

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-7545-CIV-ZLOCH

RICHARD COTTONE, as Personal
Representative of the Estate
of PETER ANTHONY COTTONE, JR.,
and PETER COTTONE, SR.,

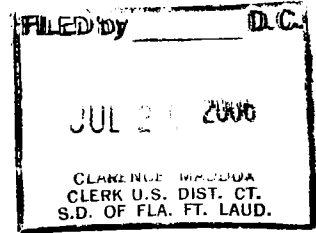
Plaintiffs,

vs.

O R D E R

KENNETH C. JENNE, II, et al.,

Defendants.



THIS MATTER is before the Court upon Defendants Andrew Perfilio, M.D., Maurice Waldman, M.D., Elma McKenzie, L.P.N., and EMSA Correctional Care, Inc.'s ore tenus Motion For Judgment As A Matter Of Law and Defendants Kenneth C. Jenne, II, in his official capacity as Sheriff of Broward County, Florida, Joseph D'Elia and George Williams's ore tenus Motion For Judgment As A Matter Of Law. Both Motions were made in open Court on April 14, 2006, and were made pursuant to Federal Rule of Civil Procedure 50(a) once Plaintiffs' case in chief was fully heard. The Court has carefully considered said Motions and the entire court file and is otherwise fully advised in the premises.

I. Background

The above-styled cause arises from the tragic and senseless death of Peter Anthony Cottone Jr. (hereinafter "Cottone") on April 7, 1999 while he was being held as a pre-trial detainee at the

405
IK

North Broward Detention Center (hereinafter the "NBDC"). Cottone died after being choked by fellow inmate, Widnel Charles (hereinafter "Charles").¹ Charles is a schizophrenic who was identified as such during his jail intake based upon his own admission, and the observation of an intake psychiatrist, Mel Limia, M.D. (hereinafter "Dr. Limia"). Before murdering Cottone, Charles was involved in numerous altercations with other inmates, the first occurring the day he arrived at the jail, and the last occurring the day before the murder at issue in the above-styled cause. As a result of this last altercation, Charles was transferred to a three man pod located in the mental health unit of the NBDC where he was housed with Cottone and a third inmate, Albert St. Hubert (hereinafter "St. Hubert"). The pod contained three one-man cells which faced a day room that operated as an enclosed common area and to which all three cells had access. At the time of Cottone's murder, the doors of each cell were open. At some point between 12:20 p.m. and approximately 12:36 p.m., Charles entered Cottone's cell and strangled him using shoelaces taken from his own shoes. Cottone was transported to North Broward Medical Center where he died a few hours later.

This action was initiated by Cottone's father, Peter Cottone Sr., and Cottone's brother, Richard Cottone, as the representative

¹ This fact, and those that follow, are taken from the evidence presented at trial unless otherwise noted.

of Cottone's estate. See DE 83, ¶¶ 7-9. On February 18, 2002, Peter Cottone, Sr. died, and the Cottone family subsequently named Richard Cottone as representative of his estate. By prior Order (DE 122), the Court substituted Richard Cottone, as Executor of the estate of Peter Cottone, Sr., for Peter Cottone, Sr. as a Plaintiff in the above-styled cause.²

The currently operative Complaint is the Amended Complaint (DE 83) wherein Plaintiffs state causes of action against the following remaining Defendants: (1) Kenneth C. Jenne, II, in his official capacity as Sheriff of Broward County, Florida (hereinafter "Sheriff Jenne" or "BSO"); (2) Joseph D'Elia (hereinafter "Deputy D'Elia") and George Williams (hereinafter "Deputy Williams"), individually and in their official capacities as the Deputy Sheriffs on duty in the mental health unit at the time of Cottone's murder; (3) EMSA Correctional Care, Inc. (hereinafter "EMSA"), a Florida corporation that contracted with BSO to provide health care, including mental health care, to inmates in the custody and control of BSO; and (4) Andrew Perfilio, M.D. (hereinafter "Dr. Perfilio"), Maurice Waldman, M.D. (hereinafter "Dr. Waldman"), and Elma McKenzie, L.P.N. (hereinafter "Nurse McKenzie"), individually and in their official capacities as doctors and a nurse employed by

² Richard Cottone, therefore, brings this action as the Representative of two Estates - that of his brother and that of his father. The two estates are denominated collectively in this Order as "Plaintiffs".

EMSA, each of whom allegedly treated or oversaw treatment of Charles. Plaintiffs state claims against these Defendants pursuant to 42 U.S.C. § 1983 and the Fourth, Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. Plaintiffs allege, in essence, that each Defendant acted with deliberate indifference to a known substantial risk of serious harm to Cottone while he was incarcerated.

