thus had no opportunity to raise a constitutional challenge *via habeas corpus*, *Heck* does not apply. Here, Sanabria pleaded guilty to violating ‘ 53a-167(a) and was sentenced to pay a \$250 fine without any term of incarceration. . . . Like the plaintiff in *Leather*, Sanabria had no *habeas corpus* remedy, and so *Heck* is no bar to his § 1983 action. Under such circumstances, the *Leather* court concluded, a plaintiff should ‘be permitted to pursue his § 1983 claim in the district court unless principles of *res judicata* or collateral estoppel preclude his suit.’ . . . . Whether the question of how to view Sanabria’s guilty plea is approached through the lens of preclusion or evidence law, though, the effect would be the same given the present procedural posture. Even if not estopped from denying the facts underlying his plea and conviction, Sanabria cannot create a disputed issue of material fact relevant to the summary judgment analysis simply by contesting the basis for his guilty plea. . . . Sanabria pleaded guilty to interfering with a police officer in violation of Connecticut General Statutes ‘ 53a-167a, a class A misdemeanor offense, thereby conceding the factual basis for the plea and admitting the facts necessary to establish the three elements of that offense: (1) interference with an officer, (2) with intent to so interfere, (3) while the officer is performing his or her duties. His bare assertions in opposition that he offered no resistance, therefore, provide no demonstration of the existence of a genuine issue of material fact on the subject which underlay his conviction. The analysis does not end here, however, because Plaintiff’s § 1983 allegations are not wholly congruent with the facts determined by his guilty plea. . . . Sanabria cannot now proceed with a § 1983 action premised on his contention that he did nothing wrong and that Martins acted without provocation. But to the extent Plaintiff is seeking damages based on the quantum of force Martins used after Plaintiff completed the offense of interfering with an officer (or perhaps in response thereto), there remains a genuine issue of material fact for trial.”); ***Denton v. Hanifen***, No. 3:06CV00400-JDM, 2008 WL 655984, at \*3 (W.D. Ky. Mar. 7, 2008) (“The Sixth Circuit and others . . . have held that *Heck* is no bar to the claims of a § 1983 plaintiff for whom *habeas* relief was not available to vindicate their federal rights. *Powers v. Hamilton County Public Defender Commission*, 501 F.3d 592, 603 (2008)(citing cases from sister circuits). Such is the case here. A person convicted of a crime in state court can obtain a writ of *habeas corpus* only if he is ‘in custody’ pursuant to the unlawful judgment of that court. . . . A person, even if in pre-trial custody, cannot attack a judgment until it is rendered, or a sentence until he has begun to serve it. . . . Thus, even though Mr. Denton was ‘in custody’ until the court accepted his guilty plea and ordered him released, *habeas* relief was not available to him because no judgment had been rendered and no sentence imposed based on that judgment. In addition, while those on parole or released on their own recognizance continue to suffer restraints on their liberty, and therefore are

considered ‘in custody’ for purposes of *habeas* relief even though not physically behind bars, . . . *habeas* relief is foreclosed to those who have completed their term of incarceration, with no further obligations due, or supervision enforced by, the state. Accordingly, the moment the state court entered its order accepting Mr. Denton’s guilty plea and awarded him full credit for time served with no further restraints on his liberty, *habeas* relief was foreclosed to Mr. Denton. The time between the court’s acceptance of Mr. Denton’s guilty plea and the order releasing him was only slightly more than one week. Thus, although technically he could have pursued *habeas* relief during that small window of time, as a practical matter, *habeas* relief was foreclosed to him once the judge entered the order releasing him and, practically speaking, was never really available. Consequently, *Heck* poses no bar to plaintiff’s assertion of his § 1983 claim in this matter.”); ***Brown v. City of Chicago***, No. 04 C 8134, 2006 WL 3320103, at \*4, \*6 (N.D. Ill. Nov. 9, 2006) (“Plaintiff cannot bring a *habeas* action because Plaintiff’s *habeas* petition was dismissed on April 27, 2006, by this Court because Plaintiff was not then presently in the custody of the Illinois Department of Corrections or under mandatory supervised release. . . Therefore, the central issue is whether Section 1983 actions should be available to former prisoners, who cannot avail themselves of the *habeas* remedy, or whether such actions are barred by the *Heck* doctrine. . . . [B]ecause Plaintiff is no longer in custody and, therefore, cannot pursue the *habeas* action, Plaintiff can pursue his Section 1983 claims.”); ***Powell v. Bucci***, No. 04-CV-1192, 2006 WL 2052159, at \*4 (N.D.N.Y. July 21, 2006) (“At first blush, it appears that the *Heck* Rule would bar the three remaining Counts. Counts 1, 2 and 3 arise out of the August 13, 2004 seizure that resulted in the traffic tickets and subsequent convictions and seek to ‘recover damages for [an] allegedly unconstitutional . . . imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.’ . . . However, the Second Circuit has interpreted *Heck* as applying only when the subsequent conviction resulted in the plaintiff’s incarceration. . . . Here, there is no indication that Plaintiff was incarcerated because of her convictions on the traffic violations, and, therefore, the *Heck* Rule does not apply to any of the Counts.”); ***Limone v. United States***, 271 F.Supp.2d 345 (D. Mass. 2003) (unfair to apply *Heck* where government had blocked effective access to post-conviction remedies by actively subverting [attempts to prevail through] commutation procedures and by withholding critical evidence until years after [convicted men] had died.”), *aff’d in part and remanded in part*, ***Limone v. Condon***, 372 F.3d 39(1st Cir. 2004); ***Lueck v. Wathen***, 262 F. Supp.2d 690, 699 & n.7 (N.D. Tex. 2003) (“[A] prisoner who is effectively barred from raising a non-frivolous claim in a federal habeas proceeding because the state has interfered with his right of access to the courts should be able to sue for money damages, to the extent those damages can be quantified.”).

The court in *Nonnette* distinguished its decision in ***Cunningham v. Gates***, 312 F.3d 1148 (9th Cir. 2003), *as amended on denial of reh’g*, (Jan. 14, 2003) and *cert. denied*, 538 U.S. 960 (2003), where *Heck* was held to bar plaintiff’s claim in a situation where the unavailability of *habeas* was due to a failure to timely pursue *habeas* remedies. 312 F.3d at 1153 n.3.

Compare ***Martin v. City of Boise***, 920 F.3d 584, 613-15 (9th Cir. 2019) (*amended opinion on denial of rehearing and denial of rehearing en banc*), *cert. denied*, 140 S. Ct. \_\_\_\_, No. 19-247

(Dec. 16, 2019) (“Relying on the concurring and dissenting opinions in *Spencer*, we have held that the ‘unavailability of a remedy in habeas corpus because of mootness’ permitted a plaintiff released from custody to maintain a § 1983 action for damages, ‘even though success in that action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits.’ *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002). But we have limited *Nonnette* in recent years. Most notably, we held in *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), that even where a plaintiff had no practical opportunity to pursue federal habeas relief while detained because of the short duration of his confinement, *Heck* bars a § 1983 action that would imply the invalidity of a prior conviction if the plaintiff could have sought invalidation of the underlying conviction via direct appeal or state post-conviction relief, but did not do so. . . . Here, the majority of the plaintiffs’ claims for *retrospective* relief are governed squarely by *Lyall*. It is undisputed that all the plaintiffs not only failed to challenge their convictions on direct appeal but expressly waived the right to do so as a condition of their guilty pleas. The plaintiffs have made no showing that any of their convictions were invalidated via state post-conviction relief. We therefore hold that all but two of the plaintiffs’ claims for damages are foreclosed under *Lyall*. . . . The *Heck* doctrine, in other words, serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge. In context, it is clear that *Wilkinson*’s holding that the *Heck* doctrine bars a § 1983 action ‘no matter the relief sought (damages or equitable relief) ... if success in that action would necessarily demonstrate the invalidity of confinement or its duration’ applies to equitable relief concerning an existing confinement, not to suits seeking to preclude an unconstitutional confinement in the future, arising from incidents occurring after any prior conviction and stemming from a possible later prosecution and conviction. . . . As *Wilkinson* held, ‘claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration)’ are distant from the ‘core’ of habeas corpus with which the *Heck* line of cases is concerned, and are not precluded by the *Heck* doctrine. . . . In sum, we hold that the majority of the plaintiffs’ claims for retrospective relief are barred by *Heck*, but both Martin and Hawkes stated claims for damages to which *Heck* has no application. We further hold that *Heck* has no application to the plaintiffs’ requests for prospective injunctive relief.”) with ***Martin v. City of Boise***, 920 F.3d 584, 618-20 (9th Cir. 2019) (*amended opinion on denial of rehearing and denial of rehearing en banc*), *cert. denied*, No. 19-247 (Dec. 16, 2019) (Owens, J., concurring in part and dissenting in part) (“I agree with the majority that the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), bars the plaintiffs’ 42 U.S.C. § 1983 claims for damages that are based on convictions that have not been challenged on direct appeal or invalidated in state post-conviction relief. *See Lyall v. City of Los Angeles*, 807 F.3d 1178, 1192 n.12 (9th Cir. 2015). I also agree that *Heck* and its progeny have no application where there is no ‘conviction or sentence’ that would be undermined by granting a plaintiff’s request for relief under § 1983. . . . I therefore concur in the majority’s conclusion that *Heck* does not bar plaintiffs Robert Martin and Pamela Hawkes from seeking retrospective relief for the two instances in which they received citations, but not convictions. I also concur in the majority’s Eighth Amendment analysis as to those two claims for retrospective relief. Where I part ways with the majority is in my understanding of *Heck*’s application to the plaintiffs’ claims for declaratory and injunctive relief. . . . *Edwards* . . . leads me

to conclude that an individual who was convicted under a criminal statute, but who did not challenge the constitutionality of the statute at the time of his conviction through direct appeal or post-conviction relief, cannot do so in the first instance by seeking declaratory or injunctive relief under § 1983. . . I therefore would hold that *Heck* bars the plaintiffs' claims for declaratory and injunctive relief. We are not the first court to struggle applying *Heck* to 'real life examples,' nor will we be the last. . . If the slate were blank, I would agree that the majority's holding as to prospective relief makes good sense. But because I read *Heck* and its progeny differently, I dissent as to that section of the majority's opinion. I otherwise join the majority in full.")

*See also Lyall v. City of Los Angeles*, 807 F.3d 1178, 1191-92 & n.12 (9th Cir. 2015) ("We have looked to the separate *Spencer* opinions for guidance as to whether *Heck's* favorable-termination requirement applies in all § 1983 cases and have concluded that, at least sometimes, it does not. Two cases, *Nonnette v. Small*, 316 F.3d 872 (9th Cir.2002), and *Guerrero v. Gates*, 442 F.3d 697 (9th Cir.2006), define the rough boundaries of the *Heck* bar, as we have construed it post-*Spencer*. In *Nonnette*, a state prisoner, after first exhausting his prison administrative remedies, brought a § 1983 suit against prison officials, alleging that they wrongly revoked some of his good-time credits and placed him in administrative segregation without giving him adequate process. The district court held that his § 1983 action was barred by *Heck*. By the time we heard his appeal, however, the inmate had been released. We held that because any habeas corpus petition filed by the now-former inmate would be dismissed as moot, he was not barred by *Heck* from bringing a § 1983 suit. . . We stated that this holding 'affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters; the status of prisoners challenging their underlying convictions or sentences does not change upon release, because they continue to be able to petition for a writ of habeas corpus.' .In *Guerrero*, decided four years later, we distinguished *Nonnette* and concluded that an ex-inmate's § 1983 suit was barred by *Heck*. The plaintiff in *Guerrero* alleged that various LAPD officials had conspired to subject him to excessive force, wrongful arrest, and malicious prosecution. . . He did not file suit until approximately a year after his release from prison. . . Examining our previous decisions, we determined that 'timely pursuit of available habeas relief' is an important prerequisite for a § 1983 plaintiff seeking to escape the *Heck* bar. . . Thus, we explained, the plaintiff in *Nonnette* deserved relief from the *Heck* bar because he 'immediately pursued relief after the incident giving rise to [his] claims and could not seek habeas relief only because of the shortness of his prison sentence.' . . *Guerrero*, by contrast, never challenged his convictions prior to filing his § 1983 suit, despite having years in custody in which to do so. We held that this 'self-imposed' failure to seek habeas relief was not a ground for allowing *Guerrero* to escape the *Heck* bar. Cortez's case is more akin to *Guerrero* than to *Nonnette*. . . . We acknowledge that Cortez's inability to obtain federal habeas relief is no fault of his own: He was in custody for only two days after his arrest and was not sentenced to any prison time as a result of his infraction conviction. The brevity of Cortez's time in custody made federal habeas effectively unavailable to him. But Cortez failed to exercise his right, under California law, to a direct appeal from his conviction. *See* Cal.Penal Code § 1466(b)(1). Cortez's success in his § 1983 suit would imply that his conviction in California was wrongly obtained. Yet his conviction has never been invalidated. Indeed, Cortez has never sought to invalidate it through direct appeal or

post-conviction relief. He is thus barred by *Heck*. . . . We are not an alternative forum for challenging his conviction. We therefore affirm the district court’s grant of summary judgment to the defendants with respect to Cortez’s unreasonable-seizure claim.”); ***Reilly v. Herrera***, 622 F. App’x 832, 834 (11th Cir. 2015) (“We have not explicitly ruled on whether a plaintiff may bring a § 1983 action in the event that habeas relief is unavailable, even if success on the merits would call into question the validity of a conviction. We decline to do so here because Mr. Reilly’s case does not fit within the framework of scenarios mentioned in Justice Souter’s *Spencer* concurrence. During his three-year term of imprisonment, Mr. Reilly had ample time to pursue an appeal or other post-conviction remedies on the supervised release revocation, yet he did not avail himself of any of them. We doubt that Justice Souter intended to propose a broad exception to include prisoners who had the opportunity to challenge their underlying convictions but failed to do so. [citing *Guerrero*] Consequently, we conclude that Justice Souter’s proposed *Heck* exception in *Spencer*, even if adopted, does not apply to Mr. Reilly’s case.”) [See also ***Reilly v. Herrera***, 729 F. App’x 760, \_\_\_ (11th Cir. 2018) (“[T]he thrust of Mr. Reilly’s current argument is that he would have been entitled to relief under *Spencer* but for our erroneous finding that he failed to pursue state court remedies. Under § 1983, a person acting under color of state law may be held liable for causing the deprivation of ‘any rights, privileges, or immunities secured by the Constitution.’ 42 U.S.C. § 1983. A § 1983 suit for damages must be dismissed, however, if ‘a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.’ *Heck*, 512 U.S. at 487. In a concurring opinion in *Spencer*, Justice Souter discussed the implications of *Heck* and opined that a ‘former prisoner, no longer “in custody”’ should be allowed to ‘bring a § 1983 claim establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.’ . . . To date, however, neither the Supreme Court nor this Court has applied the exception described in Justice Souter’s concurrence in a published opinion. Justice Souter’s concurring opinion in *Spencer* did not overturn *Heck*’s bar on § 1983 actions challenging the validity of the claimant’s conviction or sentence. . . . Therefore, even if we erred in finding that Mr. Reilly had not pursued his state court remedies, our ruling was not clearly erroneous and did not result in manifest injustice because *Heck* is still controlling law.”)]; ***Radwan v. County of Orange***, 519 F. App’x 490, 490-91 (9th Cir. 2013) (“The district court properly ruled that *Heck* bars Radwan’s § 1983 unlawful search and seizure claim. We have repeatedly found *Heck* to bar § 1983 claims, even where the plaintiff’s prior convictions were the result of guilty or no contest pleas. . . . In his § 1983 suit, Radwan challenges the search and seizure of the marijuana that formed the basis of his conviction for marijuana possession under California Health and Safety Code § 11357(b). Were Radwan to succeed on his § 1983 search and seizure claim, such success would necessarily imply the invalidity of his conviction for marijuana possession. . . . Thus, *Heck* bars this claim. . . . Moreover, even though Radwan could not pursue habeas corpus relief, *Heck* bars his § 1983 search and seizure claim because he failed to meet *Heck*’s favorable termination requirement due to his own lack of diligence.”); ***Guerrero v. Gates***, 442 F.3d 697, 704, 705 (9th Cir. 2006) (“*Guerrero*’s prior convictions have never been invalidated. We therefore hold that, with the exception of his excessive force claim, *Heck* bars *Guerrero*’s § 1983 claims. The fact that *Guerrero* is no longer in custody and thus cannot overturn his prior convictions by means of *habeas corpus*

does not lift *Heck*'s bar. Although exceptions to *Heck*'s bar for plaintiffs no longer in custody may exist, as suggested by concurring members of the Supreme Court in *Spencer v. Kemna* and adopted by this court in *Nonnette v. Small*, any such exceptions would not apply here. The *Spencer* concurrence suggests that a plaintiff's inability to pursue *habeas* relief after release from incarceration should create an exception to *Heck*'s bar. The plaintiff in *Spencer* had diligently sought relief for his claim of invalid revocation of parole. After appealing the denial of his state *habeas* petition all the way to the state supreme court, he filed a federal *habeas* petition. His prison term ended, however, before the court could render a decision. . . . In following the reasoning of the concurrence in *Spencer*, we have emphasized the importance of timely pursuit of available remedies in two cases. In *Cunningham v. Gates*, we held that *Heck* barred the plaintiff's § 1983 claims despite the fact that *habeas* relief was unavailable. *Habeas* relief was 'impossible as a matter of law' in Cunningham's case because he failed timely to pursue it. . . . Although we held in *Nonnette* that the plaintiff could bring § 1983 claims despite the *Heck* bar because *habeas* relief was unavailable, we did so because Nonnette, unlike Cunningham, timely pursued appropriate relief from prior convictions. *Nonnette* was founded on the unfairness of barring a plaintiff's potentially legitimate constitutional claims when the individual immediately pursued relief after the incident giving rise to those claims and could not seek *habeas* relief only because of the shortness of his prison sentence. . . . Thus, a § 1983 plaintiff's timely pursuit of available *habeas* relief is important. Even so, we emphasized that Nonnette's relief from *Heck* 'affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters,' not challenges to an underlying conviction such as those Guerrero brought.").

*See also Smith v. Ulbricht*, No. CV 12-00199-M-DLC, 2013 WL 589628, \*1, \*2 (D. Mont. Feb. 14, 2013) ("In essence, Smith suggests that an individual not 'in custody' for purposes of the *habeas* statute may always proceed under a section 1983 action. Accordingly, Smith argues *Heck*'s bar does not apply and his Complaint should not be dismissed. The Court disagrees. At the outset, the Court notes that, as stated by the majority in *Heck*, the *Heck* bar does not have an 'in custody' component; it generally applies when a § 1983 action would render a sentence *or* conviction invalid. . . . However, in *Spencer*, the four concurring justices and one dissenting justice recognized that, in limited circumstances, *Heck* may not bar a § 1983 action when an individual cannot proceed under a *habeas* action because he is no longer 'in custody'. . . . Relying on Justice Souter's concurring opinion in *Spencer*, this exception was expressly adopted by the Ninth Circuit in *Nonnette v. Small*, 316 F.3d 872, 875-877 (9th Cir.2002). In *Nonnette*, the Ninth Circuit recognized in a § 1983 action challenging the revocation of good time credits that *Heck* should not preclude Nonnette's claim because he could not maintain a *habeas* action since he was no longer incarcerated. . . . Central to the *Nonnette* court's decision was the fact that Nonnette had timely and diligently pursued appropriate relief from prior convictions. . . . *Nonnette*'s exception to *Heck* is to be narrowly construed, as evidenced by the court's emphasis that it 'affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters.'. . . *Nonnette*'s exception was clarified in *Guerrero v. Gates*, 442 F.3d 697 (9th Cir.2003). Guerrero was convicted on narcotics charges and served his sentence. . . . After he was released, he filed a § 1983 action challenging, among other things, the validity of his convictions. . . . After distinguishing *Nonnette*,

the Court held that *Heck* barred Guerrero's § 1983 claims . . . .Smith's situation resembles *Guerrero* far more closely than *Nonnette*. Unlike *Nonnette*, Smith has not timely and diligently sought appropriate relief from his prior convictions. According to his Complaint, Smith's first attempt to challenge his June 6, 2008 conviction was April 9, 2012. Smith did not apply for habeas relief and his failure to timely do so was self-imposed. Thus, though habeas relief for Smith may be 'impossible as a matter of law,' he is not entitled to the relaxation of *Heck*'s bar. Accordingly, Smith's objection that *Heck* does not bar his complaint because he cannot pursue a habeas action since he is not 'in custody' is overruled."); *Jean-Laurent v. Hennessy*, No. 05-CV-1155 (JFB)(LB), 2008 WL 5274322, at \*3, \*4 (E.D.N.Y. Dec. 18, 2008) ("In the instant case, the exception to the *Heck* rule established by the Second Circuit in *Jenkins* and its progeny does not apply. Plaintiff correctly notes that his *habeas* petition, which challenged his 2002 Queens County conviction, was dismissed, in part, because plaintiff was not in custody at the time he filed his *habeas* petition. . . . However, plaintiff overlooks the fact that the court also found that his petition was untimely because it was filed over two years after the expiration of the one-year statute of limitations period. . . . and there was no basis for equitable tolling. . . . Thus, plaintiff did not file a direct appeal in state court challenging his conviction, and did not file a timely *habeas* petition in federal court with respect to such conviction. Under these circumstances, the exceptions to the *Heck* rule do not apply because plaintiff clearly had legal remedies available to him both in state and federal court to challenge his conviction, but failed to avail himself of such remedies in a timely manner. . . . Such a situation is distinct from the individual who challenges his conviction in the state and federal courts in a timely manner but, through no fault of his own, is unable to have the federal court consider his challenge because he is no longer in custody at the time his petition is filed. To hold otherwise in the instant case would allow a plaintiff to completely circumvent the *Heck* rule by filing an untimely *habeas* petition and then arguing that his Section 1983 claims are not barred by the conviction because his challenge was never heard on the merits by the federal court. There is nothing in Supreme Court nor Second Circuit jurisprudence that warrants such a result."); *El v. Crain*, 560 F.Supp.2d 932, 944, 945 (C.D. Cal. 2008) ("A complication, not briefed by the parties, arises here because Plaintiff already has completed the 180-day sentence for the underlying conviction. . . . In some exceptional situations, *Heck* may not bar a noncustodial plaintiff – one to whom habeas corpus is not available because he is no longer 'in custody' as required . . . from proceeding with a civil-rights action that, if successful, would imply the invalidity of an adjudicated offense. Five Supreme Court Justices in *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 97, 140 L.Ed.2d 43 (1998), believed that a 'convict given a fine alone, however onerous, or sentenced to a term too short to permit even expeditious litigation without continuances before expiration of the sentence,' should not be ineligible for § 1983 relief, because his circumstances rendered impossible any successful challenge to his conviction or parole revocation – although this five-Justice view does not have the status of a *holding*. . . . The Ninth Circuit has interpreted *Spencer* as creating a limited exception to *Heck*, permitting some litigants who no longer may pursue habeas relief to bring collateral civil rights claims. . . . But this exception is narrow, for it is limited to plaintiffs (1) who are 'former prisoners challenging loss of good-time credits, revocation of parole or similar matters,' . . . not collaterally challenging underlying criminal *convictions*, and (2) who diligently pursued 'expeditious litigation' to challenge those punishments to the extent possible. .

. Plaintiff satisfies neither of these tests for an exemption from *Heck*. First, his current action would imply the invalidity of a criminal conviction, not a mere parole revocation or prison administrative decision. Second, although Plaintiff vigorously challenged that conviction in the state courts, he did not do so entirely ‘expeditious[ly]’: he missed a critical deadline for filing in the intermediate appellate court, resulting in a procedural default. For the foregoing reasons, *Heck* bars Plaintiff’s claims of excessive force, and Defendants are entitled to summary judgment on those claims.”); ***Adamson v. Los Angeles County***, No. CV 06-4384-ODW (“GR), 2008 WL 779519, at \*4 (C.D. Cal. Mar. 20, 2008) (“*Heck* bars Plaintiff’s claims even though he has completed his sentence. . . . This is true even though the statute of limitations for filing a petition for writ of *habeas corpus* has expired. . . . Just as in *Guerrero*, Plaintiff did not challenge his conviction by any means, including direct appeal or *habeas*, prior to filing this lawsuit approximately two years after his release from prison. . . . The Ninth Circuit has limited the exception to *Heck*. ‘*Nonnette*’s relief from *Heck* affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters,’ not challenges to an underlying conviction.’ . . . Plaintiff challenges his underlying conviction and none of the exceptions apply.”); ***Byrd v. Teater***, 2008 WL 495757, at \*9 -10 (E.D. Cal. Feb. 21, 2008) (“Plaintiff’s sentence was six months incarceration (credit for time-served), voluntary enrollment in a residential alcohol treatment program, and three years felony probation. Plaintiff was still on probation when he filed this action. Plaintiff was not precluded from seeking *habeas* relief before he completed the sentence. *Guerrero* makes clear that *Nonnette* is limited to former prisoner’s challenging loss of good-time credits, revocation of parole or similar matters. Plaintiff’s claims based on the invalidity of his conviction are barred by *Heck v. Humphrey*. . . . A claim that the right to a speedy trial has been violated of necessity challenges the validity of the underlying conviction. A claim challenging the sentence imposed is barred explicitly by *Heck*. Defendants’ motions to dismiss the Section 1983 claims on the basis of *Heck v. Humphrey* are GRANTED WITH PREJUDICE to the extent the Section 1983 claims are based on Plaintiff’s alleged false arrest and prosecution, on delay in the criminal proceedings against Plaintiff, and on the sentence imposed. Defendants’ motions to dismiss the Section 1983 claims on the basis of *Heck v. Humphrey* are DENIED to the extent the claims are based on excessive bail. This claim addresses a procedure used that does not depend on the invalidity of Byrd’s conviction and for which the availability of *habeas corpus* expired upon Plaintiff’s relief from custody.”); ***Whitmore v. Pierce County Dept. of Community Corrections***, 2007 WL 2116402, at \*5 (W.D.Wash. July 19, 2007) (“The Ninth Circuit has held that when a person fails to file a *habeas* petition while in custody and had an opportunity to file one, a civil rights action may be procedurally barred. *Guerrero v. Gates*, 442 F.3d 697 (9th Cir.2006). Here, there is nothing to indicate Mr. Whitmore attempted to challenge his probation hearings in a *habeas* action. He is no longer in custody, and he is barred from bringing an action challenging the probation revocation proceedings at this point in time.”).

Compare ***Savory v. Cannon***, 947 F.3d 409, 417-23, 427-28, 430-31 (7th Cir. 2020) (en banc) (“Applying the analytical paradigm of *Heck* and *McDonough* to Savory’s case, we first look at the nature of his section 1983 claims and conclude that, like Heck’s claims, they strongly resemble the common-law tort of malicious prosecution. Indeed, Savory’s claims largely

echo Heck's complaint, asserting the suppression of exculpatory evidence and the fabrication of false evidence in order to effect a conviction. There is no logical way to reconcile those claims with a valid conviction. Therefore, *Heck* supplies the rule for accrual of the claim. Because Savory's claims 'would necessarily imply the invalidity of his conviction or sentence, his section 1983 claims could not accrue until 'the conviction or sentence ha[d] been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.' . . . In Savory's case, that occurred on January 12, 2015, when the governor of Illinois pardoned him[.] . . . Until that moment, his conviction was intact and he had no cause of action under section 1983. . . . His January 11, 2017, lawsuit was therefore timely under *Heck*, and we must reverse the district court's judgment and remand for further proceedings. *McDonough* supports the same result. Because McDonough (who was not held in custody during his trials) was acquitted rather than convicted, his section 1983 claim would not have infringed upon the exclusivity of the habeas corpus remedy. The Court nevertheless indicated that the other concerns discussed in *Heck* still guided the outcome, and no section 1983 claim could proceed until the criminal proceeding ended in the defendant's favor or the resulting conviction was invalidated within the meaning of *Heck*. So too with Savory. Although his sentence had been served and habeas relief was no longer available to him (and thus habeas exclusivity was not at issue), the other considerations raised in *Heck* controlled the outcome: he had no complete cause of action until he received a favorable termination of his conviction, which occurred when the governor issued a pardon for the subject conviction. . . . The *Heck* bar accounts for the preclusive effect of state court criminal judgments on civil litigation by lifting the bar only when the plaintiff has achieved a favorable termination of the criminal proceeding. . . . Under the defendants' rule, a section 1983 claim would accrue on release from custody even though the conviction remained intact, and even though preclusion rules would effectively prevent the plaintiff from bringing any claim inconsistent with the original criminal conviction. Claimants like Savory, who obtained a pardon several years after release from custody and who may have the most meritorious claims, would be too late. Nothing in *Heck* requires such a result. . . . Although a straight-forward reading of *Heck* and its progeny (including *McDonough*) determines the outcome here, we must address the defendant's arguments that concurring and dissenting opinions of certain Supreme Court justices cobbled together into a seeming majority or the opinions of this court may somehow override the prime directive of *Heck*. Several of our post-*Heck* cases contain dicta or rely on reasoning that is in conflict with *Heck* and *McDonough*, and we must address and clarify those cases as well. . . . [I]n *Spencer v. Kemna*. . . Justice Souter again filed a concurrence expressing the view that he urged in his *Heck* concurrence, namely 'that a former prisoner, no longer "in custody," may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.' . . . Justice Ginsburg, who had been in the majority in *Heck*, this time agreed with Justice Souter (who was also joined by Justices O'Connor and Breyer), joining his concurrence and filing her own. . . . Justice Stevens dissented in *Spencer*, but he approved Justice Souter's basic premise[.] . . . The defendants contended in the district court and maintain on appeal that this dicta in concurring and dissenting opinions, cobbled together, now formed a new majority,

essentially overruling footnote 10 in *Heck*. But it is axiomatic that dicta from a collection of concurrences and dissents may not overrule majority opinions. . . The Supreme Court may eventually adopt Justice Souter’s view, but it has not yet done so and we are bound by *Heck*. . . The defendants also assert that footnote 10 of *Heck* (which specifically rejected Justice Souter’s proposed rule) was dicta, and therefore does not control the outcome here. The plaintiff in *Heck*, they note, was incarcerated and allowing a section 1983 suit during incarceration would have permitted an endrun around the habeas corpus statute. No such concern is present, they argue, in the scenario addressed in footnote 10 of *Heck*, specifically, persons who are no longer in custody and cannot bring habeas challenges. But *Heck* was concerned with more than the exclusivity of the habeas corpus remedy for persons in custody, or the intersection between habeas corpus and section 1983. The favorable termination rule in *Heck* also rested on concerns arising generally from collateral attacks on extant criminal convictions through civil law suits. Specifically, requiring a section 1983 plaintiff to prove favorable termination of the criminal conviction avoids parallel litigation over the issues of probable cause and guilt, and precludes the possibility that a plaintiff might succeed in a civil tort action after having been convicted in the underlying criminal prosecution, allowing the creation of conflicting judgments arising out of the same transaction. . . These concerns were repeated recently in *McDonough* as rationales supporting the application of *Heck*’s favorable termination rule in a case that did not implicate concerns about habeas corpus. Because the plaintiff had been acquitted rather than convicted, there was little likelihood of a collision between habeas corpus and section 1983. Yet the Court cited the continued relevance of the favorable-termination rule as being ‘rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.’ . . In further support of the favorable termination rule, the Court also cited related concerns for finality, consistency, and the avoidance of unnecessary friction between the state and federal court systems. . . Although footnote 10 of *Heck* addressed a factual scenario that was not before the Court, to dismiss all of footnote 10 as dicta is to divorce a significant part of the Court’s rationale from its holding. The Court was simply making clear how broadly it intended its holding to apply. . . . The defendants also asserted below and argued on appeal that this court has abrogated the rule in *Heck*, citing five cases: *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000); *Simpson v. Nickel*, 450 F.3d 303 (7th Cir. 2006); *Burd v. Sessler*, 702 F.3d 429 (7th Cir. 2012); *Whitfield v. Howard*, 852 F.3d 656 (7th Cir. 2017); and *Sanchez v. City of Chicago*, 880 F.3d 349 (7th Cir. 2018). According to the defendants, those cases ‘together sensibly hold an individual who is no longer in custody with no access to habeas corpus relief may bring a § 1983 action challenging the constitutionality of a still standing conviction without first satisfying the favorable termination rule of *Heck*.’ . . As we just explained, however, this court may not on its own initiative overturn decisions of the Supreme Court. Although four of those five cases came to correct resolutions, some of our language and reasoning has created confusion regarding the applicability of *Heck* in cases where habeas relief is not available. Indeed, it was on these cases that the district court relied in concluding that Savory had brought his claims too late. . . . We reaffirm *DeWalt*’s basic holding today: a section 1983 complaint that challenges a disciplinary sanction related only to the conditions of confinement and that does not implicate the validity of the underlying conviction or the duration of the sentence (e.g. loss of good time credits) is not

subject to *Heck*'s favorable termination requirement. . . . But part of the reasoning and language of *DeWalt* went further than that and implied that, in all cases where habeas relief is unavailable, then section 1983 must provide an avenue of relief. . . . This language suggesting that a section 1983 remedy must be available when habeas relief is unavailable is in conflict with footnote 10 of *Heck* and with our holding today. Moreover, it was unnecessary to the holding in *DeWalt*, and we now disavow that language. . . . Our dissenting colleague urges the court to adopt an accrual rule tied to the end of custody. A claim accrues when a plaintiff has 'a complete and present cause of action.' . . . When a section 1983 claim resembles the common-law tort of malicious prosecution, the Court treats favorable termination as an element of the claim. . . . Without favorable termination, a plaintiff lacks 'a complete and present cause of action.' Yet the dissent's rule would require a plaintiff to file suit without this essential element of the claim. . . . In requiring favorable termination before allowing a section 1983 claim to proceed, *Heck* sets a high standard. Undoubtedly, as the dissent asserts, some valid claims will never make it past the courthouse door. *Heck* explains, though, why a high bar must be cleared before seeking damages in a civil action on claims that imply the invalidity of a criminal conviction. The Court sought to avoid parallel litigation on the issue of guilt, preclude the possibility of conflicting resolutions arising out of the same transaction, prevent collateral attacks on criminal convictions through the vehicle of civil suits, and respect concerns for comity, finality and consistency. . . . We are not in a position to alter the *Heck* standard or set aside these concerns. . . . *Heck* controls the outcome where a section 1983 claim implies the invalidity of the conviction or the sentence, regardless of the availability of habeas relief. Claims that relate only to conditions of confinement and that do not implicate the validity of the conviction or sentence are not subject to the *Heck* bar. We disavow the language in any case that suggests that release from custody and the unavailability of habeas relief means that section 1983 must be available as a remedy. That includes the cases on which the district court, in good faith, reasonably relied. *McDonough* confirms that habeas exclusivity is just one part of the rationale for *Heck*'s holding. Concerns about comity, finality, conflicting judgments, and 'the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments' all underpin *Heck*'s favorable termination rule. . . . The Supreme Court may revisit the need for the favorable termination rule in cases where habeas relief is unavailable, but it has not yet done so. Savory's claims, which necessarily imply the invalidity of his conviction, accrued when he was pardoned by the governor of Illinois. His section 1983 action, filed within two years of the pardon, was therefore timely filed. We reverse the district court's judgment and remand for further proceedings.") with *Savory v. Cannon*, 947 F.3d 409, 433-34 (7th Cir. 2020) (en banc) (Easterbrook, J., dissenting) ("The Justices expressed concern in *Manuel* and its successor *McDonough* about a rule starting the time so early that legitimate claims would be lost. We should be equally concerned about a rule starting the time so late that claims never accrue. The majority's approach does just that. Some sentences are too short to allow collateral relief. We routinely see cases in which it has taken a decade to pursue a direct appeal, collateral review in state court, and collateral review in federal court. If confinement ends before collateral review begins, the custody requirement prevents all further review. If the sentence is fully served while state collateral review is ongoing, federal collateral review cannot begin. (Only state prisoners 'in custody' can seek review under § 2254(a).) So a

rule under which a § 1983 claim does not accrue as long as the criminal judgment stands means that thousands of defendants sentenced to less than five or ten years in prison can *never* present a § 1983 claim, no matter how egregious the constitutional violations that led to wrongful conviction and custody. Released prisoners can obtain relief under the majority’s approach if their convictions are set aside by pardon (Savory’s situation) or certificate of innocence. Yet in most states pardons are rare, and pardons for federal crimes are rarer still. Getting a certificate of innocence is wickedly hard in both state and federal systems, because the applicant must show factual innocence, and even an acquittal does not establish that. . . Proof of innocence—the need to prove a negative—is difficult to come by. Again Savory may be an exception; he eventually found conclusive DNA evidence. Few wrongly convicted persons are so fortunate.”)

