11-617

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

STEVEN SPAVONE,

Plaintiff-Appellee,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,
BRIAN FISCHER, COMMISSIONER (DOCS), NICK CHALK, TEMPORARY RELEASE
CHAIRMAN (WCF), DEBORAH JOY, DIRECTOR TEMPORARY RELEASE (DOCS),

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York (New York City)

BRIEF FOR PLAINTIFF-APPELLEE

Hannah Y.S. Chanoine
MAYER BROWN LLP
Attorneys for Plaintiff-Appellee
1675 Broadway
New York, New York 10019
212-506-2500

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PRELIMINARY STATEMENT

The New York State legislature has recognized that, on occasion, inmates in the custody of the Department of Corrections (DOCS) may require medical treatment that is "not available in the correctional institution" but is nonetheless "absolutely necessary to the health and well-being of the inmate." N.Y. Corrections Law § 851(6). By statute, the legislature permits an inmate to seek that necessary (but otherwise unavailable) medical treatment by applying to "the commissioner [of DOCS] or his designated representative" for permission to obtain that treatment outside the corrections institution. N.Y. Corrections Law § 851(6); *see also* 7 N.Y.C.R.R. § 1900.3(a). However, in violation of the United States Constitution, DOCS has adopted a policy that categorically bars inmates suffering from *mental* illness from seeking "absolutely necessary" but unavailable medical treatment through this statutory safety valve.

DOCS seeks to excuse its policy by pointing to an arrangement with the New York Office of Mental Health ("OMH"), whereby OMH treats the mental health conditions of inmates in DOCS custody. In the aggregate, OMH offers a variety of mental health treatment options to

DOCS inmates – but not at every correctional facility. The result? If OMH fails to provide an inmate at a particular facility with appropriate medical treatment for his mental illness, the inmate is stuck. An inmate, like Mr. Spavone, who needs "absolutely necessary" but unavailable medical treatment – treatment authorized by the New York legislature – simply can't get it.

That is precisely what happened here. Steven Spavone has long suffered from debilitating post-traumatic stress disorder ("PTSD"), a result of combat trauma and his experiences at the World Trade Center site on September 11, 2001, when he personally witnessed the disaster from a scaffolding on a nearby building, and when he heroically saved several lives in the aftermath. While an inmate in DOCS custody serving a sentence for robbery, he received some medical treatment from OMH for this debilitating condition. But after his transfer to a new facility in 2007, his OMH treatment sharply deteriorated. After numerous complaints about the quality of his OMH treatment, Mr. Spavone eventually sought to access the necessary medical treatment for his PTSD under N.Y. Corrections Law § 851(6) and the implementing regulations 7 N.Y.C.R.R. § 1900.3(a)(3).

Mr. Spavone did *not* ask to be released into the community. Rather, he applied to serve out the two years remaining until his release in a secure facility where he could obtain the medical care for his condition that he so desperately needed. After failing to follow its own regulatory procedures, DOCS ultimately denied his request. The reason given by the Commissioner's designee, Debra Joy, was that the relevant regulations authorized only "medical care" not "mental care."

Mr. Spavone sued DOCS and several individuals connected with this process for violating the Americans With Disabilities Act, and for violating the Eighth and Fourteenth Amendments of the United States Constitution under 42 U.S.C. § 1983. Proceeding *pro se*, and while still incarcerated, Mr. Spavone defended against DOCS' motion for summary judgment. The United States District Court for the Southern District of New York (Patterson, J.) agreed with Mr. Spavone that the DOCS rationale for denying him access to "absolutely necessary" medical treatment was facially discriminatory, because "mental health treatment is generally recognized as medical treatment." SPA10. Among other triable issues of fact, the district court held that it was a question for the jury "whether, under the present regulations of DOCS,

[a medical leave of absence] is not available for mental health treatment even if it is absolutely necessary to the 'health and well being' of persons such as the Plaintiff." SPA12

DOCS has taken this narrow interlocutory appeal strictly on the issue of qualified immunity for DOCS officials individually named in Mr. Spavone's § 1983 claims. DOCS acknowledges, as it must, that this Court currently lacks jurisdiction to review the statutory discrimination claim under the ADA. This Court should affirm and remand this case to the district court for trial.

ISSUE PRESENTED

Did the district court correctly deny summary judgment where there are disputed issues of fact concerning the existence and application of a policy that categorically excludes mental health treatment from medical health treatment, and thereby bars *all* mentally ill patients from obtaining "absolutely necessary" medical treatment under N.Y. Corrections Law § 851(6) and 7 N.Y.C.R.R. § 1900.3(a)(3)?

STATEMENT OF THE CASE AND OF THE FACTS

I. BACKGROUND

A. Access to "Necessary" Medical Treatment under N.Y. Corrections Law § 851(6)(c).

New York Corrections Law § 851(6)(c) permits an inmate to seek a "Leave of Absence"

> to undergo surgery or to receive medical or dental treatment not available in the correctional institution only if deemed absolutely necessary to the health and well-being of the inmate and whose approval is granted by the commissioner or his designated representative.