Based upon the state of the record as it stood at the close of Plaintiffs' case in chief, the Court granted the instant Motions in open Court on April 17, 2006. The Court enters this Order for the purpose of setting forth its reasoning.

II. Judgement As A Matter Of Law

Federal Rule of Civil Procedure 50 provides that

[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

FED. R. Civ. P. 50(a)(1). In granting the instant Motions, the Court resolved all the factual disputes and drew all logical inferences in favor of Plaintiffs to determine whether those facts and inferences "so strongly favor one party 'that reasonable people, in the exercise of impartial judgment, could not arrive at a contrary verdict.'" Rankin v. Evans, 133 F.3d 1425, 1435 (11th

Cir. 1998) (quoting Bailey v. Bd. of County Comm'rs of Alachua County, 956 F.2d 1112, 1119 (11th Cir. 1992)). A mere scintilla of evidence does not create a jury question; rather, a jury question is only created by a substantial conflict in the evidence. Rankin, 133 F.3d at 1435.

III. Municipal Liability Pursuant To 42 U.S.C. § 1983

The Court begins by considering the claim stated against Sheriff Jenne. 42 U.S.C. § 1983, originally enacted as part of the Civil Rights Act of 1871, provides that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . 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

42 U.S.C. § 1983 (2003). It should be noted from the outset that § 1983 forecloses the possibility of municipal vicarious liability, or more specifically, respondeat superior liability. This is so because § 1983 liability may only attach to the person who "subjects, or causes to be subjected" a citizen to a constitutional violation. See Monell v. Dep't of Soc. Serv. of the City of New York, 436 U.S. 658, 692 (1978).

In 1978, the United States Supreme Court held that a local governmental entity can be held liable under § 1983 "when execution of [the] government's policy or custom . . . inflicts the injury" Id. at 694 (overruling Monroe v. Pape, 365 U.S. 167, 187

(1961) which held that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]"). In applying this holding to the facts before it, the Monell court found that the municipality in question was liable under § 1983 because its policy was the "moving force" behind the constitutional violation of which the plaintiff therein complained. Id. The Supreme Court stated further, however, that it was not addressing "what the full contours of municipal liability under § 1983 may be." Monell, 436 U.S. at 695.

Those contours became clearer with the decision of City of Canton v. Harris, 489 U.S. 378 (1989), where the Supreme Court held that "the inadequacy of police training may serve as the basis for § 1983 liability [but] only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton, 489 U.S. at 388. The Court held that inadequate training would only amount to the municipal "policy or custom" required by Monell where "a deliberate choice to follow a course of action is made from among various alternatives," and that choice amounts to "deliberate indifference to the rights of [the municipality's] inhabitants." Id. at 389 (internal quotations and citations omitted). Recognizing that there was still uncertainty regarding the parameters of deliberate indifference, the Supreme Court subsequently clarified

that a prison official cannot be found liable under the

Eighth Amendment³ for denying an inmate humane conditions of confinement unless the official 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.

Farmer v. Brennan, 511 U.S. 825, 837 (1994) (emphasis added). It is important to note that in adopting actual notice as the standard, the Supreme Court expressly rejected the civil recklessness standard for deliberate indifference, which would have imposed liability where an official disregards a risk of harm that either is known or should be known. Id.

The holdings of City of Canton and Farmer make clear the high burden imposed upon plaintiffs alleging municipal liability based on deliberate indifference, as are Plaintiffs in the above-styled cause. They are not without guidance, however, as to how the burden is to be met because the United States Court of Appeals for the Eleventh Circuit has instructed that this actual notice requirement "may be demonstrated in one of two ways." Young v. City of Augusta, Georgia, 59 F.3d 1160, 1172 (11th Cir. 1995). First, a plaintiff may make a showing that "a pattern of

³ While a convicted prisoner receives the protection from cruel and unusual punishment afforded by the Eighth Amendment, a pre-trial detainee, like Cottone, cannot lawfully receive "punishment" and so is provided the protections of due process guaranteed by the Fourteenth Amendment. See Hamm v. DeKalb County, 774 F.2d 1567, 1572 (11th Cir. 1985). The Court notes, however, that "with respect to the provision of basic necessities to individuals in the state's custody, the two provisions necessarily yield the same result." Id. at 1574.