*See also Wells v. Caudill*, 967 F.3d 598, 602 (7th Cir. 2020) (“If while in prison Wells had sought relief from a federal court on the ground that state officials had miscalculated his sentences’ ending date, he would have been told to go to state court, for federal collateral relief cannot be used to fix errors of state law. . . Why should the federal role be greater if the prisoner serves out his sentence and then seeks damages? The parties have overlooked a second potential issue too. *Heck v. Humphrey* . . . holds that a federal court may not award damages under § 1983 when that calls into question the validity of a state conviction. *Edwards v. Balisok* . . . extends that rule to state procedures that determine the length of the sentence (as by granting or revoking good-time credits). This court recently held that *Heck*’s bar continues even after a prisoner has been released. *See Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020) (en banc). Unless a pardon or a state court sets aside the conviction or decision about time in prison, damages under § 1983 are unavailable. This could be understood to mean that someone in Wells’s position needs to obtain a ruling from a state court establishing his proper release date. We mention these subjects, not to decide them, but to make clear that we have not decided them in passing. They are open for consideration in some future case. We have resolved this case as the litigants presented it. Because the district judge did not make a clearly erroneous finding when concluding that Wells had not shown that Caudill acted with the necessary state of mind, the judgment is AFFIRMED.”)

*See also Griffin v. Baltimore Police Dep’t*, 804 F.3d 692, 695-99 (4th Cir. 2015) (“While § 1983 suits seeking DNA testing may proceed around the *Heck* bar, § 1983 actions based on *Brady* claims may not. *Skinner* itself makes this distinction clear. . . . What we have here, then, are § 1983 claims predicated on alleged *Brady* violations which would, if proven, necessarily imply the invalidity of Griffin’s convictions. And those convictions have not been ‘reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . or called into question by a federal court’s issuance of a writ of habeas corpus.’ . . Under *Heck*, therefore, they may not be collaterally attacked through § 1983 now. That Griffin is no longer in custody does not change this result. The *Heck* bar is ‘not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.’ . . This rule prevents would-be § 1983 plaintiffs from bringing suit even after they are released from custody and thus unable to challenge their conviction through a habeas petition. Were the rule otherwise, plaintiffs might simply wait to file their § 1983 actions until after their sentences were served, and thereby transform § 1983 into a new font of federal post-

conviction review. Successful resolution of Griffin’s § 1983 claims would necessarily undermine the validity of Griffin’s prior convictions. Griffin’s claims would appear therefore to fall within the core of the *Heck* bar. . . Together, *Covey* and *Wilson* delineate the *Heck* bar’s narrow exception. A would-be plaintiff who is no longer in custody may bring a § 1983 claim undermining the validity of a prior conviction only if he lacked access to federal habeas corpus while in custody. . . Griffin did not lack access to habeas relief while in custody. While *Wilson* had only a few months to make a habeas claim, and while *Covey* had at most a little over a year, Griffin had three decades. And Griffin actually did bring a federal habeas petition during his time in custody. Although his petition was denied, the fact that he was able to file it demonstrates that the concern animating *Wilson* and *Covey*—that a citizen unconstitutionally punished might lack an opportunity for federal redress if kept in custody for only a short period of time—is absent in this case. Griffin argues that he never had the opportunity to achieve meaningful habeas relief because evidence necessary to his case remained in the hands of the Baltimore Police Department. . . But likelihood of success is not the equivalent of opportunity to seek relief. And even if it were, nothing in the record suggests that Griffin sought the relevant records (much less encountered resistance to their production) until he filed his Maryland Public Information Act request in 2010. That law, meanwhile, has been in effect since 1970. . . Lack of information did not take away Griffin’s opportunity for meaningful habeas relief. While our precedent makes clear that lawful access to federal habeas corpus is the touchstone of our inquiry, Griffin’s case is further undercut by the fact that he did eventually receive actual notice of possible official misconduct and still did not pursue additional federal habeas relief. In declining to except *Brady* claims from the rule in *Heck v. Humphrey*, *Skinner*, 562 U.S. at 536–37, the Supreme Court recognized that the adversary process does not as a rule require a potential respondent to give notice to a potential petitioner of every claim, meritorious or otherwise, that the petitioner may possess. Griffin knew of possible police misconduct by, at the latest, August 4, 2011, the date of his evidentiary hearing in the Baltimore City Circuit Court. His custody did not terminate until over sixteen months later, on December 19, 2012. The habeas ‘in custody’ requirement, moreover, applies only at the time of filing, not throughout the case. . . Griffin would have had only to file his petition during those sixteen months. He did not do so. In sum, Griffin has identified no impediment to habeas access warranting an expansion of the *Heck* exception. In fact, to dissolve the *Heck* bar for a damages suit some thirty years after a still-valid conviction for a plaintiff who not only could but did file a federal habeas petition would permit the *Heck* exception to swallow the rule. . . We close by noting that our decision sounds in procedure, not substance. We express no opinion on the actual merits of Griffin’s *Brady* claims. Our holding is not meant to bar him from seeking a remedy for possible police misconduct. The remedy of habeas corpus was open to him in the past, and he may retain state remedies he can pursue in the future. We hold only that the vehicle he has presently chosen is not, at least not now, an appropriate one under Supreme Court and circuit precedent. Should his convictions at some point be invalidated, he might again attempt a § 1983 suit free of any *Heck* bar. Until then, however, we must affirm the judgment of the district court.”); *Newmy v. Johnson*, 758 F.3d 1008, 1010-12 (8th Cir. 2014) (“A landscape consisting of *Heck* and the collection of opinions in *Spencer* has resulted in a conflict in the circuits about the scope of *Heck*’s favorable-termination rule. Several courts—counting up the five Justices who opined in concurring and dissenting opinions in

*Spencer*—have concluded that the *Heck* bar does not apply to a § 1983 plaintiff who cannot bring a habeas action. [collecting cases from 4th, 6th, 7th, 9th, and 10th Circuits] Four other circuits, including this one, have adhered to the conclusion—set forth in footnote 10 of *Heck*—that the favorable-termination rule still applies when a § 1983 plaintiff is not incarcerated. [cases from 1st, 3d, 5th, and 8th Circuits] After *Spencer*, the Supreme Court said in *Muhammad v. Close*, 540 U.S. 749, 752 n. 2, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004) (per curiam), that it had ‘no occasion to settle’ whether the unavailability of habeas may dispense with the *Heck* favorable-termination requirement. We concluded in *Entzi* that the combination of concurring and dissenting opinions in *Spencer* did not amount to a holding that binds this court. We opted instead to follow footnote 10 in the opinion of the Court in *Heck*. . . .As the Third Circuit recently recognized, the Eighth Circuit—like the First, Third, and Fifth—has ‘interpreted *Heck* to impose a universal favorable termination requirement on all § 1983 plaintiffs attacking the validity of their conviction or sentence.’ [citing *Deemer v. Beard*] We recognize that this rule could preclude a damages remedy for an inmate who is detained for only a short time with limited access to legal resources, but that is a consequence of the principle barring collateral attacks that was applied in *Heck*. The district court correctly followed circuit precedent in dismissing Newmy’s claim.”); *Newmy v. Johnson*, 758 F.3d 1008, 1012 (8th Cir. 2014) (Kelly, J., concurring) (“Although I agree the district court correctly applied this circuit’s precedent in dismissing Newmy’s suit, I write separately to express my concern that our approach ‘needlessly place[s] at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not “in custody” for habeas purposes.’ . . .[A]s the Tenth Circuit recently reiterated, ‘[i]f a petitioner is unable to obtain habeas relief—at least where this inability is not due to the petitioner’s own lack of diligence—it would be unjust to place his claim for relief beyond the scope of § 1983 where “exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas.” ’”); *Deemer v. Beard*, 557 F. App’x 162, 164-66 (3d Cir. 2014), cert . denied, 135 S. Ct. 50 (2014) (“Deemer argues that the District Court erred in applying the *Heck v. Humphrey* favorable termination bar to the facts of his case. He contends that *Heck*’s rule does not, and should not, apply to § 1983 plaintiffs who, like him, are no longer in custody and who, through no fault of their own, never had alternate access to the federal courts’ habeas corpus jurisdiction. In view of our existing precedent, we disagree. . . . The main dispute between the parties before us is in identifying the position staked out by this Court. Taking a cue from the five-justice *Spencer* plurality, seven courts of appeals have found that the *Heck* favorable termination rule does not apply to plaintiffs for whom federal habeas relief is unavailable, at least where the plaintiff is not responsible for failing to seek or limiting his own access to the habeas corpus remedy. See *Burd v. Sessler*, 702 F.3d 429, 435 (7th Cir.2012); *Cohen v. Longshore*, 621 F.3d 1311, 1315–17 (10th Cir.2010); *Wilson v. Johnson*, 535 F.3d 262, 267–68 (4th Cir.2008); *Powers v. Hamilton Cnty. Pub. Defender Comm’n*, 501 F.3d 592, 602–03 (6th Cir.2007); *Harden v. Pataki*, 320 F.3d 1289, 1298–99 (11th Cir.2003); *Nonnette v. Small*, 316 F.3d 872, 876–77 (9th Cir.2002); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir.2001). We have not adopted this approach. We, along with three other courts of appeals, have declined to follow the concurring and dissenting opinions in *Spencer*, and have interpreted *Heck* to impose a universal favorable termination requirement on all § 1983 plaintiffs attacking the validity of their conviction or sentence. See *Williams*, 453 F.3d at 177–78;

*Gilles v. Davis*, 427 F.3d 197, 209–10 (3d Cir.2005); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir.2007); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir.2000) (per curiam); *Figueroa v. Rivera*, 147 F.3d 77, 80–81 & n. 3 (1st Cir.1998); see also *Cohen*, 621 F.3d at 1315 (finding our Court has aligned itself with the First, Fifth, and Eighth Circuits on this question); *Powers*, 501 F.3d at 602 (same). Thus, our decisions in *Gilles v. Davis* and *Williams v. Consovoy* already resolved the issue raised in this case, concluding, as they did, that *Heck*'s favorable termination rule applies to all § 1983 plaintiffs, not just those in state custody. . . . *Gilles* and *Williams* dictate that, under *Heck*, any claimant, even if the door to federal habeas is shut and regardless of the reason why, must establish favorable termination of his underlying criminal proceeding before he can challenge his conviction or sentence in a § 1983 action. We are bound by that precedent); *Walker v. Munsell*, No. 08-30087, 2008 WL 2403768, at \*2 (5th Cir. June 13, 2008) (“Appellant argues that *Heck* does not apply because he was fined and not imprisoned following his conviction, and he consequently had no opportunity to challenge his conviction on habeas review. This circuit, however, has determined that *Heck*'s bar applies to both custodial and non-custodial § 1983 plaintiffs. *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir.2000).”); *Abdullah v. Minnesota*, No. 06-4142, 2008 WL 283693, at \*1 (8th Cir. Feb. 4, 2008) (“We conclude that the district court did not err in dismissing Abdullah's section 1983 claim under *Heck*, because success on his claim would necessarily render invalid the ‘sentence’ of a fine imposed for his possession of marijuana, and because he did not allege or show that the fine had been invalidated or that his criminal petty-misdemeanor case had otherwise been resolved in his favor.”); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) (“Entzi argues that because the writ of *habeas corpus* is no longer available to him on a claim challenging the length of his imprisonment, *Heck* does not bar his § 1983 suit against the prison officials. The opinion in *Heck* rejected the proposition urged by Entzi. The Court said that ‘the principle barring collateral attacks – a longstanding and deeply rooted feature of both the common law and our own jurisprudence – is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.’ *Heck*, 512 U.S. at 490 n. 10. Entzi relies on a later decision of the Supreme Court, *Spencer v. Kemna*, 523 U.S. 1 (1998), in which a combination of five concurring and dissenting Justices agreed in dicta that ‘a former prisoner, no longer in custody,’ may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.’ . . . Absent a decision of the Court that explicitly overrules what we understand to be the holding of *Heck*, however, we decline to depart from that rule.”); *Williams v. Consovoy*, 453 F.3d 173, 177, 178 (3d Cir. 2006) (“Williams cites *Huang v. Johnson*, 251 F.3d 65 (2d Cir.2001), as support for the argument that because *habeas* relief is no longer available to him, he should nonetheless be permitted to maintain a § 1983 action. *Huang* held that a plaintiff for whom *habeas* relief was no longer available on the ground that he had been released from custody could nevertheless maintain a § 1983 action for false imprisonment. . . . *Huang* relied on the fact that, post-*Heck*, five Justices took the view in *Spencer* . . . that § 1983 relief should be available to address constitutional wrongs where *habeas* relief is no longer available. . . . We decline to adopt *Huang* here. As we recently held in *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir.2005), a § 1983 remedy is not available to a litigant to whom *habeas* relief is no longer available. In *Gilles*, we concluded that *Heck*'s favorable-termination requirement had not

been undermined, and, to the extent that its validity was called into question by *Spencer*, we observed that the Justices who believed § 1983 claims should be allowed to proceed where *habeas* relief is not available so stated in concurring and dissenting opinions in *Spencer*, not in a cohesive majority opinion. . . Thus, because the Supreme Court had not squarely held post-*Heck* that the favorable-termination rule does not apply to defendants no longer in custody, we declined in *Gilles* to extend the rule of *Heck*, and likewise decline to extend it here.”); *Vickers v. Donahue*, 135 F. App’x 285, 2005 WL 1519353, at \*4, \*5 (11th Cir. June 28, 2005)(not published) (applying *Heck* where plaintiff had failed to avail himself of appeal with respect to revocation order and resulting nine month sentence); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000); *Figueroa v. Rivera*, 147 F.3d 77, 80, 81 (1st Cir. 1998) (“The appellants counter that strict application of *Heck* works a fundamental unfairness in this case. After all, Rios was attempting to impugn his conviction when death intervened. Although this plaint strikes a responsive chord, it runs afoul of *Heck*’s core holding: that annulment of the underlying conviction is an element of a section 1983 ‘unconstitutional conviction’ claim. . . Creating an equitable exception to this tenet not only would fly in the teeth of *Heck*, but also would contravene the settled rule that a section 1983 claimant bears the burden of proving all the essential elements of her cause of action.”).

See also *Batchelor v. City of Chicago*, No. 18 C 8513, 2020 WL 509034, at \*3-4 (N.D. Ill. Jan. 31, 2020) (“Defendants argue that *Heck*’s prohibition on Batchelor’s Section 1983 claims lifted when he was released from prison, which made habeas relief unavailable to him, and thus started the clock on his claims. They point to decisions where the Seventh Circuit concluded *Heck* did not bar a plaintiff’s Section 1983 claims after he was released from custody, *Manuel v. City of Joliet, Illinois*, 903 F.3d 667, 670 (7th Cir. 2018) (“Manuel II”) and *Sanchez v. City of Chicago*, 880 F.3d 349, 356 (7th Cir. 2018), or after habeas relief was unavailable to a plaintiff, *DeWalt v. Carter*, 224 F.3d 607, 617-18 (7th Cir. 2000). Defendants calculate that Batchelor was released in 2006 based on his allegation that he ‘languished fifteen years in Illinois prison’ following his 1991 conviction. They conclude that Batchelor’s Section 1983 claims are some ten years late. The Seventh Circuit recently addressed the same accrual arguments in *Savory v. Cannon*, No. 17-3543, 2020 WL 240447, at \*3-14 (7th Cir. Jan. 7, 2020) (en banc). Savory, the plaintiff, was convicted of a double murder that he claimed he did not commit, incarcerated for thirty years, paroled for five years, and then, some three years after his parole ended, received a gubernatorial pardon acquitting him of his conviction. . . Less than two years after his pardon, Savory filed suit against the City of Peoria and certain of its police officers alleging that they fabricated evidence, coerced a false confession from him, fabricated incriminating witness statements, and suppressed exculpatory evidence. . . The court applied the rule set forth in *Heck* and concluded Savory’s Section 1983 claims necessarily implied the invalidity of his conviction and thus accrued when that conviction was invalidated by a pardon. . . The court rejected arguments that Savory’s claims accrued when he was released from custody and explicitly stated that its reasoning in prior decisions that the *Heck* bar lifts when a plaintiff is released from custody was incorrect and does not survive its decision. . . Batchelor’s claims that Defendant Officers suppressed exculpatory evidence, fabricated evidence, and coerced his confession in order to secure his conviction echo the claims at issue in *Heck* and *Savory*. As in

those cases, Batchelor’s claims necessarily imply the invalidity of his conviction and thus could not accrue until that conviction was vacated. His Section 1983 claims are timely as he filed suit within two years of his conviction being vacated.”); *Fant v. City of Ferguson*, 107 F.Supp.3d 1016, 1028-30 (E.D. Mo. 2015) (“In this case, the Court agrees with Plaintiffs that the only state court convictions at issue are the Plaintiffs’ underlying traffic and other minor offenses, which are alleged to have resulted only in fines, not sentences. Plaintiffs allege that their incarceration resulted from post-judgment procedures to enforce non-payment of those fines, but not from any separate conviction or sentence. . . A judgment in Plaintiffs’ favor would not necessarily demonstrate the invalidity of Plaintiffs’ underlying traffic convictions or fines, but only the City’s procedures for enforcing those fines. Nor would Plaintiffs’ success in this case ‘necessarily’ invalidate the fact or duration of their incarceration. Success would mean only a change in the City’s procedures prior to incarceration. Even if these procedures were changed, Plaintiffs may still have been found to have willfully refused to pay a fine they were capable of paying and thereafter lawfully incarcerated pursuant to constitutional procedures and conditions. . . The Court notes that the City’s discussion of the Sixth Circuit case, *Powers v. Hamilton County Pub. Defender Comm’n*, 501 F.3d 592 (6th Cir.2007), is misplaced and, more importantly, incomplete. Like this case, *Powers* involved a putative class action brought by a plaintiff who was incarcerated for non-payment of a fine incurred as a result of a reckless-driving charge. . . The municipal court in *Powers* appointed a public defender for the plaintiff at both his initial reckless driving hearing and sentencing, as well as a subsequent court hearing after his arrest for failing to pay the court-ordered fine. . . The plaintiff pleaded no contest to both the initial reckless driving charge and the subsequent failure to pay his fine, the public defender did not seek an indigency hearing, and plaintiff served at least one day in jail for failing to pay the fine. . . He then brought a § 1983 action, alleging that the public defender’s office had a policy of failing to request indigency hearings for clients facing jail time for nonpayment of court-ordered fines. . .The Sixth Circuit found that the § 1983 action was cognizable, notwithstanding *Heck*, for two reasons. The first was that the plaintiff’s term of incarceration—one day—was too short to enable him to seek habeas relief, and the Sixth Circuit held that *Heck*’s favorable-termination requirement was excused for habeas-ineligible § 1983 plaintiffs. . . As the City correctly notes, this issue is the subject of a circuit split, in which the Eighth Circuit has explicitly disagreed with the Sixth Circuit. . . Therefore, as the City correctly notes, Plaintiffs in this case could not avoid *Heck* merely by arguing their jail terms were too short to enable them to seek habeas relief. But Plaintiffs do not make this argument. Rather, Plaintiffs argue that *Heck* is inapplicable for the second reason discussed in *Powers*—namely, because they do not challenge the fact or duration of their underlying convictions or sentences but only the improper procedures that culminated in their post-judgment incarceration. . . . The same is true in this case. Accordingly, the Court rejects the City’s argument that *Heck* bars Plaintiffs’ claims.”); *Cabot v. Lewis*, 241 F.Supp.3d 239, 247-56 (D. Mass. 2017) (“The issue before the Court. . . is the narrow question of whether plaintiff’s acceptance of pretrial probation bars his claims. For present purposes, it is irrelevant whether plaintiff was in fact arrested without probable cause, whether he in fact chest-bumped Lewis, or even why he accepted the disposition of pretrial probation. . . . Defendants have moved for summary judgment on the ground that plaintiff’s acceptance of pretrial probation bars all of his claims under the rule of *Heck v.*

*Humphrey* . . . [M]ore than twenty years since *Heck*, considerable disagreement has developed as to the scope of its application. Two areas of uncertainty are of potential concern here. First, courts are divided as to whether *Heck*'s favorable-termination requirement applies when a § 1983 plaintiff is not in custody—either because he was never sentenced to prison or has already been released—such that he cannot seek habeas relief. Second, there is disagreement as to whether a disposition other than an ordinary conviction—such as a term of pretrial probation (as occurred here)—can constitute a ‘conviction’ triggering the favorable-termination requirement of *Heck*. As to the first issue, the law in the First Circuit is settled: the rule of *Heck* applies even if the plaintiff is not in custody and therefore cannot obtain habeas relief. [discussing *Figueroa*] . . . The second issue is considerably more difficult to resolve. By its terms, the *Heck* rule applies to actions ‘to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.’ . . . Plaintiff contends that because he was never convicted, much less sentenced or imprisoned, the *Heck* rule does not apply. It is certainly true that by its literal terms, the *Heck* rule applies to ‘convictions.’ A straightforward plea of guilty to a criminal charge would obviously fall within its scope. Whether *Heck* applies, however, to other types of criminal dispositions is less obvious. Many courts have held that the *Heck* rule applies to a plea of *nolo contendere*. Other courts have held that it applies to a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Some courts, including this one, have held that it applies where the plaintiff admitted to sufficient facts and the court entered a continuance without a finding (“CWOFF”). *Nolo contendere* pleas and *Alford* pleas both result in convictions. And although an admission to sufficient facts does not result in a formal conviction, it does require a formal admission, in open court, to a set of facts that are sufficient to support a criminal conviction. Here, the criminal charges against plaintiff were dismissed after he completed a term of pretrial probation. Under Massachusetts law, a defendant may be placed on a term of pretrial probation, without either pleading guilty or admitting to sufficient facts to warrant a finding of guilty, with the understanding that the criminal charges will be dismissed after the successful completion of a term of probation. . . . A disposition by pretrial probation does not, under Massachusetts law, result in a conviction. . . . Courts are divided as to whether imposition of a pretrial probation (or an analogous disposition, such as pretrial diversion) constitutes a ‘conviction’ for purposes of the *Heck* rule. [fn.12 There is some inconsistency in the case law as to how to frame the issue of the applicability of the *Heck* rule to cases involving dispositions of pretrial probation. The issue is sometimes framed as whether pretrial probation is a ‘favorable termination’ such that subsequent § 1983 claims challenging the lawfulness of a conviction or sentence may proceed. See *Gilles v. Davis*, 427 F.3d 197, 209 (3d Cir. 2005). The issue may also be framed as whether pretrial probation constitutes a ‘conviction’ such that *Heck* applies at all. The latter appears to be the more appropriate approach. See *McClish v. Nugent*, 483 F.3d 1231, 1251 (11th Cir. 2007). A favorable termination is only necessary if *Heck* applies, and *Heck* only applies as a potential bar to subsequent § 1983 claims if there has been a conviction or sentence—or something sufficiently analogous—the validity of which would be impugned by a successful § 1983 claim.] The Sixth, Tenth, and Eleventh Circuits have concluded that *Heck* does not bar a subsequent lawsuit after disposition of a criminal case through pretrial diversion that ultimately results in dismissal of criminal charges. See *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d

633, 637–39 (6th Cir. 2008) (Kentucky juvenile pretrial diversion program); *Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (Kansas pretrial diversion program); *McClish v. Nugent*, 483 F.3d 1231, 1250–51 (11th Cir. 2007) (Florida pretrial intervention program); *see also Butts v. City of Bowling Green*, 374 F.Supp.2d 532, 537 (W.D. Ky. 2005) (Kentucky pretrial diversion program). The Second, Third, and Fifth Circuits have reached the opposite conclusion. *See Miles v. City of Hartford*, 445 Fed.Appx. 379, 382 (2d Cir. 2011) (Connecticut accelerated pretrial rehabilitation program); *Gilles v. Davis*, 427 F.3d 197, 209–11 (3d Cir. 2005) (Pennsylvania “Accelerated Rehabilitative Disposition” program); *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 655–56 (5th Cir. 2007) (Texas deferred adjudication procedure). . . The First Circuit has not yet addressed the issue. Two judges in this district, however, have concluded that the imposition of pretrial probation under Massachusetts law triggers the rule of *Heck* and bars a subsequent related claim under § 1983. *See Kennedy v. Town of Billerica*, 2014 WL 4926348 at \*1 (D. Mass. 2014) (pretrial probation bars subsequent related § 1983 claim); *Cardoso v. City of Brockton*, 62 F.Supp.3d 185, 186 (D. Mass. 2015) (same). The courts that have concluded that the *Heck* rule does not apply to pretrial probation generally have done so based on the literal terms of *Heck*. As noted, *Heck* holds that when a successful § 1983 claim ‘would necessarily imply the invalidity of [a] conviction or sentence ... the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.’ . . . Because the successful completion of a pretrial diversion program results in the dismissal of criminal charges, those courts have concluded that there is no underlying criminal ‘conviction’ that could be invalidated by a successful § 1983 claim, and *Heck* therefore does not apply. The view that *Heck* should be applied narrowly has at least two advantages: it is faithful to the literal language of the opinion, and it imposes a bright-line rule that is relatively easy to apply. That approach is not, however, without its problems. Most notably, the literal approach ignores, and appears to be inconsistent with, the purposes and rationale of *Heck*. Those may be characterized, in simple terms, as threefold: finality, consistency, and comity. . . . If dispositions of pretrial probation are not accorded finality—and if they leave open the possibility of continuing litigation and potential damages awards—prosecutors will be less likely to agree to them and they will be less available to defendants. . . . If a civil proceeding seeks to reach a result that is fundamentally contrary to the result of a criminal proceeding—particularly on such basic issues as whether there was probable cause to believe that a crime had been committed—similar concerns will arise, even in the absence of a formal conviction. . . . Finally, the *Heck* decision also appears to have been underpinned, in substantial part, by concerns of federal-state comity that caution against using a federal civil-rights action to impugn the validity of a state criminal proceeding. . . . At a minimum, federal courts should be hesitant to permit claims to proceed that are intended to negate or nullify the outcome of prior state proceedings. The circumstances presented by this case highlight those same concerns. To begin, plaintiff entered into a bargain with the Commonwealth. He essentially consented to a term of probation in exchange for the dismissal of his criminal charges. In doing so, he ‘avoid[ed] the possibility of a formal guilty finding but ... he also fore[went] a formal finding that his arrest lacked probable cause.’ . . . He now seeks to use a federal civil rights action to obtain the formal finding that he avoided in state court. Furthermore, while plaintiff did not plead guilty or admit to sufficient facts, he did accept the state’s authority to impose a term of probation. . . . A subsequent

finding, through a federal civil-rights claim, that defendants were without probable cause to arrest him would completely undermine the state court's imposition of probation. Finally, plaintiff accepted sanctions imposed by the state court, however minimal those sanctions might have been. His liberty was curtailed, at least to some minor degree, during the three-month period of unsupervised probation. Furthermore, the court ordered him to write a letter of apology. While those sanctions, of course, seem trivial compared to a term of imprisonment, they were sanctions nonetheless: a state court judge of competent authority concluded that it was an appropriate consequence under the circumstances. Plaintiff formally accepted that consequence. He now seeks, in substance, to prove that no consequence should have been imposed, because there was no basis for the arrest or the charge. Even his letter of apology would be negated if he were successful; he essentially now contends that he did nothing meriting such an apology. On balance, the considerations favoring the imposition of the favorable-termination rule outweigh the countervailing factors. The Court therefore concludes that the favorable-termination requirement of *Heck* applies under the circumstances of this case. [fn. 14 While the Court recognizes that there may indeed be some unfairness in precluding § 1983 relief where it does not appear that any other form of relief is available for plaintiff's allegedly unlawful arrest, that alone cannot lift *Heck*'s bar. As the First Circuit held in *Figueroa*, permitting a § 1983 action to proceed simply because no other form of relief is available would 'run afoul of *Heck*'s core holding.'] That conclusion does not fully answer the question of whether that requirement bars plaintiff's § 1983 claims. The rule bars only those claims that would undermine the validity of his pretrial probation. . . Thus, a more detailed analysis of the relationship between plaintiff's individual theories for relief and his criminal case is required. . . . Plaintiff contends that because his claim is premised on his false arrest, rather than malicious prosecution, the favorable-termination requirement is inapplicable. Plaintiff's contention is premised on too narrow a reading of *Heck*. *Heck* states that the favorable-termination requirement applies both to actions to recover damages for 'allegedly unconstitutional convictions or imprisonment' as well as actions to recover damages 'for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.' . . As an example of the latter category, the court provided the hypothetical of a man convicted of resisting arrest who then sought to bring a § 1983 action against his arresting officers for the violation of his Fourth Amendment rights. . . The favorable-termination rule applies to such a claim, the court explained, because in order to prevail on his § 1983 claim, he would have to negate an element of the offense for which he was convicted— namely, that his arrest was lawful. . . That same reasoning applies here. Plaintiff was arrested for assault and battery on a police officer ("ABPO") for allegedly chest-bumping officer Lewis. The elements of the crime of ABPO are (1) a harmful or offensive touching (2) committed on a public employee engaged in the performance of his duty. . . The § 1983 claim here centers on plaintiff's arrest, which he contends was made without probable cause. To succeed on that claim, plaintiff would need to show that 'defendants acted unreasonably in arresting [him] and taking him into custody.' . . To do that, he would have to show that he did not engage in any harmful or offensive contact with Officer Lewis. In other words, he would have to negate an element of the offense for which he was arrested and for which he received a disposition of pretrial probation. The favorable-termination requirement of *Heck* therefore applies to plaintiff's false-arrest claim. For that reason, and the reasons stated above, defendants' motions for summary

judgment will be granted as to the false-arrest claim. . . .As a preliminary matter, criticizing a police officer and asking for his name and badge number is protected speech under the First Amendment. . . . Beyond that, plaintiff's retaliatory-arrest claim becomes more difficult. As discussed above, *Heck* bars plaintiff from challenging whether there was probable cause for his arrest. . . . Courts are divided as to whether *Hartman*'s no-probable-cause requirement applies to retaliatory-arrest claims. . . . The First Circuit has not yet addressed the issue. However, this Court need not now resolve the difficult question of whether there is a right under the First Amendment to be free from a retaliatory arrest even where there was probable cause for that arrest. Whether or not such a right exists, the Supreme Court has held that such a right is not 'clearly established' for purposes of qualified immunity because reasonable officials could conclude that *Hartman* applies in the context of retaliatory arrests. . . . Here, for the purposes of analyzing plaintiff's retaliatory-arrest claim, the *Heck* rule requires the conclusion that there was in fact probable cause for his arrest. Defendants are therefore entitled to qualified immunity. . . . Under *Reichle*, it was not clearly established at the time of plaintiff's arrest that a retaliatory arrest that was supported by probable cause could violate the First Amendment. . . . Summary judgment will therefore be granted as to the retaliatory-arrest claim. . . . Because plaintiff's challenge to the lawfulness of the alleged strip-search is not a challenge to the fact or length of his confinement, that claim is not barred by *Heck*. Defendants' motions for summary judgment on Count 1 will therefore be denied as to plaintiff's claim that he was strip-searched in violation of the Fourth Amendment.") (footnotes omitted); ***Kennedy v. Town of Billerica***, CIV.A. 10-11457-GAO, 2014 WL 4926348, \*1-\*3 (D. Mass. Sept. 30, 2014) ("The question presented by the defendant's motion is whether Mitchell Kennedy's pre-trial probationary disposition bars his § 1983 unlawful arrest claim for damages. While the criminal charges were ultimately dismissed, the dismissal, which followed the successful completion of a period of supervised probation, was not one that was 'consistent with the innocence of the accused,' a criterion generally required in order for a disposition to be considered a 'successful termination.' . . . The First Circuit has not ruled specifically on whether a state criminal defendant's acceptance of participation in a pre-trial diversion program bars a later § 1983 false arrest claim. The circuits that have addressed the issue are divided. [collecting cases] At least in the circumstances of this case, I am persuaded by the reasoning of the Second and Third Circuits that Mitchell Kennedy's acceptance of pretrial diversion on terms of probation did not imply that his arrest had been made without probable cause. A defendant agreeing to such a disposition avoids the possibility of a formal guilty finding but, even if he also avoids the necessity of formally admitting that the facts of the case are sufficient to support such a finding, he also foregoes a formal finding that his arrest lacked probable cause. . . . The circuits that have not found that pre-trial diversion bars a § 1983 false arrest claim have focused on the plaintiff's ineligibility to seek habeas relief. . . . That reasoning does not apply here because the First Circuit has held that the *Heck* rule applies even if habeas relief is actually unavailable. . . . Mitchell Kennedy's criminal case was resolved by a dismissal that included his acceptance of a period of probationary supervision as well as other limitations on his liberty. His acceptance of that disposition was inconsistent with his claim here that his arrest by Officer Moran lacked probable cause. For that reason, Moran is entitled to judgment in his favor on that claim as a matter of law."); ***Malden v. City of Waukegan, Ill.***, No. 04 C 2822, 2009 WL 2905594, at \*14 (N.D. Ill. Sept. 10, 2009) ("Having concluded that