DOCS Rules and Regulations likewise provide for a leave of absence "to undergo surgery or to receive medical or dental treatment not available in the correctional institution, only if deemed absolutely necessary to the health and well-being of the inmate and where approval is granted by the commissioner or his designated representative." 7 N.Y.C.R.R. § 1900.3(a)(3).

When an inmate applies for a temporary release, DOCS regulations obligate a DOCS corrections facility to provide a temporary release interviewer to conduct a preliminary review of the inmate's application, including "mak[ing] several types of checks." 7 N.Y.C.R.R. § 1900.4(b). The regulation specifies that the temporary release

interviewer is responsible for ensuring "that the inmate is statutorily or otherwise available for temporary release," 7 N.Y.C.R.R. § 1900.4(c), including evaluating whether the inmate satisfied the "[t]emporary release purpose" (such as eligibility for a medical leave of absence) under 7 N.Y.C.R.R. § 1900.3. *See* 7 N.Y.C.R.R. § 1900.3(c)(10). The interviewer is also responsible for "scoring" the inmate's application under a complex point system outlined by the regulation. *See* 7 N.Y.C.R.R. § 1900.3(e). To be eligible for a medical leave of absence, inmates must have an evaluation score of "at least 30," though the DOCS Commissioner retains the right to waive all eligibility requirements for medical leave. 7 N.Y.C.R.R. § 1900.3(a)(3).

B. DOCS' Arrangement With OMH For Mental Health Treatment of Inmates in DOCS Custody.

The DOCS Commissioner, in cooperation with the commissioner of mental health, has established programs for the treatment of mental health for inmates housed in DOCS facilities. *See* N.Y. Correction Law § 401. Mental health care services are provided to DOCS inmates by

the New York State Office of Mental Health ("OMH"), a state agency separate from DOCS.[1]

OMH does not offer all treatment levels at every DOCS facility, so some inmates – such as Mr. Spavone – are unable to receive the necessary and appropriate level of medical treatment for their mental health conditions. At certain facilities (mostly maximum security), OMH provides "Satellite Units" with full time psychiatric staff. A265-66. The "components" of the Satellite Unit Programs include: "Residential Crisis Treatment Programs," A266, "Outpatient Services" which are "similar to mental health clinic services in the community," A267, and "Intermediate Care Programs," which "are similar to day treatment and residential programs which exist in the community." *Id.*[2]

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[1] A Memorandum of Understanding between DOCS and OMH purports to describe the variety and availability of OMH mental health services offered within DOCS facilities. A258-307. There was no discovery below on whether the Memorandum of Understanding accurately reflects reality.

[2] OMH also provides inpatient services in a secure psychiatric hospital, the Central New York Psychiatric Center (CNYPC). Only a narrow subset of mentally ill patients are eligible for inpatient services and Mr. Spavone himself was deemed ineligible. A89.

This level of mental health care was *not* available to Mr. Spavone at Woodbourne Correctional Facility ("Woodbourne"), the medium-security prison he entered in 2007 until his release in 2010. Though he had obtained better treatment at the Eastern Correctional Facility ("Eastern") from 2005-2007, the OMH treatment at Woodbourne was sorely lacking. Woodbourne is only a "Mental Health Unit." A268. Mental Health Unit Program components purportedly include "Outpatient Services" which are supposed to be "similar to mental health clinic services in the community," and are supposed to "provide[] individual and group therapy and psychiatric services." A269. As discussed further below, however, the reality of the OMH "outpatient services" at Woodbourne did not match this description.

C. Mr. Spavone's Long Battle With PTSD.

Mr. Spavone is a combat veteran. As young man in the 1980s heeding President Reagan's call for American citizens to fight communism, he traveled to Nicaragua to fight for the Contras. A138. But he paid the terrible price of PTSD. A139. Two decades later, Mr. Spavone was injured again when he was working as a bricklayer and restoration specialist on a building across the street from the World

Trade Center. He was working on a scaffold 32 floors up the side of a building when the planes crashed into the twin towers on September 11, 2011 – close enough to be hit by the jet fuel. A134, 137, 138, 148. Even as victims fell to their deaths around him and others fled, he heroically saved the lives of two coworkers and later assisted emergency officials to save others. A138, A183, A204-06.

As a result of his combat trauma and the terrifying experiences of 9/11, Mr. Spavone suffers from PTSD and major depressive disorder, resulting in nightmares, crippling flashbacks and hallucinations, high anxiety, severe depression, chronic headaches, as well as nervousness, anger, frustration and guilt. A134, A139-40. He requires multiple medications to control these symptoms. A140-41. These symptoms affect Mr. Spavone's ability to function around people on a daily basis. A139. And he was medically precluded from sleeping in a dormitory environment in prison (which prevented him from participating in certain programs), and could only sleep in an individual cell. A133, 139, 143, 144. Nor could Mr. Spavone participate in most of the OMH intermediate care programs because they required a dormitory. A144.

