No. _____

In the Supreme Court of the United States

IMHOTEP CARTER AND SALEH OBAISI,
Petitioners,
v.

TYRONE PETTIES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court found that prison officials violated the Eighth Amendment if they were deliberately indifferent to a prisoner's serious medical needs. However, *Estelle* also established that a prisoner could not raise an Eighth Amendment claim merely by alleging that medical personnel did not pursue additional or alternative diagnostics or treatment with respect to that medical need. *See id.*, 429 U.S. at 107. Subsequently, this Court found in *Farmer v. Brennan*, 511 U.S. 825 (1994), that in order to raise an Eighth Amendment claim for deliberate indifference, a prisoner must demonstrate that he or she faced an objectively serious risk of harm, and that a prison official was subjectively aware of the risk of serious harm to that prisoner, but disregarded that risk.

Estelle will celebrate its 40th anniversary this month. It remains the only Supreme Court case where the standard for an Eighth Amendment claim brought against a prison doctor for deliberate indifference was directly addressed. In the interim, circuit courts have expanded upon the application of *Estelle* and *Farmer* to Eighth Amendment medical claims. Here, the Seventh Circuit determined that summary judgment was inappropriate where a prisoner contended that medical treatment was provided, but that the treatment was substandard. The Seventh Circuit also held that even if medical personnel denied knowing they were exposing a prisoner to serious risk of harm, an objective examination could be employed to infer the

subjective component of the deliberate indifference test.

Review is warranted to clarify the applicable standard for Eighth Amendment medical cases. The questions presented in this case are:

1. Whether a prisoner who receives treatment, including palliative treatment for pain, from prison medical personnel, but claims the treatment provided was substantially inadequate, has stated an Eighth Amendment claim as to the medical personnel who provided that care.

2. Whether, in determining if a prison medical provider was deliberatively indifferent to a prisoner's serious medical need, objective standards or criteria may be employed to determine if the medical provider had the requisite subjective state of mind necessary for a deliberate indifference finding.

PARTIES TO THE PROCEEDING

Petitioners, Imhotep Carter, M.D., and Saleh Obaisi, M.D., were the defendants-appellees before the Court of Appeals. Respondent, Tyrone Petties, was the plaintiff-appellant.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
-Continued-

Page

TABLE OF CONTENTS
-Continued-

Page

APPENDICES

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
-Continued-

Page(s)

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Imhotep Carter, M.D., and Saleh Obaisi, M.D., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The *en banc* Opinion of the Court of Appeals, *as amended* (Appendix A, 1a–27a), reversing the district court's decision to grant summary judgment in favor of Petitioners is reported at 836 F.3d 722. The original *en banc* Opinion is unreported; an excerpt containing the section that was subsequently amended by the Court of Appeals is provided in Appendix B, p. 28a.

The underlying Opinion rendered by a panel of the Court of Appeals (Appendix C, 29a–50a), which affirmed the district court, is reported at 795 F.3d 688. The Memorandum Opinion and Order of the U.S. District Court for the Northern District of Illinois (Appendix D, 51a–67a), is unreported.

JURISDICTION

The judgment and original *en banc* Opinion of the Court of Appeals was entered on August 23, 2016. The amended *en banc* Opinion was issued on August 25, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTIUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment states, in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amd. XIV, § 1.

42 U.S.C. § 1983 states, 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 . . . .

The full text of the statutes and constitutional provisions referenced above are provided in the Appendix E to this Petition.

STATEMENT OF THE CASE

A. Introduction

Respondent, Tyrone Petties, injured his left Achilles tendon while incarcerated at the Illinois Department of Corrections' ("IDOC") Stateville Correctional Center ("Stateville"). Petitioners, Dr. Imhotep Carter and Dr. Saleh Obaisi—private medical personnel who were employed at Stateville—successively examined and provided Petties with treatment for his injury, including medication, crutches, diagnostic imagery, and a specialist referral. Petties was ultimately dissatisfied with Petitioners' treatment, and filed a civil rights complaint against Petitioners under 42 U.S.C. § 1983.[1] Petties claimed Petitioners' treatment was delayed or insufficient, and therefore violated his Eighth Amendment right to be free from cruel and unusual punishment.

After the issues were joined and fact discovery was concluded, Petitioners pursued summary judgment. Petitioners did not dispute that Petties's Achilles injury constituted a serious medical problem. Rather, they argued that their continued efforts to care for Petties's injury vitiated his claim of deliberate indifference. In turn, Petties argued that differences between Petitioners' treatment, and the treatment recommended by established protocols or

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[1] Mr. Petties initially brought suit against Petitioners' employer as well; however, his amended pleadings focused solely on Petitioners.

by specialists, created a material issue of fact as to Petitioners' subjective state of mind.

The district court agreed with Petitioners, and awarded summary judgment. On appeal, a divided 2–1 panel of the Seventh Circuit affirmed the district court's ruling. However, on *en banc* review, the Court of Appeals reversed the district court in a 6–3 decision.