Mr. Malden’s claims in this case, if successful, would necessarily imply the invalidity of his criminal conviction, we now address the question of whether *Heck* applies where, as here, a civil plaintiff no longer can challenge a criminal conviction through *habeas corpus*. We conclude that it does. . . . [N]one of the cases Mr. Malden cites for that proposition have held that the favorable termination requirement is inapplicable where a plaintiff: (1) has an underlying criminal conviction, (2) no longer can seek *habeas* relief in connection with that conviction, and (3) asserts a Section 1983 claim that, if accepted, necessarily would imply the invalidity of that conviction. . . . We hold that *Heck*’s favorable termination requirement applies to this case, and bars Mr. Malden’s claim in Count I.”); ***Ference v. Township of Hamilton***, 538 F.Supp.2d 785, 790 (D.N.J. 2008) (“Plaintiff was convicted of violating a municipal ordinance of the Township of Hamilton and assessed a minimal fine and court costs. . . . He did not appeal his conviction. . . . Similar to the plaintiff in *Gilles*, who entered into Pennsylvania’s Accelerated Rehabilitative Disposition program, whereby, after a probationary period his conviction was expunged, Plaintiff here had no recourse to *habeas corpus*; there was no detention to contest. Nonetheless, pursuant to *Gilles*, *Heck* still applies to Plaintiff’s section 1983 claims.”); ***Williams v. Donald***, 2007 WL 2345254, at \*2, \*3 (M.D.Ga. Aug. 14, 2007) (“A Circuit split exists regarding whether a former prisoner, who is thus not in custody for federal *habeas* purposes, may be allowed to attack his conviction or sentence through § 1983. The First, Third, Fifth and Sixth Circuits have held such a non-prisoner plaintiff may not attack a conviction in a § 1983 claim, and the Fourth and Eleventh Circuits have indicated in unpublished opinions they would be likely to render the same holding. [collecting cases] However, the Second and Ninth Circuits have held that *Heck* only applies to plaintiffs whose confinement can be challenged in post conviction proceedings. [citing cases] Having considered these opposite positions, the Court finds *Heck* bars Williams’ suit for two reasons. First, the Court is mindful of the Supreme Court’s admonition that ‘[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower federal court] should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions.’. . . Second, the Court cannot help but conclude that a judgment in Williams’ favor would necessarily imply the invalidity of his sentence – the very outcome *Heck* seeks to bar. As Donald and Roberson argue, Williams’ § 1983 lawsuit specifically challenges the validity of his sentence, but Williams’ sentence has not been invalidated. . . . Fundamentally, Williams seeks to recover monetary damages for allegedly unconstitutional imprisonment, but the sentence about which he complains was never reversed, expunged, declared invalid or called into question. Indeed, the sentence was upheld in a state *habeas* proceeding. Accordingly, Williams’ claim is not cognizable under § 1983.”); ***Abdullah v. City of Jacksonville***, No. 3:04-cv-667-J-32TEM, 2006 WL 2789137, at \*4 (M.D. Fla. Sept. 26, 2006) (“The Eleventh Circuit is not the only Circuit to re-examine *Heck* post-*Spencer*. In fact, a Circuit split has developed regarding the application of *Heck* to situations, such as that in *Vickers*, where a claimant has been released from incarceration and asserts a § 1983 complaint attacking the very reason he was incarcerated. The Third, Fifth and Fourth (in an unpublished opinion) Circuits have held, similar to the Eleventh Circuit’s unpublished *Vickers* opinion, that *Heck* clearly ruled a plaintiff may not attack a conviction in a § 1983 claim even if the plaintiff is not in prison and thus not in custody for federal habeas purposes. [citing cases] The Ninth and Second Circuits,

however, have adopted Justice Souter's position in *Spencer* that *Heck* only applies to plaintiffs whose confinement can be challenged in post conviction proceedings. [citing cases] In the present case, the gravamen of plaintiff's § 1983 claim is that the JSO Officers (Brown and Rodgers) unlawfully arrested him and caused him to spend twenty-nine days in prison at the Duval County Pretrial Detention Facility based on 'false charges.' Plaintiff's § 1983 claim attacks the very reason he was arrested and later adjudicated guilty (based on the plea of no contest). Like in *Vickers*, if plaintiff here is allowed to proceed with his § 1983 claim and prevails, such a result would impliedly render his conviction invalid, which is the precise situation that *Heck* seeks to preclude. While it appears the Eleventh Circuit would find plaintiff's claim *Heck* barred, because the City does not raise or rely on *Heck*, the reach of *Heck* in these circumstances is not entirely settled in the Eleventh Circuit and plaintiff's § 1983 suit fails for other reasons, the Court declines to decide this case on *Heck* grounds. The Court, however, thought it prudent to raise the *Heck* issue sua sponte due to its potential application to plaintiff's claims at bar.”).

*See also Harrison v. Michigan*, 722 F.3d 768, 774 (6th Cir. 2013) (“*Powers* has no bearing on this case because, as Justice Souter made clear in his concurrence in *Spencer*, the exception applies only to those § 1983 litigants who are unable as a matter of law to satisfy *Heck*'s favorable-termination requirement or, at least, those unable as a matter of law to satisfy it by means of a federal habeas action. . . . In this case, however, Harrison was not prevented from seeking habeas relief in prison by the brevity of his sentence. Nor was he prevented by law from satisfying the favorable-termination requirement by other means—as is evident by the fact that he succeeded in securing a favorable termination before he brought this § 1983 suit. As a result, both *Spencer* and *Powers* are irrelevant to Harrison's claim.”); *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1139-42 (9th Cir. 2005) (holding “*Heck* applies to SVPA [Sexually Violent Predators Act] detainees with access to *habeas* relief; detainee argued *Heck* shouldn't apply because he was no longer civilly committed and hence was unable to file a *habeas* corpus petition[,]’ but court of appeals found that “[u]nder California's SVPA scheme, the current petition to recommit Huftile is directly traceable to his initial term of confinement and is thereby sufficient to confer standing for federal *habeas* purposes.”).

*Compare Gilles v. Davis*, 427 F.3d 197, 209-12 (3d Cir. 2005) (“Petit's underlying disorderly conduct charge and his § 1983 First Amendment claim require answering the same question – whether Petit's behavior constituted protected activity or disorderly conduct. If ARD [“Accelerated Rehabilitative Disposition” (“ARD”) program, which permits expungement of the criminal record upon successful completion of a probationary term] does not constitute a favorable termination, success in the § 1983 claim would result in parallel litigation over whether Petit's activity constituted disorderly conduct and could result in a conflicting resolution arising from the same conduct. We recognize that concurring and dissenting opinions in *Spencer*. . . question the applicability of *Heck* to an individual, such as Petit, who has no recourse under the habeas statute. . . . But these opinions do not affect our conclusion that *Heck* applies to Petit's claims. We doubt that *Heck* has been undermined, but to the extent its continued validity has been called into question, we join on this point, our sister courts of appeals for the First and Fifth Circuits in

following the Supreme Court’s admonition ‘to lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court “the prerogative of overruling its own decisions.”’ . . . Because the holding of *Heck* applies, Petit cannot maintain a § 1983 claim unless successful completion of the ARD program constitutes a ‘termination of the prior criminal proceeding in favor of the accused.’ . . . We have not had occasion to address this issue directly. Our trial courts have held that ARD is not a termination favorable for purposes of bringing a subsequent § 1983 malicious prosecution claim. We find instructive opinions from the Second and Fifth Circuits that have addressed whether similar pre-trial probationary programs are a favorable termination sufficient to bring a subsequent civil suit. [discussing cases] Viewing these factors together, we hold the ARD program is not a favorable termination under *Heck*. Petit’s participation in the ARD program bars his § 1983 claim.’ footnotes omitted) *with id.* at 216-19 (Fuentes, J. dissenting in part) (“Like the District Court, the majority assumes that the favorable termination rule in *Heck* applies to Petit’s claim. But because Petit was not in custody when he filed his § 1983 action, *Heck* does not apply to his claims. Under the best reading of *Heck* and *Spencer v. Kemna*, 523 U.S. 1 (1998), the favorable termination rule does not apply where habeas relief is unavailable. . . . I now turn to the critical question on this point: whether Petit could have brought a habeas petition instead of the present § 1983 action. The duration of Petit’s ARD program is not on record, but it could not have exceeded two years. . . . Since Petit filed suit about one and a half years after his arrest, his ARD program was likely completed before he brought this suit. Thus, Petit could not have pursued habeas relief. . . . Even if the ARD program was not complete when Petit initiated the instant action, based on my review of the record, I conclude that the ARD program never placed Petit ‘in custody’ for habeas purposes. ARD is a pre-trial diversionary program, the purpose of which ‘is to attempt to rehabilitate the defendant without resort to a trial and ensuing conviction.’ . . . Although we do not know the precise conditions imposed upon Petit, they do not appear to have required Petit to report anywhere in Pennsylvania since his stated reason for entering ARD was to enable his return to Kentucky as quickly as possible for work. . . . I therefore conclude that, even in the unlikely event that Petit was still in ARD at the time that he filed the present suit, his ARD program was not sufficiently burdensome to render him ‘in custody’ for habeas purposes. Accordingly, the favorable termination rule does not apply to his claims and the dismissal of his claim on that basis was error.”).

*See also Teichmann v. New York*, 769 F.3d 821, 825 (2d Cir. 2014) (per curiam) (“We denied both motions and directed the parties to file supplemental briefs answering the following question: “Whether this Court should recognize an exception to the preclusionary rule of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), where the plaintiff is no longer in custody when his § 1983 complaint is filed.” We decline to reach this question and rule today on a narrower ground. . . . Since Teichmann’s allegations fail to state a claim upon which we may properly grant him relief, we dismiss without considering the *Heck v. Humphrey* issues discussed by the District Court on which we requested additional briefing.”); *Teichmann v. New York*, 769 F.3d 821, 827-28 (2d Cir. 2014) (per curiam) (Livingston, J., concurring in part and concurring in the judgment in part) (“In 2004, Teichmann was convicted in New York state court on one count

of attempted commission of a criminal sex act and twenty-two counts of criminal contempt. In this lawsuit, as we and the district court have construed his complaint, Teichmann asserts a § 1983 claim explicitly asking us to review and overturn his conviction. Under *Heck*, this claim is ‘not cognizable.’ To be sure, some Circuits, including our own, have recognized exceptions to *Heck*’s bar in certain circumstances based on two concurrences by Justice Souter that at one point won the support of five Justices. . . Referring to this line of cases, Judge Calabresi describes the ‘law in this Circuit’ as holding that ‘when a plaintiff does not have access to habeas—at least where the plaintiff has not intentionally caused habeas to be unavailable—favorable termination of the underlying sentence or conviction is not required.’ . . While our *en Banc* decision in *Poventud v. City of New York* may not have disturbed certain precedents in this area, . . . the *Poventud* panel decision has been vacated . . . and I respectfully disagree with my colleague’s characterization of our still-binding case law. We have never said that a plaintiff’s access to § 1983 turns on whether he has intentionally caused habeas to be unavailable. We have recognized an exception to *Heck*’s favorable termination requirement when habeas was *never* reasonably available to the plaintiff through no lack of diligence on his part—that is, where an action under § 1983 was a diligent plaintiff’s only opportunity to challenge his conviction in a federal forum. *See Leather v. Ten Eyck*, 180 F.3d 420, 424 (2d Cir.1999) (plaintiff “is not and never was in the custody of the State”). . . Though there is much to recommend the view that *Heck* permits *no* exceptions, those courts recognizing a narrow exception in situations where habeas was never an option have sought to afford access to a federal forum for the adjudication of constitutional claims while, at the same time, preventing those duly convicted of crimes in state proceedings (and whatever their intentions) from mounting attacks on their extant state convictions in disregard of the habeas statute’s requirements. This is the balance that we, and every other Circuit to recognize an analogous *Heck* exception, have struck. . . Perhaps it can be said that a state prisoner who has failed to pursue habeas diligently has ‘intentionally’ rendered it unavailable. If so, then Judge Calabresi and I agree on the narrow scope of the *Heck* exception that our precedents have recognized. But I do not believe it is an open question whether claims like Teichmann’s are cognizable under § 1983. Teichmann’s state-court remedies were exhausted in May 2010. He then waited more than a year, until he was no longer in custody within the meaning of 28 U.S.C. § 2254, and filed a federal lawsuit seeking a declaration that his prior conviction was unconstitutional. No court has recognized an exception to *Heck*’s bar under such circumstances, and there is no reason to dispose of Teichmann’s § 1983 claim on the merits solely to avoid deciding whether we should be the first to do so.”); *Teichmann v. New York*, 769 F.3d 821, 828-31 (2d Cir. 2014) (per curiam) (Calabresi, J., concurring) (“I fully join in today’s opinion but write separately because, although we decided this case easily without reference to the Supreme Court’s decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), both the District Court and the parties addressed it, and it is an issue that continues to cause some consternation in this Circuit. In fact, there are many § 1983 actions, like the one here, that can be disposed of on a motion to dismiss without ever needing to reach any *Heck* questions or indeed without needing to discuss *Heck* at all. Because many *Heck* issues are contentious, I believe that a decision on these other grounds is generally preferable. . . . [W]hat ‘necessarily demonstrates’ the invalidity of a sentence or conviction is often anything but easy to decide, and hence the

applicability vel non of *Heck* can be, to put it mildly, troublesome. Similarly, if we accept that a § 1983 suit does ‘necessarily’ attack a conviction or sentence, what happens if the plaintiff is no longer in custody and therefore cannot challenge the lawfulness of his confinement through habeas? On this issue, there is a deep circuit split. . . The law in this Circuit, however, holds—whether correctly or not—that *Heck* does not bar § 1983 claims when habeas is unavailable, at least so long as the unavailability was not intentionally caused by the plaintiff. *See Huang ex rel. Yu v. Johnson*, 251 F.3d 65, 75 (2d Cir.2001); *Green v. Montgomery*, 219 F.3d 52, 60 n. 3 (2d Cir.2000); *Jenkins v. Haubert*, 179 F.3d 19, 27 (2d Cir.1999); *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir.1999). Indeed, it is only because of these seemingly binding Circuit cases that in *Poventud v. City of New York* the panel majority (as opposed to the en banc majority) reached the *Heck*-habeas issue that led to en banc consideration in the first place. 715 F.3d 57, 61–62 (2d Cir.2013), *aff’d on other grounds on reh’g en banc*, 750 F.3d 121 (2d Cir.2014). The animating rationale of this result was stated to be that ‘some federal remedy—either habeas corpus or § 1983—must be available’ to redress constitutional violations. . . Yet there are clearly many members of our Court who disagree deeply with that rationale and our Circuit’s apparent position. . . I believe that the law of our Circuit remains as it was despite our recent en banc decision in *Poventud*, in which—though the issue was squarely presented—the majority failed to reach the question of *Heck*’s applicability when habeas is unavailable, and ruled instead that because *Poventud*’s § 1983 claim did not undercut his guilty plea, *Heck* was no obstacle. . . That holding *explicitly* did nothing to disturb the cases cited above. . . Thus, until the Supreme Court rules that our position is wrong, or we resolve the issue en banc, I think that the law in this Circuit remains what it was: when a plaintiff does not have access to habeas—at least where the plaintiff has not intentionally caused habeas to be unavailable—favorable termination of the underlying sentence or conviction is not required. That said, who can doubt that this position, which has split the circuits and has been forcefully attacked by a significant number of judges on our Court, is controversial and hence to be avoided where other, easier grounds for deciding cases are available? Moreover, what *does* remain an open question, even in this Circuit, is perhaps even more difficult: whether *Heck* bars § 1983 suits when the plaintiff has intentionally defaulted his habeas claims. I know of no circuit cases that allow § 1983 claims to proceed in such circumstances, and some have suggested they cannot. . . And despite suggestions to the contrary, *Poventud*, 715 F.3d at 70 (Jacobs, J., dissenting), the *Poventud* panel majority did not address, let alone attempt to decide, the issue. . . Nevertheless, there are serious arguments to be made on both sides of the question. To discuss those arguments, however, is beyond the scope of this concurrence. For today, it is enough to suggest that here, too, we would be wise to move cautiously when deciding future cases, ruling narrowly where possible, and confining ourselves to the facts before us. And this brings us back to the beginning of this concurrence. When there are non-controversial, non-*Heck* grounds for ruling, we and district courts would be well advised to decide on those grounds rather than needlessly on *Heck* ones.”)

*See also Poventud v. City of New York*, 750 F.3d 121, 132-38 (2d Cir. 2014) (en banc) (“This Court has emphatically and properly confirmed that *Brady*-based § 1983 claims necessarily imply the invalidity of the challenged conviction in the trial (or plea) *in which the Brady violation*

occurred. . . That should come as no surprise; the remedy for a *Brady* violation is *vacatur* of the judgment of conviction and a new trial in which the defendant now has the *Brady* material available to her. . . .The district court treated Poventud’s case as though it were a malicious prosecution claim. . . . It measured his admission in the subsequent plea agreement against his claims in his *Brady* submission. Because his 2006 plea was at odds with his alibi defense at his 1998 trial, Judge Batts concluded that his recovery for a *Brady* claim would call his plea into question. That view misunderstands *Brady* and its correlation to § 1983 claims asserting only violations of the right to due process. The district court’s view incorrectly presumes that, on the facts of this case, the State could violate Poventud’s *Brady* rights only if Poventud is an innocent man. This last restriction has no basis in the *Brady* case law; materiality does not depend on factual innocence, but rather what would have been proven absent the violation. . . . In this case, Poventud has the right to argue to the jury that, with the main State witness impeached, he would have been acquitted based on reasonable doubt or convicted on a lesser charge. . . . [H]ad Poventud’s complaint sounded in malicious prosecution, rather than in a procedural *Brady*-based claim, that claim would have been barred because of the favorable termination element of the malicious prosecution tort. . . . Finally, Poventud cannot seek to collect damages for the time that he served pursuant to his plea agreement (that is, for the year-long term of imprisonment). *Olsen*, 189 F.3d at 55. With these limitations in mind, we find that Poventud has stated a § 1983 claim. . . .Were Poventud to win at trial—far from a foregone conclusion—the legal status of his 2006 guilty plea would remain preserved. No element of his § 1983 *Brady* claim requires Poventud to prove his absence from the scene of the crime; if it did, his claim would be *Heck*-barred. Poventud’s success at trial would mean only that his 1998 conviction was the product of a constitutional violation; in this case, a New York State court has *already* reached this determination and vacated the conviction as a result. . . .Poventud’s claim is one of process. He asserts that members of the New York City Police Department willfully withheld exculpatory evidence that called into question the testimony of the only witness to place him at the scene of the crime. Poventud’s claims are not the stuff of prison idleness or self-absorption; he has proven his claims in state court and the State elected not to appeal his victory. Poventud’s conviction was vacated because it rested on a constitutional infirmity. Armed with the information previously denied him, Poventud accepted an offer from the State to plead to a lesser offense. He now seeks to recover from those who violated his right to a fair trial. He does not contest the legitimacy of his plea (nor could he). His claim is restricted to the acts of the police officers before and during his trial in 1998. Poventud’s victory in state court, securing *vacatur* of his jury trial conviction, gave life to his claim and separated it from the criminal activity that took place in the Bronx on March 6, 1997. Had Poventud claimed that the entire criminal process was one borne of malice, then our decision would be different. But his claims are circumscribed to the misdeeds of the police prior to his jury trial, and nothing more.”); ***Poventud v. City of New York***, 750 F.3d 121, 138-43 (2d Cir. 2014) (en banc) (Lynch, J., concurring) (“The question before the Court is whether the rule of *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994), which prohibits a criminal defendant from obtaining damages for wrongful prosecution, conviction or imprisonment until and unless the conviction he complains of has been overturned, prevents the plaintiff Marcos Poventud from suing the defendants for, as he alleges, obtaining a conviction against him that led to his incarceration for almost nine years by deliberately suppressing evidence that cast doubt on

the critical identification testimony of the victim. . . The short answer is that it does not, because the criminal judgment against him *was* later vacated by the state court that entered it, because the court found that the police had indeed rendered his trial unfair by suppressing exculpatory evidence. The defendants argue, however, that we should nevertheless forbid Poventud from seeking damages for that wrongful conviction and sentence, because Poventud later, after the full facts were known to both sides, pled guilty to a related but lesser offense, and was sentenced to *one* year of imprisonment. . . . To recapitulate the results of the two trials of Marcos Poventud: at the first proceeding, corrupted by police misconduct, a jury that was ignorant of the truth about the identification witness, convicted him of attempted murder and three other crimes leading to nine years of imprisonment on a ten-to-twenty year sentence; at the second, he was convicted on his plea of guilty to third-degree attempted robbery and was sentenced to one year. Now Poventud seeks damages from those who, in effect, fabricated evidence of his guilt by suppressing evidence that would have shaken, perhaps fatally, the identification testimony used to convict him. The defendants seek to have his suit dismissed, based on the same rule that would have prevented him from suing *while his initial conviction stood unchallenged*, arguing that a fairly obtained conviction by guilty plea (albeit to a lesser offense with sharply limited consequences) prevents a suit seeking damages for the wrongful conduct that resulted in his earlier, more serious, now-vacated conviction, with its resulting drastically more serious punishments. It seems to me, as it does to a majority of the judges of this Court, that the legal answer is simple. . . . Poventud seeks to recover damages for his initial conviction and for that portion of his lengthy imprisonment that was attributable to that conviction. That conviction exists no longer; a state court declared it invalid, and we must accept the outcome of the legal process that holds him not guilty of those offenses. *Heck* thus does not bar his suit. It seems to me that the answer is equally simple from the standpoint of simple justice. The state court decided that Poventud was not fairly tried, and that the police deliberately suppressed evidence helpful to the defense in order to make the case against him appear stronger than it was. His conviction of four crimes including attempted murder, and sentence to 10 to 20 years in prison is a legal and moral nullity, the result of a trial deliberately corrupted by the police. Whether or not prosecutors might have successfully appealed that judgment, or obtained the same conviction again after a second, fair trial, they chose not to take those risks; whether or not Poventud would have been acquitted at a second trial, he too elected not to take his chances. Our best—however imperfect—approximation of the result that would have come from a fair trial is the result of the plea bargain: conviction on a single, much less serious count, and a sentence to only a year in prison. We must accept as binding the outcome of these criminal proceedings: that Poventud, at an unfair trial, suffered a much more serious conviction and punishment than he received from a fair proceeding, with all the facts known. By the same token, however, Poventud must accept the other outcome of the legal process: his conviction, by plea of guilty, of the offense of attempted robbery in the third degree, and his sentence to one year of imprisonment. Irrespective of the difficulty of his choice to plead guilty, Poventud is legally guilty of that offense. He therefore may not argue that he was wrongly prosecuted or charged; he cannot claim that he was unfairly convicted of a crime, or that he was wrongly required to serve a year in prison. But he certainly may argue that his initial, more serious conviction was wrong, and *wrongful*, and that as a result of deliberately unfair and corrupted

processes he was forced to serve many additional years in prison. . . . There is thus a certain common sense, rough justice to the idea that Poventud can seek damages for the difference between the outcomes of his first and second processes, the first conducted outside the rules and the second within them. It is reasonable to ask, however, where is the *truth* in all of this. I think any fair-minded person will agree that the trial that led to Poventud’s initial conviction was deeply—and intentionally—corrupted, and that its result is unreliable. But Poventud has now admitted, under oath (albeit under deeply questionable circumstances) that he was indeed involved in the robbery. Are we to award damages, in effect, for the fact that Poventud lost the opportunity to be acquitted of a crime that he may very well have committed because the rules were not followed? I believe that we must. As a matter of law, in order to prevent the horror of convicting an innocent person, we insist that someone charged with a crime may only be convicted and punished if the state can prove his or her guilt by a very demanding standard of proof, beyond a reasonable doubt. If a defendant cannot be thus proven guilty—if the evidence, however *suggestive* of guilt it may be, does not rise to a sufficient level of strength, that defendant must be declared not legally guilty of the crime charged. And certainly, if a defendant is found legally guilty by a jury that has been deprived of the full story by government misconduct, that conviction is void.”); ***Poventud v. City of New York***, 750 F.3d 121, 163, 164 (2d Cir. 2014) (en banc) (Jacobs, J., dissenting) (“Precedent compels us to conclude that the *Heck* bar blocks Poventud’s claim. Poventud’s criminal proceeding did not terminate until he pled guilty to a lesser included offense. . . . Therefore, Poventud’s *Brady*-based § 1983 claim ‘does indeed call into question the validity of his conviction.’ . . . Because we conclude that Poventud’s claim necessarily implies the invalidity of his extant conviction, we reach the issues that launched this rehearing *in banc*: whether the *Heck* bar applies only to persons in custody, as the majority of the three-judge panel held; whether there are any exceptions to the *Heck* bar; and whether any exceptions that may exist would save Poventud’s claim. We reject the holding of the majority opinion issued by the three-judge panel, an opinion which has in any event been vacated. Assuming *arguendo* that there are some exceptions to *Heck*, we conclude that Poventud’s action could not come within them. On the basis of self-described *dicta* signed by five Supreme Court Justices (three of whom are no longer on the Court), a Circuit split has opened as to whether some exceptions to *Heck* may be permitted. In a nutshell, these Justices posited that ‘a former prisoner, no longer “in custody,” may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be *impossible as a matter of law* for him to satisfy.’ . . . Several Circuits have concluded that the *Spencer* concurrences cannot override *Heck*’s binding precedent. *See, e.g., Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir.2007); *Gilles v. Davis*, 427 F.3d 197, 209–10 (3d Cir.2005); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir.2000) (per curiam); *Figueroa v. Rivera*, 147 F.3d 77, 80 (1st Cir.1998). These courts hold that *Heck*’s bar is absolute, heeding the Supreme Court’s admonition that, even if binding precedent ‘appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.’ . . . Other Circuits have nevertheless held that *Spencer*’s *dicta* allows courts to recognize unusual and compelling circumstances in which *Heck*’s holding does not absolutely foreclose a claim. *See, e.g., Burd v. Sessler*, 702 F.3d 429, 435–36 (7th Cir.2012); *Cohen v. Longshore*, 621

F.3d 1311, 1317 (10th Cir.2010); *Wilson v. Johnson*, 535 F.3d 262, 267–68 (4th Cir.2008); *Powers v. Hamilton Cnty. Pub. Defender Comm’n*, 501 F.3d 592, 603 (6th Cir.2007); *Guerrero v. Gates*, 442 F.3d 697, 704 (9th Cir.2006); *Harden v. Pataki*, 320 F.3d 1289, 1298 (11th Cir.2003). There is no need to choose a side in this split because the narrow exception articulated by Justice Souter would be inapplicable here in any event. The motivating concern in the *Spencer dicta* was that circumstances beyond the control of a criminal defendant might deprive him of the opportunity to challenge a federal constitutional violation in federal court. Poventud is not such a person. Poventud challenged his first conviction in state court and won—making it unnecessary for him to seek federal habeas relief. At that point, Poventud had the option of defending in an untainted trial or of pleading guilty to the same crime on reduced charges and accepting a reduced sentence. He chose to plead. Poventud then had the option of filing a motion to challenge the voluntariness of his plea—and Poventud did so, but he withdrew it prior to an evidentiary hearing. It was therefore by no means ‘impossible as a matter of law,’ *Spencer*, 523 U.S. at 21 (Souter, J., concurring), for Poventud to challenge his conviction and thereby satisfy *Heck’s* favorable termination requirement; he simply decided not to.”)