Mr. Spavone's diagnosis of PTSD has never been in dispute.

D. The Deterioration of Mr. Spavone's PTSD Treatment After His Transfer from Eastern Correctional Facility to Woodbourne Correctional Facility.

DOCS has been aware of Mr. Spavone's PTSD from the outset of his incarceration in 2003. A145. From 2005 to 2007, during his tenure at Eastern, Dr. Ed Rudder (a psychologist) and Dr. V.R. Inaghanti (a psychiatrist) treated Mr. Spavone for his PTSD. A320.

In 2007, Mr. Spavone became aware that he would be transferred to Woodbourne, a medium security facility. He asked Drs. Rudder and Inaghanti to write a letter in support of his anticipated request for a medical leave of absence while at Woodbourne.[3] In a letter dated April 27, 2007, addressed to the "Program Admissions Officer," Drs. Rudder and Inaghanti "strongly recommend[ed] that he be allowed to seek and obtain Exposure Therapy, Cognitive Behavioral Therapy, Group Therapy" and emphasized that "[t]hese therapeutic modalities,

[3] Mr. Spavone believed that he could only apply for a medical leave of absence once he was within two years of his anticipated release date. A151; *see* 7 N.Y.C.R.R. § 1900.4(c)(1)(i); *but see* 7 N.Y.C.R.R. § 1900.3(a) (loosening time criteria restrictions for medical leave).

especially if in a community inpatient program" would "be of great benefit to this patient." A192; SPA5.[4]

When Mr. Spavone arrived at Woodbourne in May 2007, the quality of his medical care for his PTSD deteriorated sharply from the care he had been receiving from Drs. Rudder and Inaghanti. For example, during his first year at Woodbourne, he only received counseling from a social worker, Charlene Vitale, not a psychologist. A387-88. Mr. Spavone complained numerous times to OMH about the adequacy of his treatment, A139, 141, 145.[5] Mr. Spavone's care only marginally improved with Vitale's replacement by another doctor, and he was forced to organize his *own* group therapy sessions because OMH

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[4] During discovery, Drs. Rudder and Inaghanti took positions contrary to their 2007 letter of recommendation, which Mr. Spavone asserted was the product of improper contact by DOCS in violation of the district court's protective order. SPA5.

[5] DOCS asserts, without support, that it was not until 2008 that Mr. Spavone "raised concerns about his PTSD treatment for the first time." Br. at 6. This is incorrect. As Mr. Spavone will be able to demonstrate at trial through his medical records, he complained to OMH about the adequacy of his PTSD treatment at Woodbourne as early as 2007. DOCS may be of this erroneous view because OMH, and not DOCS, received Mr. Spavone's complaints.

failed to provide them.[6] In response to his complaints, Dr. Al Shimkunas, Chief Psychologist of Outpatient Services at Central New York Psychiatric Center (who had never treated Mr. Spavone), had a social worker administer some tests which confirmed Mr. Spavone's diagnoses. A153; SPA 3-4.

In a letter to Mr. Spavone dated September 2, 2008, Dr. Shimkunas stated that he was not "at liberty to make" a recommendation that he be given a temporary release. A220. While the letter suggested that the type of treatment Mr. Spavone was then receiving was considered "effective" for his condition, Dr. Shimkunas stated that he was "prepared to strongly recommend that further treatment [was] required." *Id.* He also stated "that treatment in a community residential or inpatient program can be of great benefit to [Mr. Spavone] provided that the Department of Correctional Services grant[ed him] a medical leave of absence." *Id.*

On September 10, 2008, Dr. Shimkunas wrote to Debra Joy, then the Director of Temporary Release Programs at DOCS, that "OMH staff

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[6] Mr. Spavone also separately organized a "self-esteem" group for veterans incarcerated at Woodbourne. A143.

members are supportive of Mr. Spavone's efforts to address his mental health problems, will continue to provide treatment, and will facilitate his transition to a residential program if his request is granted." A89; SPA5. Ms. Joy responded that "Medical Leave of Absence allows an approved inmate to leave the institution to undergo surgery or receive medical or dental treatment not available in the correctional institution only if deemed absolutely necessary to the health and well-being of the inmate." A87. She stated that "as described in your letter" the request "would not appear to meet this statutory definition for Medial [*sic*] Leave of Absence." A87; SPA5. However, she stated that "if and when he applies, his application will be evaluated." A87; SPA5.

E. DOCS' Denial of Mr. Spavone's Application For A Medical Leave of Absence Under N.Y. Corrections Law § 851(6) On the Basis that "Mental" Treatment Was Not "Medical" Treatment.