As noted by Judge Easterbrook in his dissent to the *en banc* opinion, the Seventh Circuit's decision reflects trends present in other circuits, but, as Judge Easterbrook additionally noted, the decision also conflicts with the aims of the Eighth Amendment, as well as this Court's prior decision in *Estelle*, which delimited the scope of Eighth Amendment medical claims. This case presents a merited opportunity for this Court to provide further definition on the Eighth Amendment's application to medical treatment claims. Given the length of time since this Court rendered its decision in *Estelle*, the significant prison population present in this country, and the corresponding amount of prisoner litigation present in federal courthouses, this Court's re-entry into the discussion will have a significant national impact, and is well warranted.

B. Factual Background

Petitioners, Dr. Carter and Dr. Obaisi, were successive medical directors at Stateville Correctional Center. App'x D, 51a–52a. Both Dr. Carter and Dr. Obaisi were employees of a private contractor, who contracted with IDOC to provide certain medical services. *Id.* Dr. Carter served as

Stateville's medical director from July 25, 2011 through May 10, 2012; Dr. Obaisi began his tenure on August 2, 2012. *Id.*

1. Petties's Injury and Initial Treatment.

On January 19, 2012, and while he was incarcerated at Stateville, Petties felt a "pop" and extreme pain in his left ankle. App'x D, 51a–52a. Petties was transported to the prison's infirmary, where he was examined and found to have tenderness and an abnormal reflex in his left Achilles tendon; the examining physician[2] also noted that Petties could not bear weight on that ankle. App'x C, 29a; App'x D, 52a. That physician prescribed Petties a course of Vicodin, ice, and crutches. *Id.*; App'x D, 52a. He also authorized Petties to have a week of "lay-in meals," which meant that meals were brought directly to Petties, rather than requiring him to walk to the cafeteria. App'x C, 29a; App'x D, 52a.

On the same day, Dr. Carter noted in Petties's medical records that Petties had an Achilles tendon "rupture." App'x C, 29a; App'x D, 52a. Dr. Carter's employer provided a protocol for ruptured Achilles tendons; the protocol advised that patients should receive a splint, crutches, and an antibiotic if a laceration accompanied the injury. App'x A, 3a. Dr. Carter had seen approximately ten Achilles ruptures in his twenty-year medical career. *Id.* Dr. Carter

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[2] Though the *en banc* opinion suggests that Dr. Carter initially saw Mr. Petties, neither of the Petitioners were the initial examining physician. *Compare* App'x A, 2a *with* App'x C, 29a; App'x D, 52a.

testified that the appropriate treatment for an Achilles rupture is immobilization, keeping weight off the ankle, anti-inflammatory drugs, and passive stretching. App'x A, 15a. Dr. Carter also believed crutches served to help stabilize or immobilize the foot. App'x A, 16a. Dr. Carter ordered that an MRI be taken of Petties's foot, and that he be examined by an orthopedist; however he did not order a splint. App'x A, 3a–4a; App'x C, 29a. Dr. Carter's request of an MRI for Petties was approved by another physician on January 25, 2012. App'x D, 52a.

2. Subsequent Treatment by Dr. Carter and Medical Personnel.

Petties was subsequently scheduled to see medical personnel on January 25 and 26, but the prison went into lockdown status, which prevented him from doing so. App'x D, 53a. Petties's next visit with medical personnel occurred on January 27, 2012. App'x D, 53a. Records from that visit indicate that Petties had weakness in his left foot, but that he could bear weight on that foot. App'x C, 30a; App'x D, 53a.

On February 8, 2012, Petties was scheduled to have an X-ray taken, but the appointment was cancelled due to another prison lockdown. App'x D, 53a. During a lockdown, a prison medical director can authorize the transfer of a prisoner to external facilities, but only for urgent medical situations or emergencies. *Id.*

On February 13, 2012, Petties noted to medical personnel that his tendon was "killing him" and that

the pain was keeping him from climbing stairs. App'x A, 4a; App'x C, 30a. Dr. Carter saw Petties the next day; he noted that Petties had a shortened, swollen left Achilles tendon. App'x C, 30a; App'x D, 53a. Dr. Carter entered an order permitting Petties to continue to have crutches, a low-bunk permit, and a lay-in permit for an additional two-month period. *Id.* Dr. Carter also provided Petties with a six-week Vicodin script for pain, as well as two anti-inflammatories to reduce swelling. *Id.* Dr. Carter further advised Petties to walk slowly and avoid stairs and the gym. *Id.*

On March 6, 2012, Petties was transported to an offsite medical center to have an MRI taken of his ankle. App'x D, 53a; App'x C, 30a. The MRI indicated a "complete Achilles tendon rupture" measuring between 2.0 and 4.7 centimeters. App'x A, 4a; App'x C, 30a; App'x D, 53a.