*Compare Taylor v. County of Pima*, 913 F.3d 930, 935-36 (9th Cir. 2019) (“Taylor seeks damages for wrongful incarceration stemming from the 42 years that he spent in prison. The Supreme Court’s holding in *Heck v. Humphrey*. . . provides an important limitation on Taylor’s claims. Under *Heck*, a plaintiff in a § 1983 action may not seek a judgment that would necessarily imply the invalidity of a state-court conviction or sentence unless, for example, the conviction had been vacated by the state court. . . Here, Taylor’s 1972 jury conviction has been vacated by the state court, so *Heck* poses no bar to a challenge to that conviction or the resulting sentence. But Taylor’s 2013 conviction, following his plea of no contest, remains valid. Accordingly, Taylor may not state a § 1983 claim if a judgment in his favor ‘would necessarily imply the invalidity of his [2013] conviction or sentence.’ . . . As the district court summarized, ‘*Heck* does not bar [Taylor] from raising claims premised on alleged constitutional violations that affect his 1972 convictions but do not taint his 2013 convictions.’ Recognizing that limitation, Taylor stresses that ‘[h]e challenges his 1972 prosecution, convictions and sentence and does not challenge his 2013 “no contest” pleas or sentence.’ . . . Taylor alleges that his 1972 conviction and resulting sentence were plagued by constitutional violations and that those errors initially caused his incarceration. Critically, however, all of the time that Taylor served in prison is supported by the valid 2013 state-court judgment. The state court accepted the plea agreement and sentenced Taylor to time served. For that reason, even if Taylor proves constitutional violations concerning the 1972 conviction, he cannot establish that the 1972 conviction caused any incarceration-related damages. As a matter of law, the 2013 conviction caused the entire period of his incarceration. . . . [W]hen a valid, unchallenged conviction and sentence justify the plaintiff’s period of imprisonment, then the plaintiff cannot prove that the challenged conviction and sentence caused his imprisonment and any resulting damages. . . . We agree with the analyses and conclusions of our sister circuits. A plaintiff in a § 1983 action may not recover incarceration-related damages for any period of incarceration supported by a valid, unchallenged conviction and sentence. We take no pleasure in reaching this unfortunate result, given Taylor’s serious allegations of unconstitutional actions by

the County. But we cannot disregard the limitations imposed by Congress and the Supreme Court on the scope of § 1983 actions.”) with *Taylor v. County of Pima*, 913 F.3d 930, 939-40 (9th Cir. 2019) (Schroeder, J., dissenting as to Part B.2) (“This decision magnifies an already tragic injustice. At the time of Tucson’s Pioneer Hotel fire in 1972, Louis Taylor was an African American male of sixteen. Arrested near the hotel, he was convicted on the basis of little more than that proximity and trial evidence that ‘black boys’ like to set fires. He has spent a lifetime of 42 years in prison following his wrongful conviction. When he filed his state court petition the county that had prosecuted him did not even respond to his allegations of grievous deprivations of civil rights, including the withholding of evidence that the fire was not caused by arson at all, and the indicia of racial bias underlying the entire prosecution. Instead of responding, the county offered Taylor his immediate freedom in return for his pleading no contest to the original charges and agreeing to a sentence of time served. He accepted the offer, since his only alternative was to stay in prison and wait for his petition for collateral relief to wend its way through the courts, a process that could take years. Because his original conviction had been vacated and all of the prison time he had served was as a result of that invalid conviction, he filed this action to recover damages for his wrongful incarceration. Yet the majority holds that he can recover nothing. Why? Because it interprets the few cases with circumstances remotely similar to this one to require the admittedly unfair holding that his plea agreement somehow validates or justifies the original sentence that deprived Taylor of a meaningful life. In my view our law is not that unjust. Our Circuit law actually supports the award of damages for the time Taylor served in prison as a result of an unlawful, and now vacated conviction. Our leading case is *Jackson v. Barnes*, 749 F.3d 755 (9th Cir. 2014), where, as here, the plaintiff’s original conviction was vacated on habeas review. Hence, a claim for damages resulting from wrongful incarceration was not barred by *Heck v. Humphrey*. . . The majority acknowledges the same is true here. In *Jackson* the plaintiff could not recover damages, however, because the wrongful conviction had not yet resulted in any wrongful incarceration. This was because he was still serving other, earlier imposed sentences and never began serving the term imposed as a result of the unlawful conviction. In other words, there was a lack of causation. . . Taylor, by contrast, served decades of imprisonment as a result of his first, vacated conviction, so there is no lack of causation here. Under *Jackson*, he should recover. That Taylor later, in order to gain prompt release, pleaded no contest to the charges and to a sentence of time served, does not undo the causal sentencing chain set in motion after the original, invalid conviction. The majority’s discussion is not consistent with *Jackson*. The Second Circuit’s decision in *Poventud* also supports reversal. *Poventud v. City of N.Y.*, 750 F.3d 121 (2d Cir. 2014) (en banc). *Poventud*’s conviction was vacated on collateral attack, on the basis of a *Brady* violation, and a new trial was ordered. . . He then pleaded guilty to a lesser charge, pursuant to a plea agreement that dismissed all other charges and stipulated to a one-year sentence, with time already served. . . The Second Circuit held that *Poventud*’s *Brady*-based claim was not *Heck*-barred insofar as it related to his first conviction. . . As the en banc court explained, were *Poventud* to win at trial in his civil rights suit, ‘the legal status of his [second conviction] would remain preserved.’ . . He was permitted to pursue a claim of damages for the time he served beyond the one year plea agreement stipulation. Judge Lynch’s concurrence is also instructive, as it focuses on the injustice of relying on the subsequent guilty plea to deny *Poventud* a remedy for the

unfairness of the first trial. . . The majority’s decision ignores such injustice in this case. Taylor’s case is even more compelling than those of *Jackson* and *Poventud* because his first conviction was so deeply tainted that we now know the disastrous fire may not have been set by anyone, and the prosecution was without adequate foundation from the beginning. He won more than a new trial, but virtual exoneration. His situation is therefore also different from the situation in *Olsen v. Correiro*, 189 F.3d 52 (1st Cir. 1999), where the plaintiff’s murder conviction was overturned but he was subsequently convicted of manslaughter. Far from being the product of a new, constitutionally-conducted second trial, Taylor’s second conviction was the product of his desperate circumstances. In his 60’s, he faced acceptance of the plea offer or waiting years for a habeas petition to work its way through the courts. We should not tolerate such coercive tactics to deprive persons of a remedy for violations of their constitutional rights. To say such a plea justifies the loss of 42 years, as the majority asserts, is to deny the reality of this situation and perpetuate an abuse of power that § 1983 should redress.”).

*See also Jackson v. Barnes*, 749 F.3d 755, 760, 761 (9th Cir. 2014) (“This. . . is a case in which a guilty plaintiff’s claim is not barred by *Heck*. In this case it is Jackson’s second conviction for first degree murder that is outstanding. It is undisputed that the second conviction was insulated from the inculpatory statements that are the subject of Jackson’s § 1983 suit against Barnes. The first conviction is the case in which the Fifth Amendment violation occurred. Therefore a judgment in Jackson’s favor would—far from ‘necessarily imply[ing]’ the invalidity of his second conviction—not have any bearing on it. The only conviction a judgment in Jackson’s favor would bear on is his first conviction, which *was* ‘called into question by a federal court’s issuance of a writ of habeas corpus.’ In fact, more than ‘called into question,’ it was reversed. . . Thus, Jackson’s § 1983 claim against Barnes for the Fifth Amendment violation is not barred by *Heck*. Our holding is similar to that of the Second Circuit in *Poventud v. City of New York*, No. 12–1011–CV, 2014 WL 182313, \_\_\_ F.3d \_\_\_ (2d Cir. Jan. 16, 2014) (en banc).”) and *Rosales-Martinez v. Palmer*, 753 F.3d 890, 899 (9th Cir. 2014) (“The viability and scope of Rosales–Martinez’s § 1983 claim, in relation to *Heck v. Humphrey* and pursuant to *Jackson* should be evaluated by the district judge on remand. In that connection, Rosales–Martinez’s December 2, 2008 guilty plea to one of the original four counts and the credit he received for 501 days of prison time for that sentence suggests a continuous validity to a portion of his original conviction and sentence, and a possible inconsistency between it and a § 1983 action, which may pose a distinction with *Jackson*. In *Jackson*, the entire initial conviction was held invalid; thus, the Ninth Circuit held, the § 1983 case could proceed without violating the rule of *Heck v. Humphrey*. In our case, Rosales–Martinez pleaded guilty to one of the four counts of his original conviction, with the other three being held invalid. On remand, the district judge might consider if this and other differences between the case before us and the decision in *Jackson* are significant. For example, the district judge may wish to consider the extent to which Rosales–Martinez can seek compensatory damages based on the convictions that were vacated as invalid, and the time he served on the count that remained valid, for which he was given credit for 501 days of time served. The district judge may also wish to consider whether any of the facts Rosales–Martinez allocuted to in his December 2, 2008 plea are

inconsistent with his allegations in this § 1983 action. These questions are illustrations; the district judge is free to pursue all relevant facts and inquiries.”)

*See also Rosato v. New York County Dist. Attorney’s Office*, No. 09 Civ. 3742(DLC), 2009 WL 4790849, at \*4 (S.D.N.Y. Dec. 14, 2009) (“Plaintiff argues that *Heck* does not bar his § 1983 claims because he is not ‘in custody’ within the meaning of the federal habeas corpus statute, citing the Second Circuit’s decision in *Leather*, 180 F.3d 420. Plaintiff’s attempt to distinguish his case based on the fact that he is not incarcerated fails as a matter of law. The Supreme Court’s interpretation of the ‘in custody’ language in the federal habeas statute is not so narrow as to require that a prisoner be physically confined in order to challenge his sentence on habeas corpus. . . . An individual on probation or parole is ‘in custody’ for purpose of federal habeas corpus proceedings. . . . Because plaintiff is still serving his sentence of probation, he is ‘in custody’ within the meaning of the federal habeas statute and his § 1983 claims are barred by *Heck*.”).

*See also Bermudez v. City of New York*, 790 F.3d 368, 376-77 & nn. 4, 5 (2d Cir. 2015) (“[W]e conclude that a jury could find that Defendants’ alleged failure to inform ADA Rodriguez about problems in the initial questioning of these witnesses could have prevented ADA Rodriguez from making an informed decision about the reliability of that evidence. . . . And this would mean that a jury could find that Defendants remained a proximate cause of the deprivation of Bermudez’s due process rights. . . . Bermudez additionally brings a due process claim under *Brady v. Maryland*, 373 U.S. 83 (1963), arguing that Defendant police officers misled ADA Rodriguez as to the nature of the photo identification procedures and the fact that Lopez’s testimony was coerced. Bermudez contends that these facts should have been disclosed to him. Police officers can be held liable for *Brady* due process violations under § 1983 if they withhold exculpatory evidence from prosecutors. . . . Thus the same disputed issues of material fact exist concerning Bermudez’s *Brady* claim. If the prosecutor was not informed about this evidence, then Defendant officers could be found to have been a proximate cause of these asserted due process violations as well. . . . In sum, there are triable issues of fact concerning whether ADA Rodriguez’s decision to bring charges was tainted by misleading information about how the witnesses originally came to identify Bermudez as the shooter. It was therefore error to grant summary judgment to Defendants on Bermudez’s due process claims. . . . Defendants appear to argue that Bermudez’s due process claims fail because there was probable cause to bring an indictment. But the absence of probable cause is not an element of a due process claim. *See Poventud v. City of New York*, 750 F.3d 121, 134 (2d Cir.2014) (en banc) (distinguishing the elements of malicious prosecution from those of other due process claims); *Alexander v. McKinney*, 692 F.3d 553, 556–57 (7th Cir.2012) (listing the elements of a malicious prosecution claim and the elements of a due process claim under *Brady*, and naming lack of probable cause as a requirement only of the former). . . . Bermudez’s claim for malicious prosecution fails at the summary judgment stage, because no facts in dispute support a lack of probable cause to charge him with the relevant crime. Where, as here, a grand jury indicted the plaintiff on the relevant criminal charge, New York law creates a presumption of probable cause that can only be overcome by evidence that the indictment ‘was the product of fraud, perjury, the suppression of evidence by the police, or other police conduct undertaken in bad faith.’ *Green v.*

*Montgomery*, 219 F.3d 52, 60 (2d Cir.2000) (quoting *Marshall v. Sullivan*, 105 F.3d 47, 54 (2d Cir.1996)); accord *Gisoni v. Town of Harrison*, 532 N.Y.S.2d 234, 236 (1988). Bermudez argues that the indictment was the product of police suppression of evidence, because Defendant officers failed to disclose the evidentiary problems to ADA Rodriguez. We need not decide this issue, however, because ADA Rodriguez interviewed the two witnesses who testified at the grand jury hearing—Thompson and Velasquez. Thompson told ADA Rodriguez, and then testified at the grand jury hearing, that he saw Bermudez shoot the victim. Velasquez told ADA Rodriguez, and then testified at the grand jury hearing, that she saw Bermudez reach behind his back for a gun. Even if the ADA had been misled about the overly suggestive photo identification and array procedures and about the alleged coercion of Lopez, these interviews provided ADA Rodriguez with probable cause to prosecute Bermudez. Because we find that probable cause existed to indict Bermudez, we do not reach the other elements of Bermudez’s malicious prosecution claim against Defendant officers.”)

In *Muhammad v. Close*, 540 U.S. 749 (2004), the Supreme Court left this issue unresolved. See *Muhammad*, 540 U.S. at 752 n.2 (2004) (“Members of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement. . . . This case is no occasion to settle the issue.”).

See also *Christy v. Sheriff of Palm Beach County, Fla.*, No. 07-11912, 2008 WL 3059718, at \*8 (11th Cir. Aug. 5, 2008) (“[W]ith respect to Christy’s assertion that his lawsuit must be allowed to proceed because habeas relief is unavailable, we have expressly declined to consider that issue in an opinion where the § 1983 action is otherwise barred under *Heck*. [citing *Vickers* and *Abusaid*]”); *Vickers v. Donahue*, No. 04-14848, 2005 WL 1519353, at \*4, \*5 (11th Cir. June 28, 2005)(not published) (“While we have not explicitly ruled on whether a plaintiff who has no federal habeas remedy available to him may proceed under § 1983 despite the fact that success on the merits would undermine the validity of, in this case, an order of revocation and the resulting nine month sentence, we decline to do so here because it is unnecessary to the outcome of Vickers’s case. First, as the district court pointed out, Vickers was not without a remedy to seek post-revocation relief. He could have appealed the revocation order and, had he prevailed, his § 1983 claims would not be barred by *Heck*. Second, unlike in *Harden*, Vickers’s claim here would imply the invalidity of the order of revocation and nine-month sentence he received. . . . Finally, the three cases cited above that permitted a plaintiff to pursue a § 1983 claim because no habeas relief was available did not involve a situation where a conviction itself was called into question. In *Nonnette* and *Carr*, the issue was the validity of prison disciplinary proceedings revoking good-time credits, and in *Huang* the issue was the denial of credit for prison time served and the conviction was not challenged. . . . Here, Vickers’s factual basis for his § 1983 claim directly undercuts a signed court order, which found that Vickers had violated his community control for two violations of condition 12. As the district court noted, Vickers insists he did not plead guilty or *nolo contendere* to these violations, but even taking his assertion as true, the undisputed fact remains that he was found to be in violation, convicted for the violation, and sentenced to nine months’ imprisonment. Accordingly, we conclude that the *Heck* bar applies to Vickers’s claim

despite the unavailability of relief.”); *Jones v. David*, No. 08-61274-CIV, 2008 WL 5045951, at \* 3 (S.D. Fla. Nov. 24, 2008) (“The Supreme Court has not determined whether *Heck* applies when a plaintiff has been released from custody and is no longer able to challenge past custody in a post-conviction proceeding. . . . The Eleventh Circuit also has not considered this issue. [ citing *Abusaid* and *Vickers*] Because it is not clear that this case is *Heck*-barred, either because the plaintiff has a post-conviction remedy or because he filed this action while he was still in custody, it is recommended that the Fourth Amendment claims against Porter proceed.”).

A lengthy discussion of the problem, along with a good collection of the cases, can be found in *Dible v. Scholl*, 410 F.Supp.2d 807, 808, 809, 820-25 & n.15, 828 (N.D. Iowa 2006) (“This controversy brings before the court an issue of first impression within the Eighth Circuit – namely whether the unavailability of a remedy under 28 U.S.C. § 2254, the federal habeas corpus statute, permits a former state prisoner to maintain an action under 42 U.S.C. § 1983, . . . even though success in such an action would necessarily imply the invalidity of a conviction or sentence. Specifically, in this case, the court confronts the question of whether a former state prisoner – who is precluded from pursuing a habeas claim – can maintain an action for damages as a result of alleged due process violations that occurred during a prison disciplinary proceeding under § 1983 or whether his rights are nothing more than a mirage – appearing to exist at first glance, but transforming into an illusion upon careful inspection due to the lack of a federal forum in which to enforce them. . . . Following the Court’s opinion in *Spencer*, the federal district and appellate courts have been left to carve out the precise contours of the favorable termination requirement with respect to prisoners who can not access a federal forum via ‘ 2254. Generally, these federal courts have split into two camps. First, are those courts that find *Heck* directly controls this issue. Therefore, because *Spencer* did not overrule *Heck*, these courts conclude that a prisoner not in custody within the meaning of the habeas statute or whose habeas action has been mooted upon release from incarceration, remains nonetheless precluded from bringing a claim for damages under § 1983 under the language in *Heck*. Second, are those courts that follow Justice Souter’s logic in *Spencer* and find that *Heck* did not affirmatively decide the issue, leaving these courts free to conclude that a prisoner without recourse under the habeas statute may bring an action under the broad scope of § 1983. There is no existing Eighth Circuit precedent on this issue. . . . The Fifth, Sixth, and Third Circuits have followed the First Circuit’s logic pronounced in *Figueroa*. See, e.g., *Randell v. Johnson*, 227 F.3d 300, 301-02 (5th Cir.2000) (relying on the reasoning set forth in *Figueroa* ); *Huey v. Stine*, 230 F.3d 226, 229-30 (6th Cir.2000) (citing *Figueroa* ), *overruled on other grounds by Muhammad v. Close*, 540 U.S. 749 (2004); *Gilles v. Davis*, 427 F.3d 197, 209-10 (3d Cir.2005) (following *Figueroa* ). . . Based on an unpublished opinion, it also appears the Fourth Circuit would follow this same reasoning. See *Gibbs v. S.C. Dep’t of Prob., Parole, & Pardon Servs.*, No. 97-7741, 1999 WL 9941, at \*2 (4th Cir. Jan. 12, 1999) (affirming district court’s grant of summary judgment with respect to released prisoner’s claims under § 1983 on the grounds the claim was precluded by *Heck*). To summarize, the conclusion reached by these courts is premised upon the belief that *Heck* definitively decided, in the negative, the question of whether a prisoner who is precluded from pursuing habeas relief can file a § 1983 action without first meeting the favorable determination requirement. Based upon this belief, although these

courts question the continued viability of *Heck*'s favorable termination requirement when habeas is unavailable, these decisions reflect that ultimately, these courts conclude that they are precluded from following *Spencer*, when to do so would overrule *Heck*, a determination solely within the province of the Supreme Court. . . . In contrast, several circuit and district courts have adopted the view articulated by Justice Souter in *Spencer* and have held that a person who is legally precluded from pursuing habeas relief may bring a § 1983 action challenging a conviction without satisfying the favorable termination requirement of *Heck*. See *Nonnette*, 316 F.3d at 875-77 & n. 6.; *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir.2001); *DeWalt v. Carter*, 224 F.3d 607, 616-17 (7th Cir.2000) [*But see Savory v. Cannon*]; . . . *Dolney v. Lahammer*, 70 F.Supp.2d 1038, 1041, 1042 n. 1 (D.S.D.1999); *Haddad v. California*, 64 F.Supp.2d 930, 938 (C.D. Cal.1999); *Zupan v. Brown*, 5 F.Supp.2d 792 (N.D.Cal.1998). This line of case law does not, as alluded to by the First Circuit in *Figueroa*, rely upon the contention that *Spencer* overruled *Heck*'s favorable termination requirement. See, e.g., *Nonnette*, 316 F.3d at 877 n. 6 (“We conclude that *Heck* does not control, and reach that understanding of *Heck*'s original meaning with the aid of the discussions in *Spencer*.”) (citing *DeWalt*, 224 F.3d at 617 n. 5). Rather, these authorities conclude that *Heck* should be read as creating a favorable termination requirement only for those persons who, like *Heck*, had the remedy of habeas corpus available to them. . . . After a review of the pertinent case law, this court concludes that it will adhere to Justice Souter's reasoning in *Spencer*. In doing so, this court aligns itself with the circuit and district courts that have concluded *Heck* only hints at an answer to the current issue before this court in dicta and therefore, does not constitute directly applicable precedent. . . This is because the prisoner in *Heck* had the remedy of habeas available to him. . . . This court does not believe its holding will encourage prisoners to delay their challenges to loss of good time credits until their release from incarceration. As the Ninth Circuit has noted, ‘The possibility of release from incarceration is the strongest incentive for prisoners to act promptly to challenge such administrative action by habeas corpus after administrative remedies are exhausted.’ *Nonnette*, 316 F.3d at 878 n. 7. Further, the court's holding today is not without limitations. For example, other courts have declined to hold that a failure to timely pursue habeas remedies takes a prisoner's § 1983 claim out of *Heck*'s purview. See, e.g., *Cunningham v. Gates*, 312 F.3d 1148, 1154 n. 3 (9th Cir.2002). Thus, the court's holding today potentially affects only a small number of prisoners – former prisoners challenging the loss of good time credits or revocation of parole whose claims, under *Spencer*, have been mooted by their release from incarceration, or those prisoners challenging their underlying convictions who were never ‘in custody,’ or served too short of time to physically file a petition for habeas corpus while ‘in custody.’ This latter group of potentially affected prisoners is further reduced by the fact that, unlike challenges to parole revocation or loss of good time credits, challenges to an underlying conviction are not mooted upon the prisoner's release from incarceration, and a habeas action may still be maintained provided that it was filed at the time the individual was ‘in custody.’ See *Spencer*, 523 U.S. at 7-8 (noting collateral consequences have been presumed in cases challenging an underlying conviction) (citing *Sibron v. New York*, 392 U.S. 40, 55-56 (1968)). . . . The decision issued by this court today ensures that prisoners seeking redress from constitutional violations will have a federal forum available to them. A contrary conclusion would have the untoward consequence of creating a right without a remedy, which is in essence, no right at all.”). See also

*Perry v. Triggs*, No. 1:05CV0010 SWW, 2006 WL 751287, at \*2, \*3 (E.D. Ark. Mar. 23, 2006) (“As could be suspected, following *Spencer*, a split of authority has developed regarding the application of *Heck* principles to the situation at hand. The First, Fifth, Sixth, and Third Circuits have found that *Heck* definitively decided that an individual (whether imprisoned or not) cannot collaterally attack their conviction in a Section 1983 action. [citing cases] The Eleventh and Fourth Circuits have joined this position in unpublished opinions. [citing cases] On the other hand, the Ninth and Second Circuits have followed the logic first expressed by Justice Souter in his concurrence in *Heck* and again later in *Spencer* that the rule in *Heck* only applies to plaintiffs whose confinement can be challenged in post conviction proceedings. [citing cases] The Seventh Circuit has indicated that it would find an exception to the *Heck* favorable termination rule for individuals who had no way to collaterally attacked their conviction or sentence. [citing cases] Based upon the language of the *Heck* opinion, the undersigned believes that the holding of *Heck* applies with equal force to inmates and those who have been released, until such time as Supreme Court may find it appropriate to limit its reach. . . As recognized by the First Circuit, any other conclusion would pervert the core holding of *Heck* and would ignore the requirement that a Section 1983 plaintiff prove all elements of the cause of action. Thus, although *Spencer* may cast doubt upon the *Heck* favorable termination requirement, we ‘leave to the Court the prerogative of overruling its own decisions.’ [citing *Figueroa*]”).

*But see Dible v. Scholl*, No. C05-4089-PAZ, 2008 WL 656076, at \*4 (N.D. Iowa Mar. 7, 2008) (Paul Zoss, US Chief Magistrate Judge) (“In considering the defendants’ motion to dismiss in the present case, Judge Bennett specifically recognized that ‘a ruling in Dible’s favor would necessarily vitiate his underlying conviction [on the disciplinary charge.]’ . . . Judge Bennett further acknowledged that both Supreme Court and Eighth Circuit precedent would bar Dible’s section 1983 action, ‘unless there is some other reason to take Dible’s claims outside the ambit of *Heck*’s favorable termination requirement.’ . . . Judge Bennett distinguished Dible’s claim based on *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) Although the undersigned concurs with Judge Bennett’s reasoning, it appears to be at odds with the Eighth Circuit’s refusal to rely on the fragmented opinions of five Justices in *Spencer*. It is significant that Judge Bennett’s order denying the defendants’ motion to dismiss was not immediately appealable as of right because it was not a ‘final decision’ of the court. . . In contrast, the undersigned’s order denying the defendants’ motion for summary judgment on qualified immunity grounds was appealable as of right under the collateral order doctrine. . . In *Dible II*, the court noted, ‘Although we have some discretion to exercise pendent appellate jurisdiction over related rulings that are not themselves immediately, we have not been asked to do so.’ . . . Thus, the court limited its review to the undersigned’s decision to deny qualified immunity, and did not address the order denying the defendants’ motion to dismiss. . . This court reluctantly finds it is compelled to follow *Entzi*, and that failure to do so would be error. Accordingly, the defendants’ motion for reconsideration is granted. The denial of the defendants’ motion to dismiss is reversed, and this case is dismissed with prejudice on the grounds that the suit is barred by *Heck*’s favorable-termination rule.”).

See also *Gray v. Kinsey*, No. 3:09cv324/LC/MD, 2009 WL 2634205, at \*5, \*8, \*9 (N.D. Fla. Aug. 25, 2009) (“Since *Spencer*, lower federal courts have grappled with defining the contours of the favorable-termination requirement with regard to § 1983 plaintiffs who cannot access a federal forum via habeas corpus. The recent opinion of District Judge James Cohn in *Domotor v. Wennet*, . . . provides an in-depth and comprehensive analysis of the legal landscape surrounding the *Heck* decision. As explained in *Domotor*, at least five circuit courts (the Second, Fourth, Sixth, Seventh and Ninth Circuits) have found that the concurring and dissenting opinions in *Spencer* provide ‘a patchwork plurality’ of five Supreme Court Justices allowing a plaintiff to obtain relief under § 1983 when federal habeas corpus is not available to address the alleged constitutional wrongs. [citing cases] On the other hand, four circuits (the First, Third, Fifth and Eighth Circuits) have decided that despite the view expressed by the plurality in *Spencer*, *Spencer* did not overrule *Heck*, *Heck* directly controls the issue, and a § 1983 plaintiff not in custody within the meaning of the habeas statute or whose habeas action has been mooted by expiration of his sentence remains prohibited from bringing a claim for damages under § 1983 unless he satisfies the favorable-termination requirement. [citing cases] The Eleventh Circuit has not explicitly decided whether *Heck* bars § 1983 suits by plaintiffs who are not in custody and thus for whom federal habeas relief is not available. In dicta and unpublished opinions, the court has expressed mixed views on the subject. . . . Although Plaintiff is no longer incarcerated and likely unable to bring a habeas action, this Court holds that *Heck*’s favorable-termination requirement bars Plaintiff from bringing the § 1983 claims alleged in the Amended Complaint. . . . This case involves plaintiff’s traffic conviction that resulted in a fine. . . . Were this court to make a determination in plaintiff’s favor, it would necessarily imply the invalidity of his conviction. . . . It is apparent from the nature of the relief plaintiff seeks, as well as the mere 11-day interval between plaintiff’s conviction and the filing of this lawsuit, that plaintiff has not obtained an invalidation of his traffic conviction. Despite the unavailability of federal habeas relief, the plaintiff is not without a remedy to seek relief from his conviction through appeal of the traffic conviction. . . . Plaintiff is attempting to substitute this civil rights action for such an appeal. To allow plaintiff to circumvent applicable state procedures and proceed directly to federal court to collaterally attack his conviction through § 1983 would undermine the basis of *Heck*’s favorable-termination requirement.”); *Domotor v. Wennet*, 630 F.Supp.2d 1368, 1375-80 (S.D. Fla. 2009) (“A circuit split has developed regarding the application of *Heck* to situations where a claimant, who may no longer bring a habeas action, asserts a § 1983 complaint attacking a sentence or conviction. . . Four circuits reject the idea that the plurality in *Spencer* restricts the favorable-termination requirement of *Heck* for § 1983 actions challenging the validity of a conviction or sentence. [citing cases from 1st, 3d, 5th, and 8th circuits] On the other hand, Five circuits have found that under certain circumstances the *Spencer* plurality allows a plaintiff to obtain relief under § 1983 when it is no longer possible to meet the favorable-termination requirement via a habeas action. [citing cases from 2d, 4th, 6th, 9th, and 7th circuits] A cornerstone for many courts that take the latter position is that the holding of *Heck* does not address whether the favorable-termination requirement applies to plaintiffs who may no longer bring a habeas action. . . .In *Guerrero v. Gates*, 442 F.3d 697 (9th Cir.2006), the Ninth Circuit articulated narrow circumstances where a § 1983 claim was available to a plaintiff who has not satisfied *Heck*’s favorable-termination requirements. . . . The Eleventh Circuit has not ruled

definitively on this issue and has instead sent mixed signals. [discussing *Abusaid*, *Vickers*, *McClish*, *Christy*] . . . . *Heck* squarely applies to the facts of this case. *First*, Plaintiff’s § 1983 claims directly ‘imply the invalidity’ of Plaintiff’s convictions. . . . *Second*, it is undisputed that Plaintiff cannot, at this point, meet *Heck*’s favorable-termination requirement. . . Although Plaintiff is no longer incarcerated and likely unable to bring a habeas action,. . . this Court holds that *Heck*’s favorable-termination requirement bars Plaintiff from bringing the § 1983 claims alleged in the Amended Complaint. . . . Plaintiff’s case would present a much more difficult question if her § 1983 claims were based on a latent injury or a conspiracy discovered by the Plaintiff only after expiration of the applicable limitation period to file a habeas petition or a motion for post-conviction relief. In contrast, the facts before this Court reveal that Plaintiff entered into a plea agreement with knowledge of all or substantially all of the allegations that now form the basis of a § 1983 action for damages. The Court finds that to allow the Plaintiff to circumvent applicable state procedures and collaterally attack her convictions in federal court ‘is the precise situation that *Heck* seeks to preclude.’”), *aff’d*, 356 F. App’x 316 (11th Cir. 2009).