constitutional violations exists such that the municipality knows or should know that corrective measures are needed." Id. (citing Belcher v. City of Foley, Ala., 30 F.3d 1390, 1397-98 (11th Cir. 1994)). Alternatively, a plaintiff may make a showing of the existence of an "obvious need" for a certain course of action based upon "clear constitutional duties in recurrent situations." Id. (citing City of Canton, 489 U.S. at 390 n. 10); see also Bd. of County Comm'rs of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 409 (1997) (leaving open the possibility that, in addition to showing a pattern of constitutional violations, a plaintiff "hypothetically" can succeed in stating a failure to train claim by showing that "a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with the specific tools to handle recurring situations.")). The Court notes that there exists some tension between allowing for the "obvious need" or "highly predictable" form of notice, while requiring that notice be actual. The tension is resolved, however, by allowing only the highest degree of obviousness to satisfy the notice requirement. See City of Canton, 489 U.S. at 390 n. 10. (providing as an example of such obvious need the need to train officers in the constitutional limits of deadly force after equipping them with firearms).

While Young articulates the means of showing notice of a substantial risk, the Court turns elsewhere for guidance as to the

type of notice a defendant must have of that risk. The Eleventh Circuit has construed very strictly the Supreme Court's holding in Farmer requiring a plaintiff to show that a prison official was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, and further showing that he in fact drew the inference. In Carter v. Galloway, 352 F.3d 1346 (11th Cir. 2003), an inmate alleged that deliberate indifference by a deputy warden and a jail unit supervisor led to him being assaulted and stabbed by his cell mate. The evidence showed that the defendants knew plaintiff's cell mate was a "problem inmate" with a well documented history of prison disobedience and . . . prone to violence" and that at the time in question, the cell mate was "act[ing] crazy, [and] roaming his cell like a 'caged animal.'" Carter, 352 F.3d at 1349. The evidence further showed that, in addition to alerting them to the above facts, the plaintiff informed the defendants that his cell mate wanted to fake a hanging, and that the cell mate had told the plaintiff that the plaintiff would help fake the hanging "one way or another." Id.

Notwithstanding the aforementioned state of the record in Carter, the Eleventh Circuit affirmed the entry of summary judgment in favor of the defendants because there was no evidence showing that they were aware "of a particularized threat or fear felt" by the plaintiff. Id. at 1350. The court therein further held that

to find that the defendants had drawn the inference that the above facts amounted to a substantial threat, as required by Farmer, the district court would have been making a finding based on an assumption, and not on the state of the record. Id.; see also McBride v. Rivers, 2006 WL 622591, * 5 (11th Cir. March 14, 2006) (citing Carter, 352 F.3d at 1349) (holding that "before a defendant's awareness rises to a sufficient level of culpability, there must be much more than mere awareness of an inmate's generally problematic nature.").

In sum, the Court notes that a municipality may be held liable pursuant to § 1983 only where its official policy is the "moving force" behind the alleged constitutional violation. A failure to train, supervise, or discipline employees may amount to just such a policy, but only where the municipality's failure to train is the result of deliberate indifference to the rights of its citizens. A municipality will not be said to have shown such deliberate indifference absent a conscious choice made in the face of notice of facts giving rise to an inference of substantial risk of serious harm. The two means by which a plaintiff can show that a municipality had notice of such a risk are by establishing the existence of a pattern of prior constitutional violations, or the existence of an obvious need for training due to recurring situations with constitutional implications. Finally, if a plaintiff, by one of these means, establishes that a defendant had

notice of facts as stated above, this must be accompanied by a showing that the defendants drew the requisite inference from those facts. With this analysis in mind, the Court turns to the reasoning for its determination that even when viewing all of the evidence presented by Plaintiffs in the light most favorable to them, there existed no legally sufficient basis upon which a reasonable jury could have found that Sheriff Jenne had the required notice that there existed an excessive or substantial risk of serious harm to Cottone.

A. Widnel Charles's Violent History

Plaintiffs presented testimonial and documentary evidence clearly establishing that Charles was involved in numerous altercations from the time he was admitted to the Broward County jail system on March 1, 1999 until the day he murdered Cottone on April 7, 1999. The evidence showed that Charles' first altercation occurred during his intake, and the last altercation took place the night before he was transferred into the mental health unit pod where he murdered Cottone. Indeed, Sheriff Jenne admitted that during Charles' time in jail, he was involved in 7 altercations. The testimony from numerous witnesses established that while each of these fights should have been documented, only 2 in fact were. It is clear that BSO employees were not properly following BSO policy of documenting altercations that would let other employees know the frequency with which Charles was fighting.