On March 14, 2012, Petties was transported to see an offsite orthopedist, Dr. Puppala. App'x C, 30a; App'x D, 53a–54a. Dr. Puppala noted that Petties had been walking on the left foot, and advised that a lack of a cast contributed to Petties's pain and "likely" contributed to the gap in Petties's ruptured tendon. *See* App'x C, 30a; App'x D, 54a. However, Dr. Puppala subsequently noted at his deposition that an Achilles tendon rupture did not always need to be immobilized; while immobilization would provide "a lot of comfort," the Achilles "would probably" heal without it, and immobilization "doesn't always have to be done." App'x D, 52a.

Subsequent to his examination of Petties, Dr. Puppala recommended immobilization of Petties's

ankle in a boot, and provided a boot to Petties. *See* App'x C, 30a; App'x D, 54a. Dr. Puppala indicated that the boot "should allow Petties to walk with less pain," and further noted that Petties could continue his use of crutches to minimize weight bearing. *Id.* Dr. Puppala noted that Petties could be a candidate for a tendon repair or a graft, and referred Petties to see a foot and ankle specialist "for definitive treatment." *Id.*

Upon Petties's return to Stateville, Dr. Carter ordered a 3-month permit for Petties's boot. App'x C, 31a; App'x D, 54a. Petties was also provided with an increased strength Vicodin script by another physician. App'x C, 31a. While Petties claimed that Dr. Carter told him that he would not authorize surgery because it would be too expensive, Dr. Carter did refer Petties to an external orthopedic clinic, located at the University of Illinois at Chicago (UIC). App'x D, 54a.

Subsequent to his March 12, 2012 appointment with Dr. Puppala, Petties continued to receive treatment from various Stateville medical staff. App'x C, 31a, App'x D, 55a. Petties received pain medications (Vicodin and Norco) in March and April, and continued Vicodin renewals in May and June. App'x D, 55a. He also received support shoes in April. *Id.* Petties's prescription for the boot, low-bunk permit, and crutches was extended twice. App'x C, 31a; App'x D, 55a.

Petties was seen by the orthopedic specialist at UIC, Dr. Chmell, on July 2, 2012. App'x A, 4a; App'x C, 31a; App'x D 55a. Dr. Chmell noted that Petties had decreased ankle strength, but had a full range of

motion; Petties's tendon was partially healed. App'x C, 31a, 36a; App'x D, 55a. Dr. Chmell determined that Petties was not a surgical candidate, and recommended continued reduction in activity, a follow-up MRI, physical stretching, and physical therapy. App'x D, 55a; App'x C, 31a. Dr. Chmell testified at his deposition that he would always immobilize an Achilles rupture. App'x D, 62a.

3. Additional Treatment by Dr. Obaisi and Medical Personnel.

Prior to his appointment as Stateville medical director in August 2012, Dr. Obaisi served as a weekend physician at Stateville. App'x C, 31a. In that capacity, he approved the follow-up MRI suggested by Dr. Chmell. *Id.* Subsequent to Dr. Obaisi's appointment as medical director, he met with Petties, who indicated that he was not using his crutches and wanted to return them. App'x C, at 32a. At that appointment, Dr. Obaisi indicated that he would not order physical therapy for Petties. App'x C, 32a. Petties had previously been given physical therapy for a right Achilles tendon injury. App'x D, 65a.

On September 4, 2012, Petties was taken to have the follow-up MRI on his ankle. App'x C, 32a; App'x D, 56a. The MRI indicated a partial tear, which, according to Dr. Chmell, indicated that the tendon was healing. *Id.* Dr. Obaisi saw Petties later in September, and diagnosed Petties with tendonitis. App'x D, 56a. He prescribed Petties with Tylenol, and extended his low bunk permit and the permit for his boot. *Id.*; App'x C, 32a; App'x A, 5a.

When Dr. Obaisi next saw Petties in November 2012, Petties was still experiencing pain. App'x C, 32a. Dr. Obaisi extended Petties's low bunk permit, use of soft-soled gym shoes, and the orthopedic boot. *Id.* Petties filed his complaint in this case on November 19, 2012. *Id.* Subsequent to initiating the complaint, Petties continued to be seen by medical staff throughout December 2012—April 2013, and received additional medication in June 2013. *Id.* As of early 2014, Petties claimed that he was still experiencing pain, soreness, and stiffness in his left ankle. *Id.*

C. Procedural Background

Petties's Section 1983 claim, as subsequently focused, contended that 1.) Dr. Carter was deliberately indifferent by failing to immobilize his ankle with a splint, making him wait six weeks for an MRI, and refusing to provide surgery; and 2.) Dr. Obaisi was deliberately indifferent by refusing to provide physical therapy or surgery. App'x C, 33a; App'x D, 58–59a.

1. The District Court's Issuance of Summary Judgment.

On June 30, 2014, the district court determined that Petitioners were entitled to summary judgment. *See generally* App'x D. Citing *Estelle*, *Farmer*, and Seventh Circuit precedent, the court found that Petties had not sufficiently established his claims.