Mr. Spavone applied to DOCS Commissioner Fischer for medical treatment under the relevant statute on September 11, 2008. He provided the Rudder and Imaghanti letter addressed to the "Program Admissions Officer" that "strongly recommend[ed]" certain therapies "especially if in a community inpatient program" A192; two letters from not-for-profit agencies willing to provide a residential/inpatient

community based treatment program," A194-95; a letter submitted to Mr. Spavone's sentencing judge stating that Mr. Spavone should receive as much psychiatric and counseling services as could be offered by DOCS, A197; and a Fact Sheet, dated April 7, 2008, by the Federal Government's National Center for PTSD "PTSD and Criminal Behavior," stating in relevant part:

> Because being in prison requires a person to be constantly vigilant regarding the threat of violence, an individual with PTSD who is in prison can be profoundly re traumatized and his or her PTSD symptoms may be exacerbated to the point where he or she will act out with violence. Finally, what is the psychiatric prognosis? Although PTSD is a chronic condition, with the proper treatment and education, its symptoms can usually be successfully managed. It is unlikely that survivors receive the proper treatment for PTSD during incarceration. In fact because prison life may re-traumatize a person, a lengthy incarceration will likely seriously exacerbate PTSD symptoms and cause the person's level of functioning to deteriorate.

A198-200; SPA4, SPA6. In a letter dated September 17, 2008, Ms. Joy informed Mr. Spavone that he had to file his application at his facility. A185; SPA6.

In a form submitted to DOCS, Mr. Spavone explained that his reason for seeking a leave of absence was "[t]o obtain a community and

residential/in-patient program to provide essential medical care that cannot be provided to me while or during my incarceration for PTSD." A217; SPA6. He stated that he planned to stay with a "[d]esignated or [a]pproved program" with and address "[t]o be provided/obtained contingent on approval." A217; SPA6.[7] He also checked the box on the form that stated "I want to meet with a Temporary Release Interviewer" and "I want to appear in person before the Temporary Release Committee." A217; SPA6. *See also* A147.

However, Mr. Spavone was not given a meeting with a Temporary Release Interviewer. A147; SPA7. Instead, he met with his counselor Ms. Luse who was "totally ignorant of the process," the medical leave of absence program, what the program entailed, or how to score his application pursuant to the regulation. A147. *See also* SPA7. The facility's Temporary Release Committee, including Woodbourne's Temporary Release Committee Chairman Nick Chalk, refused to review his medical documents, A149, and the Committee denied his application on the basis of false assumptions regarding his criminal history. A218;

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[7] These treatment centers would not provide a specifics about Mr. Spavone's date of entering the program or the nature of his care unless DOCS approved him for a leave of absence. A154.

SPA7. He later learned that he had an eligibility score of 48 out of 52 points. A150; SPA7.

On October 31, 2008, Mr. Spavone appealed the adverse decision of the Woodbourne Temporary Release Committee to Defendant Joy. On November 24, 2008, Ms. Joy denied Mr. Spavone's application:

> After careful review and consultation with NYS DOCS Counsel's office, ***there are no provisions in the temporary release rules and regulations that allow a medical leave of absence for mental health reasons. Therefore*** your current application for a medical leave of absence is denied based on eligibility criteria.

A91.

On December 8, 2008, in response to Mr. Spavone's request for reconsideration, Ms. Joy stated that "MLOAs are considered for medical treatment not available in the facility" and that his "request was for an OMH placement." A93. Ms. Joy stated that Mr. Spavone "was receiving OMH services at [his] facility and [he was] encouraged to continue these services." *Id.* On December 19, 2008, Ms. Joy reiterated that his "request did not meet statutory eligibility requirements" and that Mr. Spavone "should continue OMH treatment at [his] facility." A92.

II. PROCEEDINGS BELOW

Mr. Spavone filed his Complaint against DOCS, DOCS Commissioner Nicholas Brian Fischer, Nicholas Chalk, the Temporary Release Chairman at Woodbourne, and Deborah Joy, the Director of Temporary Release (collectively "Defendants" or "DOCS") in the Southern District of New York on February 4, 2009. A13. He alleged violations of the American with Disabilities Act, as well as violations of the Eighth Amendment, and the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution.[8]

DOCS deposed Mr. Spavone. However, Mr. Spavone – still incarcerated and proceeding *pro se* – was barely able to take any discovery at all. He took no depositions, and managed only to secure some affidavits from DOCS officials and OMH doctors.

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[8] The district court granted Mr. Spavone's subsequent motion for leave to amend the Complaint to add additional individuals for retaliatory conduct after the filing of the Complaint. *See* A39-44; SPA 8-10. Defendants acknowledge that the Court lacks jurisdiction to review the district court's decision (Br. at 12) and do not present arguments on the propriety of those individuals' conduct as alleged in the supplemental Complaint.

In an opinion and order dated January 20, 2011, the district court denied defendants' motion for summary judgment, and by implication rejected the defendants' argument that the individual defendants were entitled to qualified immunity. *See* Dkt. No. 36, at 21-23.