#### **L. What Counts as Conviction or Favorable Termination?**

*Compare Mitchell v. Kirchmeier*, No. 21-1071, 2022 WL 759938, at \*3 (8th Cir. Mar. 14, 2022) (“Here, Mitchell was never convicted of—and therefore, *a fortiori*, never sentenced on—the charges against him. Furthermore, even if the pretrial diversion agreement were a ‘conviction or sentence,’ . . . the success of Mitchell’s § 1983 claims would not imply its invalidity. In North Dakota, a pretrial diversion agreement is simply a contract in which the state agrees to forgo prosecution in consideration for the defendant agreeing not to ‘commit a felony, misdemeanor or infraction’ for a specified period of time (and, in some cases, agreeing to further conditions). N.D. R. Crim. P. 32.2(a)(1)-(2). The success of Mitchell’s § 1983 claims would imply nothing at all about whether his pretrial diversion agreement with the state was a valid contract. Therefore, the favorable-termination requirement does not come into play, and Mitchell’s § 1983 claims are not *Heck*-barred. *See Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (holding that *Heck* does not apply to pretrial diversion agreements because “there is no related underlying conviction”); *McClish v. Nugent*, 483 F.3d 1231, 1251 (11th Cir. 2007) (holding that *Heck* does not apply to pretrial intervention agreements, regardless of whether such an agreement “amount[s] to a favorable termination,” because the § 1983 plaintiff “was never convicted of any crime” (emphasis omitted)). The district court reached a contrary conclusion by misreading *Heck*. According to the district court, *Heck* bars any § 1983 claim whose success would imply the plaintiff’s innocence of charges in a criminal proceeding unless the plaintiff can prove that the proceeding was terminated favorably to him. On this reading, the mere existence of a criminal *charge* incompatible with the plaintiff’s § 1983 claim triggers the favorable-termination requirement. But that is not what the Court said in *Heck*, 512 U.S. at 487, 114 S.Ct. 2364 (barring only § 1983 claims whose success would imply the invalidity of the plaintiff’s “conviction or sentence”), and it conflicts with what the Court has consistently held since, *see, e.g., Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007) (denying that *Heck* applied where “there was in existence no criminal conviction that the [§ 1983] cause of action would

impugn”). We recognize that the Third Circuit has adopted a reading of *Heck* like the district court’s. See *Gilles v. Davis*, 427 F.3d 197, 208-12 (3d Cir. 2005). For the reasons explained above, however, we find the cases from the Tenth and Eleventh Circuits that reject this reading more persuasive. See *Vasquez Arroyo*, 589 F.3d at 1095; *McClish*, 483 F.3d at 1251.”); *Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1096 (10th Cir. 2009) (“Because we have determined that the Kansas pre-trial diversion agreements are not outstanding convictions and therefore these § 1983 claims impugning their validity are not barred by *Heck*, we need not decide whether *Heck* applies when the plaintiff lacks an available remedy in habeas. Although we implied in *Butler* in dicta that *Heck* does not apply when a habeas remedy is lacking, 482 F.2d at 1278-81, we decline to reach this issue which the Supreme Court has not resolved, see *Close*, 540 U.S. at 752 n. 2, and on which the circuits are split. [footnote collecting cases]”) and *McClish v. Nugent*, 483 F.3d 1231, 1251 & n.19 (11th Cir. 2007) (“Holmberg’s § 1983 claim arose out of his arrest for allegedly interfering with the ongoing arrest of McClish by Deputies Terry and Calderone. The deputies arrested Holmberg for ‘resisting arrest without violence,’ see Fla. Stat. § 843.02, and the charge was eventually dismissed without prejudice pursuant to Florida’s pretrial intervention program, see Fla. Stat. § 843.02. The district court determined that *Heck* barred Holmberg from bringing a § 1983 claim because of his participation in PTI. Although we have never determined that participation in PTI barred a subsequent § 1983 claim, the district court cited to Second, Third, and Fifth Circuit cases holding that a defendant’s participation in PTI barred subsequent § 1983 claims. Dist. Ct. Order at 19- 20 (citing *Gilles v. Davis*, 427 F.3d 197 (3d Cir.2005); *Taylor v. Gregg*, 36 F.3d 453 (5th Cir.1994); *Roesch v. Otarola*, 980 F.2d 850 (2d Cir.1992)). The district court then concluded that ‘Holmberg’s participation in PTI, which resulted in a dismissal of the charge of resisting arrest without violence, is not a termination in his favor, and therefore, he is barred from bringing a § 1983 claim for false arrest.’ We disagree. *Heck* is inapposite. The issue is not, as the district court saw it, whether Holmberg’s participation in PTI amounted to a favorable termination on the merits. Instead, the question is an antecedent one – whether *Heck* applies at all since Holmberg was never convicted of any crime. The primary category of cases barred by *Heck* – suits seeking damages for an allegedly unconstitutional conviction or imprisonment – is plainly inapplicable. Instead, the district court based its *Heck* ruling on the second, indirect category of cases barred by *Heck*: suits to recover damages ‘for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.’ . . . The problem with using this second *Heck* category to bar Holmberg’s § 1983 suit is definitional – to prevail in his § 1983 suit, Holmberg would not have to ‘negate an element of the offense of which he has been convicted,’ because he was never convicted of any offense. [citing *Heck* and *Wallace*] . . . . Even if we were to assume that *Heck* somehow applies to this case, Holmberg correctly cites to *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F.3d 1298 (11th Cir.2005), for the proposition that the Supreme Court has apparently receded from the idea that *Heck*’s favorable-termination requirement also applies to non-incarcerated individuals. . . . The logic of our reasoning in *Abusaid*, although dicta, is clear: If *Heck* only bars § 1983 claims when the alternative remedy of *habeas corpus* is available, then *Heck* has no application to Holmberg’s claim. Holmberg was never in custody at all, and the remedy of *habeas corpus* is not currently available to him.”) with *Gilles v. Davis*, 427 F.3d 197, 209-12 (3d Cir. 2005) (“Petit’s underlying disorderly conduct charge and his § 1983 First

Amendment claim require answering the same question – whether Petit’s behavior constituted protected activity or disorderly conduct. If ARD [“Accelerated Rehabilitative Disposition” (“ARD”) program, which permits expungement of the criminal record upon successful completion of a probationary term] does not constitute a favorable termination, success in the § 1983 claim would result in parallel litigation over whether Petit’s activity constituted disorderly conduct and could result in a conflicting resolution arising from the same conduct. We recognize that concurring and dissenting opinions in *Spencer*. . . question the applicability of *Heck* to an individual, such as Petit, who has no recourse under the habeas statute. . . But these opinions do not affect our conclusion that *Heck* applies to Petit’s claims. We doubt that *Heck* has been undermined, but to the extent its continued validity has been called into question, we join on this point, our sister courts of appeals for the First and Fifth Circuits in following the Supreme Court’s admonition ‘to lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court “the prerogative of overruling its own decisions.”’. . . Because the holding of *Heck* applies, Petit cannot maintain a § 1983 claim unless successful completion of the ARD program constitutes a ‘termination of the prior criminal proceeding in favor of the accused.’ . . We have not had occasion to address this issue directly. Our trial courts have held that ARD is not a termination favorable for purposes of bringing a subsequent § 1983 malicious prosecution claim. We find instructive opinions from the Second and Fifth Circuits that have addressed whether similar pre-trial probationary programs are a favorable termination sufficient to bring a subsequent civil suit. [discussing cases] Viewing these factors together, we hold the ARD program is not a favorable termination under *Heck*. Petit’s participation in the ARD program bars his § 1983 claim.’ footnotes omitted).

On “expungement by executive order,” see *Savory v. Cannon*, 947 F.3d 409, 429 (7th Cir. 2020) (en banc) (“The contention that a pardon must be based on innocence in order to serve as a favorable termination finds no support in *Heck*, and we see no reason to impose that additional limitation on *Heck*’s holding. If the Court had wanted to specify that the pardon must be based on innocence, it certainly could have done so, but it did not. Instead, the Court offered a list of possible resolutions that would satisfy the favorable termination requirement, and none require an affirmative finding of innocence. A conviction need only be ‘reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.’. . . Any of these outcomes can occur without a declaration of a defendant’s innocence. *McDonough* added that acquittal is a favorable termination under *Heck* that starts the clock on claim accrual, another resolution that does not necessarily imply innocence.”); *Wilson v. Lawrence County*, 154 F.3d 757, 760-61 (8th Cir. 1998) (“Wilson asserts that his conviction was ‘expunged by executive order’ by virtue of his full pardon from the governor. The defendants disagree. The district court, relying on Missouri law, concluded that a person who is pardoned by the governor remains guilty in the eyes of the Missouri court and therefore cannot bring a 1983 claim for wrongful incarceration. In our view, however, the issue in this case is one of federal law. . . . The relevant question is whether Wilson’s pardon invalidated his conviction within the meaning of *Heck*. We find that it did. . . .

The gist of *Heck* is that section 1983 is not an appropriate vehicle for attacking the validity of a state conviction. Wilson does not seek to put it to this improper use. He used the executive clemency process, which the Supreme Court has expressly approved, as the forum in which to challenge his criminal conviction.”). *But see Carr v. Louisville-Jefferson County Metropolitan Government*, No. 3:20-CV-818-CRS, 2021 WL 3115389, at \*5 (W.D. Ky. July 22, 2021) (“Here, the parties do not dispute the accrual date for Carr’s claims. Instead, the issue before this Court concerns whether Carr’s pardon invalidated her conviction in such a manner that permits her to presently assert claims under § 1983 against Defendants. Unlike the Seventh Circuit, which has routinely determined that a pardon or executive pardon are synonyms with the phrase ‘expunged by executive order,’ the Sixth Circuit has not announced such a rule and we decline to find that the mere issuance of a pardon, without language that questions or discredits a judicial finding of guilt, appropriately invalidates a criminal conviction for purposes of *Heck*. Accordingly, Carr may not assert any of her federal claims because they are dependent upon an ability to assert a cognizable cause of action.”); *Walden v. City of Chicago*, 391 F.Supp.2d 660, 670, 671 (N.D. Ill. 2005) (“A substantial portion of this case turns on the meaning and significance of a general pardon, on the one hand, and a pardon of innocence, on the other, under Illinois law. . . . Defendant’s argument in this regard boils down to the following: Governor Thompson’s pardon of Walden in 1978 amounted to an acquittal, and an acquittal is tantamount to an invalidation of his conviction (under *Heck*) (D.E. 20 at 5) and a termination of the proceedings in Walden’s favor (under state law). If 1978 is the point of accrual, then all of Plaintiff’s claims are time-barred. Plaintiff, however, maintains that his claims did not accrue until January 13, 2003, the time at which he received a pardon of innocence. Plaintiff alleges that the general pardon differs from a pardon of innocence and that while the 1978 pardon ‘acquitted’ Plaintiff of further punishment, it did not undermine or negate the validity of Walden’s prior conviction. . . . [T]he Court holds that the gubernatorial pardon Plaintiff received on June 30, 1978 was a general pardon. As such, it did not invalidate his conviction or act to terminate Plaintiff’s conviction in his favor for purposes of *Heck* and the corresponding state law requirements. Walden’s causes of action thus did not accrue with the signing of Walden’s 1978 general pardon.”).

*Compare Roberts v. City of Fairbanks*, 947 F.3d 1191, 1193-1203 (9th Cir. 2020) (“The primary question before us is whether § 1983 plaintiffs may recover damages if the convictions underlying their claims were vacated pursuant to a settlement agreement. The answer depends on whether such a vacatur serves to invalidate the convictions and thus renders the related § 1983 claims actionable notwithstanding *Heck*. We conclude that where all convictions underlying § 1983 claims are vacated and no outstanding criminal judgments remain, *Heck* does not bar plaintiffs from seeking relief under § 1983. . . .The *Heck* Court was explicit: ‘If the district court determines that the plaintiff’s action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.’. . . Because all convictions here were vacated and underlying indictments ordered dismissed, there remains no outstanding criminal judgment nor any charges pending against Plaintiffs. The absence of a criminal judgment here renders the *Heck* bar inapplicable; the plain language of the decision requires the existence of a conviction in order

for a § 1983 suit to be barred. . . . The dissent’s view that a conviction vacated by settlement is not ‘declared invalid’ under *Heck* appears to arise out of its conflation of the favorable-termination rule in the tort of malicious prosecution with *Heck*’s four distinct means of favorable termination. . . . *Heck*’s favorable termination requirement is distinct from the favorable termination element of a malicious-prosecution claim. Compare *Awabdy*, 368 F.3d at 1068 (malicious-prosecution plaintiff must “establish that the prior proceedings terminated in such a manner as to indicate his innocence”), with *Heck*, 512 U.S. at 486–87 (favorable-termination rule satisfied when conviction or sentence is (1) reversed on direct appeal, (2) expunged by executive order, (3) declared invalid by a state court, or (4) called into question by a federal court’s issuance of a writ of habeas corpus). . . . The dissent accuses us of creating ‘a fifth method of favorable termination’ in addition to *Heck*’s four—namely, vacatur-by-settlement. . . . Not so. We merely hold that where, as here, a § 1983 plaintiff’s conviction is vacated by a state court, that conviction has been ‘declared invalid by a state tribunal authorized to make such determination,’ . . . and that *Heck* is therefore no bar to the suit.”) with *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1210-15 (9th Cir. 2020) (Ikuta, J., dissenting) (“Because the plaintiffs’ convictions were not ‘declared invalid by a state tribunal authorized to make such determination,’ nor reversed on direct appeal, expunged by executive order, or called into question by a federal court’s issuance of a writ of habeas corpus, . . . the plaintiffs are unable to show that their criminal proceedings were terminated in their favor. They are therefore barred from using a civil action to establish they were wrongly convicted. Thus, the plaintiffs’ claim for damages stemming from their allegedly wrongful convictions are ‘not cognizable under § 1983.’ . . . *Heck*’s clear holding resolves this appeal. . . . In sum, the plaintiffs’ convictions were not ‘declared invalid by a state tribunal.’ . . . Rather, the convictions were vacated pursuant to settlement agreements, such that the ‘criminal judgment[s]’ are still ‘outstanding,’ precluding the plaintiffs’ claims for relief. . . . Therefore, the plaintiffs cannot make the necessary showing to bring their § 1983 malicious prosecution action. . . . As an initial matter, *Heck* makes clear that plaintiffs ‘must’ show that their convictions were terminated in one of four specific ways. . . . Vacatur by settlement is not on the list, and the list is exclusive: *Heck* does not permit other, unidentified ways of satisfying the favorable-termination requirement. . . . Thus, any attempt to recognize additional means of favorable termination is contrary to Supreme Court precedent. . . . Moreover, recognizing vacatur by settlement as another method of favorable termination is contrary to *Heck*’s reliance on the common-law cause of action for malicious prosecution, which was the Court’s ‘starting point’ for determining the viability of a § 1983 claim. . . . The common law did not recognize vacatur by settlement as a method of favorable termination: For over a century, courts have recognized that a claim for malicious prosecution does not lie if the prosecution was abandoned based on a settlement or compromise. . . . In sum, the majority has no authority to recognize a new means of favorable termination; *Heck*’s list is exclusive. . . . And even if the majority could recognize new means of favorable termination, vacatur by settlement is not a favorable termination at common law, so there is no basis for deeming it a method of favorable termination here. . . . Simply stated, the plaintiffs did not have their prior convictions ‘declared invalid by a state tribunal authorized to make such determination,’ . . . but instead reached an agreement with the state to vacate their convictions. Regardless of the plaintiffs’ reasons for doing so, they cannot now claim that the prior convictions were terminated in a manner that provides a

basis for bringing § 1983 malicious prosecution claims. In holding otherwise, the majority casts aside the favorable-termination rule articulated by *Heck v. Humphrey* and thus is inconsistent with Supreme Court precedent. Accordingly, I dissent.”)

*See also Roberts v. City of Fairbanks*, 962 F.3d 1165, 1166-67, 1175 (9th Cir. 2020) (VanDyke, J., joined by Ikuta, J., dissenting from the denial of rehearing en banc) (“The split panel decision in this case created an additional exception to the *Heck* bar that, as far as I can tell, is unprecedented—not only in our circuit, but across the federal courts. It did so by reinterpreting *Heck*’s favorable termination requirement into something less than even a *neutral* termination requirement. In doing so, it expressly refused to apply the ‘hoary principle[s]’ adopted from the malicious prosecution context that were the express basis for the majority’s decision in *Heck*. . . Now, in every situation where a criminal defendant’s conviction is ministerially vacated without any judicial determination that the conviction was actually ‘invalid,’ this new exception casts into doubt the *Heck* bar’s applicability. This includes in the many states in our circuit that have statutes that automatically vacate some convictions once the defendant has served his sentence. *Heck* is a quarter-century old, and its better-established exceptions already bedevil federal courts across the country, including this one. The fact that no other court has conceived or applied the panel majority’s new exception in over 25 years of applying *Heck* should be reason enough for this Court to rehear this case en banc before cracking this lid on Pandora’s box. . . .In the face of controlling Supreme Court precedent, the split-panel majority in *Roberts* created a novel exception to reach a result inconsistent with *Heck*. We should have considered this inconsistency en banc before cementing it as binding precedent in our circuit. I respectfully dissent from the denial of rehearing en banc.”)

*Compare Laskar v. Hurd*, 972 F.3d 1278, 1282, 1285-86, 1289-95 (11th Cir. 2020) (“The main issue in this appeal is whether the dismissal of a prosecution as untimely satisfies the favorable-termination element of a claim for malicious prosecution under the Fourth Amendment. . . .The officials argue that Laskar did not receive a favorable termination. They explain that several of our sister circuits define favorable terminations as those that ‘indicate the innocence of the accused.’ [collecting cases] Laskar cannot satisfy the favorable-termination element, they contend, because the trial court dismissed the prosecution against him as untimely, which does not suggest that he was innocent of the charges facing him. This argument requires us to decide whether a termination must contain evidence of a plaintiff’s innocence to be favorable. We have held that a claim of malicious prosecution accrues when the prosecution against the plaintiff terminates in his favor. . . . We have also held that a prosecutor’s unilateral dismissal of charges against a plaintiff constitutes a favorable termination. . . . But the details of the favorable-termination requirement, including whether a termination must suggest a plaintiff’s innocence, otherwise remain unsettled. This question implicates our ‘two-step approach to “defining the contours and prerequisites of a § 1983 claim.”’ . . . We must first look to the common-law principles that were ‘well settled’ when Congress enacted section 1983. . . . ‘After identifying the relevant common-law rule, we must consider whether that rule is compatible with the constitutional provision at issue.’ . . .Because the tort of malicious prosecution is the common-law analogue to the

constitutional violation that Laskar alleges, . . . we examine the favorable-termination element of malicious prosecution as it existed when Congress enacted section 1983 in 1871. We then consider whether the relevant common-law rule is compatible with the Fourth Amendment. . . . In the light of this history, we have no trouble discerning a well-settled principle of law to guide our analysis. Although States disputed whether a prosecution could terminate without a court order, every State to reach the issue other than Rhode Island agreed that a prosecution terminated when a court formally dismissed the prosecution and discharged the plaintiff. And the vast majority of courts to consider the favorable-termination requirement either adopted standards that excluded considering the merits of the underlying prosecution or held that particular terminations that did not evidence plaintiffs' innocence could satisfy the requirement. Indeed, outside of Rhode Island, the only final terminations that would bar a plaintiff's suit were those that were inconsistent with a plaintiff's innocence—that is, if a jury convicted the plaintiff or if the plaintiff compromised with his accuser to end the prosecution in a way that conceded his guilt. So we can readily discern from that consensus the following principle: a formal end to a prosecution in a manner not inconsistent with a plaintiff's innocence is a favorable termination. . . . In sum, whether a particular termination affirmatively supported a plaintiff's innocence was not material to the favorable-termination element in the vast majority of States. As common-law courts on both sides of the Atlantic stressed, a termination on technical grounds did not cure the harm that malicious prosecution caused. . . . Instead, the favorable-termination requirement prevented plaintiffs from using the tort to collaterally attack ongoing criminal proceedings or unfavorable terminations. . . . And under prevailing standards, a plaintiff could satisfy the favorable-termination element of malicious prosecution by proving that a court formally ended the prosecution in a manner that was not inconsistent with his innocence. Because section 1983 is not merely 'a federalized amalgamation of pre-existing common-law claims,' . . . we must determine whether this common-law understanding comports with relevant constitutional principles[.] . . . Here, nothing in the Fourth Amendment supports departing from the weight of the common law. A claim of malicious prosecution under the Fourth Amendment is only 'shorthand' for a claim of deprivation of liberty pursuant to legal process, so the validity of these claims depends on whether the seizure was justified, not whether the prosecution itself was justified[.] . . . That question almost always turns on whether the judicial officer who authorized the seizure had sufficient information before him to support the seizure. . . . Conversely, limiting favorable terminations to those that affirmatively support a plaintiff's innocence redirects the focus to whether the entire prosecution was justified. In other words, the 'indication-of-innocence' approach to favorable terminations considers the wrong body of information. . . . The Fourth Amendment does not require plaintiffs to support their innocence with such a narrow, inapposite source of evidence. Because 'the Fourth Amendment protects against "searches" and "seizures" (and not "prosecutions"),' . . . the favorable-termination requirement functions as a rule of accrual, not as a criterion for determining whether a constitutional violation occurred. Indeed, we have never considered the requirement outside of the accrual context. . . . In the light of this limited role, the favorable-termination requirement will bar a suit for malicious prosecution only when the prosecution remains ongoing or terminates in a way that precludes any finding that the plaintiff was innocent of the charges that justified his seizure—that is, when the prosecution ends in the plaintiff's conviction on or admission of guilt to each

charge that justified his seizure. . . In other words, a plaintiff can satisfy the favorable-termination requirement by proving that the prosecution against him formally ended in a manner not inconsistent with his innocence on at least one charge that authorized his confinement. . . . We acknowledge that our conclusion departs from the consensus of our sister circuits, but we do not agree with the dissent that these decisions should alter our conclusion. To start, the dissent miscounts the circuits that have adopted the indication-of-innocence approach to claims of malicious prosecution under the Fourth Amendment. Although seven circuits have done so, [citing cases,] the dissent erroneously relies on decisions applying state or local tort law to conclude that the Fifth, Seventh, and District of Columbia Circuits followed suit. *See Lemoine v. Wolfe*, 812 F.3d 477, 479 (5th Cir. 2016) (applying Louisiana tort law); *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 925 (7th Cir. 2001) (applying Illinois tort law); *Whelan v. Abell*, 953 F.2d 663, 669 (D.C. Cir. 1992) (applying D.C. tort law). Indeed, the Seventh Circuit has held that a Fourth Amendment claim for unlawful pretrial detention does not require any favorable termination. *See Manuel*, 903 F.3d at 670. More importantly, when considering the decisions of our sister circuits, ‘[w]e are not merely to count noses. The parties are entitled to our independent judgment.’. . . And the justification that our sister circuits offered for the consensus view is unpersuasive. Each circuit to embrace the indication-of-innocence approach grounded its decision in a comment in the *Restatement (Second) of Torts* or the modern decisions of States that adopted that comment. . . . It is far from clear that the *Second Restatement* reflects even a modern consensus. *See Restatement (Third) of Torts: Liability for Economic Harm* § 23 cmt. a & n.a (Am. L. Inst. 2020) (acknowledging a split in authority, rejecting the indication-of-innocence requirement, and endorsing a “not-inconsistent-with-innocence” approach). Indeed, two of the three states in this Circuit, including the one in which Laskar’s seizure and prosecution occurred, do not require an indication of innocence. *Compare Vadner v. Dickerson*, 441 S.E.2d 527, 528 (Ga. Ct. App. 1994) (holding that a dismissal on jurisdictional grounds is a favorable termination if the prosecutor does not recommence the prosecution), and *Kroger Co. v. Puckett*, 351 So. 2d 582, 585–86 (Ala. Civ. App. 1977) (rejecting the approach in the *Second Restatement* (citing *Adams*, 32 So. 503)), with *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1356 (Fla. 1994) (requiring a termination “that indicates the innocence of the accused”). Setting this issue aside, modern common law is not the touchstone when defining a claim under section 1983. ‘[T]he Supreme Court has clarified that the relevant common-law principles are those that were “well settled at the time of section 1983’s enactment.”’. . . Although the *Restatements* and modern treatises often reflect ancient legal principles, the indication-of-innocence approach to favorable terminations has no such pedigree. And we cannot base our decision on common-law doctrines that developed long after Congress enacted section 1983. The dissent next faults us for attempting to ‘square the tort of malicious prosecution with the Fourth Amendment,’. . . and we readily plead guilty to that charge. Although the dissent acknowledges that the Fourth Amendment does not neatly overlap with the tort of malicious prosecution, it nonetheless contends that we must adhere to the common law. . . . This argument turns our approach to malicious prosecution on its head. Our oldest decisions on the subject explained that ‘malicious prosecution’ is only a ‘shorthand way of describing’ certain claims for unlawful seizure, not an ‘independent Fourth Amendment right . . . to be free from a malicious prosecution.’. . . More recently, the Supreme Court has explained that

‘[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims’ and that we must ‘closely attend’ to the ‘constitutional right at issue’ when defining these claims. . . . To give priority to the common law over the Fourth Amendment, we would need to depart from both our earliest decisions on the subject and the decisions of the Supreme Court. Of course, we cannot do so. Finally, the dissent highlights the ostensible policy benefits of the indication-of-innocence approach, such as the ‘additional opportunity’ it could create ‘for courts to stop false claims’ at the pleading stage instead of at summary judgment, . . . but we fail to see how the operation of the Federal Rules of Civil Procedure is relevant to our analysis of the Fourth Amendment. . . . We must adhere to the clear commands of the law instead of favoring an alternative policy of judicial economy. . . . We need not redefine the favorable-termination requirement to provide extra protection for defendants accused of malicious prosecution. The probable-cause requirement already limits meritless claims by placing the burden on the plaintiff to establish ‘(1) that the legal process justifying his seizure was constitutionally infirm and (2) that his seizure would not otherwise be justified without legal process.’ . . . On top of that, the plaintiff must overcome qualified immunity by proving that the absence of probable cause was clearly established. . . . And a plaintiff seized without probable cause must prove he suffered an injury to recover compensatory damages for the specific charges he says were unfounded . . . . After considering both the common law and Fourth Amendment, we hold that the favorable-termination element of malicious prosecution is not limited to terminations that affirmatively support the plaintiff’s innocence. Instead, the favorable-termination element requires only that the criminal proceedings against the plaintiff formally end in a manner not inconsistent with his innocence on at least one charge that authorized his confinement. A formal end to criminal proceedings will satisfy this standard unless it precludes any finding that the plaintiff was innocent of the charges that justified his seizure, which occurs only when the prosecution ends in the plaintiff’s conviction on or admission of guilt to each charge that justified his seizure. Because Laskar’s complaint alleges that the prosecution against Laskar formally terminated and does not allege that he was convicted or that he admitted his guilt to each charge that justified his seizure, Laskar has alleged that he received a favorable termination.”) *with Laskar v. Hurd*, 972 F.3d 1278, 1298-99, 1303-07 (11th Cir. 2020) (Moore, J., Chief District Judge, dissenting) (“Today, the majority adopts a legal standard for the favorable termination element of a 42 U.S.C. § 1983 malicious prosecution claim that pushes us out-of-step with our sister circuits and requires the Court to depart from its well-founded opinion in *Uboh v. Reno*, 141 F.3d 1000 (11th Cir. 1998). The majority contends that (1) it is bound to reject the indication of innocence standard by a review of ‘well-settled’ common-law principles at the time of § 1983’s passage, and (2) the majority’s proposed standard better serves the constitutional concerns implicated by § 1983 and the Fourth Amendment. I dissent because there was no ‘well-settled’ common-law principle as to what was required of a malicious prosecution claimant to meet the favorable termination element in the late 19th century. Further, the rule adopted by majority is an inadequate filter for meritless claims. . . . Based on my own review of 19th century precedent, I respectfully disagree that there is a well-settled legal principle that commands that we abandon our reasoning in *Uboh* and defy the sound logic exercised in nearly every other circuit. Furthermore, the majority advances a standard that does not appear in any 19th century case, has been rejected by several of our sister circuits, and has not

been adopted by any other circuit. The majority argues that its proposed standard more accurately reflects the constitutional considerations at issue under the fourth amendment. However, such considerations do not justify adoption of a rule that appears out of thin air. To be clear, the Majority Opinion does not provide the source of its ‘not inconsistent with his innocence on at least one charge that authorized his confinement’ rule. . . . That is likely because it has not been adopted by any court with persuasive authority before today. . . . Unlike the any-crime rule in *Williams*, a question that circuit courts were split on, the indication of innocence standard has been adopted by all the circuit courts that have resolved this question. As such, formal adoption of the indication of innocence standard would synchronize the Court with our sister circuits. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits all rely on the indication of innocence standard, and no federal court of appeals has adopted the majority’s rule. . . . Although the Fifth, Seventh, and D.C. Circuits have only applied the indication of innocence standard to state-law malicious prosecution claims, they have utilized no alternative standard for the favorable termination element in § 1983 malicious prosecution. Furthermore, those courts’ application of the indication of innocence to state-law malicious prosecution is (1) indicative of the confines of a § 1983 claim in that jurisdiction, and (2) further evidence of the indication of innocence standard’s pervasiveness throughout the federal court system. . . . That the indication of innocence standard continues to be used in light of *Manuel* and *Nieves* speaks to its strength. The Second Circuit in *Lanning* opined that the indication of innocence standard prohibits defendants from ‘relitigat[ing] the issue of probable cause ... thus posing the prospect of harassment, waste and endless litigation.’ . . . Indeed, allowing the favorable termination requirement to retain its teeth sets the tort of § 1983 malicious prosecution apart from § 1983 false arrest; to hold otherwise would reduce the malicious prosecution inquiry to a mere determination of probable cause. Finally, the Tenth Circuit expressly rejected the not inconsistent with innocence standard. . . . In so doing, the Tenth Circuit noted that the indication of innocence test is ‘a standard feature of the tort of malicious prosecution and a reflection of the idea that malicious prosecution actions are disfavored at common law.’ . . . And, the court emphasized the indication of innocence standard balances the important considerations at play—noting that it may bar some meritorious claims, but it serves as ‘a useful filtering mechanism, barring actions that have not already demonstrated some likelihood of success.’ . . . Because almost all courts of appeal have adopted the standard, and our adoption would not only synchronize the circuit courts, but also strike the best balance between filtering out meritless claims and permitting claims that demonstrate some likelihood of success, the Court should adopt the indication of innocence. . . . The majority attempts to massage the favorable termination requirement in a way that will square the tort of malicious prosecution with the Fourth Amendment, thus tying a tidy bow on the debate. However, this Court is not tasked with answering this bigger question, left unanswered by the Supreme Court. Instead, we are asked merely to apply the tort of malicious prosecution under § 1983—a tort which exists, despite some persuasive arguments in favor of its elimination—to a set of facts that might be new to this Court but are far from groundbreaking. If malicious prosecution is a tort that is so incongruous with the Fourth Amendment that it can no longer be cognizable under § 1983, then a court will be asked to prohibit such claims. No one has asked the Court to do so today. Therefore, rather than trying to force § 1983 malicious prosecution to be something completely other than what it is—a tort that concerns

the abuse of legal processes—we should apply the law as it lays before us. . . . Accordingly, because the indication of innocence standard (1) has already been applied by this Court, (2) is heralded as the standard in almost every other circuit, (3) permits the dismissal of spurious claims at the motion to dismiss stage, and (4) is not contrary to any well-settled common-law principle at the time of § 1983’s passage, I respectfully dissent.”)