With respect to Dr. Carter, the district court noted that Dr. Carter did not "wantonly and unnecessarily leave Petties to suffer in pain." App'x

D, 63a. Rather, the district court noted that an MRI was necessary to determine whether Petties had an Achilles rupture, and that Dr. Carter had ordered an MRI the same day of the injury. App'x D, 62a. The district court also found that Petties had not provided any evidence that the time between the order and the time that Petties had the MRI was attributable to Dr. Carter, or that the MRI could have been scheduled any sooner. App'x D, 62a–63a. In the meantime, Petties had been provided weight-reducing crutches, a lay-in permit, and medication. App'x D, 63a.

The district court also found persuasive that the two outside physicians who saw Petties differed in their approaches to tendon immobilization: Dr. Chmell testified that he always immobilized an Achilles rupture; Dr. Puppala testified that it was not always necessary to immobilize a rupture. *Id.* It also found that Petties's claim that Dr. Carter had allegedly refused to provide surgery due to excessive cost was nullified by the fact that no physician had actually recommended surgery for Petties. *Id.* at 64a.

With respect to Dr. Obaisi, the district court similarly found that Petties had not established a claim. App'x D, 64–65a. Though Dr. Obaisi had not provided Petties with physical therapy, the Court found persuasive the fact that Petties had previous experience with physical therapy and could have performed physical therapy on his own. App'x D, 65a. With respect to both Petitioners, the district court also noted that the treatment provided by Dr. Obaisi and Dr. Carter was sufficient to overcome a deliberate indifference claim, given that Petties's ankle was demonstrably healing. App'x D, 64a–65a.

2. The Initial Affirmation by the Court of Appeals.

Petties appealed, and, on July 30, 2015, a 2-1 divided panel affirmed the district court's decision. *See generally* App'x C, 28a–49a. The majority agreed with the district court that the "meaningful and ongoing treatment of Petties's injury at Stateville and with outside medical providers" would not allow a jury to conclude that Dr. Carter was deliberately indifferent to Petties's needs. App'x C, 34a–35a. Similarly, the majority noted, though Petties did not receive recommended physical therapy, the continuing care that Petties *did* receive after Dr. Obaisi became medical director was sufficient to overcome any argument of deliberate indifference. App'x C, 35a–36a. The majority's conclusion was bolstered again by the fact that Petties demonstrated a full range of motion in his ankle when he saw Dr. Chmell, and the fact that the tendon was demonstrably healing. App'x C, 35a–36a.

Judge Williams dissented. She concluded that there was sufficient circumstantial evidence of Petitioners' deliberate indifference to allow the case to go to a jury. App'x C, 36a–49a. Citing Seventh Circuit precedent, as well as precedent from the Sixth and Tenth Circuits (*Mata v. Saiz*, 427 F.3d 745, 757–58 (10th Cir. 2005), and *Phillips v. Roane Cnty., Tenn.,* 534 F.3d 531 (6th Cir. 2008), respectively), Judge Williams noted that a medical professional's subjective state of mind could be inferred through an objective lens. App'x C, 31a. Specifically, Judge Williams noted that "where symptoms plainly call for a particular medical

treatment (for example, the leg is broken, so it must be set), a doctor's deliberate decision not to furnish the treatment is actionable." App'x C, 43–44a (citing *Walkers v. Peters*, 233 F.3d 494, 498 (7th Cir. 2000)). Judge Williams also noted that a treater's deliberate indifference could be inferred from a "treatment decision which is so far afield from accepted professional standards as to raise the inference that it was not actually based on a medical judgment." App'x C, 47a (citing *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006)).

Specifically, with respect to Dr. Carter, Judge Williams took issue with his failure to provide Petties with a splint at the time of injury. App'x C, 37a–38a. Judge Williams noted that "[i]t is widely known that failing to immobilize an Achilles tendon results in extreme pain," and found that there was no medical justification for Dr. Carter's failure to provide a splint. App'x C, 39a. She also found that Dr. Carter's own testimony—that he believed providing Petties crutches and minimizing time on his feet was the equivalent of immobilization—was ineffective to avoid a deliberate indifference claim, due to statements by himself, by Dr. Puppala, and Dr. Chmell that immobilization was generally the indicated course of treatment, as well as the existence of a policy recommending immobilization. App'x C, 44a. Judge Williams further found that Dr. Carter's treatment of Petties was unreasonably ineffective given the availability of splinting; therefore, he could not use the fact that he had provided treatment to Petties to avoid a deliberate indifference claim. *See* App'x C, 42a.

With respect to Dr. Obaisi, Judge Williams determined that Dr. Obaisi's decision to not follow Dr. Chmell's physical therapy recommendation was done without medical justification, and therefore could constitute evidence of deliberate indifference. App'x C, 45a, 47–48a. Judge Williams similarly found that the totality of care otherwise provided to Petties was insufficient and could not overcome Dr. Obaisi's decision not to provide physical therapy. App'x C, 46a–47a.

