

OVERVIEW OF SECTION 1983 LITIGATION

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OVERVIEW OF SECTION 1983 LITIGATION

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 *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.”).

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 Smart v. County of Burlington, No. 13–0354 (RBK), 2013 WL 312791, *4 (D.N.J. Jan. 24, 2013) (“Here, Plaintiff has not alleged facts that the strip search to which he was subjected was so outside the scope of reasonable search policy that it would rise to the level of a Fourth Amendment violation. *See Aruanno v. Allen*, No. 12–2260, 2012 WL 4320446 (3d Cir. Sept. 21, 2012). Moreover, even assuming that the search violated a state correctional regulation, such a violation would not render the search *per se* unreasonable under the Fourth Amendment.”).

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).

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.”

THIRD CIRCUIT

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).

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.”)

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, e.g., Muhammad v. City of Newark, No. 12–0325 (CCC), 2013 WL 211345, *3 (D.N.J. Jan. 18, 2013) (“Federal courts look to state law to determine the limitations period for § 1983 actions. *See Wallace v. Kato*, 549 U.S. 384, 387–88 (2007). Civil rights or constitutional tort claims are best characterized as personal injury actions and are governed by the applicable state's statute of limitations for personal injury actions. . . . Accordingly, New Jersey's two-year limitations period on personal injury actions, N.J. Stat. Ann., § 2A:14–2, governs Plaintiff's claim. *See Montgomery v. DeSimone*, 159 F.3d 120, 126 & n. 4 (3d Cir.1998); *Cito v. Bridgewater Twp. Police Dep't*, 892 F.2d 23, 25 (3d Cir.1989). Under N.J. Stat. Ann. § 2A:14–2, an action for an injury to the person caused by a wrongful act, neglect, or default must be commenced within two years of accrual of the cause of action.”)

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. See also *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."); *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."); *Taylor v. Plousis*, 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.”).

See also Ingram v. Township of Deptford, No. 11–2710 (JBS/AMD), 2012 WL 5984685, *9 (D.N.J. Nov. 28, 2012) (“The Court cannot find, nor has Plaintiff provided, any citations to any New Jersey court decisions that permit a finding of municipal liability based on respondeat superior for claims brought under the New Jersey Constitution and the NJCRA. . . . Therefore, because respondeat superior liability is not permitted under § 1983, and because New Jersey courts interpret the NJCRA as analogous to § 1983, the Court holds that respondeat superior liability is not permitted for claims under the New Jersey Constitution and the NJCRA.”)

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.”).

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*].

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 Hafer v. Melo*, 112 S. Ct. 358, 361-62 (1991) (personal and official capacity suits distinguished). 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). 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).

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.

1. Pre-Iqbal Cases

See *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); *Sample v. Diecks*, 885 F.2d 1099, 1116-18 (3d Cir. 1989) ("For the purpose of defining the standard for liability of a supervisor under § 1983, the characterization of a particular aspect of supervision is unimportant. Supervisory liability in this context presents the question whether Robinson was responsible for—whether he was the 'moving force [behind],' [citing *City of Canton v. Harris*]—Diecks' constitutional tort. . . . Although the issue here is one of individual liability rather than of the liability of a political subdivision, we are confident that, absent official immunity, the standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve. In either case, a 'person' is not the 'moving force [behind] the constitutional violation' of a subordinate, *City of Canton*, 109 S.Ct. at 1205, unless that 'person'—whether a natural one or a municipality—has exhibited deliberate indifference to the plight of the person deprived."); *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.").

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.”).

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 “supervisory 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* Cases

Bistrrian 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, Bistrrian 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 Fed. Appx. 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 1448 (emphasis added). And finally, although Laffey argues that Plouisis, 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.”).

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 Fed. Appx. 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.”)

Figueroa 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 Count must be dismissed.”)

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)

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).")

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")

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.”)

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.”)

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")

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 ‘exact[s] 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.’”).

G. 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 Lapidus 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.").

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.

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.

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.

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 *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).

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:

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.”).

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.”)

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.”).

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.").

C. *Heck* Does Not Apply in Pre-Conviction Setting

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 a conviction on a pending criminal charge. *See, e.g., Smith v. Holtz*, 87 F.3d 108, 113 (3d Cir. 1996).

Wallace now makes clear that the *Heck* doctrine does not come into play until there is a criminal 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:

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.").

D. *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.

E. *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.

F. *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.”).

G. 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) (“lito, 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.”)

H. *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.").

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.").

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 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.”)

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.”).

I. What Counts as Favorable Termination?

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.")

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.")

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.")