*See also Kee v. City of New York*, 12 F.4th 150, 162-63, 165, 169-70 (2d Cir. 2021) (“On appeal, the defendants do not dispute that the dismissal of Kee’s criminal prosecution on speedy trial grounds is a favorable termination under state law in the context of his state tort claim for malicious prosecution. We agree and reiterate that, under New York State law, dismissal of a criminal prosecution on speedy trial grounds . . . is generally a favorable termination for the purpose of a New York tort claim for malicious prosecution. . . . The dispute on appeal as to this element is whether, as a matter of *federal* law, a speedy trial dismissal satisfies the favorable termination element for purposes of a malicious prosecution claim brought under Section 1983. Kee challenges the district court’s determination that, under federal law, a dismissal on speedy trial grounds does not qualify as a favorable termination. Specifically, he asserts that under general principles of traditional common law, and following the precedent of our Circuit, speedy trial dismissals are favorable. In contrast, defendants assert that the district court correctly granted them summary judgment on Kee’s Section 1983 malicious prosecution claim because, under federal law, a plaintiff must show that the underlying prosecution terminated in a manner indicating innocence and that the dismissal of Kee’s prosecution on speedy trial grounds is merely ‘neutral as to innocence and equally consistent with guilt.’. . . The district court, as well as defendants, support their analysis by relying upon our decision in *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018). As discussed below and in *Lanning*, New York state tort law has diverged from traditional common law with respect to what qualifies as a favorable termination. This divergence has unfortunately been the source of some confusion in Section 1983 litigation, and district courts in the Circuit have reached different conclusions regarding the impact of our decision in *Lanning* on the question of whether a speedy trial dismissal is a favorable termination in the context of a federal malicious prosecution claim. *Compare Blount v. City of New York*, 15-CV-5599 (PKC) (JO), 2019 WL 1050994, at \*5 (E.D.N.Y. Mar. 5, 2019) (“*Lanning* makes clear that, as the Circuit consistently held pre-*Lanning*, dismissals on speedy trial grounds are terminations in the favor of the accused.”), with *Minus v. City of New York*, 488 F. Supp. 3d 58, 66 (S.D.N.Y. 2020) (concluding, after reviewing *Lanning* and prior case authority, that “a speedy trial dismissal is not a favorable termination for purposes of a Section 1983 claim without an affirmative indication of the accused’s innocence”); *see generally Herrera-Amador v. N.Y.C. Police Dep’t*, 16-CV-5915 (NGG) (VMS), 2021 WL 3012583, at \*4 (E.D.N.Y. July 16, 2021) (collecting cases). We now clarify that *Lanning* did not modify, but rather re-affirmed, the longstanding ‘indicative of innocence’ standard for Section 1983 malicious prosecution claims under which this Court has repeatedly held, and holds again today, that a speedy trial dismissal generally constitutes a ‘favorable termination.’. . . Therefore, we again hold that *Murphy* is good law and binding precedent—namely, a speedy trial dismissal is generally a favorable termination for purposes of a malicious prosecution claim under Section 1983. In clarifying that a dismissal on speedy trial grounds

is *generally* a favorable termination, we note the qualifier. Although such dismissals are generally (or presumed to be) favorable, the defendant may attempt to present evidence to rebut this presumption. Thus, as explained in *Murphy*, a plaintiff will prevail on this ‘favorable termination’ element as a matter of law when there was a speedy trial dismissal unless the defendant produces evidence of a ‘non-merits-based explanation for the failure to pursue the prosecution’ of the plaintiff. . . . Even though defendants acknowledge that a fair trial claim is cognizable even in the absence of a trial under *Frost*, they argued in their brief that Kee still must satisfy a ‘favorable termination’ requirement that is identical in its scope to that same element in the context of a malicious prosecution claim, and they asserted Kee failed to meet that requirement. The Supreme Court recently held that a fair trial claim based on fabricated evidence does not accrue until the underlying criminal proceeding terminates in the plaintiff’s favor. *See McDonough v. Smith*, — U.S. —, 139 S. Ct. 2149, 2158–61, 204 L.Ed.2d 506 (2019). Moreover, in *McDonough*, the Supreme Court suggested that there may be a need ‘for a context-specific and more capacious understanding of what constitutes “favorable” termination for purposes of a § 1983 false-evidence claim.’. . . However, because the plaintiff’s acquittal on the underlying criminal charges ‘was unquestionably a favorable termination,’ the Supreme Court had ‘no occasion to address the broader range of ways a criminal prosecution . . . might end favorably to the accused’ in the fair trial context. . . . As an initial matter, because we have already concluded that Kee has met the ‘favorable termination’ requirement mandated for a malicious prosecution claim, defendants’ argument is moot because, even if that identical standard were to be applied to a fair trial claim, Kee would still satisfy that requirement. In any event, in *Smalls v. Collins*, — F.4th —, 2021 WL 3700194 (2d Cir. Aug. 20, 2021), we recently addressed this issue in the wake of *McDonough* and rejected the precise argument asserted by the defendants here . . . . Instead, we held that ‘[w]here the plaintiff asserts a section 1983 fair-trial claim based on fabricated evidence, all that is required is that the underlying criminal proceeding be terminated in such a manner that the lawsuit does not impugn an *ongoing* prosecution or *outstanding* conviction.’. . . Applying that standard here, because Kee’s underlying criminal proceeding was dismissed on speedy trial grounds, his fair trial claim does not impugn an ongoing prosecution, nor would it potentially invalidate any outstanding conviction if he were to prevail. Accordingly, this dismissal on speedy trial grounds constitutes a favorable termination under the standard articulated in *Smalls*, which is necessary for the accrual of a fair trial claim based upon fabricated evidence under *McDonough*.”); *Ashley v. City of New York*, 992 F.3d 128, 139-42 (2d Cir. 2021) (“Civil contends that under *McDonough v. Smith*, 139 S. Ct. 2149 (2019), plaintiffs asserting a fabricated-evidence claim must establish that the underlying prosecution terminated in their favor. He asserts that, because Ashley has not shown a favorable termination, any possible errors in the jury instructions were harmless. We hold, however, that Ashley’s criminal case did terminate favorably to him. Our favorable-termination analysis here relies on our precedents regarding favorable termination in the malicious-prosecution context. The Supreme Court explained in *McDonough* that fabricated-evidence claims might merit a ‘context-specific,’ and indeed ‘more capacious,’ understanding of what constitutes a favorable termination. . . . But even assuming, *arguendo*, that the favorable termination requirement for fabricated-evidence claims is identical to that used for malicious prosecution claims, we believe that our malicious prosecution precedents compel the conclusion

that Ashley’s prosecution terminated in his favor. In the malicious prosecution context, we have held that, to be deemed a favorable termination, the prosecution’s ‘final disposition [must be] such as to indicate the accused is not guilty.’ *Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980). This requirement is most easily met with a judgment of acquittal. But we have long recognized that a termination may be favorable when, although the termination is ‘not based on the merits, ... the failure to proceed implies a lack of reasonable grounds for the prosecution.’ . . . This principle, which we have repeatedly and consistently recognized, . . . is stated most clearly in *Murphy v. Lynn*, 118 F.3d 938 (2d Cir. 1997). There, we explained that whether a non-merits termination is ‘indicative of innocence depends on the nature and circumstances of the termination; the dispositive inquiry is whether the failure to proceed implies a lack of reasonable grounds for the prosecution.’ . . . And although we held in *Murphy* that, as a ‘general[ ]’ matter, ‘certain types of dispositions’—such as dismissals for facial insufficiency in which the prosecution has ‘fail[ed] to allege sufficient facts to support the charge’—do not qualify as favorable terminations, we emphasized that the determination is context-specific. . . . Here, the circumstances surrounding the termination of Ashley’s prosecution show favorable termination, even though the disposition was denoted as a dismissal for facial insufficiency. . . . [T]he problem with the prosecution’s case did not stem from a deficiency in the pleading, but rather from the court’s sense that the prosecution’s case without more simply did not support a charge of unlawful possession of marijuana against Ashley. Indeed, although the prosecution was offered multiple opportunities to strengthen its case and supersede the deficient pleading, it declined to do so. . . . It follows that the prosecution’s dismissal would ‘indicate [that Ashley is] not guilty.’ . . . As a result, we need not decide whether and how the favorable-termination standard for fabricated-evidence claims may be ‘more capacious’ than the favorable-termination standard for malicious prosecution claims, . . . because we hold that in the circumstances before us, Ashley’s state criminal case terminated favorably to him even under our malicious prosecution precedents.”); *Garcia v. City of New Hope*, 984 F.3d 655, 666 (8th Cir. 2021) (“Does a court finding of a ‘substantial likelihood of conviction’ have the same or similar effect of an actual conviction resulting as an admission that there was probable cause? We think not. Minnesota case law explains that in a continuance for dismissal, ‘[t]he district court does not make a finding of guilt, and the defendant does not make an admission of guilt.’ . . . Further, the Agreement did not require Garcia to stipulate to any facts regarding his charges even though the Agreement provides an area to do so. Because the Agreement does not require an admission of guilt or a finding of guilt, it is distinguishable from a conviction. The Agreement alone does not defeat Garcia’s claim that Officer Baker stopped his vehicle without probable cause.”); *Fenn v. City of Truth or Consequences*, 983 F.3d 1143, 1150 (10th Cir. 2020) (“To show that the termination was favorable, a plaintiff must allege facts that, if true, would allow a reasonable jury to find the proceedings terminated ‘for reasons indicative of innocence.’ . . . Here, the charges were dismissed without prejudice, and the state court denied Fenn’s motion to dismiss for failure to establish all the elements of the offense. Defendants point to case law stating that a § 1983 malicious prosecution claim may proceed ‘only if the criminal prosecution against the plaintiff is disposed of in a way which indicates his innocence.’ . . . Dismissal without prejudice does not necessarily indicate innocence, but here the district attorney stated in the dismissal papers that there was insufficient evidence to proceed. When the issue of termination indicating innocence is

unclear, the court ‘look[s] to the stated reasons for the dismissal as well as to the circumstances surrounding it and determine[s] whether the failure to proceed implies a lack of reasonable grounds for the prosecution.’. . . The surrounding circumstances point in both directions, but Fenn has cleared this hurdle for summary judgment purposes based on the district attorney’s stated reason for the dismissal.”); *Allen v. New Jersey State Police*, 974 F.3d 497, 503-04 (3d Cir. 2020) (“Allen submits that he has satisfied the favorable termination element because the State formally abandoned his prosecution. Although in some cases a prosecutor’s decision to abandon the criminal case may indicate the innocence of the accused, and thereby satisfies the favorable termination requirement, this analysis depends on the particular facts. As we held in *Donahue v. Gavin*, 280 F.3d 371 (3d Cir. 2002), ‘not all cases where the prosecutor abandons criminal charges are considered to have terminated favorably.’. . . Abandonment of the criminal case is a favorable termination ‘only when [the case’s] final disposition is such as to indicate the innocence of the accused.’. . . For that reason, in *Donahue*, we held that a prosecutor’s decision not to retry a defendant in the interest of judicial economy, and not because of any doubt about the strength of the evidence against him, was not a favorable termination. . . . Although we have not considered whether a prosecutor’s decision to abandon further prosecution due to suppression of otherwise reliable evidence is a favorable termination, our sister circuits have done so. We agree with their reasoning. . . . The question is thus whether the evidence was suppressed because it was unreliable or whether it was suppressed based on other grounds that do not cast doubt on the trustworthiness of the evidence. We must therefore ‘look to the stated reasons for the dismissal [of the criminal proceedings] as well as the circumstances surrounding it in an attempt to determine whether the dismissal indicates [the plaintiff’s] innocence.’. . . Here, the Supreme Court of New Jersey vacated Allen’s conviction because Nugnes’s search of the vehicle’s trunk was not permitted under any exception to the warrant requirement. In other words, the search was conducted and the inculpatory evidence was discovered in violation of the Fourth Amendment. Neither the trial court nor the Supreme Court cast any doubt at any point on the reliability of the heroin discovered during the search or its relevance to the charges for which Allen was convicted; the issue was solely whether the search itself was constitutionally permitted. The evidence was thus ultimately suppressed for reasons ‘having no or little relation to the evidence’s trustworthiness,’. . . and Allen has not shown otherwise. Allen’s claim that the termination of his criminal case was indicative of his innocence because he was arrested without probable cause is unavailing. This argument conflates the second and third elements of the requirements for a malicious prosecution claim. To prove a malicious prosecution claim, Allen must show *both* that the criminal proceeding ended in his favor *and* that the defendant initiated the proceeding without probable cause. . . . Allen’s ultimate success in his suppression motion may bear on the probable cause element. However, since the suppression did not cast any doubt on the reliability of the evidence, it does not indicate his innocence. The State has not suggested that it decided not to retry Allen because he was innocent. To the contrary, Allen admitted under oath that he was guilty of possession with intent to distribute heroin.”); *Salley v. Myers*, 971 F.3d 308, \_\_\_ (4th Cir. 2020) (“The favorable termination element—at issue in this appeal—is satisfied when the ‘criminal case against the plaintiff has been disposed of in a way that indicates the plaintiff’]s innocence.’. . . South Carolina law—which informs our inquiry because § 1983 malicious prosecution claims sound in common law—tells us that a nolle prosequere alone will

not establish favorable termination. . . . Instead, a malicious prosecution plaintiff must ‘establish[ ] that charges were nolle prossed for reasons which imply or are consistent with innocence.’ . . . Whether the termination of a criminal case is consistent with a defendant’s innocence ‘depends on the nature and circumstances of the termination.’ . . . In other words, ‘[t]he circumstances surrounding the abandonment of the criminal proceedings must compel an inference that there existed a lack of reasonable grounds to pursue the criminal prosecution.’ . . . For instance, dismissal due to witness or victim unavailability does not indicate a defendant’s innocence. *See, e.g., Jordan v. Town of Waldoboro*, 943 F.3d 532, 546 (1st Cir. 2019) (dismissed because the victim and key witness had died). Similarly, the abandonment of charges due to a compromise or an act of mercy typically does not imply innocence. . . . Viewed in the proper light, Salley has shown that a genuine issue of material fact exists as to whether Myers nolle prossed the congregating charge ‘in a way that indicates [Salley’s] innocence.’ . . . [V]iewing the facts in the light most favorable to Salley, he has presented testimony that conflicts with Myers’ explanation, as well as corroborating circumstantial evidence from which a jury could reasonably infer that the nolle prosee was consistent with his innocence. Considering this evidence and that a court cannot weigh credibility at this stage, summary judgment is not appropriate on the issue of whether proceedings terminated in Salley’s favor.”); ***Jones v. Clark County, Kentucky***, 959 F.3d 748, 763-65 (6th Cir. 2020) (“This Court has not addressed the narrow issue presented in this case: whether a dismissal without prejudice constitutes a favorable termination for the purposes of a malicious prosecution action. However, the district court and Defendants in the present case appear to have ignored our decision in *Ohnemus v. Thompson*, which, while unpublished, most directly speaks to this question. 594 F. App’x 864 (6th Cir. 2014). In *Ohnemus*, we stated that, ‘[t]he termination [of proceedings] must go to the merits of the accused’s professed innocence for the dismissal to be “favorable” to him.’ . . . And ‘[o]nly where dismissal indicates that the accused may be innocent of the charges, have Kentucky courts found that the termination of the proceedings were favorable to the party bringing a malicious prosecution claim.’ . . . We held that the proceedings against the plaintiff did not terminate in his favor because he paid restitution in exchange for a dismissal of the theft charge brought against him. . . . Instead of addressing this case law, Defendants and the district court relied on decisions from a few district courts in this circuit that have found that a dismissal without prejudice is not a favorable termination. Such decisions do not bind us. Each decision, moreover, is inapposite. . . . *Ohnemus* and the state law cases it cites rely on the Restatement (Second) of Torts which clearly supports finding that the proceedings against Jones terminated in his favor. Commentary to the Restatement provision on the termination of proceedings that give rise to private malicious prosecution actions provides in relevant part that ‘[t]he abandonment of the proceedings because the accuser believes that the accused is innocent or that a conviction has, in the natural course of events, become impossible or improbable, is a sufficient termination in favor [of] the accused.’ . . . We have good reason independent of state or tort law principles to find that a showing that the government abandoned the prosecution because acquittal became ‘improbable’ is enough to meet this element of § 1983 malicious prosecution actions. The fact that the government recognized its error and moved to dismiss charges before a trial could be conducted or completed should not bar a subsequent malicious prosecution claim. A contrary holding would punish would-be plaintiffs for having a weak case brought against them. The Supreme Court made

clear in *Heck* that the purpose of the favorable termination element is to prevent a collateral attack by a ‘convicted criminal defendant’ on the conviction itself. . . That logic is inapplicable to a case such as this, where there is no conviction and the malicious prosecution claim itself is founded on the dearth of evidence substantiating the institution and continuation of proceedings in the first place. Categorically construing the favorable termination requirement to exclude plaintiffs whose cases were dismissed without prejudice would undermine the ability of malicious prosecution claims to hold officials accountable for baseless legal proceedings simply because those proceedings ended prior to a verdict. This would weaken the protections and deterrence provided by § 1983 and effectively deny an entire class of plaintiffs a remedy for their constitutional violations. That said, Jones must still demonstrate that his ‘dismissal indicates that [he] may be innocent of the charges,’ *Ohnemus*, 594 F. App’x at 867, or that a conviction has become ‘improbable,’ Restatement (Second) of Torts § 660. And ‘the determination of whether a termination is sufficiently favorable ultimately rests with the trial court as a matter of law, absent a factual dispute relative to the circumstances of the dismissal.’ . . . Taking the evidence in the light most favorable to Jones, he has established a sufficient factual dispute to overcome summary judgment. Prosecutors Engel and Johnson testified that they moved to dismiss the charges against Jones because they had no evidence connecting him to the illegal video. Johnson specifically noted that Lars Daniel’s report indicating that there was no evidence of an Ares download on Jones’ devices meant he could no longer impeach Jones’ credibility insofar as Jones consistently denied downloading the illegal video, possessing the video, or even using the Ares peer-to-peer file sharing network. These statements suggest, at a minimum, that there is a genuine dispute as to whether the prosecutors’ decision to voluntarily dismiss the charges against Jones was indicative of his innocence or show that his conviction was improbable. . . Moreover, no new charges have been brought against Jones and no additional evidence has been discovered. These facts only reinforce this Court’s conclusion that Jones has met his burden, at the summary judgment stage, to show a genuine issue as to whether the proceedings against him terminated in his favor.”); *Henley v. Payne*, 945 F.3d 1320, 1327-28 (11th Cir. 2019) (“Mr. Henley’s § 1983 suit asserts that his Fourth Amendment rights were violated when he was arrested for criminal trespass on February 24, 2016. As recounted above, this trespass charge was dropped a month later when he pled guilty to wholly unrelated offenses. Deputy Payne claims it is meaningful that, on the road to having his criminal trespass charge dropped, Mr. Henley was convicted of possessing marijuana and making harassing phone calls. But in so arguing, Deputy Payne conflates *Heck*’s favorable termination requirement with the ‘antecedent’ question of ‘whether *Heck* applies at all.’ . . . It does not matter whether, as Deputy Payne argues, Mr. Henley was convicted of ‘any crime at all.’ Rather, the question is whether success on his § 1983 claim would necessarily imply the invalidity of one of his convictions. *Heck* is intended to ‘foreclos[e] collateral attacks.’ . . . In Mr. Henley’s case, there is nothing to collaterally attack because the charge that forms the basis for his § 1983 claim was dismissed. And unlike the typical *Heck* case, Mr. Henley’s § 1983 suit challenging his trespassing arrest does not ‘share a common element’ with his state convictions for harassing phone calls and marijuana possession, which stem from wholly distinct incidents. . . . Because successful prosecution of Mr. Henley’s § 1983 claim would not ‘necessarily imply that [his] criminal conviction[s]’ for harassing phone calls or marijuana possession were ‘wrongful,’ *Heck* does not

act as a bar. . . . *Heck* has no application if the plaintiff has not been convicted of an offense that derives from a common nucleus of operative fact with the offense underlying his § 1983 claim.”); *Oglesby v. Lesan*, 929 F.3d 526, 535 (8th Cir. 2019) (“Oglesby . . . avers that all evidence related to his state conviction for interfering with an arrest, including a certified copy of the chapter of the Lincoln Municipal Code under which he was arrested, was inadmissible as irrelevant to the instant case. However, a plea of no contest in a matter forecloses a subsequent § 1983 claim for arrest without probable cause. [citing *Heck*] Officer Hein raised this defense in response to Oglesby’s unlawful arrest claim. Evidence that Oglesby pled no contest to and was subsequently convicted in state court of charges stemming from his arrest was therefore relevant to whether Oglesby could prevail on his unlawful arrest claim . . . The district court did not abuse its discretion in finding this evidence relevant and admitting it.”); *Morris v. Mekkdessie*, 768 F. App’x 299, \_\_\_ (5th Cir. 2019) (“*Heck* does not allow a civil rights lawsuit to be an alternative vehicle to a criminal case for challenging law enforcement decisions that resulted in arrest or prosecution unless the criminal case was resolved ‘in favor of the accused.’ . . . Morris completed a pretrial diversion program. A diversion program is essentially a middle ground between conviction and exoneration. . . . Even though it is not a guilty plea, defendants entering diversion programs ‘acknowledge responsibility for their actions. . . . As such, ‘[e]ntering a pre-trial diversion agreement does not terminate the criminal action in favor of the criminal defendant. . . .’ . . . *Heck* thus applies and dismissal was appropriate under our decades-old rule.”); *Geness v. Cox*, 902 F.3d 344, 356 (3d Cir. 2018) (“Here, the District Court concluded that the charges did not ‘favorably terminate’ for Geness because the *nol pros* order did not itself indicate his innocence. . . . That reasoning does not square with our precedent. Regardless of whether a *nol pros* order on its face ‘indicate[s] the innocence of the accused,’ . . . a district court must conduct a ‘fact-based inquiry,’ . . . considering, among other things, the ‘underlying facts’ of the case, . . . the ‘particular circumstances’ prompting the *nol pros* determination, . . . and the substance of the ‘request for a *nol pros* that . . . result[ed in the] dismissal[.]’ . . . Yet the District Court here refused to look beyond the four corners of the order. And it need not have looked far to conclude that the *nol pros* termination here was a favorable termination, for the abandonment of charges for ‘insufficient evidence’ unquestionably provides ‘an indication that the accused is actually innocent of the crimes charged.’ . . . In Geness’s case, the DA’s Office anticipated it would be ‘unable to prove the case,’ . . . and the state court agreed that ‘a reasonable possibility that the decedent just fell’ would make it ‘impossible for the Commonwealth to prove the case beyond a reasonable doubt[.]’ . . . In addition, the proposed order submitted by the DA’s Office expressly acknowledged ‘substantive evidentiary issues in this matter that likely could and would impair the Commonwealth’s ability to meet its burden of proof.’ . . . Under *Kossler* and *Donahue*, this *nol pros* disposition did reflect a favorable termination, and the District Court should not have dismissed the malicious prosecution claim for failure to prove that element.”); *Johnson v. Thibodaux City*, 887 F.3d 726, 732 (5th Cir. 2018) (“Every is precluded from seeking damages under § 1983 for her allegedly unlawful arrest because she pleaded no-contest to resisting arrest. Under the favorable-termination requirement, if a judgment in a plaintiff’s favor would necessarily imply the invalidity of her conviction, the plaintiff can recover only by showing that the conviction was reversed on direct appeal, expunged, declared invalid by an authorized state tribunal, or called into question by a federal writ of habeas corpus. .

. Every's no-contest plea is considered a conviction under Louisiana law. . . Accordingly, like an *Alford* plea, it implicates *Heck*'s favorable-termination rule. . . And Every's present unlawful-arrest claim plainly arises from the same facts as her resisting-arrest conviction. Allowing her to recover under § 1983 for unlawful arrest would necessarily imply that any conviction for resisting the arrest was invalid. . . Finally, there is no evidence that Every's conviction was reversed, expunged, declared invalid, or called into question by a federal court on habeas review. Therefore, *Heck*'s favorable-termination rule precludes her unlawful-arrest claim.”); ***Stephens v. DeGiovanni***, 852 F.3d 1298, (11th Cir. 2017) (“Stephens admits he pled nolo contendere to the offense of his arrest, Fla. Stat. § 322.03(1), driving without a valid driver’s license, so he could travel to Jamaica in time to attend his cousin’s funeral. This was his decision with counsel; Stephens has not shown the prosecuting authority engaged in any improper conduct. Under *Goldstein*, the conviction judgment must have been obtained by fraud, perjury, or corrupt means, not the arrest. Stephens has presented no evidence he was coerced into pleading nolo contendere by any corrupt means or shown his plea otherwise was defective. Consequently, Stephens has averred no facts to show the Florida court acted with ‘fraud, perjury, or other corrupt means’ in accepting his plea and rendering his conviction judgment. . . With Stephens’s nolo contendere plea establishing probable cause for his arrest, his conviction stands under Florida law, which we must accept. . . The district judge correctly granted summary judgment to Deputy DeGiovanni on Stephens’s false-arrest claim.”); ***Curry v. Yachera***, 835 F.3d 373, 376-79 (3d Cir. 2016) (“The broader context of this matter is disturbing, as it shines a light on what has become a threat to equal justice under the law. That is, the problem of individuals posing little flight or public safety risk, who are detained in jail because they cannot afford the bail set for criminal charges that are often minor in nature. . . It seems anomalous that in our system of justice, the access to wealth is what often determines whether a defendant is freed or must stay in jail. Further, those unable to pay who remain in jail may not have the “luxury” of awaiting a trial on the merits of their charges; they are often forced to accept a plea deal to leave the jail environment and be freed. . . Unable to post his bail, Curry was sent to jail and waited there for months for his case to proceed. While imprisoned, he missed the birth of his only child, lost his job, and feared losing his home and vehicle. Ultimately, he pled nolo contendere in order to return home. Curry has maintained his innocence throughout the criminal proceedings and the present matter. Nevertheless, as part of his nolo contendere plea, Curry must pay restitution of \$130.27 to Wal-Mart and the costs of prosecution. He was sentenced to probation for two years. Moreover, as discussed in Subsection IV(A) below, Curry’s nolo contendere plea operates as a procedural bar requiring dismissal of his malicious prosecution claim against all defendants except McClure. Thus, Curry’s inability to post bail deprived him not only of his freedom, but also of his ability to seek redress for the potentially unconstitutional prosecution that landed him in jail in the first place. . . Curry entered a nolo contendere plea for the charges brought by Yachera, and under Pennsylvania law, that plea must be treated the same as a conviction under *Heck*. See *United States v. Poellnitz*, 372 F.3d 562, 566 (3d Cir. 2004) (“[A] nolo plea is indisputably tantamount to a conviction ....”). . . For purposes of *Heck*, Curry was convicted of the charges brought by Yachera. The constitutional claims against Yachera, and by extension Wal-Mart, John Does, and Fitcher, are precluded by *Heck* because their success would imply that his conviction was invalid. . . Curry does not allege that his conviction

was invalidated to satisfy the favorable termination rule. As a result, we hold that the District Court properly dismissed Curry’s constitutional claim of malicious prosecution against Yachera, and by extension, Wal-Mart, John Does, and Fitcher. . . . The District Court dismissed the malicious prosecution claim against McClure because Curry could not meet the fifth element. We agree with that ruling. Curry was already incarcerated on Yachera’s charges when McClure brought his charges against Curry. . . . When McClure’s charges were dropped, Curry was still in jail. As a result, McClure never deprived Curry of his liberty ‘as a consequence of’ the charges McClure brought against Curry. Curry’s liberty had already been deprived. . . . McClure simply never deprived Curry of his liberty as a consequence of his (McClure’s) charges. Therefore, the District Court properly dismissed the Fourth Amendment malicious prosecution claim against McClure.”); **Julian v. Hanna**, 732 F.3d 842, 845 (7th Cir. 2013) (“The defendants argued that Julian’s claim accrued when his conviction was reversed, which was way more than two years before he filed this suit. The district judge agreed. But she was mistaken. Under both state and federal law a malicious prosecution claim does not accrue until the criminal proceeding that gave rise to it ends in the claimant’s favor. . . . That didn’t happen until the charges against Julian were dismissed, and that was less than two years before he sued. Although his conviction had been reversed much earlier and the reversal affirmed, he had not been ordered acquitted; nor had the criminal charges against him been dropped—rather, the case had been remanded for a retrial. Until the retrial was held, and ended favorably to him, or the charges against him were dropped without a retrial, which is what happened, the criminal case had not terminated in his favor. Julian’s claim thus is timely.”); **Morris v. McAllester**, 702 F.3d 187, 190, 191 (5th Cir. 2012) (“The trial court’s February 2011 order of ‘Early Release and Discharge from Community Supervision’ does not state that it serves to invalidate Morris’s conviction for possession of child pornography. The order merely concludes that Morris satisfactorily completed a sufficient percentage of his community supervision and that dismissal of the proceedings and the remainder of his term was appropriate under Tex.Code Crim. Proc. art. 42.12 § 20. We do not agree with Morris that this language is equivalent to an order invalidating his conviction. Nonetheless, Morris further maintains that his argument is supported by the TCCA’s interpretation of Article 42.12 § 20(a) in *Cuellar*. Tex.Code Crim. Proc. art. 42.12 § 20(a); *Cuellar*, 70 S.W.3d 815. In that case, the TCCA held that under a dismissal pursuant to Article 42.12 § 20, the conviction is ‘wiped away’ in its entirety, which according to Morris, is the same as being declared ‘invalid.’ . . . Morris’s case, however, is distinguishable from the factual circumstances set forth in *Cuellar*. The defendant in *Cuellar* received relief because the order included express language dismissing the indictment. . . . Further, a review of the applicable case law reveals that Texas courts do not imply the dismissal of the indictment when ordering early release under Article 42.12 § 20; they instead include the language in the order. . . . Morris’s order does not include express language dismissing his indictment, nor does it state that his guilty plea is withdrawn, that the verdict is set aside, or that his civil liberties are restored.”); **Marlowe v. Fabian**, 676 F.3d 743, 747 (8th Cir. 2012) (“Marlowe contends that *Heck* does not bar his claims because the Minnesota court of appeals decision remanding his habeas claim to the trial court satisfies the favorable termination requirement. . . . That decision was not a favorable *termination* for Marlowe, however, because his incarceration was not ‘reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.’ . . . Although Marlowe had sought a writ of

habeas corpus ordering his immediate release to a halfway house, the court of appeals did not grant that relief. Instead, the appellate court directed the Department to ‘consider restructuring Marlowe’s release plan’ and to ‘seek to develop a plan’ that could lead to his release from prison. . . . The court of appeals decision did not invalidate the Department’s ongoing imprisonment of Marlowe. It did not hold that any portion of his incarceration had been unlawful, and it allowed the Department to continue to incarcerate him until he met all the conditions of his supervised release. Indeed, following the court’s decision the Department kept him incarcerated for another three months until placement in approved housing could be arranged. Marlowe can point to no cases where a decision like the one issued by the court of appeals here was determined to be a favorable termination. . . . Since Marlowe has not met the requirements of *Heck*, he has no cause of action for unlawful imprisonment under § 1983.”); ***Rodriguez v. Cook County, Ill.***, 664 F.3d 627, 630, 631 (7th Cir. 2011) (“*Kitchen* does not get this subject entirely right. *Heck* holds that a § 1983 claim that would call a conviction into question accrues when the conviction has been reversed or otherwise set aside. The district court in *Kitchen* assumed that a certificate of innocence is one way that Illinois provides for vitiating a conviction. It isn’t. Under the 2008 statute, a conviction’s vacatur is a precondition to obtaining a certificate; it is not something that can be accomplished by a certificate. . . . Thus the claim in *Kitchen*—and this case too—accrued when the conviction was vacated, not when a state court issued the certificate of innocence. Rodriguez’s conviction was reversed in 2000. His current suit is much too late.”).

*See also Manansingh v. United States*, No. 2:20-CV-01139-DWM, 2021 WL 2080190, at \*4-5 & nn. 2, 3 (D. Nev. May 24, 2021) (“Plaintiffs first argue that their claims would have been barred by *Heck* had they pursued them prior to the June 21, 2018 dismissal of Manansingh’s indictment. The argument is unpersuasive. ‘*Heck* established the now well-known rule that when an otherwise complete and present § 1983 cause of action would impugn an extant conviction, accrual is deferred until the conviction or sentence has been invalidated.’ *Bradford v. Scherschligt*, 803 F.3d 382, 386 (9th Cir. 2015). While the Ninth Circuit determined at one point that the *Heck* bar extended to pending criminal proceedings, . . . the Supreme Court subsequently held in *Wallace*, that ‘*Heck* applies only when there is an extant conviction and is not implicated merely by the pendency of charge[.]’. . . Here, no conviction was ever obtained, let alone invalidated, so *Heck* does not apply. ‘Consequently, the resolution of this [case] hinges on traditional rules of accrual and not on the extension of *Heck* to [these] proceedings.’ *Bradford*, 803 F.3d at 386. . . . Plaintiffs’ substantive due process claim (Claim 4) includes a properly pled Fifth Amendment fabricated evidence claim. . . . That claim is also timely, as it did not accrue until ‘the criminal proceedings against [Manansingh] terminated in his favor.’ *McDonough v. Smith*, 139 S. Ct. 2149, 2161 (2019). Here, the criminal case against Manansingh was dismissed by order of the district court on June 21, 2018. Although it was not a final assessment of innocence, courts have held that dropping charges or a *nolle prosequi* is an affirmative choice to terminate criminal proceedings *for purposes of claim accrual*. [citing cases] Because Plaintiffs brought their fabrication claim within two years of the dismissal of the criminal charges against Manansingh, that claim is timely. . . . ‘Favorable termination’ in this context is not necessarily concomitant with the ‘favorable termination’ element of malicious prosecution. *See Roberts v.*

*City of Fairbanks*, 947 F.3d 1191, 1202 n.12 (9th Cir. 2020) (malicious prosecution claim may require termination ‘dispositive of the defendant’s innocence’). . . . Apart from a dispute over what qualifies as ‘favorable termination,’ the parties do not appear to dispute that this claim is timely under *McDonough*.’); ***Grytsyk v. Morales***, No. 19-CV-3470 (JMF), 2021 WL 1105368, at \*7–8 (S.D.N.Y. Mar. 22, 2021) (“[Defendants] argue that the claim fails because the dismissal of Grytsyk’s charges for speedy trial reasons cannot qualify as favorable termination for purposes of malicious prosecution. . . . Defendants’ argument is foreclosed by binding Second Circuit precedent. [citing *Murphy v. Lynn*, 118 F.3d 938, 950 (2d Cir. 1997)] To be sure, the Second Circuit’s decision in *Murphy* notwithstanding, Defendants’ argument has been accepted by a host of district judges following *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018), in which the Court held that, to prevail on a malicious prosecution claim under federal law, a plaintiff must show ‘that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence.’. . . And these district judges have admittedly offered some persuasive reasons to question whether *Murphy* can be squared with *Lanning*. . . . In the Court’s view, however, these district judges have gotten too far out over the[ir] proverbial skis. It is well established that a district court must follow a precedential opinion of the Second Circuit ‘unless and until it is overruled . . . by the Second Circuit itself or unless a subsequent decision of the Supreme Court so undermines it that it will almost inevitably be overruled by the Second Circuit’. . . . First and foremost, the *Lanning* Court itself cited *Murphy* favorably. . . . Second, since *Lanning*, the Second Circuit has four times cited *Murphy* as good law (albeit for more general propositions). [citing cases] And third, a host of other-district judges have adhered to *Murphy* even after *Lanning*. . . . The ultimate point, of course, is not that *Murphy* is rightly decided or long for this world; it may not be either. Instead, it is that the Second Circuit, not this Court or any other district court, gets to decide that question. And in light of the Second Circuit’s own citations to *Murphy*, in *Lanning* and since, not to mention the analyses of Judge Engelmayer and others, the Court certainly cannot say that *Lanning* renders the holding of *Murphy* ‘untenable.’. . . In short, Defendants’ argument — that Grytsyk cannot, as a categorical matter, establish favorable termination for purposes of his Section 1983 malicious prosecution claim because the dismissal of his charges was on speedy trial grounds — remains foreclosed by Second Circuit precedent. . . . Of course, “[i]n the event that ensuing case law on this point is adverse to this conclusion, the Court will stand ready, at the summary judgment stage, to reconsider this assessment.”); ***Moore v. City of Chicago***, No. 19 CV 3902, 2020 WL 3077565, at \*3 (N.D. Ill. June 10, 2020) (“Defendants equate favorable termination with innocence. *Heck* demands no such thing. ‘[T]he [*Heck*] Court offered a list of possible resolutions that would satisfy the favorable termination requirement, and none require an affirmative finding of innocence.’. . . A criminal proceeding can terminate favorably ‘without a declaration of a defendant’s innocence.’. . . Plaintiff’s sentence was vacated and his charges were dismissed. That is all he needs to allege for his section 1983 claims to satisfy *Heck*.”); ***Krause v. Yavapai County***, No. CV1908054PCTMTLESW, 2020 WL 1659908, at \*5–6 (D. Ariz. Apr. 3, 2020) (“It appears the Ninth Circuit has never squarely addressed the particular circumstances presented in this case, where after his conviction was reversed, Plaintiff could have been retried for the same charges but was not. Defendants’ characterization of the issue in this case as ‘what knowledge the Plaintiff derived, or should have derived, from the undisputed fact that retrial was not sought by the Rule