The Court finds, however, that making the inference most favorable to Plaintiffs that this evidence allows, it establishes only that Charles posed a fight risk. There was no evidence presented to show Charles posed an excessive or substantial risk to any other inmate during the period of incarceration leading up to Cottone's murder. Nurse McKenzie provided the only testimony describing the aftermath of an altercation in which Charles was involved, and she testified that Charles had bruised knuckles and his cell mate had a swollen face. It cannot be said that this type of injury put BSO on notice that Charles posed some excessive or substantial threat to his fellow inmates. At most, the evidence presented at trial established Charles's "generally problematic nature," which is not sufficient to put Sheriff Jenne on notice for the purpose of § 1983 deliberate indifference analysis. See Carter, 352 F.3d at 1349.

This finding of a lack of § 1983 notice is especially appropriate in an environment where, as BSO Deputies Kevin Moher and Douglas Wendt testified, fighting among inmates is not unusual. In fact, retired EMSA Psychiatric Site Supervisor Mercedes Nelson testified that if she was called every time there was a fight between inmates, she would be called "every two seconds." While the Court notes Nelson's use of hyperbole, her testimony does make clear that fighting was not an extraordinary occurrence in the jail. Plaintiffs presented no evidence showing that Charles was

exceptional in his penchant for fighting, or that his altercations were of an exceptionally violent or egregious nature such that they created a pattern of constitutional violations providing the required notice to Sheriff Jenne. Absent such a showing, the Court finds that there was no legally sufficient basis for a jury to find that Sheriff Jenne was on notice that Charles posed an excessive or substantial threat to his fellow inmates.

The Court notes that Plaintiffs argued at various times during trial that the aforementioned failure of documentation was a means by which BSO wrongfully protected itself from liability. In other words, there was no way to know if Charles' fights were severe enough to put BSO on notice that he posed an excessive threat to his fellow inmates because documentation of the same does not exist due to BSO's deliberate indifference. The Court finds, however, that such an absence does not relieve Plaintiffs of their burden to satisfy the legal standard for municipal liability. If the documentation that should exist as to Charles's fighting does not exist, the Court may not take Plaintiffs' word for it that what is missing would have put Sheriff Jenne on the required notice of the threat posed to Cottone. Perhaps resourcefulness could have turned up other sources of proof; perhaps there exists no way to establish that Sheriff Jenne had notice of any threat posed to Cottone by Charles, or inmates like him. While the answers to these questions are unknown, it is clear that the Court may not fill in the gaps in

Plaintiffs' case with evidence establishing a pattern of behavior by Charles so egregious as to put Sheriff Jenne on notice that there existed a serious risk of substantial harm to Cottone. Rule 50 requires that the Court resolve all disputes in favor of the Plaintiffs, and that it draw in favor of Plaintiffs all reasonable inferences from the evidence actually presented. Rule 50 does not, however, require that the Court conjure into existence legally sufficient evidence not otherwise presented which will satisfy the standard Plaintiffs are required to meet.

B. Windel Charles' Mental Illness

Plaintiffs also presented irrefutable evidence that Charles was suffering from schizophrenia at the time in question. The testimony from Charles gave the clearest view as to the extent to which his interior condition deteriorated. In a deposition taken on May 16, 2003 and read into the record at trial, Charles testified that at the time in question, he felt everything going on was somehow related to him, and that everyone was against him. He testified, in fact, that his murder of Cottone was directly attributable to these symptoms, and that he killed Cottone because he felt that the decedent was against him. Additionally, Charles testified that he told certain unnamed guards that he needed more medication, as well as the type of medication he needed.

Testimony from other witnesses also established that Charles was exhibiting signs of schizophrenia. Upon his psychiatric

intake, for example, Charles asked Dr. Limia to "fix his third eye" and asked Nurse Patricia Rell, an intake nurse, to "clean his third eye." Dr. Limia testified that he believed Charles was an undifferentiated schizophrenic, which he characterized as the type of schizophrenic who would "have a tough time keeping it together." As an example of what he meant by this phrase, Dr. Limia stated that such a schizophrenic might have a difficult time maintaining employment, and may hold ten jobs in a year. Dr. Limia further testified that despite believing that Charles exhibited the aforementioned level of schizophrenia, and despite the fact that Charles admitted to hallucinations, he did not believe that Charles posed a threat. He recommended that Charles be housed at the NBDC in the mental health population, but testified that this was for Charles's own protection.

Plaintiffs also introduced evidence showing that Charles's condition was deteriorating during his time in jail.⁴ Nurse Maud Boleman, for example, testified that she witnessed Charles pacing in an agitated condition, and further testified that she often found Charles naked. Nurse McKenzie testified that in the early days of April 1999, she found Charles to be sad, anxious, and disheveled. On the day of the murder, Nurse McKenzie observed that Charles was "rambling," by which she meant talking to himself.