3. The *En Banc* Reversal by the Court of Appeals.

Petties subsequently petitioned for additional review. The Seventh Circuit granted Petties's *en banc* request, and on August 23, 2016, reversed the district court's issuance of summary judgment in a 6–3 decision. *See generally* App'x A & B, 1a–27a. Judge Williams, now writing for the majority, found that Petitioners' provision of treatment to Petties did not rise to a level which allowed for the issuance of summary judgment. Citing primarily Seventh Circuit precedent, the majority examined the treatment Petitioners provided—coupled with the context surrounding that treatment—and concluded that a material issue of fact existed with respect to Petitioners' subjective state of mind.

Specifically, the court found that while this Court "instructed us that a plaintiff must provide evidence that an official *actually* knew of and disregarded a substantial risk of harm," and that officials "can avoid liability by proving they were unaware even of an obvious risk to inmate health or safety," "a blatant disregard for medical standards

could support a finding of mere medical malpractice, or it could rise to the level of deliberate indifference, depending on the circumstances." App'x 7a–8a (citing *Farmer*, 511 U.S. at 837, 844). The Circuit Court further noted that its precedent "rejected the notion that the provision of some care . . . meets the basic requirements of the Eighth Amendment," and that "the context surrounding a doctor's treatment . . . can sometimes override his claimed ignorance of the risks stemming from that decision." App'x A, 13a. In short, the court found that: "where evidence exists that the defendants knew better than to make the medical decision that they did, a jury should decide whether or not the defendants were actually ignorant to the risk of harm that they caused." App'x A, 14a.

Turning to Petitioners, the Circuit Court found that neither of them were entitled to summary judgment. With respect to Dr. Carter, the court held that the statements that he, Dr. Puppala, and Dr. Chmell made concerning the general propriety of immobilization, coupled with the existing employer protocol concerning a ruptured Achilles tendon, "support[ed] a reasonable inference that Dr. Carter knew that failure to immobilize an Achilles rupture would impede Petties's recovery and prolong his pain." App'x A, at 15a–16a. This was even in light of the fact that "some of [Dr. Carter]'s testimony suggests that he believed crutches served the same purpose as a boot." *Id.* The Circuit Court also found that Dr. Carter's failure to declare Petties's case a medical emergency to accelerate his access to an MRI, or splint the ankle during the wait for an MRI, could allow the jury to conclude Dr. Carter was deliberately indifferent to Mr. Petties' well-being,

despite the other care being provided. App'x A, 17a. The majority also found that Petties's claim that Dr. Carter told him he could not get surgery due to the expense—though Petties did not produce medical evidence to support surgery—could be used as circumstantial evidence of Dr. Carter's subjective state of mind in being deliberately indifferent to Petties's medical needs. App'x A, 18a.

With respect to Dr. Obaisi, the Circuit Court found that his rationale for not prescribing Petties with physical therapy was inconsistent and not supported by medical evidence. App'x A, 18a–19a. Accordingly, the Circuit Court found, Petties had the right to have a jury "hear Dr. Obaisi's justifications for his treatment decisions (or lack thereof) and to determine if Dr. Obaisi was deliberately indifferent, rather than simply incompetent, in treating his injury." App'x A, 19a.

Judge Easterbrook, who was joined by Judges Flaum and Kanne, wrote a dissenting opinion. In it, he found that the *en banc* opinion ran contrary to the principles this Court espoused in *Estelle v. Gamble*, 429 U.S. 97 (1976), and that it invited the federalization of medical malpractice claims under the auspices of Section 1983. *See generally* App'x A, 20a–26a. Specifically, Judge Easterbrook noted that in *Estelle*, this Court found that the provision of palliative care to a prisoner—i.e., "pain relief without an effort at cure"—was, by itself, sufficient to satisfy the Eighth Amendment. App'x A, 21a. *Estelle*, Judge Easterbrook noted, was predicated upon whether a prisoner received substantial care, rather than the medical judgments exercised as part of that care, however wrong those judgments might

have turned out to be. App'x A, 22a (citing *Estelle*, 429 U.S. at 107 & n.5). An issue of deficient care, the dissent noted, was a matter for state malpractice law. *Id.* Judge Easterbrook noted that Petitioners provided Petties with "quite a lot" of medical care, and, while Petties took issue that he did not receive more care, "there can be no question that Petties received more, and better, medical care than Gamble received. Yet Gamble lost on the pleadings." App'x 23a. He also found that there were differing opinions in other circuit courts as to the proper scope of review of deliberate indifference medical cases, specifically, with respect to the question as to whether treatment was given, rather than the quality of the medical decisions accompanying that treatment. App'x 24a–25a (comparing cases).