8.2(c) deadline’ is misplaced. The accrual date of Plaintiff’s § 1983 claim does not depend solely on when Plaintiff knew he was injured. As the Supreme Court noted in *McDonough*, the date on which a constitutional injury first occurs is not the only date from which a limitations period may run. . . . ‘To the contrary, the injury caused by a classic malicious prosecution [ ] first occurs as soon as legal process is brought to bear on a defendant, yet *favorable termination* remains the accrual date.’ . . . Defendants also argue that the prosecution terminated favorably to Plaintiff, at the latest, when, under Arizona’s speedy trial rules, the time for the State to retry Plaintiff elapsed, and the State did not retry him. Plaintiff contends that despite the 90-day limitation, the State could have retried him, although the resulting conviction could have been subject to reversal if the delay prejudiced him; therefore, his claim did not accrue until then. . . . The Court agrees. . . . Plaintiff for the same charges. Defendants attempt to equate the State’s decision to allow the 90 days under the speedy trial rules to elapse to dropping charges. However, unlike allowing a procedural time limit to elapse, dropping charges or a *nolle prosequi* is an affirmative choice to terminate the criminal proceeding. . . . In this case, Defendants did not *choose* to drop the charges. Instead, they allowed the time to retry Plaintiff to elapse, and Plaintiff sought enforcement of the Arizona Court of Appeals’ Mandate. It was in response to Plaintiff’s request that the trial court vacated his conviction and dismissed the indictment. Finally, Defendants erroneously suggest that because Plaintiff knew that any retrial would necessarily exclude the CBLA evidence, this was “sufficient to place Plaintiff on notice that his criminal case had ended favorably” for purposes of accrual by October 2016. . . . The question is not whether the State could have *successfully* retried Plaintiff following the Arizona Court of Appeals’ decision. Rather, so long as the State had the option of prosecuting Plaintiff for the same charges, if Plaintiff had filed his § 1983 action during that time, there was still the possibility of ‘parallel criminal and civil litigation over the same subject matter’ or ‘the related possibility of conflicting civil and criminal judgments.’ . . . For the foregoing reasons, the Court concludes that Plaintiff’s § 1983 claims did not accrue until February 22, 2017. His original Complaint, filed on February 19, 2019, was therefore timely. Accordingly, the Court will deny the Yavapai County Defendants’ Motion to Dismiss.”); *Hincapie v. City of New York*, 434 F.Supp.3d 61, \_\_ (S.D.N.Y. 2020) (“Hincapie adequately pleads favorable termination. Contrary to Defendant’s suggestion, neither an acquittal nor a finding of actual innocence by clear and convincing evidence is necessary. Citing *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018), Defendants argue that the dismissal and vacatur of Hincapie’s conviction did not ‘affirmatively indicate his innocence.’ Defendants’ argument misinterprets *Lanning* and the Complaint. The Second Circuit in *Lanning* ‘reaffirmed the longtime requirement that favorable termination under federal law requires that “the prosecution terminated in some manner indicating that the person was not guilty of the offense charged,” based on the “merits” rather than “on any number of procedural or jurisdictional grounds.”’ . . . In *Lanning*, the Second Circuit held that plaintiff’s ‘vague allegations’ were insufficient to plead favorable termination where he alleged that ‘the charges were dismissed at some point after a jury trial, without specifying how or on what grounds;’ plaintiff conceded the dismissals were in part based on jurisdiction arising out of where his estranged wife was physically located; and the state court explicitly stated there was no ‘determination of the merits[.]’ . . . By contrast, here, the Complaint alleges that Plaintiff’s conviction was vacated, and his indictment was dismissed after he was imprisoned for twenty-five years,

following a reinvestigation of the charge and newly discovered exculpatory evidence. In vacating the conviction, the state court determined on the merits that Hincapie had met his burden of establishing, by a preponderance of the evidence, that the newly discovered exculpatory and material evidence would have produced a more favorable verdict at trial. . . . Further, the totality of circumstances surrounding the dismissal indicate innocence. Significantly, the DA’s Office decided not to retry Hincapie because it did not believe it could prove the case. . . . Defendants argue that the proceeding was not terminated in Plaintiff’s favor because he did not prove actual innocence. . . . That argument is wrong, and Defendants cite no support for that argument. Indeed, that proposition fundamentally conflicts with the axiomatic and elementary principle of the presumption of innocence—once a conviction is erased, the presumption of innocence is restored.”); **Goldring v. Donawa**, No. 16-CV-5651 (KAM)(LB), 2019 WL 4535507, at \*4 (E.D.N.Y. Sept. 19, 2019) (“Plaintiff cannot maintain a § 1983 suit based on a conviction that has not already been invalidated on direct appeal, by writ of habeas corpus, or an equivalent. Plaintiff has not received a favorable termination affirmatively indicating his innocence. Plaintiff’s win at the Appellate Division did not affirmatively indicate innocence, but indicated that he should be retried with a different jury instruction. More importantly, plaintiff plea of guilty to a lesser included offense is a valid conviction which prevents this court from finding that there was a favorable termination. The court grants defendants’ motion for summary judgment on the malicious prosecution claim.”); **Taylor v. City of Chicago**, No. 17-CV-03642, 2018 WL 4075402, at \*5-6 (N.D. Ill. Aug. 27, 2018) (“Defendants insist that even applying the *Heck* rule of delayed accrual, Taylor’s due process claim is still untimely because it was filed more than two years after he was granted a writ of *habeas corpus*. Taylor, on the other hand, argues that his claim is timely because it only accrued after he was acquitted following retrial. . . . The express language of *Heck* would seem to support Defendants’ view, as it states that a § 1983 claim accrues when the conviction is ‘called into question by a federal court’s issuance of a writ of *habeas corpus*.’. . . Yet the *habeas* court did not unconditionally invalidate Taylor’s conviction. Rather, it released him from custody contingent on the State’s determination whether or not to retry him. . . . The State did retry him, and Taylor was acquitted. Seventh Circuit precedent post-*Heck* makes clear that given those circumstances, Taylor’s claim did not accrue until his acquittal. [discussing *Julian v. Hanna* and *Johnson v. Dossey*] [T]he overwhelming weight of authority weighs in favor of finding that Taylor’s § 1983 claim accrued only once he was acquitted following retrial. For that reason, his Fourteenth Amendment claim cannot be dismissed as time-barred.”).

*Compare Owens v. Baltimore City State’s Attorneys Office*, 767 F.3d 379, 390-92 (4th Cir. 2014) (“Because the grant of a new trial does not trigger the limitations period for a malicious prosecution claim, the statute of limitations on Owens’s § 1983 claims did not begin to run on the date he was granted a new trial. Instead, the operative limitations period began to run on the date a malicious prosecution claim became ripe at common law, i.e., the date on which the *nolle prosequi* was entered. It was only on this date that proceedings against Owens were favorably terminated in such manner that they could not be revived. Because Owens filed suit within three years of this date, the statute of limitations does not bar his present cause of action. . . . In sum, we take the Supreme Court at its word. We determine when the statute of limitations on a plaintiff’s

§ 1983 claim begins to run by looking to the common-law tort most analogous to the plaintiff's claim. In general, the limitations period for common law torts commences when the plaintiff knows or has reason to know of his injury. But if the common law provides a 'distinctive rule' for determining the start date of the limitations period for the analogous tort, a court should consider this rule in determining when the limitations period for the plaintiff's claim begins to run. . . . Application of this rule to Owens's claims sets the start of the limitations period at the date of the *nolle prosequi*. Because Owens filed suit within three years of this date, his claims were timely filed.") with ***Owens v. Baltimore City State's Attorneys Office***, 767 F.3d 379, 404-07 (4th Cir. 2014) (Traxler, CJ, concurring in part and dissenting in part) ("I concur in parts III, IV.A, and V of the majority opinion. However, I respectfully dissent from parts II and IV.B. First, I believe that Owens' *Brady* claims were untimely because they accrued when he discovered the exculpatory and impeaching evidence that had not been disclosed, not when the proceeding was subsequently terminated via entry of the *nolle prosequi*. Second, I would conclude that the district court correctly determined that the individual defendants were entitled to qualified immunity because it was not clearly established in the spring of 1988 that a police officer's failure to disclose exculpatory evidence made the officer potentially liable for a violation of a criminal defendant's constitutional rights. . . . For a *Brady* claim, the plaintiff need only demonstrate 'that prejudice resulted from the suppression.' . . . [A] defendant's right to pre-trial disclosure under *Brady* is not conditioned on his ability to demonstrate that he would or even probably would prevail at trial if the evidence were disclosed, much less that he is in fact innocent.' [citing *Poventud*] *Brady* is meant to ensure a fair trial; [t]he remedy for a *Brady* claim is therefore a new trial, as proof of the constitutional violation need not be at odds with [defendant's] guilt.' . . . Accordingly, I would conclude that the proceedings were 'favorably terminated' when Owens' conviction was vacated and he was granted a new trial on June 7, 2007. The *Brady* violation was complete; 'the harm the alleged *Brady* violation had done could not be affected by a retrial.' . . . His claim was therefore ripe and, assuming he knew about the undisclosed exculpatory evidence in question at that point, the limitations period began running at that time. Alternatively, as previously noted, Owens at the latest was aware of the exculpatory evidence by June 11, 2008, when his attorney filed a motion to exclude that evidence at his retrial. Either way, Owens' claims are untimely.")

See also ***Thompson v. Clark***, 794 F. App'x 140, 142 (2d Cir. 2020), *cert. granted*, 141 S. Ct. 1682 (2021) ("[T]he district court here held an evidentiary hearing and found that the evidence of Thompson's guilt of the crime of obstruction of governmental administration and resisting arrest was substantial, and that dismissal was likely based on factors other than the merits. We are 'bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.' . . . Accordingly, we agree with the district court that it was bound by *Lanning* to enter judgment in favor of the defendants on Thompson's malicious prosecution claim."); ***Parnell v. City of Detroit, Michigan***, 786 F. App'x 43, \_\_ (6th Cir. 2019) ("[T]here is no binding precedent in this circuit as to whether a dismissal without prejudice can constitute a favorable termination for § 1983 purposes. The officers offer a variety of district court opinions as support for their conclusion that a dismissal without prejudice can never constitute a favorable termination. . . . Yet, the officers also acknowledge that 'an abandonment of a prosecution

by the prosecutor ... generally constitutes a termination in favor of the accused,’ so long as the ‘final decision indicates that the accused is innocent.’ We note that this is the test set forth in the Restatement (Second) of Torts §§ 659, 660 (1977). And it appears to be exactly what we have here. Upon learning of the undisclosed evidentiary report, the prosecutor immediately decided to dismiss the charges because she believed she could not prevail at trial. The prosecutor informed defense counsel that she would seek dismissal because of the contradictory evidence, and she later testified that she would never go to trial on the charges against Parnell, nor would she ever bring other charges arising out of the incident in question. Given the evidence we have before us on appeal, which we must view in a light most favorable to Parnell, he has shown sufficient evidence of a ‘formal abandonment’ of the charges based on his innocence, . . . such that his claim survives summary judgment on this prong. Because he has produced enough evidence to satisfy all of the tort’s elements for summary judgment purposes, Parnell’s malicious prosecution claims against Mack and Billingslea must go to a jury.”); *Lanning v. City of Glens Falls*, 908 F.3d 19, 25-29 (2d Cir. 2018) (“We have previously stated that claims for malicious prosecution under § 1983 are ‘substantially the same’ as claims for ‘malicious prosecution under state law.’ . . . Some district courts in our Circuit have interpreted the language in these cases to mean that they must follow a State’s most recent decisional law to figure out whether a termination is favorable, even with respect to federal claims brought under § 1983. . . . We now clarify that federal law defines the elements of a § 1983 malicious prosecution claim, and that a State’s tort law serves only as a source of persuasive authority rather than binding precedent in defining these elements. Our prior decisions requiring affirmative indications of innocence to establish ‘favorable termination’ therefore continue to govern § 1983 malicious prosecution claims, regardless of developments in New York State malicious prosecution law. Our view flows directly from the Supreme Court’s decision in *Manuel v. City of Joliet*, — U.S. —, 137 S.Ct. 911, 197 L.Ed.2d 312 (2017), which dealt in part with the time at which a § 1983 claim for unlawful pretrial detention accrues. There the Supreme Court instructed courts to ‘look first to the common law of torts’ in order to ‘defin[e] the contours and prerequisites of a § 1983 claim.’ . . . But common law principles are meant simply ‘to guide rather than to control the definition of § 1983 claims, serving more as a source of inspired examples rather than of prefabricated components.’ . . . Thus, in *Singleton v. City of New York*, our seminal decision on § 1983 malicious prosecution claims, we did not mechanically apply the law of New York State. Instead, we considered the common law of torts in multiple jurisdictions to determine whether the termination of the underlying criminal charges was favorable to the accused. . . . In 2000, however, the New York Court of Appeals, in *Smith-Hunter v. Harvey* (a case involving dismissal for violation of the defendant’s right to a speedy trial), for the first time characterized the favorable termination language in its prior cases as dicta; it simultaneously ‘reject[ed] the notion’ that a plaintiff asserting a State tort claim for malicious prosecution, at least under the ‘particular circumstances’ presented in that case, ‘must demonstrate innocence in order to satisfy the favorable termination prong.’ . . . In 2001, in *Cantalino v. Danner*, 96 N.Y.2d 391, 729 N.Y.S.2d 405, 754 N.E.2d 164 (2001), the Court of Appeals appeared to go further. In *Cantalino*, the Court of Appeals characterized *Smith-Hunter* as holding that ‘any termination of a criminal prosecution, such that the criminal charges may not be brought again, qualifies as a favorable termination, so long as the circumstances surrounding the termination are not inconsistent with the

innocence of the accused[.]’ . . . But we are not bound to apply New York law to malicious prosecution claims arising under § 1983; indeed, even though *Cantalino* was decided nearly twenty years ago, this Court has never applied its ‘favorable termination’ standard to a § 1983 claim. . . . When a person has been arrested and indicted, absent an affirmative indication that the person is innocent of the offense charged, the government’s failure to proceed does not necessarily ‘impl[y] a lack of reasonable grounds for the prosecution.’ . . . Turning to the allegations in this case, we conclude that Lanning did not adequately plead that the termination of the prosecutions against him affirmatively indicated his innocence. With respect to the prosecution following his May 24, 2012 arrest, Lanning alleged that the charges against him ‘were dismissed’ at some point after a jury trial, without specifying how or on what grounds. . . . This vague allegation is consistent with dismissal on any number of procedural or jurisdictional grounds, all of which fail to affirmatively indicate innocence. . . . As we have explained in discussing ‘the constitutional tort of malicious prosecution in an action pursuant to § 1983,’ where a dismissal in the interest of justice ‘leaves the question of guilt or innocence unanswered[,] . . . it cannot provide the favorable termination required as the basis for [that] claim.’ . . . Lanning has not plausibly alleged that any of the criminal proceedings against him were terminated in a manner indicating his innocence. We therefore conclude that Lanning failed to plead a viable § 1983 claim for malicious prosecution, and we affirm the District Court’s judgments dismissing his malicious prosecution claims.”); ***Russell v. The Journal News***, 672 F. App’x 76, 78, 79 n.1 (2d Cir. 2016) (“[T]he prosecution against Russell was terminated when the state court dismissed the charges without prejudice based on facial insufficiency. Such a dismissal does not constitute a favorable termination. . . . We recognize that the New York Court of Appeals has never squarely addressed the question of whether a prosecutor’s failure to re-file charges becomes sufficiently ‘final’ to constitute a favorable termination once the applicable speedy trial time has elapsed. While the Court of Appeals’ decision in *MacFawn* holds that a dismissal of a criminal complaint without prejudice for facial insufficiency does not constitute a favorable termination, it does not address the speedy trial question. . . . Our summary order in *McGee* is also silent on this point. . . . In some jurisdictions, the failure to re-file charges within the statutory speedy trial period does constitute a favorable termination. *See Ferguson v. City of Chicago*, 213 Ill.2d 94, 104, 289 Ill.Dec. 679, 820 N.E.2d 455 (2004) (holding that the plaintiff’s malicious prosecution claim accrued upon “the expiration of the statutory speedy-trial period,” where charges were dismissed with leave to reinstate and were never re-filed); *see also Scott v. Bender*, 893 F.Supp.2d 963, 976 (N.D. Ill. 2012). In the absence of more specific guidance from the New York courts, however, we think that the district court’s holding hews most closely to existing law.”); ***Montgomery v. De Simone***, 159 F.3d 120, 125 (3d Cir. 1998) (“We hold today that the Restatement’s rule that an overturned municipal conviction presumptively establish[es] probable cause contravenes the policies underlying the Civil Rights Act and therefore does not apply to a section 1983 malicious prosecution action.”).

*Compare Freeman v. Ellis*, No. 1:17-CV-683, 2020 WL 5849294, at \*\_\_ n.3 (W.D.N.Y. Oct. 1, 2020) (“ In 2018, the Second Circuit clarified its position on the favorable termination element of a § 1983 malicious prosecution claim, explaining that a plaintiff must plausibly allege that the criminal proceedings filed against him ‘were terminated in a manner indicating his

innocence.’ *Lanning v. City of Glens Falls*, 908 F.3d 19, 29 (2d Cir. 2018). However, this Court agrees with the persuasive reasoning of the court in *Blount v. City of New York* that ‘*Lanning* makes clear that, as the Circuit consistently held pre-*Lanning*, dismissals on speedy trial grounds are terminations in the favor of the accused.’ No. 15- CV-5599 (PKC) (JO), 2019 WL 1050994 at \*5 (E.D.N.Y. Mar. 5, 2019).”) with *Marshall v. Port Authority of New York and New Jersey*, No. 19CV2168, 2020 WL 5633155, at \*7 (S.D.N.Y. Sept. 21, 2020) (“[T]his Court agrees with other district judges in this Circuit who have held that dismissal of a plaintiff’s case on speedy trial grounds ‘does not affirmatively indicate his innocence, as required under Section 1983.’ . . . While the Court of Appeals acknowledged that ‘the dismissal of a prosecution on speedy trial grounds is a favorable termination’ under the traditional common law, . . . it also noted that ‘common law principles are meant simply “to guide rather than to control the definition of § 1983 claims ...[.]”’ . . . Although there are some instances in which a speedy trial dismissal may affirmatively indicate innocence, it is uncertain whether the Second Circuit would apply a mechanical rule that *every* speedy trial dismissal meets that standard. Indeed, ‘New York’s speedy trial statute does not mandate dismissal of an action when a defendant is demonstrably innocent—it requires dismissal where the prosecution is not ready for trial within certain specified time periods. If the prosecution does not comply with the statute, its case will be dismissed even as to the most guilty defendant.’ . . . Therefore, Marshall has not met the ‘favorable termination’ element for his § 1983 claim.”).

*See also Moore v. Keller*, 498 F. Supp. 3d 335 (N.D.N.Y. 2020) (“As a general matter, ‘claims for malicious prosecution under § 1983 are substantially the same as claims for malicious prosecution under state law.’ *Lanning*, 908 F.3d at 25 (cleaned up). However, the Second Circuit has recently rejected the ‘the more permissive standard of proof’ available under New York law on the so-called ‘favorable termination’ element of a malicious prosecution claim. *Thompson v. Clark*, 794 F. App’x 140, 141 (2d Cir. 2020) (summary order). This distinction between state and federal law is a problem for plaintiffs. Unlike its state law analogue, the ‘favorable termination’ element on a § 1983 claim for malicious prosecution cannot be satisfied absent some ‘affirmative indications of innocence.’ *Lanning*, 908 F.3d at 25. As the Second Circuit explained in *Lanning*, ‘where a dismissal in the interest of justice “leaves the question of guilt or innocence unanswered[,] ... it cannot provide the favorable termination required as the basis for [that] claim.’ . . . Accordingly, an ‘interest of justice’ dismissal under § 170.40 ‘is by itself insufficient to satisfy the favorable termination requirement as a matter of law.’ . . . Upon review, plaintiffs cannot satisfy the more demanding ‘favorable termination’ requirement set out by the Second Circuit in *Lanning*. . . The record evidence supplied by plaintiffs does not affirmatively indicate that the § 170.40 dismissal was granted because plaintiffs were innocent. . . Instead, the record suggests the dismissal was joined by ADA Berry and granted by Judge Limpert out of mercy or leniency in light of the minimal harm at issue and plaintiffs’ cooperation with the prosecution. But that reasoning is not enough to satisfy the favorable termination element under federal law. . . As courts have repeatedly held since *Lanning*, a dismissal under these circumstances does not ‘affirmatively indicate’ innocence. . . Accordingly, Lise, Sabria, and Jalia’s § 1983 malicious prosecution claims must be dismissed.”); *Thomas v. City of Philadelphia*, No. CV 17-4196, 2019 WL 4039575, at \*7-8, \*10-

12 (E.D. Pa. Aug. 27, 2019) (“The defendants argue that the plaintiff’s malicious prosecution claims must fail because (1) the plaintiff’s underlying convictions were not ‘favorably terminated’; and (2) because the detectives had probable cause to arrest the plaintiff for the murder of Mr. Martinez. The Court disagrees and will not dismiss the plaintiff’s malicious prosecution claims on summary judgment. . . . In analyzing whether a *nol pros* decision constitutes a favorable termination, a district court must consider ‘the underlying facts of the case, the particular circumstances prompting the *nol pros* determination, and the substance of the request for a *nol pros* that resulted in the dismissal.’. . . An abandonment of charges for ‘insufficient evidence unquestionably provides an indication that the accused is’ innocent of the crimes charged. . . . However, where the *nol pros* ‘merely reflect[s] an informed and reasoned exercise of prosecutorial discretion as to how best to use ... limited resources’ and does ‘not suggest that [the plaintiff] was innocent,’ it does not constitute a favorable termination. . . .The reasons underlying the plaintiff’s *nol pros*—particularly the CRU’s conclusion that it did not ‘believe sufficient evidence exists to prove [the plaintiff] guilty beyond a reasonable doubt’—are indicative of his innocence. . . . Therefore, the Court will not dismiss the plaintiff’s malicious prosecution claims on failure to show favorable termination grounds. . . . The plaintiff argues that the standard for favorable termination in fabrication of evidence claims is governed by *Heck*, not by malicious prosecution case law, and is less stringent. *See Heck*, 512 U.S. at 486-87 (requiring only “that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus”). The defendants, in contrast, argue that the favorable termination standard for fabrication of evidence claims is the same as that for malicious prosecution claims. However, for the reasons discussed above, the Court need not address this dispute because of the previous conclusion that the plaintiff’s *nol pros* is indicative of his innocence, and the favorable termination requirement is thus satisfied regardless of which standard applies to the plaintiff’s fabrication of evidence claims”); *McKenzie v. City of New York*, No. 17 CIV. 4899 (PAE), 2019 WL 3288267, at \*15 (S.D.N.Y. July 22, 2019) (“Under New York law, favorable termination requires only that the criminal proceeding be terminated such that charges may not be brought again and that ‘the circumstances surrounding the termination are not inconsistent with the innocence of the accused.’. . . A prosecutor’s elective decision to drop or dismiss a charge may sometimes constitute a favorable termination in favor of the defendant. A ‘formal abandonment of the proceedings by the public prosecutor’ can constitute favorable termination. . . .To be sure, under § 1983, the bar to demonstrate favorable termination is higher. In the Second Circuit, ‘a plaintiff asserting a malicious prosecution claim under § 1983 must still show that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence.’. . . ‘When a person has been arrested and indicted, absent an affirmative indication that the person is innocent of the offense charged, the government’s failure to proceed does not necessarily “impl[y] a lack of reasonable grounds for the prosecution.”’. . . Indeed, ‘where a dismissal in the interest of justice leaves the question of guilt or innocence unanswered ... it cannot provide the favorable termination required’ as the basis for a claim of malicious prosecution. . . .Here, however, at least as to the reckless driving charge, a jury could easily find that the explanation given by the Bronx District Attorney’s Office for dropping that charge affirmatively

admits McKenzie's entitlement to prevail. After all, a lack of sufficient evidence in a criminal case entitles a defendant, as a matter of law, to a judgment of acquittal. The same, however, cannot be said for the unexplained decision by the Bronx District Attorney's Office in moving, pre-trial, to dismiss McKenzie's resisting arrest charge. McKenzie has not adduced any basis on which to argue that that decision 'ended in a manner that affirmatively indicated his innocence.' . . . Accordingly, should McKenzie's § 1983 claim sounding in malicious prosecution go to trial, it can proceed based only on the prosecution for reckless driving. The Court therefore denies defendants' motion for summary judgment on McKenzie's state and federal malicious prosecution claims, while limiting the scope of the federal claim to the prosecution for reckless driving."); **Olaizola v. Foley**, No. 16-CV-3777 (JPO), 2019 WL 428832, at \*5 (S.D.N.Y. Feb. 4, 2019) ("Under the Second Circuit's case law, 'affirmative indications of innocence' are required 'to establish "favorable termination"' for purposes of a Section 1983 malicious-prosecution claim. . . . Here, Olaizola has failed to produce evidence of why the [Bronx] charges were dismissed,' and so the summary judgment record contains 'insufficient proof as a matter of law that the proceedings were terminated in [his] favor.' . . . If anything, the record suggests that the Bronx charges were dismissed not because of Olaizola's innocence but because his lengthy criminal sentence on the Queens charges meant that moving forward on misdemeanor charges in the Bronx would disserve 'judicial economy.'"); **Butler v. Hesch**, No. 1:16-CV-1540, 2018 WL 922187, at \*15 (N.D.N.Y. Feb. 15, 2018) ("In the order of dismissal, neither the Court nor the Government makes clear the exact reasons for dismissal and do not specifically refer to Plaintiff's guilt or innocence. Further, it is not implied that the dismissal was out of mercy. Nothing before the Court indicates that the reasons for dismissing the charge against Plaintiff are inconsistent with his innocence. Moreover, the criminal case against Plaintiff was dismissed on February 7, 2014. It is now four years later and no new criminal charges have been brought against Plaintiff relating to the fire. Accordingly, the Court finds that Plaintiff has plausibly alleged that the criminal proceedings terminated in his favor."); **Ortiz v. Town of Stratford**, No. 3:07-cv-1144 ("HN), 2008 WL 4630527, at \*7 n.5 (D. Conn. Oct. 14, 2008) ("Another important prerequisite to bringing a false arrest or malicious prosecution claim is whether the criminal charges were terminated in the plaintiff's favor. The Second Circuit has yet to rule on whether a *nolle* is a 'favorable termination' for the plaintiff such that § 1983 claims for false arrest and malicious prosecution can be brought. . . . Viewing the evidence in a light most favorable to the nonmoving party, the court considers the *nolle* a favorable termination for purposes of this ruling."); **Phillip v. Wondrack**, No. 05-571 (JAG), 2008 WL 839597, at \*6 (D.N.J. Mar. 27, 2008) ("Plaintiff does not allege that he is innocent of the crimes for which he was charged and convicted. . . . In fact, Plaintiff alleges that his convictions were overturned, and the indictments dismissed, as a result of underlying racial profiling by the New Jersey State Police, not because he was innocent. . . . Therefore, Plaintiff has not alleged facts supporting a claim for malicious prosecution.[collecting cases] Based on the precedents enunciated above, Plaintiff's claims for malicious prosecution, pursuant to 42 U.S.C. § 1983, and New Jersey common law, must be dismissed."); **McCray v. City of New York**, 2007 WL 4352748, at \*21 (S.D.N.Y. Dec. 11, 2007) ("Although Defendants repeatedly declare that Plaintiffs have not been exonerated or proven innocent, 'New York law does not require a malicious prosecution plaintiff to prove her innocence, or even that the termination of the criminal proceeding was indicative of

innocence.’ . . . Rather, the law in New York could not be clearer: ‘[A]ny termination of a criminal prosecution, such that the criminal charges may not be brought again, qualifies as a favorable termination, so long as the circumstances surrounding the termination are not inconsistent with the innocence of the accused.’”); *Ramsey v. Dintino*, 2007 WL 979845, \*7, \*11 (D.N.J. Mar. 30, 2007) (not reported) (“Part of the ‘favorable termination’ element of malicious prosecution is that the ‘plaintiff claiming malicious prosecution must be innocent of the crime charged in the underlying prosecution.’ *Hector v. Watt*, 235 F.3d 154, 156 (3d Cir.2000). . . . Plaintiff does not contend he was innocent of the crime charged; in fact, the Complaint alleges that he was found in possession of illegal drugs, and subsequently arrested and charged with that crime. . . . Plaintiff’s conviction was vacated because there were ‘colorable issues of racial profiling,’ not because Plaintiff was innocent of drug possession. . . . Plaintiff, therefore, has failed to allege facts which could support a malicious prosecution claim.”); *St. Germain v. Isenhower*, 98 F.Supp.2d 1366, 1369, 1370 (S.D.Fla. 2000) (“[T]he question presented is whether a § 1983 action for malicious prosecution can be maintained with respect to the initial criminal charges lodged against the plaintiff if the prosecution resulted in the plaintiff’s conviction on lesser-included offenses and no outright acquittals. . . . Those courts which have addressed the issue presented here have held that a malicious prosecution action will not lie if the plaintiff has been convicted of a lesser-included offense. [citing cases] The rationale is that a conviction on a lesser-included offense does not constitute a favorable termination for the accused. . . . Simply put, a judgment in favor of Mr. St. Germain in this case would necessarily call into doubt his convictions on the lesser-included offenses. Although Mr. St. Germain says that he is only attacking the original (and more serious) charges lodged against him, he alleges unlawful behavior (e.g., perjury) that would also undermine his convictions on the lesser-included offenses. Thus, the difficulty of parallel litigation over the issues of probable cause and guilt and the danger of conflicting resolutions arising out of the same or identical transaction exist in this case just as they did in *Heck*.”); *Nuno v. County of San Bernardino*, 58 F. Supp.2d 1127, 1135, 1136 (C.D. Cal. 1999) (“The Court concludes that, for purposes of the *Heck* analysis, a plea of nolo contendere in a California criminal action has the same effect as a guilty plea or jury verdict of guilty. . . . Thus, the Court concludes that the fact that plaintiff’s obstruction of an officer conviction was by plea of nolo contendere does not have any effect on the application of the rule of *Heck v. Humphrey* which precludes his section 1983 cause of action based on Moreno’s alleged use of excessive force in arresting plaintiff.”).