Judge Patterson held that "[t]he reasons given for the denial of Plaintiff's application for [Medical Leave of Absence] are discriminatory on their face." SPA10. Specifically, "[t]he absence of any specification of mental health care in the statute or regulations about leave of absence for medical care is not a proper ground for rejection." *Id.* The court noted that "[m]ental health is generally recognized as part of medical health and "[m]ental health treatment is generally recognized as medical treatment." *Id.* (citing *Langley v. Coughlin*, 888 F.2d 252, 254 (2d Cir. 1989) ("We think it plain that from the legal standpoint psychiatric or mental health care is an integral part of medical care.")).

Construing the totality of the documents presented by Mr. Spavone in connection with his application, the district court determined that Mr. Spavone had raised a genuine issue of material fact as to whether his treatment was in fact "effective." "None of those documents explains why the treatment Spavone seeks is not necessary

to his health and well-being." SPA10. Judge Patterson also expressed concerns based on the record – from DOCS failure to provide Mr. Spavone with an interviewer that could review, evaluate, and score an inmate's application under the implementing regulations, to the miserly statistics of instances where medical leave was granted, to the fundamental question of whether DOCS improperly excluded mentally ill inmates from accessing "absolutely necessary" medical care – that the manner in which DOCS was implementing the statute was merely "ministerial" and suggested mere "lip service." SPA10-11.

Ultimately, district court identified three main issues of material fact for a jury's consideration: (1) "whether the mental health treatment" sought by Mr. Spavone was "absolutely necessary" to Mr. Spavone's health and well-being under 7 N.Y.C.R.R. § 1900.3(a)(3), SPA10, (2) "whether the present practices and policies of DOCS are being administered in accordance with the purposes of Section 851 and regulations which DOCS itself adopted," SPA11, and relatedly (3) "whether, under the present regulations of DOCS, [a medical leave of absence] is not available for mental health treatment even if it is

absolutely necessary to the 'health and well being' of persons such as the Plaintiff." SPA12

At the conclusion of his opinion, Judge Patterson invited the parties to identify any additional discovery required before trial. SPA13. During a subsequent status conference, Judge Patterson urged Mr. Spavone to engage trial counsel and to hire an expert for trial. *See* Dkt. 89 (transcript of Feb. 10, 2011 status conference).

STANDARD OF REVIEW

The Court's review is *de novo*, but sharply constrained by the collateral order doctrine. *Bolmer v. Oliveira, M.D.*, 594 F.3d 134, 141 (2d. Cir. 2010). Orders denying summary judgment are generally not immediately appealable. *Id.* at 140. The collateral order doctrine affords the Court jurisdiction to review interlocutory appeals of orders denying claims of qualified immunity. *Id.* Even this review is limited, however, and the Court "may review immunity denials only to the narrow extent that they turn on questions of law." *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).

Specifically, though the Court may assess whether a defendant is entitled to immunity "'on stipulated facts, or on the facts that the

plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find,'" the Court "may *not* review the district court's ruling that 'the plaintiff's evidence was sufficient to create a jury issue on the facts relevant to the defendant's immunity defense.'" *Bolmer*, 594 F.3d at 141 (quoting *Salim v. Proulx*, 93 F.3d 86, 90-91 (2d Cir. 1996) (emphasis added)). In other words, the Court has "jurisdiction to determine whether the issue is *material*, but not whether it is *genuine*." *Id.* at 140-41 (citation omitted, emphasis in original).

This latter limitation is especially pertinent here: as discussed below, several of DOCS' arguments are a thinly disguised request that this Court revisit Judge Patterson's conclusion that Mr. Spavone's evidence sufficed to create a jury issue on the facts relevant to their immunity defense.

SUMMARY OF ARGUMENT

The district court correctly rejected DOCS' qualified immunity defense when it denied DOCS' motion for summary judgment.

As a threshold matter, the collateral order doctrine is strict: this Court may review immunity denials only to the narrow extent they turn

on questions of law. Accordingly, the Court may not review the district court's determination that Mr. Spavone's evidence sufficed to create a triable issue of fact on, for example, the efficacy of Mr. Spavone's mental health treatment at the time he sought a medical leave of absence.

The core of the constitutional violation is a policy that categorically excludes treatment for mental illness from the definition of medical treatment. But it is clearly established in this Circuit that mental health care may not be defined out of medical care. The policy – founded on this improper definition – violates the Equal Protection clause of the Fourteenth Amendment because it is irrational and devoid of a legitimate penological interest. It also violates the Eighth Amendment because it permits recklessly indifferent denials of necessary medical treatment for serious medical conditions.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S DETERMINATION THAT THERE WAS A JURY QUESTION ON WHETHER MR. SPAVONE QUALIFIED FOR A STATUTORY MLOA TO SEEK NECESSARY BUT UNAVAILBLE MEDICAL TREATMENT

DOCS spends many pages on a factual issue firmly beyond this Court's review: whether the district court correctly determined that

there was a genuine issue of material fact whether the medical treatment Mr. Spavone applied for was "absolutely necessary" for his health and well being. SPA 10. DOCS argues that Mr. Spavone was already receiving appropriate care from OMH and that therefore he did not qualify for the medical leave he sought. *See e.g.*, Br. at 17-18. The question of whether Mr. Spavone was already receiving adequate medical treatment for his mental health is a "fact[] relevant to [DOCS'] qualified immunity defense," *Bolmer*, 594 F.3d at 141. Properly construing every inference against DOCS, the district court found triable issues of fact on this score. And even if this Court disagrees, it "may not review the district court's ruling that '[Mr. Spavone's] evidence was sufficient to create a jury issue'" on this material issue, *Bolmer*, 594 F.3d at 141 (quoting *Salim*, 93 F.3d at 90-91).