Judge Easterbrook's dissent also took issue with the Circuit Court's employment of a medical "judgment" or "competence" standard to determine whether a prison official was deliberately indifferent, as such standards ran against *Estelle*'s determination that medical malpractice did not constitute an Eight Amendment violation. App'x A, 26a. Noting the existence of state law tort remedies for claims of deficient medical care, Judge Easterbrook cautioned that the implementation of the Circuit Court's decision seemed to act as a proxy for state law malpractice claims, which, as this Court indicated, were properly left in state court. *Id.*

REASONS FOR GRANTING THE PETITION

A. The Circuit Court's decision represents a substantial departure from this Court's existing jurisprudence under *Estelle*, where it dismissed a prisoner's purported Eighth Amendment claim that he had received substantial palliative medical treatment, but the treatment was insufficient.

The right of a prisoner to sue prison medical care providers under the Eighth Amendment was established by this Court in *Estelle v. Gamble*, 429 U.S. 97 (1976). In *Estelle*, the Court recalled that "the primary concern of the drafters of the Eighth Amendment was to proscribe "torture"' and other 'barbarous"' methods of punishment. *Id.* at 102 (citing *Gregg v. Georgia*, 428 U.S. 153, 842 (1976)). The Court noted that it had previously found the Eighth Amendment to proscribe punishments which were incompatible with "the evolving standards of decency that mark the progress of a maturing society." *Id.* (citations omitted). This included, the Court noted, punishments which "involve the unnecessary and wanton infliction of pain." *Id.*

The Court accordingly found that "these elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration." *Estelle*, 429 U.S. at 103. Thus, this Court concluded, the deliberate indifference to serious medical needs of prisoners involves the "unnecessary and wanton infliction of pain" that the Eighth Amendment protected against. *Id.* at 104 (citing *Gregg v. Georgia*, 428 U.S. at 173).

However, this Court specifically cautioned that although modern jurisprudence allowed for a medical indifference claim, not every claim by a prisoner that he received inadequate medical treatment stated a violation of the Eighth Amendment. *Id.* at 105. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.* at 106. Rather, "in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the 8th Amendment." *Id.* at 106.

Against that backdrop, the Court in *Estelle* evaluated claims strikingly similar to those raised by Petties in the present matter—and found that no Eighth Amendment claim was stated by the prisoner. The conflicting interpretations of this Court's decision in *Estelle* served as the primary area of disagreement between the majority and the dissent in the Circuit Court. There is obvious confusion about the standard that merits clarification.

Without addressing the accuracy of the Circuit Court's factual findings, a comparison of those findings to the findings of this Court in *Estelle* is important in demonstrating how the Seventh Circuit's analysis would unduly expand the "deliberate indifference" standard by lowering the bar for Plaintiff to establish proof of that indifference.

In *Estelle*, as in the present case, an inmate was injured in an accident. In both cases, the inmate received palliative treatment immediately, and of a very similar nature. In both cases, the inmate alleged deliberate indifference due to the failure of medical care providers to provide definitive diagnoses and treatment of the condition from which the inmate claimed to have suffered as a result of the accident.

In *Estelle*, inmate Gamble claimed to have suffered an injury on November 9, 1973, when a 600 pound bale of cotton fell on him and injured his back. *Estelle*, 429 U.S. at 99 & n.3. After a few hours, Estelle's back became stiff and he reported to the unit hospital. *Id.* He was checked for a hernia and sent back to his cell. *Id.* When the pain became intense a couple of hours later, he returned to the hospital, where he was given pain pills and examined by a doctor. *Id.* He was initially diagnosed with a lower back strain and prescribed a pain reliever and a muscle relaxant. *Id.* He was also placed on an order that allowed him to remain in his cell and receive his meals there for two days, similar to the "lay in" permit that Petties received. *Id.*

Three days after the initial injury, on November 12, 1973, Gamble was continued on his medications, and his pass that allowed him to remain in his cell was continued for seven days. *Id.* The ordering physician, Dr. Astone, also ordered that he be moved from an upper bunk to a lower bunk for one week, similar to the order Petties received. *Id.* Unlike the instant matter, prison authorities overseeing Gamble failed to comply with that order. *Id.* The following week, Gamble returned to Dr. Astone,

where his pain medications and cell pass were again continued. *Id.*

On December 3, 1973, and despite Gamble's allegation that his back had not improved, Dr. Astone took him off of his cell pass and certified him capable of doing light work. *Id.* at 100. Yet, he prescribed the pain medication for another seven days. *Id.* Gamble reported to the prison administrators that he was in too much pain to work, at which point he was moved to "administrative segregation." *Id.* On December 6, he was seen by a Dr. Gray, who prescribed additional medications and continued them for 30 days. There was a four-day delay in one of the prescriptions being filled out because it was lost by the staff. *Id.*

In early January 1974, Mr. Gamble was told that he would be sent to the "farm" if he did not return to work—this despite his claims of being in excruciating pain. *Id.* at 100–01. He continued to receive pain medication prescriptions throughout the remainder of that month, but received no other diagnostic testing. *Id.*