*See also* *Bronowicz v. Allegheny Cnty.*, 804 F.3d 338, 347-48 (3d Cir. 2015) (“Even though the Superior Court did not expressly address Bronowicz’s challenges to the legality of the sentence and revocation proceedings, the Superior Court’s order vacating the January 2011 judgment in light of the Commonwealth’s concession of ‘an error committed at the time of sentencing’ is consistent with Bronowicz’s claim that the sentence imposed in January 2011 was invalid. Unlike in *Kossler* and *Gilles*, the Superior Court order does not imply that the sentence imposed or the proceedings before the Court of Common Pleas in January 2011 were valid. The Superior Court vacated the ‘Judgment of Sentence’ in its entirety. . . and on remand, the Court of Common Pleas released Bronowicz from custody. . . . Neither the Superior Court order nor the subsequent order issued by the Court of Common Pleas vacating Bronowicz’s sentence imposed

any ‘unfavorable’ conditions or burdens on Bronowicz that would be inconsistent with his claim that the January 2011 judgment was imposed illegally. Moreover, the purpose of the favorable termination rule is fully realized by this result because there is no risk that permitting Bronowicz’s § 1983 claims to proceed would lead to ‘two conflicting resolutions arising from the same transaction.’ . . . Upon the imposition of the judgment of sentence in January 2011, Bronowicz did exactly what *Heck* requires—he appealed to a competent state tribunal which declared that judgment invalid. . . . Bronowicz’s claims stemming from the January 2011 revocation proceedings and sentence do not constitute a collateral attack on his sentence because Bronowicz has already successfully challenged his sentence in state court. . . . Success on Bronowicz’s § 1983 claims attacking the legality of the January 2011 proceedings would be fully consistent with the Superior Court’s order. Thus, the Superior Court’s order satisfies the favorable termination rule and fulfills its objectives. We hold that Bronowicz’s § 1983 claims arising from the January 2011 proceedings before the Court of Common Pleas are not barred by *Heck* because Bronowicz has demonstrated that the judgment imposed was invalidated on appeal. The District Court, however, properly dismissed Bronowicz’s remaining § 1983 claims, which, if successful, would impugn the validity of the July 2005 and July 2008 revocation proceedings, as Bronowicz has not demonstrated that those proceedings were terminated in his favor.”); *Kossler v. Crisanti*, 564 F.3d 181, 188, 191 (3d Cir. 2009) (“Kossler’s argument is problematic because his acquittal is accompanied by a contemporaneous conviction at the same proceeding. We are thus faced with a question of first impression in this Circuit: Whether acquittal on at least one criminal charge constitutes ‘favorable termination’ for the purpose of a subsequent malicious prosecution claim, when the charge arose out of the same act for which the plaintiff was convicted on a different charge during the same criminal prosecution. On these facts, we conclude that this question should be answered in the negative. As an initial observation, we note that various authorities refer to the favorable termination of a ‘proceeding,’ not merely a ‘charge’ or ‘offense.’ . . . Therefore, the favorable termination of some but not all individual charges does not necessarily establish the favorable termination of the criminal proceeding as a whole. Rather we conclude that, upon examination of the entire criminal proceeding, the judgment must indicate the plaintiff’s innocence of the alleged misconduct underlying the offenses charged. In urging us not to hold that ‘the favorable termination element . . . categorically requires the plaintiff to show that all of the criminal charges were decided in his favor,’ Kossler himself argues (correctly) that the result ‘depend[s] on the particular circumstances.’ The argument goes both ways: The favorable termination element is not categorically satisfied whenever the plaintiff is acquitted of just one of several charges in the same proceeding. When the circumstances – both the offenses as stated in the statute and the underlying facts of the case – indicate that the judgment as a whole does not reflect the plaintiff’s innocence, then the plaintiff fails to establish the favorable termination element. . . . We read both the *Janetka* and *Uboh* courts’ focus on the differences between the offenses charged and the conduct leading to the charges as implying that, under different facts, when the offenses charged aim to punish the same misconduct, a simultaneous acquittal and conviction on related charges may not amount to favorable termination.”); *Butler v. Compton*, 482 F.3d 1277, 1280, 1281(10th Cir. 2007) (“Although Mr. Butler was not convicted of the burglary charges arising out of Officer Compton’s arrest, he was convicted of three other unrelated burglary charges after he pled guilty to those

charges. He pled guilty to these unrelated burglary charges as part of the same plea agreement in which the burglary charges arising out of Officer Compton's arrest were dismissed. In this § 1983 action, he does not challenge any conduct relating to his conviction on the three burglary charges to which he pled guilty. His sole challenge is to the constitutionality of Officer Compton's conduct during his arrest for the burglary charges that were dismissed. Recognizing that this was an issue of first impression, the district court concluded that it was appropriate to use Mr. Butler's conviction on the unrelated burglary charges as the basis for applying *Heck* to Mr. Butler's case. The district court reached this conclusion by deciding that, if successful, Mr. Butler's § 1983 action would necessarily call into question the validity of his other unrelated burglary conviction because it was a part of the same plea agreement as the related burglary charges that were dismissed. . . . Mr. Butler's § 1983 action seeks compensatory and punitive damages based on conduct that occurred during an arrest by Officer Compton that resulted in two burglary charges. Mr. Butler was not convicted on those charges because they were dismissed as part of a plea agreement. There is no related underlying conviction therefore that could be invalidated by Mr. Butler's §1983 action. Moreover, the purpose behind *Heck* is not implicated here because there is no attempt by Mr. Butler to avoid the pleading requirements of *habeas*. He cannot bring a *habeas* action because he has no conviction to challenge. Mr. Butler's conviction on unrelated charges may not form the basis for the application of *Heck* where there is no challenge to that conviction in Mr. Butler's § 1983 action.”).

*See also Lessard v. Kravitz*, No. 16-1351, 2017 WL 1453997, at \*4 (10th Cir. Apr. 25, 2017) (not reported) (“Having completed a deferred judgment and sentence under Colorado’s deferred-judgment statute, which resulted in the withdrawal of his plea and the dismissal of the criminal charge against him, Mr. Lessard has no existing ‘conviction’ that could be affected by his malicious-prosecution claim. His claims are thus not subject to the *Heck* bar. *Cf. Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (holding *Heck* did not bar § 1983 claim claiming plaintiff’s signature had been forged on agreement resulting in deferred prosecution, because under Kansas law, there was “no related underlying conviction that could be invalidated by [a] § 1983 [suit]”). We are therefore not concerned with exceptions Mr. Lessard cites that may be used to avoid or qualify *Heck*. He has already avoided that bar. . . His challenge is different: he must show a favorable termination that is suggestive of *his innocence*. The completion of his deferred judgment and sentence, with a resulting dismissal, though evading the *Heck* bar, does not meet this standard. *See Land v. Hill*, 644 P.2d 43, 45 (Colo. App. 1981) (holding that vacation of judgment and dismissal of criminal action after guilty plea under Colorado’s deferred-judgment procedure did not constitute a “favorable termination” for purposes of malicious prosecution action). Mr. Lessard’s decision to plead guilty in exchange for a deferred judgment may have robbed him of his malicious prosecution claim, but ‘such trade-offs are a standard feature of malicious prosecution law.’ *Cordova v. City of Albuquerque*, 816 F.3d 645, 652 (10th Cir. 2016).”); *Cordova v. City of Albuquerque*, 816 F.3d 645, 652-54(10th Cir. 2016) (“*Wilkins* adopted the traditional common law element that a dismissal must ‘indicate the innocence of the accused’ to qualify as a favorable termination. . . But in *Smith–Hunter*, the New York Court of Appeals rejected the traditional rule, holding that any dismissal that is ‘*not inconsistent*’ with

innocence qualifies as ‘favorable.’ 734 N.E. 2d at 755 (emphasis added). Not only is *Smith–Hunter*’s conception of the favorable termination requirement at odds with the rule we adopted in *Wilkins*, it flips the traditional rule on its head by presuming terminations are favorable until proven otherwise. As a result, both *Smith–Hunter* and the Second Circuit’s *Rogers* decision, 303 F.3d at 160 (applying *Smith–Hunter* and holding that a speedy trial dismissal is a favorable termination under New York law), are of limited persuasive value. Applying our indicative-of-innocence rule, many courts have found that an abandonment is not favorable even when the crucial evidence was suppressed on *constitutional* grounds. . . In all of these instances, it was the defendant’s exercise of his constitutional right to exclude certain evidence that led to the dismissal. Courts often find that no favorable termination has occurred despite the exercise of statutory or constitutional rights resulting in the termination of a case. . . In fact, most courts follow the *Wilkins* approach and look to the circumstances surrounding speedy trial dismissals to determine whether they indicate the innocence of the accused. . . That Cordova had a statutory right to dismissal under the Speedy Trial Act thus does not set aside his burden of meeting the indicative-of-innocence requirement. Thus, a plaintiff generally cannot maintain a malicious prosecution action unless his charges were dismissed in a manner indicative of innocence, even when he was entitled to dismissal on statutory or constitutional grounds. Although this rule may produce a dilemma for defendants at least in some applications, it is both a standard feature of the tort of malicious prosecution and a reflection of the idea that malicious prosecution actions are disfavored at common law. . . A speedy trial dismissal, moreover, is unlike the *nolle prosequi* in *Wilkins*, in which the prosecution merely dropped the charges. This action by the prosecution is ambiguous, in that we cannot know the reasons for dropping the charges. Here, by contrast, the state court unambiguously granted a motion to dismiss the charges against Cordova. But this distinction is irrelevant. The question we must ask is whether the dismissal was indicative of innocence. It cannot be the case that all dismissals that result from granted motions are favorable terminations for purposes of malicious prosecution actions. The dismissal here does not indicate Cordova’s innocence, so it is not a favorable termination. The favorable termination requirement thus serves as a useful filtering mechanism, barring actions that have not already demonstrated some likelihood of success. Although the traditional requirement may bar some meritorious actions, where prosecutorial delay *does* indicate the innocence of the accused the plaintiff will not be barred from bringing his malicious prosecution claim under our rule. Our conclusion is thus more receptive to Cordova’s fairness concerns than many applications in this area of the law traditionally are—a dismissal due to a lack of jurisdiction or of admissible evidence will rarely reflect on the merits of the case and is therefore more likely to bar a meritorious claim. Nor, we should emphasize, does a dismissal of charges create a presumption of innocence or shift the burden of proving the element of favorable termination to the defendant. In sum, we agree with the district court that the dismissal of the underlying assault charges under New Mexico’s Speedy Trial Act was not indicative of Cordova’s innocence. The undisputed facts reveal the prosecution did not abandon its effort to try Cordova, and nothing suggests the speedy trial dismissal indicated his innocence of the charged crime. Absent such a showing, the district court properly granted summary judgment on the malicious prosecution claim.”); *Wilkins v. DeReyes*, 528 F.3d 790, 803 (10th Cir. 2008) (“To decide whether a *nolle prosequi* constitutes a favorable termination, we look to the stated reasons for the dismissal

as well as to the circumstances surrounding it in an attempt to determine whether the dismissal indicates the accused's innocence. . . . In the circumstances here, the *nolle proseques* should be considered terminations in favor of Plaintiffs. The dismissals were not entered due to any compromise or plea for mercy by either Wilkins or Buchner. Rather, they were the result of a judgment by the prosecutor that the case could not be proven beyond a reasonable doubt.”).

*See also Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124, 1130, 1131 (7th Cir. 2012) (“Here, the district court was presented with a complaint that contains slight inconsistencies as to the date of exoneration. Starks initially alleges that the Illinois Appellate Court reversed his conviction on March 23, 2006, (Starks Compl. at 5), although that court did not issue the related mandate returning jurisdiction to the trial court until January 20, 2007. ( *Id.* at 6). Momentarily ignoring the importance of either date, both of these allegations imply that Starks was fully exonerated following action by the Illinois Appellate Court. Alternatively, the complaint alleges that the state’s attorney sought to re-prosecute Starks even after the Illinois Appellate Court overturned his conviction. ( *Id.* at 6; n.1.) This allegation, of course, suggests that neither action by the Illinois Appellate Court exonerated Starks, which means that his malicious prosecution claim has not yet ripened. . . . Notwithstanding that inconsistency, we can definitively say that Starks’s malicious prosecution (and related) allegations do not trigger the two Northfield policies in effect from November 1, 1991, to November 1, 1995. Because Starks was not exonerated during that policy period, Northfield has no duty to defend his malicious prosecution claims. . . . That leaves us with the St. Paul Fire policy, effective November 1, 2006, to November 1, 2009. Because we are charged with liberally construing the complaint and policy in favor of the appellants, we will evaluate the two divergent lines of allegations in Starks’s complaint, while granting all reasonable inferences to the appellants. We take the easy strain first and assume as true the allegation that Starks has not yet been exonerated. If true, then Starks’s claim for malicious prosecution has not ripened. In other words, Starks was not exonerated during St. Paul Fire’s policy period, and thus, the insurer has no duty to defend in this scenario. The other line of allegations suggests that Starks was fully exonerated once the Illinois Appellate Court vacated his conviction. If true, the question for us is which date applies: the date of the reversal or the date of the mandate. This is also a relatively easy question because the law in Illinois clearly provides that the effective date of an Illinois Appellate Court decision is the date of judgment, not the date the mandate was issued. . . . Thus, even if we were to read the complaint to suggest that Starks was fully exonerated, the effective date of that exoneration is March 23, 2006, which falls outside of St. Paul Fire’s coverage. . . . For civil malicious prosecution matters in Illinois, ‘a criminal proceeding has been terminated in favor of the accused when a prosecutor formally abandons the proceeding via a *nolle prosequi*, unless the abandonment is for reasons not indicative of the innocence of the accused.’ . . . The *Swick* rule leaves two possibilities for Starks and the appellants. If the prosecution was abandoned for reasons of Starks’s innocence, then May 15, 2012, is the trigger date for his malicious prosecution claim. On the other hand, if the prosecutors dropped Starks’s case for some reason not indicative of innocence—such as the unavailability of a key witness—then the *nolle prosequi* order would not have terminated the prosecution in Starks’s favor, leaving Starks yet to be exonerated. We need not decide whether the *nolle prosequi* order in this case is indicative of

innocence because in either scenario, the malicious prosecution occurrence falls outside of St. Paul Fire’s policy.”); *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124, 1135, 1136 (7th Cir. 2012) (Hamilton, J., concurring) (“For the reasons explained in Judge Kanne’s opinion for the court, I am confident that the two insurers in this case are not required to defend or indemnify the city against these claims. As long as the city has kept liability insurance in place over the decades, though, it is highly likely that the city is entitled to a defense and indemnity from at least one insurer, perhaps from more than one. . . . There is plenty of room for confusion and mutual inconsistency in the ways courts handle these different timing issues in these wrongful conviction cases, not to mention malleability of arguments and outcomes. In any particular case, current Illinois law allows capable counsel to make arguments to justify nearly any resolution that would benefit their client—whether the client is the wrongfully convicted plaintiff, the government, or the insurer. Only the Illinois courts can untangle these knots to provide justice, consistency, and predictability. For example, the city here suggested at oral argument that the statute of limitations might have run on Starks’ claims before he could even bring them. The convoluted theory seems to be that Starks was actually exonerated back in 2007 when the Illinois Appellate Court issued its mandate, but that his claims did not accrue until the criminal prosecution ended with the 2012 *nolle prosequi*. Under this theory, the 2012 *nolle prosequi* somehow retroactively started the statute-of-limitations clock running back in 2007, effectively barring Starks’ claims before they accrued and could be brought. The fact that such an argument could be made with a straight face is a symptom of a need for clarification of Illinois law on these timing issues.”)

*See also Moman v. Valenzuela*, No. 18 C 5678, 2021 WL 3285948, at \*5 (N.D. Ill. Aug. 2, 2021) (“[T]he Court must address Moman’s argument that *Heck* cannot apply because his juvenile adjudication is not a conviction. *See People v. Taylor*, 221 Ill. 2d 157, 176 (2006) (“In the absence of a statute expressly defining a juvenile adjudication as a conviction, Illinois courts have consistently held that juvenile adjudications do not constitute convictions.”). But *Heck* does not apply solely to formal criminal convictions, as the Supreme Court and the Seventh Circuit have consistently applied *Heck* to plaintiffs who have been civilly committed or to prisoner disciplinary determinations. [collecting cases] Moreover, other circuits have held that the *Heck* doctrine can be applied to juvenile delinquency proceedings. [collecting cases] This Court agrees and finds that the *Heck* doctrine applies to juvenile adjudications.”)

#### **M. Other Miscellaneous *Heck* Issues**

On the question of *Heck*’s application to immigration orders, *see Humphries v. Various Federal USINS Employees*, 164 F.3d 936, 946 & n.11 (5th Cir. 1999) (“[I]f *Heck* were to apply in the context of immigration orders, it would, by analogy, bar only those claims that ‘necessarily imply’ the invalidity of an INS or BIA order. . . . Assuming *arguendo* that *Humphries* were to recover damages for the alleged involuntary servitude as well as the alleged mistreatment while in detention, these judgments would in no way imply the invalidity of *Humphries*’ detention or exclusion. . . . [A]t least one scenario comes to mind in which *Heck* may bar a claim over which we retain jurisdiction under ‘ 1252(g). An alien whose claim arises from INS misconduct during

an exclusion proceeding, for instance, may be able to invoke our jurisdiction despite ‘ 1252(g), but because that error may in fact impugn the validity of the underlying proceeding, *Heck* may prove relevant.”).

Note that *Heck* has been applied to federal prisoners and *Bivens* actions. *See, e.g., Martin v. Sias*, 88 F.3d 774 (9th Cir.1996). *See also Mohamed v. Tattum*, 380 F.Supp.2d 1214, 1223 (D. Kan. 2005) (“Just as the actions in *Heck* and *Edwards* implied the invalidity of the plaintiffs’ conviction and disciplinary action, a finding that defendant failed to protect plaintiff from an attack by his cellmate implies the invalidity of the disciplinary adjudication whereby plaintiff was adjudged guilty of fighting. Plaintiff’s *Bivens* claim bears a sufficient relationship to the disciplinary adjudication such that the claim is not cognizable absent the invalidation of the disciplinary adjudication. If plaintiff’s injuries were actually the result of defendant’s failure to protect rather than plaintiff’s *active participation* in a fight, the disciplinary hearing findings are necessarily erroneous and must be invalidated. But plaintiff admitted guilt during the disciplinary hearing and has not appealed the disciplinary hearing findings, despite being given an opportunity to do so. Accordingly, his failure to protect action against defendant is not cognizable pursuant to the principles announced in *Heck* and *Edwards*.”). *See also Priovolos v. F.B.I.*, 632 F. App’x 58, 60 n.2 (3d Cir. 2015) (“It appears that Priovolos is no longer serving his sentence for the murder conviction. . . We have held, however, that *Heck*’s favorable termination rule applies even when the plaintiff is no longer in custody and cannot pursue habeas relief. *Gilles v. Davis*, 427 F.3d 197, 209–10 (3d Cir.2005). In addition, we have not addressed in a precedential opinion whether *Heck* applies to FTCA actions. For purposes of this appeal, however, we will ‘assume that the exception of *Heck* extends to FTCA claims.’ *Morrow v. Fed. Bureau of Prisons*, 610 F.3d 1271, 1272 (11th Cir.2010); *see also Erlin v. United States*, 364 F.3d 1127, 1133 (9th Cir.2004) (holding that “a civil action under the Federal Tort Claims Act for negligently calculating a prisoner’s release date, or otherwise wrongfully imprisoning the prisoner, does not accrue until the prisoner has established, in a direct or collateral attack on his imprisonment, that he is entitled to release from custody.”); *Parris v. United States*, 45 F.3d 383, 384–85 (10th Cir.1995) (holding that *Heck* applies to actions brought under the FTCA.”)

The Ninth Circuit has held that *Heck* does not operate as an evidentiary bar. *Simpson v. Thomas*, 528 F.3d 685, 691, 696 (9th Cir. 2008) (“We turn next to yet another issue of first impression in this circuit: whether *Heck v. Humphrey* may be used to bar evidence in a § 1983 claim for excessive force. We conclude that *Heck* does not create a rule of evidence exclusion. Therefore, if, as in this case, a party is permitted to proceed on a § 1983 claim, relevant evidence may not be barred under the rule announced in *Heck*. . . . In light of our analysis of Supreme Court precedent relating to *Heck*, ‘§ 1983 and 2254, we hold that *Heck* is not an evidentiary doctrine. Therefore, we reverse and remand for a new trial. We conclude that even if the district court determines on remand that Simpson may not file a § 1983 lawsuit relating to any injuries stemming from Thomas’s alleged punch upon entering the cell, Simpson is still entitled to tell the jury the entire story – in other words, he may present evidence and/or testimony that Thomas initiated the physical confrontation in the cell by punching Simpson.”).

The Seventh Circuit has held that the *Heck* doctrine is not a jurisdictional bar and that it is a defense that is subject to waiver. *Polzin v. Gage*, 636 F.3d 834, 837, 838 (7th Cir. 2011) (“Mr. Polzin maintains that the district court improperly ruled on the merits of his claims. In his view, the district court could not address his constitutional arguments on the merits because *Heck* required the court to dismiss his case without prejudice. The *Heck* doctrine is not a jurisdictional bar. . . . Because it is not jurisdictional, the *Heck* defense is subject to waiver. . . . We have implied, but never explicitly held in a published opinion, that district courts may bypass the question of whether *Heck* applies to decide a case on its merits. We now hold explicitly that district courts may bypass the impediment of the *Heck* doctrine and address the merits of the case.”). See also *Vuyanich v. Smithton Borough*, 5 F.4th 379, 389 (3d Cir. 2021) (“Importantly, the *Heck* decision contains no jurisdictional language. Instead, it holds that a ‘§ 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.’ . . . Consistent with this approach, at least one of our sister circuits has treated *Heck* as an affirmative defense rather than a jurisdictional rule. See *Carr v. O’Leary*, 167 F.3d 1124, 1126 (7th Cir. 1999) (“The failure to plead the *Heck* defense in a timely fashion was a waiver[.]”); but see *O’Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019) (stating, without analysis, that “[w]hether *Heck* bars § 1983 claims is a jurisdictional question”). As the Ninth Circuit has opined, ‘compliance with *Heck* most closely resembles the mandatory administrative exhaustion of [Prison Litigation Reform Act] claims, which constitutes an affirmative defense and not a pleading requirement.’ *Washington v. Los Angeles Cnty. Sheriff’s Dep’t*, 833 F.3d 1048, 1056 (9th Cir. 2016). We agree that *Heck* does not implicate a federal court’s jurisdiction; thus there is no need to reach Defendants’ *Heck* argument at this time.”); *Colvin v. LeBlanc*, 2 F.4th 494, 498-99 & n.20 (5th Cir. 2021) (“We have routinely characterized a *Heck* dismissal as one for failure to state a claim, . . . but district courts in this circuit have occasionally characterized *Heck* as a jurisdictional doctrine. . . . We have also, at least once, affirmed a *Heck* dismissal granted for lack of subject matter jurisdiction. . . . We therefore take this opportunity to reiterate that *Heck* does not pose a jurisdictional bar to the assertion of § 1983 claims. *Heck* discussed the scope of § 1983 claims, not subject matter jurisdiction. . . . It based its holding on the ‘hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments,’ and analyzed when and how a § 1983 cause of action accrues. . . . By its own language, therefore, *Heck* implicates a plaintiff’s ability to state a claim, not whether the court has jurisdiction over that claim. We therefore hold that *Heck* does not present a jurisdictional hurdle that would require a remand of this case to state court.<sup>20</sup> **[fn. 20:** This reading comports with the Seventh Circuit, which has held that ‘[t]he *Heck* doctrine is not a jurisdictional bar.’ *Polzin v. Gage*, 636 F.3d 834, 837 (7th Cir. 2011). Other circuits, often in unpublished cases or in dicta, have suggested the same. [collecting cases] This view is not shared by the First Circuit, where ‘[w]hether *Heck* bars § 1983 claims is a jurisdictional question that can be raised at any time during the pendency of litigation.’ *O’Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019). And the Eleventh Circuit’s approach is unclear, having recently endorsed both approaches. Compare *Teagan v. City of McDonough*, 949 F.3d 670, 678 (11th Cir. 2020) (noting that ‘the Supreme Court’s own language suggests that *Heck* deprives the plaintiff of a cause of action—not that it deprives a court of jurisdiction’ but noting that it has not ‘definitively

answered that question’), with *Dixon v. Hodges*, 887 F.3d 1235, 1237 (11th Cir. 2018) (per curiam) (calling *Heck* a rule that ‘strips a district court of jurisdiction in a § 1983 suit.’)]; *Teagan v. City of McDonough*, 949 F.3d 670, 678 (11th Cir. 2020) (“In his concurrence, Judge Tjoflat concludes that Ms. Teagan’s § 1983 claims are barred by *Heck v. Humphrey*[.]. . . Having already affirmed the grant of summary judgment in favor of the City on the § 1983 claims, we need not address the applicability of *Heck*. First, the Supreme Court’s own language suggests that *Heck* deprives the plaintiff of a cause of action—not that it deprives a court of jurisdiction. . . . As a result, some of our sister circuits have concluded that *Heck* is an affirmative defense and not a jurisdictional rule. [collecting cases]”)

On the question of whether a *Heck* dismissal counts as a “strike” under the PLRA, see *Garrett v. Murphy*, 17 F.4th 419, 423-24, 427-28 (3d Cir. 2021) (“Because Garrett has filed many fruitless lawsuits, this Court queried whether he should be allowed to avoid prepaying filing fees under the three-strikes rule. 28 U.S.C. § 1915(g). Garrett’s eligibility to avoid prepaying fees turns in part on whether suits barred by *Heck v. Humphrey* are properly dismissed for failure to state a claim. . . . Because this is an important question of law that has divided the circuits, we appointed the Georgetown Law Appellate Courts Immersion Clinic as amicus to address this and other issues relevant to Garrett’s application. Amicus has ably discharged its responsibilities, but we nevertheless conclude that Garrett has struck out. A suit dismissed under *Heck* is dismissed for failure to state a claim and counts as a strike. We will deny Garrett’s motion to proceed in forma pauperis. To press his appeal, Garrett must first pay the filing fee. . . . Every year, pro se prisoners file over one thousand civil-rights suits in this circuit. . . . Many of these suits are barred by *Heck*’s favorable-termination requirement, but courts must nevertheless use their limited time to read the pleadings and dismiss them, delaying justice in other cases. And yet, until now, we have never addressed in a precedential opinion whether a dismissal under *Heck* counts as a PLRA strike for failure to state a claim. . . . Several other circuits have addressed this issue. The Fifth, Tenth, and D.C. Circuits have held that dismissals for failure to meet *Heck*’s favorable-termination requirement count as dismissals for failure to state a claim. *Colvin v. Le-Blanc*, 2 F.4th 494, 499 (5th Cir. 2021); *Smith v. Veterans Admin.*, 636 F.3d 1306, 1311–12 (10th Cir. 2011); *In re Jones*, 652 F.3d 36, 38 (D.C. Cir. 2011). The Seventh and Ninth Circuits, however, have characterized *Heck*’s favorable-termination requirement as an affirmative defense subject to ‘waiver,’ analogous to an exhaustion requirement. *Polzin v. Gage*, 636 F.3d 834, 838 (7th Cir. 2011); *Washington v. L.A. Cnty. Sheriff’s Dep’t*, 833 F.3d 1048, 1056 (9th Cir. 2016). The First and Eleventh Circuits have described *Heck*’s favorable-termination requirement as both ‘jurisdictional’ and as an ‘element’ of a claim for damages arising from a conviction or sentence under § 1983. Compare *O’Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019), with *Figueroa v. Rivera*, 147 F.3d 77, 81 (1st Cir. 1998); see also *Harrigan v. Metro Dade Police Dep’t Station #4*, 977 F.3d 1185, 1191 n.4 (11th Cir. 2020). For our part, we recently held that *Heck*’s favorable-termination requirement ‘does not implicate a federal court’s jurisdiction.’ *Vuyanich v. Smithton Borough*, 5 F.4th 379, 389 (3d Cir. 2021). We now join the Fifth, Tenth, and D.C. Circuits in holding that the dismissal of an action for failure to meet *Heck*’s favorable-termination requirement counts as a PLRA strike for failure to state a claim. We do so

for a simple reason: Any other rule is incompatible with *Heck*. *Heck* is clear. Suits dismissed for failure to meet *Heck*'s favorable-termination requirement are dismissed because the plaintiff lacks a valid 'cause of action' under § 1983, and a cause of action in this context is synonymous with a 'claim' under the PLRA. . . This is consistent with the Supreme Court's consistent interpretation of *Heck*'s favorable-termination requirement as necessary to bring 'a complete and present cause of action' under § 1983. *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019) (citation omitted). It is also consistent with the tort of malicious prosecution *Heck* relied on. Favorable termination is (and always has been) a necessary element of a malicious prosecution claim. . . Without favorable termination, a plaintiff lacks a claim, and the complaint must be dismissed as premature for failure to state a claim. . . Dismissals for failure to meet *Heck*'s favorable-termination element therefore count as PLRA strikes for failure to state a claim."); *Washington v. Los Angeles Cty. Sheriff's Dep't*, 833 F.3d 1048, 1055-56 & n.4 (9th Cir. 2016) ("Washington advances several arguments concerning why *Heck* dismissals do not qualify as strikes. . . First, we address the legal framework for determining when a *Heck* dismissal constitutes a strike, including whether such dismissals may be 'frivolous, malicious, or fail[ ] to state a claim' under the PLRA. 28 U.S.C. § 1915(g). Ultimately, we hold that a dismissal may constitute a PLRA strike for failure to state a claim when *Heck*'s bar to relief is obvious from the face of the complaint, and the entirety of the complaint is dismissed for a qualifying reason under the PLRA. Second, we apply this legal framework to the facts of Washington's case, and conclude that the *Heck* dismissal in question, No. 2:09-CV-3052, does not constitute a PLRA strike. . . First, Washington contends that a complaint dismissed under *Heck*, standing alone, is not a per se 'frivolous' or 'malicious' complaint. We agree. A *Heck* dismissal is not categorically frivolous—that is, having 'no basis in law or fact,' . . . because plaintiffs may have meritorious claims that do not accrue until the underlying criminal proceedings have been successfully challenged. . . For this reason, a *Heck* dismissal is made without prejudice, such that a prisoner may refile the complaint once his conviction has been overturned. . . Neither do all *Heck* dismissals categorically count as dismissals for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). We have previously determined that the language 'fails to state a claim upon which relief may be granted' in § 1915(g), tracks the language of Rule 12(b)(6), and that dismissals under Rule 12(b)(6) may constitute strikes within the meaning of the PLRA. . . We now hold that *Heck* dismissals may constitute Rule 12(b)(6) dismissals for failure to state a claim when the pleadings present an 'obvious bar to securing relief' under *Heck*. . . We do not hold, however, that a successful challenge to the underlying criminal proceedings, *i.e.*, 'favorable termination,' is a necessary element of a civil damages claim under § 1983. . . Section 1983 merely requires that a litigant allege a 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' and that the challenged conduct transpire 'under color of [state law].' . . The fact that a conviction has been set aside is *not* an element of the claim at issue. Indeed, a particular plaintiff's need to demonstrate that his conviction has been set aside is contingent on a threshold legal determination, made by the court, that the requested relief would undermine the underlying conviction. . . Instead, compliance with *Heck* most closely resembles the mandatory administrative exhaustion of PLRA claims, which constitutes an affirmative defense and not a pleading requirement. . . Like dismissals for lack of administrative exhaustion, *Heck* dismissals do not reflect a final determination on the underlying merits of the case. . . Rather, *Heck* dismissals

reflect a matter of ‘judicial traffic control’ and prevent civil actions from collaterally attacking existing criminal judgments. . . Therefore, as with affirmative defenses, a court may properly dismiss a *Heck*-barred claim under Rule 12(b)(6) if there exists an ‘obvious bar to securing relief on the face of the complaint.’ . . With respect to No. 2:09-CV-3052, the *Heck* deficiency was plain from the face of the complaint, as Washington sought a ‘recall’ of his allegedly unlawful sentence, thereby revealing that it was still extant. . . . In light of the above analysis of *Heck*, we must next decide whether the dismissal in No. 2:09-CV-3052 triggered a PLRA strike. Before proceeding, however, we clarify that so-called *Heck* dismissals come in various guises. This is an important distinction because only a complete dismissal of an action under *Heck*—rather than the dismissal of a particular claim within that action—constitutes a strike. . . Broadly speaking, there are two kinds of cases in which *Heck* is implicated. The first type was presented in *Heck* itself, where a prisoner filed a civil suit seeking purely money damages related to an allegedly unlawful conviction. . . *Heck* barred the suit because an award of damages would undermine the validity of the underlying conviction, and the entire action therefore faced dismissal under *Heck*. . . Another type is the one we have before us, in which a prisoner seeks injunctive relief challenging his sentence or conviction—and further seeks monetary relief for damages attributable to the same sentence or conviction. The first request, for injunctive relief, sounds in habeas, and is not subject to the PLRA’s regime. . . The second request, seeking damages, is intertwined with Washington’s plea for injunctive relief, and is therefore subject to dismissal under *Heck*. When we are presented with multiple claims within a single action, we assess a PLRA strike only when the ‘case as a whole’ is dismissed for a qualifying reason under the Act. . . Although one portion of Washington’s action might have been dismissed for failure to comply with *Heck*, the remainder sounds only in habeas. A habeas action, as we have held, is not a ‘civil action’ within the purview of the PLRA because it operates to challenge the validity of a criminal proceeding, and its dismissal does not trigger a strike. . . As a result, Washington has not accrued a strike for the dismissal of his first suit, No. 2:09-CV-3052, because the entire action was not dismissed for one of the qualifying reasons enumerated by the Act. . . Considered from another angle, the *Heck*-dismissed claims were part and parcel of Washington’s legal challenge to his criminal sentence. Washington sought relief from the fact or duration of his confinement, specifically a ‘recall of his sentence,’ and related monetary damages. This prompted the district court to advise him that habeas proceedings were ‘the proper mechanism’ for challenges to his sentence. Until Washington has proven the invalidity of that sentence, he is barred from obtaining damages arising from it. . . Because Washington’s *Heck*-barred damages claims are thus intertwined with his habeas challenge to the underlying sentence, we decline to impose a strike with respect to his entire action. This approach squares with the underlying purposes of the PLRA, where Congress was preoccupied with the proliferation of civil-rights suits challenging prison conditions—not criminal convictions. . . . The two circuit courts to consider this issue directly have both held that *Heck* dismissals may constitute a strike for ‘failure to state a claim,’ although their reasoning on this score is overbroad. *See Smith v. Veterans Admin.*, 636 F.3d 1306, 1312 (10th Cir. 2011) (holding that “the favorable termination of a habeas case is an *essential element* of a prisoner’s civil claim for damages brought under 42 U.S.C. § 1983 that necessarily implies the invalidity of the prisoner’s conviction”); *In re Jones*, 652 F.3d 36, 37 (D.C. Cir. 2011) (per curiam) (adopting the reasoning in *Smith*); *see also Hamilton*

*v. Lyons*, 74 F.3d 99, 103 (5th Cir. 1996) (holding, with scant analysis, that *Heck* dismissals are categorically “frivolous”).”)