⁴ Although not all testimony received supports this characterization, the Court resolves such dispute in favor of Plaintiffs pursuant to Rule 50.

Based upon the contrast of this testimony when considered next to Dr. Limia's testimony, a reasonable jury could have found that Charles was in an increasingly psychologically agitated state as the date of Cottone's murder neared.

The Court finds, however, that even when drawing all reasonable inferences in favor of Plaintiffs, there is insufficient evidence in the record to establish that Sheriff Jenne had notice that Charles posed a substantial risk of serious harm to his fellow inmates. Such notice would have to be provided from Charles' statements that he wanted someone to tend to his "third eye," his disheveled or even naked appearance, his sad and anxious demeanor, and his pacing about and talking to himself. These facts do not provide a legally sufficient basis for putting Sheriff Jenne on notice that Charles posed an excessive threat of violence.

Indeed, the presented testimony established that not a single witness believed Charles posed a threat of violence to anybody. First, while Charles's deposition testimony established that he asked guards for medication, it lacked any indication that he informed anyone that he felt everyone was against him. There was no other evidence that tended to show that anyone was aware of this aspect of Charles's mental condition. Furthermore, two inmates, St. Hubert and Aaron Cass (hereinafter "Cass") testified as to Charles's strange behavior, but neither felt threatened by him. Numerous other witnesses who encountered Charles testified that they did not find him to be threatening; even less a substantial

risk of serious harm. While there is testimony from witnesses who noted the strange behavior arising from his schizophrenia, there is a total absence from the record of any witness who, prior to the murder, felt Charles posed a threat to other inmates. Accordingly, the Court finds that the evidence in the record establishing Charles's mental illness does not give rise to an inference that Sheriff Jenne was on notice that Charles posed a substantial or excessive risk of serious harm.

C. The Danger Posed By Shoelaces

Plaintiffs also presented evidence that shoelaces were used by inmates prior to Cottone's murder in attempting and committing suicide. Yet no evidence was presented of prior assaults or murders in which an aggressor used shoelaces against a victim, or where shoelaces were used as a weapon in inmate on inmate violence. Testimony from former BSO Director of Detention Patrick Tighe (hereinafter "Tighe") confirmed that prior to the incident in question, there was not a single instance where one inmate used shoelaces as a weapon against another. The Court notes, therefore, that the evidence Plaintiffs presented regarding suicidal conduct by inmates involving shoelaces must have provided a pattern of constitutional violations, or an obvious need for action, sufficient to put Sheriff Jenne on notice that their presence in the jail amounted to a substantial risk of serious harm, namely of serious inmate on inmate violence. The Court finds that under controlling law, this evidence cannot provide a legally sufficient

basis for finding for Plaintiffs that the aforementioned instances provided notice of any substantial risk of serious harm posed by mentally ill inmates with shoelaces.

The Court finds this lack of notice because of the lack of particularity of the notice provided by the suicides. Specifically, there is a lack of any evidence that Sheriff Jenne drew the inference, as required by Farmer and Carter, from suicidal conduct involving shoelaces that they posed a substantial risk of being used by inmates to inflict serious harm on one another. The evidence clearly established that Sheriff Jenne did not disregard the substantial risk of suicide posed by shoelaces because anyone who testified to the issue stated that suicidal inmates were not allowed to have shoelaces. There was no evidence, however, showing that Sheriff Jenne was aware of facts giving rise to the inference mentally ill inmates were to be treated like suicidal inmates for the purpose of possession of shoelaces. For this reason, the Court finds the evidence showing past suicidal conduct involving shoelaces insufficient to establish that Sheriff Jenne was on notice that their presence in the jail, or in the mental health unit in particular, presented a substantial risk of serious harm to inmates.

D. Use of Games by Deputies

Each unit at the NBDC had a central area manned by a deputy known as the "control room." The control room is a locked enclosure used for the observation of inmates, record keeping, and

communication with the rest of the facility. The testimony of computer consultant Eric Berzok (hereinafter "Berzok") established that beginning shortly before the murder, new computers were installed throughout the jail facilities, including the control rooms, and that these computers were to assist deputies in record keeping. Although the computers had various games that were included as part of their operating system, steps were taken by BSO to disable the direct links used to open the games.