On January 31, Gamble was brought before the prison disciplinary committee for his alleged refusal to work. *Id.* at 101. He told the committee that he could not work because of his severe back pain. *Id.* The committee, with no further medical evaluation or testimony, placed him in solitary confinement. *Id.* Four days later, Mr. Gamble ended up in the hospital with chest pain and what he referred to as "blank outs." *Id.*

In *Estelle*, this Court held that even applying what it described as "liberal standards," Gamble's claims were "not cognizable under § 1983." *Id.* at 107. In so holding, this Court noted that Gamble "was seen by medical personnel on 17 occasions over a three-month period" and received substantial treatment for his back injury. *Id.* Gamble contended that "more should have been done by way of diagnosis and treatment," including a number of options that were not pursued. *Id.* The Court of Appeals agreed, citing a failure of prison officials to even get an X-ray of Gamble's lower back. *Id.* In rejecting that argument, and overturning the decision of the Court of Appeals, this Court asserted:

> The question whether an X-ray - or additional diagnostic techniques or forms of treatment - is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice . . . . The Court of Appeals was in error in holding that the alleged insufficiency of the medical treatment required reversal and remand.

Id, 429 U.S. at 107–08.

The facts of the present case, as analyzed by the Circuit Court, bear a striking resemblance to the facts of *Estelle*. As with the inmate in *Estelle*, Petties was seen immediately after his initial injury. Petitioner Carter gave Petties crutches, ice and Vicodin. Like the inmate in *Estelle*, Petties was authorized a week of "lay in" meals. He was also assigned to a lower bunk, referred to a specialist,

and sent for an MRI (a diagnostic test never ordered for Mr. Gamble). Following an evaluation by an orthopedic specialist, and pursuant to that specialist's recommendation, Petties was given an orthopedic boot, and continued on crutches, ice, and assignment to a lower bunk. Unlike the inmate in *Estelle*, he was never threatened with solitary confinement for failure to participate in work detail. Rather, Petties continued to receive permits to limit his physical activity.

Despite a pattern of care very similar to, but arguably superior to, that in *Estelle*, the Circuit Court majority reached a very different conclusion from that reached by this Court, and that reached by Judge Easterbrook's dissent. Rather than dismissing Petties's petition outright, the Circuit Court determined that a sufficient basis existed for the case to proceed to trial on Eighth Amendment grounds. The mere fact of the Circuit Court majority reaching a different conclusion is not, in and of itself, a matter for this Court's concern. However, the rationale relied upon by the Circuit Court is.

After citing the standards this Court set forth in *Estelle*, the Seventh Circuit focused almost exclusively upon its own precedent, citing only one case from outside the Seventh Circuit. App'x A, 8a-14a.

After review of its own precedent, the Circuit Court set forth its analytical framework as follows:

> "These cases bear a few notable commonalities. Most of them involve treatment, sometimes over an extended period of time. But

> repeatedly, we have rejected the notion that the provision of some care means the doctor provided medical treatment which meets the basic requirements of the Eighth Amendment. Rather, the context surrounding a doctor's treatment decision can sometimes override his claimed ignorance of the risks stemming from that decision. When a doctor says he did not realize his treatment decisions (or lack thereof) could cause serious harm to a plaintiff, the jury is entitled to weigh that explanation against certain clues that the doctor did know. Those context clues might include the existence of documents the doctor regularly consulted which advised against his course of treatment, evidence that the patient repeatedly complained of enduring pain with no modifications in care, inexplicable delays or departures from common medical standards, or, of course, the doctor's own testimony that indicates knowledge of necessary treatment he failed to provide."

App'x A, 13a.

This manner of analyzing an Eighth Amendment claim of deliberate indifference in the medical context is significant, as evidenced by the more than 20 times it has already been cited in District Court and Circuit Court cases within the Seventh Circuit in the past few months since the decision was rendered. The Circuit Court would have juries attempting to evaluate "contextual clues" as to the hidden thought processes of the treating medical care providers to determine whether the choices they made in rendering, or failing to render, certain

aspects of care constituted deliberate indifference as opposed to a mere exercise of medical judgment, faulty or otherwise. However, as this Court noted in *Estelle*, "a medical decision not to order an x-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice…." 429 U.S. at 107. Accordingly, as Judge Easterbrook noted, the decision is a venture into the federalization of medical malpractice claims, which *Estelle* sought to forestall.

Indeed, most of the Circuit Court's rationale focuses upon the issue of Dr. Carter's decision to put Mr. Petties on crutches rather than immobilize his ankle with a splint. While splinting was listed as one of the remedies in the protocol, the medical judgment to choose an alternative approach, faulty or not, is hardly grounds for a jury to speculate on deliberate indifference.

This case does not present a situation where care was denied. It is undisputed that both Petitioners provided substantial and ongoing palliative care specifically addressed to Mr. Petties's pain. While certain choices Dr. Carter and Dr. Obaisi made as part of the extensive care they provided could fairly be questioned as less than ideal—that does not give rise to an inference of deliberate indifference by the very doctors who provided all of that care. Nor does it implicate the Eighth Amendment.