It is also worth noting that in the proceedings below, Mr. Spavone proceeded *pro se* and while still incarcerated. He sought and obtained very limited documentary evidence without knowledge or use of the discovery devices available to him under the Federal Rules of Civil Procedure. The docket demonstrates the difficulties he encountered in attempting to obtain evidence to resist the government's motion for

summary judgment. Despite these handicaps, the district court correctly identified triable fact issues, signaled willingness to entertain additional discovery requests, and even encouraged Mr. Spavone to seek trial counsel and engage an expert.[9]

II. DOCS' POLICY OF CARVING OUT MENTAL HEALTH TREATMENT FROM THE STATUTORY SAFETY VALVE FOR NECESSARY BUT UNAVAILABLE MEDICAL TREATMENT UNDER N.Y. CORRECTIONS LAW § 851(6) IS UNCONSTITUTIONAL.

DOCS appears to concede on appeal that DOCS *does* have a policy of barring mentally ill patients from accessing necessary medical

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[9] As far as the record discloses, there has never been a discovery conference, nor has a discovery plan ever been discussed. This firm has now agreed to represent Mr. Spavone pro bono once this Court has resolved the limited issue over which it has jurisdiction. Upon remand following resolution of the issue of qualified immunity under Section 1983, we anticipate seeking a proper Rule 26(f) conference and formulating a discovery plan consistent with the court's invitation for additional discovery to proceed before trial.

Among other things, we anticipate seeking leave: to depose the mental health professionals who treated Mr. Spavone while he was incarcerated and who submitted affidavits below, with respect to the severity of his PTSD and the necessity and benefit of further treatment; to obtain a complete set of Mr. Spavone's medical records and session notes, which DOCS failed to provide during the proceedings below; to depose DOCS officials regarding the adoption of the policy, its intended scope, and the study undertaken prior to categorically excluding mental health care from the definition of medical care; and to depose officials at DOCS and OMH regarding the actual implementation of the Memorandum of Understanding.

treatment under N.Y. Corrections Law § 851(6). *See, e.g.,* Br. at 21-22, 24.[10] As discussed below, this policy violates the Fourteenth and Eighth Amendments of the United States Constitution, and these violations were clearly established at the time that the DOCS officials implemented that policy.[11] Accordingly, this Court should affirm.

A. DOCS' Policy Violates Equal Protection

The Equal Protection clause of the Fourteenth Amendment protects prisoners from policies that create irrational classifications devoid of a legitimate penological interest. *See Benjamin v. Coughlin*, 905 F.2d 571, 575 (2d Cir. 1990); *see also Dingle v. Zon*, 189 Fed. Appx. 8, 11 (2d Cir. 2006) (remanding prisoner's equal protection claim in summary order because genuine issues of material fact existed whether prison policy was being applied neutrally). Prison regulations "cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or

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[10] If DOCS backpedals and claims that it made no such concession, it suffices that the district court identified jury issues on this point, particularly whether mentally ill inmates can *ever* seek necessary but unavailable medical care under the statute.

[11] Mr. Spavone is no longer pursuing a § 1983 claim for a procedural due process violation.

irrational." *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). In addition, the asserted government objective "must be a legitimate and neutral one." *Id.* at 90. Here, DOCS' policy of excluding ***all*** mentally ill patients from the benefits of N.Y. Corrections Law § 851(6) is irrational and devoid of a legitimate penological interest.

First, as this Court has recognized, mental health treatment is generally recognized as medical treatment. *Langley v. Coughlin*, 888 F.2d 252, 254 (2d Cir. 1989). For DOCS to unilaterally construe the statute otherwise is fundamentally irrational and contrary to law.