Berzok testified, however, that it became known to him that computers in other departments at BSO, namely the Classification Department, had been manipulated through a "back door" allowing employees to access the games. This discovery prompted a removal of the back door which was being so used. Although Berzok did not know initially whether games had been accessed on the control room computers, he was asked after Cottone's murder to inspect the computer from the control room of the unit in question. This inspection led him to discover that after the computer was placed in the control room on March 18, 1999, there were two games accessed, as well as several drawings created. Berzok testified that there was no way to tell when the games were in fact played.

Additionally, Cass testified that he observed guards gathered around the computer in the control room in question playing games, and that he overheard discussions among guards describing a pool involving the computer games and their various performances. Furthermore, the evidence suggests, and the Court must take as

true, that Deputy D'Elia accessed a computer game on the computer in the control room overseeing the unit in question at some point between 12:32 p.m. and 12:36 p.m. on the day of the murder. Deputy D'Elia made a statement in October 1999 indicating that he returned to the unit in question from a break which began at 12:20 p.m. and concluded somewhere between 12:32 p.m. and 12:36 p.m. Deputy D'Elia relieved Deputy Williams after having made rounds in the unit and not having seen anything out of the ordinary. Deputy D'Elia testified that because he had not seen any trouble, he accessed a computer game in the control room, but before he could play it, he was summoned by St. Hubert. As noted above, Charles murdered Cottone at some point between 12:20 p.m., when D'elia saw Cottone with St. Hubert in the day room, and 12:36 p.m., the latest possible time that St. Hubert summoned Deputy D'Elia into the unit. It was then that Deputy D'Elia discovered Cottone on the floor of his cell having been strangled.

The Court finds that even when accepting the testimony regarding the games as true, there is not a legally sufficient basis for finding that Sheriff Jenne knew of a risk of serious harm which he disregarded. First, testimony from Berzok established that to the extent deputies were playing games, they were doing so in violation of BSO policy. Furthermore, Berzok's testimony established that the computers were being installed in the weeks immediately preceding Cottone's death. To the extent that deputies had begun playing games, which the evidence has established, it is

not reasonable to infer that those with policy making authority within BSO knew of such conduct, and of the risk posed by such game playing, and then consciously ignored that risk. The Court finds such inference particularly untenable because each BSO employee in a supervisory position who testified, namely Willis Robinson, Barbara Law, and Tighe all stated that they were either unaware of allegations of computer game playing, or heard rumors of such only after Cottone's murder. There was no evidence presented to contradict the testimony of these witnesses and show that BSO policy makers were, in fact, aware that deputies were playing computer games prior to Cottone's murder. Accordingly, the Court finds that there is no legally sufficient basis to support a finding for Plaintiffs that BSO had notice of, and disregarded, a substantial risk of serious harm posed by deputies incompetently fulfilling their duties by playing computer games.

E. The Carruthers v. Cochran Consent Decree

The Court turns now to a discussion of the Stipulation For Entry Of Consent Decree (hereinafter the "Consent Decree") entered into by the parties in the case styled Ollie Carruther, et al. v. Ron Cochran, et al., Case No. 76-6086-CIV-Hoevler, United States District Court, Southern District of Florida, and approved by United States District Court Judge William M. Hoevler on January 31, 1995. See DE 1, Ex. A. Plaintiffs' Amended Complaint contained allegations against Defendants seeking to impose liability for violations of the Consent Decree. See DE 83, ¶¶ 3,

22-27, 91, 130, and 137. On the eve of the first trial of the above-styled cause, Sheriff Jenne, D'Elia, and Williams filed a Motion In Limine Concerning Carruthers v. Cochran Consent Decree (DE 338), arguing that mention of the Consent Decree should be excluded because Plaintiffs plainly intended to allege liability based upon violation of the Consent Decree, but that violation of the same was not the proper standard when alleging claims pursuant to § 1983. Upon re-commencing trial, the Court granted Defendants' Motion (DE 338), and the reasoning for this decision is set forth by separate Order.

For the purpose of completion regarding the reasoning of this Order, however, the Court notes herein that the Consent Decree was excluded because, where such a document does not include a finding that its terms are necessary to remedy a constitutional violation, it cannot create or expand constitutional rights. See Cagle v. Sutherland, 334 F. 3d 980, 986-87 (11th Cir. 2003). The Court further notes, however, that the terms of the Consent Decree can be relevant to the instant analysis inasmuch as they provide Sheriff Jenne notice of a substantial risk of serious harm. See id. at 987. For this reason, the Court ruled that Plaintiffs were allowed to question witnesses regarding the terms of the Consent Decree, but to refer to those terms simply as requirements of law.⁵

⁵ While the Court's ruling on the first day of trial simply foreclosed the mention of the Consent Decree, the issue was revisited a number of times in the following days, and the full nature of the Court's ruling, including the manner in which terms of the Consent Decree could be introduced, was made clear to counsel for Plaintiffs.

As noted in the Court's separate Order granting Defendants' Motion In Limine (DE 338), the Consent Decree is largely irrelevant to the above-styled cause. The few portions that are relevant to this action are immaterial to the instant analysis because they impose duties, which as noted above, cannot create or expand constitutional rights. The Court finds, however, that the Consent Decree's requirement that special inmates be checked every 15 minutes is the only one of its terms that may provide Sheriff Jenne with notice of a standard below which a substantial risk of serious harm exists. The Court makes this finding based on the specificity of this requirement.

Most BSO employees who testified believed that special inmates were supposed to be checked every 30 minutes. The testimony established that BSO failed to communicate to its employees a policy requiring more frequent checks. The Court notes, however, that there was no evidence presented establishing that Sheriff Jenne was aware that checking special inmates every 30 minutes subjected them to a substantial risk of serious harm they were not subject to if checked every 15 minutes. This lack of notice is supported by the fact that prior to the event in question, the Eleventh Circuit held that a jailer's failure to check inmates held in a group cell, who had yet to be separated by classification, for one hour did not amount to deliberate indifference. Hale v. Tallapoosa County, 50 F.3d 1579, 1582 (11th Cir. 1995).⁶

⁶ Although decided after the events giving rise to the above-styled cause, the court in Cagle found that a jailer who knew an inmate

The Court further finds that even if it were to be determined that the 15 minute check requirement amounted to notice to Sheriff Jenne that he disregarded at the risk of being deliberately indifferent, there is no evidence upon which a finding could be made that such deliberate indifference caused Cottone's death. The undisputed testimony from Deputy D'Elia established that he checked the inmates at 12:20 p.m., and that at that time, Cottone was in the day room with St. Hubert. Upon undertaking his next check sometime after 12:32 p.m., Deputy D'Elia saw only Charles in the day room. Deputy D'Elia then entered the control room, and was summoned almost immediately by St. Hubert, at a time not later than 12:36 p.m. It is therefore clear that, at the time of Cottone's murder, his unit was checked at an interval compliant with the Consent Decree. Accordingly, even accepting as true that the 15 minute check requirement provided notice to Sheriff Jenne, and Sheriff Jenne's deliberate indifference to that notice in failing to implement checks at that interval, there is no evidence that will support a finding that Sheriff Jenne's failure caused Cottone's death.

Based on the forgoing, the Court finds that there was no evidence from which a reasonable jury could find that the 15 minute check requirement amounted to notice to Sheriff Jenne that a less

was suicidal, yet allowed one hour and forty minutes to elapse between cell checks, was not deliberately indifferent to the rights of that inmate. See Cagle, 334 F.3d at 989. The Eleventh Circuit made this finding notwithstanding a consent decree covering jail operations which required inmate checks at least every hour.

frequent interval for checks amounted to subjecting inmates to a substantial risk of serious harm. The Court further finds, however, that even if the 15 minutes check requirement did provide such notice, Sheriff Jenne's deliberate indifference to that notice did not cause Cottone's death because at the time in question, Deputy D'Elia's checks of the mental health unit were at least as frequent as required by the Consent Decree, if not more frequent.

III. The Liability of the Remaining Defendants

The claims stated against the remaining Defendants are also based upon deliberate indifference to a substantial risk of serious harm posed to Cottone. See DE 83, ¶¶ 77, 87, and 94. The allegations stated against EMSA are similar to those made against BSO in that they involve a failure to train, discipline and supervise employees. When considering the evidence presented by Plaintiffs under the standard set forth by Rule 50 and articulated above, the Court finds that EMSA was likewise without notice as to any excessive or substantial threat of serious harm posed by Charles. There was no additional evidence presented other than that already considered which would have provided EMSA with notice of which Sheriff Jenne was unaware. Accordingly, the Court, relying on the above-stated reasoning, finds that there was no legally sufficient basis for a jury to find for Plaintiffs on the issue of whether EMSA had notice that Charles posed a substantial risk of serious harm to Cottone.

Regarding Deputy D'Elia, Deputy Williams, Dr. Perfilio, Dr.