Second, a policy that refuses to define "mental health" treatment as a form of "medical treatment" is not rational because it allows the commissioner or his designee to make improper "shortcuts," without individualized determinations of whether an inmate truly is being deprived of "absolutely necessary" treatment. *See Shakur v. Selsky*, 391 F.3d 106, 115-16 (2d Cir. 2005) (prison ban on all literature from all unauthorized organizations could not meet *Turner* standard for rational regulation because the lack of individualized determinations would lead to needless exclusions). Indeed, a reasonable inference from Ms. Joy's letters to Mr. Spavone regarding the basis for the denial of his

application is that she had not conducted *any* kind of meaningful individualized determination of his situation, but was in fact relying on the "shortcut" of this exclusionary policy. *See id.*

DOCS argues that the documentation that Mr. Spavone provided in support of his application for medical leave supports only the inference that Ms. Joy should have concluded that Mr. Spavone was receiving adequate care from OMH. Br. at 18. However, a reasonable jury could infer the opposite from those same documents. In particular, the April 27, 2007 letter addressed to the "Program Admissions Officer" from Mr. Spavone's treating physicians of two years, Drs. Rudder and Inaghanti "strongly recommend[ed] that he be allowed to seek and obtain exposure Exposure Therapy, Cognitive Behavioral Therapy, Group Therapy" and that "[t]hese therapeutic modalities, especially if in a community inpatient program" would "be of great benefit to this patient." A192. None of this was available at Woodbourne. The jury could also infer the necessity of the treatment from the document that Mr. Spavone submitted illustrating the dangers of lengthy incarceration to individuals suffering from PTSD.

More fundamentally, Ms. Joy stated that her decision "was based on [her] understanding that all of an inmate's mental health care needs are met in the correctional facility setting through the comprehensive services provided by OMH" and "[n]othing in the papers submitted in connection with plaintiff's application raised a substantial challenge to that understanding." A79. This astonishing statement illustrates how Ms. Joy's default interpretation of the statute excludes mentally ill inmates as a matter of course. As the district court correctly found, there is a genuine issue of material fact as to whether *any* inmate suffering from mental illness may access the statutory option for obtaining "absolutely necessary" medical care that is unavailable at that inmate's facility. SPA 12.

Indeed, it appears on appeal that DOCS has conceded that this is in fact the policy. *See* Br. at 24 ("Here, OMH's provision of comprehensive outpatient mental-health care services and programs within DOCS correctional facilities provides a rational basis for limiting medical leave to requests for outside medical treatment."); Br. at 21-22 ("Although there may be forms of medical care (such as surgery or particular dental procedures) that cannot be performed in prison,

mental health services are not among those.”). In light of the fact that Ms. Joy’s letters to Mr. Spavone expressed adherence to that selfsame exclusionary policy, *see* A91-93, a jury could reasonably infer that she conducted *no* meaningful review of his application for medical necessity and that his application was denied purely because of her application of the unconstitutional policy.

Third, DOCS relies on the Memorandum of Understanding between DOCS and OMH to argue that the mental health treatment offered by OMH within DOCS facilities obviates the need for the treatment authorized by N.Y. Corrections Law § 851(6). *See* Br. at 5-6. However, the same Memorandum of Understanding illustrates the fallacy of that position. While OMH may offer a broad range of mental health services somewhere in the DOCS system, OMH very clearly does *not* offer those services at all DOCS correctional facilities. Thus, the fact that OMH offers “Intermediate Care Programs,” (Br. at 5), and “satellite mental health units with full-time psychiatric staff and residential treatment programs,” (*id.*) at maximum security facilities such as Downstate Correctional Facility or Sing Sing (A265), offers no comfort to inmates such as Mr. Spavone, who was incarcerated at a

facility that lacked such services (A268). And the OMH services vary widely even between facilities that the Memorandum of Understanding characterizes as having the same level of care. For example Mr. Spavone obtained better treatment for his PTSD at Eastern than he had received at Woodbourne, despite the fact that both facilities are listed in the same category in the Memorandum of Understanding. A268.

Moreover, inmates are not entitled to pick the facility where they are incarcerated. *See e.g. Meriwether v. Coughlin*, 879 F.2d 1037 (2d Cir. 1989). Nor may inmates apply to OMH itself for access to "absolutely necessary" mental health treatment under N.Y. Corrections Law § 851(6); the statute vests approval authority for this care strictly in the hands of the DOCS commissioner or his or her designee. *See* N.Y. Corrections Law § 851(6).

Fourth, DOCS' argument that the "public interest in ensuring that prisoners serve the entire term of their prison sentence" (Br. at 21) is a red herring. Contrary to DOCS' insinuation, Mr. Spavone did not seek release onto the street as some kind of shortcut out of prison; he sought admission into a secure inpatient facility where he could get the help he

needed. The anchor purpose of the type of leave at stake is to obtain medical treatment that is "necessary" but unavailable. The statute itself provides for leave: it is a safety valve when necessary medical care is unavailable. It does not provide for early release or parole.

DOCS also conclusorily asserts that mental health services are a type of medical treatment that can always be performed in prison, citing the range of services offered by OMH. Br. at 22. On its face, the proposition that a policy that *all* mental health services – without individualized analysis of a particular inmate's situation – may be performed in prison is a factual question, not a legal one. As noted, the very face of the Memorandum of Understanding demonstrates that OMH's services are not, in fact, provided comprehensively at every facility.

Finally, DOCS suggests that the Equal Protection Clause permits government officials to draw distinctions even if there might be "some outlier cases or unique situations where the distinction might not hold". Br. at 23. But this is not some outlier or unique situation: under DOCS' position, someone suffering from a mental illness could *never* qualify for the statutory access to medical care.