Waldman, and Nurse McKenzie, the Eleventh Circuit has articulated the burden of proof that must be met by a plaintiff alleging deliberate indifference against individuals such as these:

A Fourteenth Amendment violation occurs when a substantial risk of serious harm, of which the official is subjectively aware, exists and the official does not respond reasonably to the risk. Furthermore, such risk must be an objectively substantial risk of serious harm to prisoners, and the prison official must respond to that risk in an objectively unreasonable manner. Finally, a plaintiff must show that the constitutional violation caused the injury.

Cottone v. Jenne, 326 F. 3d 1352, 1358 (11th Cir. 2003) (internal citations omitted). Upon a full hearing from Plaintiffs, the Court finds that, with regard to these individual Defendants, there is no legally sufficient basis upon which to find that they were subjectively aware of any substantial risk of serious harm posed by Charles. In affirming in part the Court's prior Order (DE 126) which, inter alia, denied Deputy D'Elia and Deputy William's Motion To Dismiss Amended Complaint (DE 111), the Eleventh Circuit focused primarily on Plaintiffs' allegations in the Amended Complaint (DE 83) that the two Deputies were subjectively aware of a substantial risk of serious harm posed by Charles primarily because they were aware of his "violent, schizophrenic outbursts which occurred prior to the murder incident." Id.

Having heard all the evidence, however, it is now clear that none of the individual Defendants were aware of any behavior that could be characterized as "violent, schizophrenic outbursts." As noted above, McKenzie was the only Defendant who had direct

knowledge of the aftermath of one of Charles's fights, and neither the condition of Charles, nor his cell mate, would have given her reason to believe he posed a substantial risk of serious harm due to his violence and mental illness. The Court again adopts the reasoning set forth above, and again finds that there was no legally sufficient basis for a jury to find that the individual Defendants were subjectively aware of a substantial threat of serious harm posed by Cottone.

IV. Conclusion

When viewing the evidence presented in the light most favorable to Plaintiffs, there is no legally sufficient basis for a jury to find that any of the Defendants had actual notice of any substantial threat of serious harm posed by Charles sufficient to impose § 1983 liability on them. It is clear that Charles was fighting, and that his mental condition was deteriorating. It is also clear that BSO employees were not following procedure as far as proper documentation of inmate altercations, and that there were instances where they were playing computer games while on duty. Furthermore, Plaintiffs established that, at a minimum, Defendants BSO and Deputy D'Elia were aware of the threat of suicide posed by shoelaces. All of this taken together, however, does not meet the high burden of establishing actual notice placed upon Plaintiffs by the Supreme Court and the Eleventh Circuit.

It is worth noting the words of the Supreme Court upon articulating the requirement that a plaintiff show actual notice by

a defendant against whom the plaintiff alleges deliberate indifference:

An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of [a constitutional injury].

Farmer, 511 U.S. at 837-38 (internal citation omitted). Plaintiffs chose to bring their claims as deliberate indifference claims pursuant to § 1983, thereby yoking themselves with the heavy burden that must be met by plaintiffs who do so.⁷ While the facts of this case are tragic, and the evidence shows that the policies of BSO and the conduct of its employees are wanting, the Court finds that the evidence was not sufficient to establish that Plaintiffs met that burden.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Defendants Andrew Perfilio, M.D., Maurice Waldman, M.D., Elma McKenzie, L.P.N., and EMSA Correctional Care, Inc.'s ore tenus Motion For Judgment As A Matter Of Law made in open Court on April

⁷ At the close of their case in chief, Plaintiffs made an ore tenus Motion To Amend Complaint To Conform To The Evidence. In making the Motion, Plaintiffs attempted to state vicarious liability claims for negligence against Sheriff Jenne and EMSA. Finding that the Motion failed under Rule 15, however, the Court denied the same. The Court's reasoning is set forth by separate Order.

14, 2006 be and the same is hereby **GRANTED**;

2. Defendants Kenneth C. Jenne, II, in his official capacity as Sheriff of Broward County, Florida, Joseph D'Elia and George Williams' ore tenus Motion For Judgment As A Matter Of Law made in open Court on April 14, 2006 be and the same is hereby **GRANTED**; and

3. Final Judgment in favor of the aforementioned Defendants will be entered by separate Order of the Court.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 21st day of July, 2006.


WILLIAM J. ZLOCH
Chief United States District Judge

Copies furnished:

Barbara A. Heyer, Esq.
For Plaintiffs

Michael R. Piper, Esq.
For Defendants Kenneth C. Jenne, II,
George Williams, and Joseph D'Elia

Gregg A. Toomey, Esq.
For Defendants Andrew Perfilio, M.D.,
Maurice Waldman, M.D., Elma McKenzie, L.P.N.,
and EMSA Correctional Care, Inc.