B. DOCS' Policy Violates the Eighth Amendment

DOCS' policy of disqualifying all inmates seeking "absolutely necessary" mental health treatment under the leave specified in N.Y. Corrections Law § 851(6) implicates the Eighth Amendment as well. An inmate seeking to prove deliberate indifference to a serious medical need must meet both an objective and subjective standard. *Salahuddin v. Goord*, 467 F.3d 263, 279 (2d Cir. 2006). First, the alleged deprivation of adequate medical care must be 'sufficiently serious'" as an objective matter. *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). The harm alleged may include "an unreasonable risk of serious damage to his future health." *Helling v. McKinney*, 509 U.S. 25, 35 (1993). If a prisoner is deprived of reasonable care for a sufficiently serious medical condition, failure to take reasonable measures in response can lead to liability. *Salahuddin*, 467 F.3d at 279-80. Second, the charged official must have acted with "deliberate indifference to inmate health" which "is a mental state equivalent to subjective recklessness." *Id.* at 280.

As DOCS itself recognizes, "the constitutional 'test is one of medical necessity and not simply one of desirability.'" Br. at 17

(quoting *Dean v. Coughlin*, 804 F.2d 207, 215 (2d Cir. 1986)). Here, the statute in question hews to that same standard: it describes "absolutely necessary" medical treatment that is not available in a correctional facility. *See* N.Y. Corrections Law § 851(6). DOCS has taken the position that medical treatment for mental health could *never* be a medical necessity. The district court correctly rejected this position. SPA10-11.

DOCS emphasizes the variety of mental health care services offered by OMH somewhere in the sprawling DOCS system. But if Mr. Spavone was unable to access those treatments because they were unavailable at his *particular* corrections facility they cannot help DOCS on the question of medical necessity. Moreover, given Ms. Joy's apparent unwillingness to make an individualized determination in light of the policy, Ms. Joy's credibility about her awareness of risk is a proper jury question. *See Salahuddin*, 467 F.3d at 281 (discussing how a prison official might attempt to contest the deliberate indifference element before a jury).

C. Second Circuit Precedent Clearly Establishes That Mental Health Care is An Integral Part of Medical Care.

Qualified immunity only shields government officials who act in ways they reasonably believe to be lawful, unless the law is clearly established to the contrary. The right must be defined with specificity, or foreshadowed, by either this Court or the Supreme Court. "[T]he absence of a decision by this Court or the Supreme Court directly addressing the right at issue will not preclude a finding that the law was clearly established at the time of the alleged violation." *Tellier v. Fields*, 280 F.3d 69 (2d Cir. 2000).

"An overly narrow definition of the right can effectively insulate the government's actions by making it easy to assert that the narrowly defined right was not clearly established." *LaBounty v. Coughlin*, 137 F.3d 68,73 (2d Cir. 1998). DOCS has attempted to do just that. Contrary to their position, the right at stake here is not "the right to residential treatment outside prison." Br. at 27. The right at stake is an inmate's right to seek adequate medical treatment.

DOCS' policy excises mental health care from the definition of medical care. But as the district court correctly recognized, this Court

has explicitly held: "We think it plain that from the legal standpoint psychiatric or mental health care is an integral part of medical care." *Langley*, 888 F.2d at 254. This decision should have readily alerted the defendants that a policy defining mental health care out of medical care – and the denial of Mr. Spavone's medical leave pursuant to that policy without a meaningful individualized determination, *see Shakur*, 391 F.3d at 115-16 – violated the Constitution.[12]

The unpublished decisions that DOCS relies upon as "routinely rejecting similar constitutional challenges" are inapposite. *Ahlers v. Recore*, (Br. at 27), involved an alleged procedural due process violation for a failure to hold a hearing, not a challenge to a categorical exclusion of inmates with a particular condition from pursuing "necessary" medical treatment. No. 95 CV 4338, 1996 WL 406782, at *5 (E.D.N.Y. July 3, 1996). Similarly, *Covington v. Westchester Cty. Dept. of Corrections*, (Br. at 28), concerned a dispute over whether an inmate's care was adequate. No. 06 Civ. 5369, 2010 WL 572125 (S.D.N.Y. Jan. 25, 2010). Unlike the facts presented here, that case did not involve the

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[12] Moreover, Mr. Spavone is not pursuing a procedural due process claim under § 1983.

application of a policy that eliminated mental health treatment from the definition of medical treatment.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's denial of summary judgment and remand Mr. Spavone's § 1983 claims against the individual defendants for trial.

Dated: New York, New York
August 26, 2011

Respectfully Submitted,

MAYER BROWN LLP

/s/_________________________
Hannah Chanoine
1675 Broadway
New York, N.Y. 10019
(212) 506-2500

Counsel for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6824 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/S/______________________________

Hannah Y.S. Chanoine
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500
Counsel for Plaintiff-Appellee

August 26, 2011