To allow a claim of this type to proceed on nothing more than speculation as to ulterior motives of the Petitioners would invite a slew of such cases in the future, and would cause an unwarranted

expansion and constitutionalization of medical malpractice in the prison setting. Review by this Court is accordingly warranted.

B. The two-step analysis posited by the Circuit Court for use in determining whether a prima facie case of deliberate indifference has been shown is at odds with this Court's prior holdings in *Estelle* and *Farmer*.

To determine if the Eighth Amendment claim has been properly asserted in the prison context, courts perform a two-step analysis. They first examine whether the risk to which the inmate is exposed is sufficiently serious, and then determine whether the individual defendant was deliberately indifferent to that risk. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

The Circuit Court's decision misstates this standard. Specifically, rather than addressing whether a significant *risk* is present, the Circuit Court has substituted in the standard of "whether a plaintiff suffered from an objectively serious medical condition." App'x, 6a. These are not the same. One may suffer from an objectively serious condition, but not be at serious *risk* from certain medical choices.

This is not a case where prison officials knew prisoners were at risk of suffering Achilles injuries, perhaps from uneven surfaces, but disregarded that risk. Nor is it a case where an inmate was at serious medical risk of a major complication, as with the patient in *Mata v. Saiz*, 427 F.3d 745, 757 (10th Cir. 2005), the only non-Seventh Circuit case relied upon by the Circuit Court majority. The Plaintiff in *Mata*

had a known heart condition that was ignored, at risk of what turned out to be a heart attack. *Id.* In the present matter, on the other hand, the only risk was that Petties's injury might not heal as quickly.

Thus, while Petties's medical condition, a ruptured Achilles, was an objectively serious one, he did not identify an objectively serious risk of further serious injury due to the medical choices made by Petitioners. By applying the wrong standard, the Circuit Court effectively eliminated one of the prongs established in *Farmer*.

The Circuit Court then altered the standard for proving the second prong. *Farmer* dealt with a prisoner who was attacked in prison and alleged a failure of prison officials to put adequate safeguards in place to avoid the very serious risk of a sexual assault. *Farmer,* 511 U.S. at 831. The inmate petitioner in *Farmer* asked this Court to establish an objective standard of what might be called civil law recklessness as being all that would be necessary to establish the deliberate indifference prong of the test. *Id.* at 837. This Court rejected that standard in favor of an approach consistent with how recklessness is defined in the criminal law. *Id.* Specifically, this Court held:

> "We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts

> from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual "conditions'; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result, society may well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis, but an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Id. at 837–38 (internal citations omitted).

Evidence of the Circuit Court's departure from *Farmer* is present throughout the Circuit Court's opinion. The Circuit Court asked the question, "How bad does an inmate's care have to be to create a reasonable inference that a doctor did not just slip up, but was aware of, and disregarded, a substantial risk of harm?" App'x A, 8a. This suggests that, for the standard set forth by the Circuit Court, if care is bad enough, deliberate indifference can be inferred.

This fails on two fronts. First, the analysis is not about "bad" care, but rather about care that puts an inmate at serious risk. Second, a jury cannot simply infer deliberate indifference because bad, or even

grossly negligent, medicine was practiced. This essentially converts an Eighth Amendment deliberate indifference analysis into a medical malpractice analysis, which this Court explicitly cautioned against in *Estelle*.

The flaw in the Circuit Court's reasoning can perhaps best be summed up in its assertion that deliberate indifference can be proven by showing "no minimally competent professional would have so responded under those circumstances." App'x A, 9a. The Circuit Court found that such "sub-minimal competence" could be found where a doctor refuses to take instructions from a specialist, deviates from certain aspects of published protocols, or persists in a course of treatment known to be ineffective. App'x A, 10a. But a doctor can be incompetent without being deliberately indifferent. In fact, almost by definition, an incompetent doctor would not know he or she was practicing bad medicine.

These are examples where the Circuit Court sought to substitute an objective standard for deliberate indifference medical claims rather than the subjective one mandated by this Court's decision in *Farmer*, and cautioned against in *Estelle*. In each case, the Circuit Court would have the jury substitute actual evidence of a decision of a medical care provider to put a prisoner at risk with suppositions based upon deviations from objective standards and evaluation of the exercise of medical judgment. This simply does not comport with this Court's guidance in *Farmer*, especially in light of this Court's prior instruction in *Estelle* that medical malpractice cases do not rise to the level of Eighth Amendment claims. Accordingly, review from this

Court is warranted to clarify the standard with respect to Eighth Amendment medical claims.

C. Given the substantial prison population in the United States and the corresponding number of prisoner litigation, the issues presented to this Court are of significant national importance.

There is a large prison population in the United States. In fiscal year 2012, more than 2.2 million individuals were incarcerated in various correctional facilities (State prison, Federal prison, or local jails) throughout the country. *See* Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Enters Adulthood*, 5 UC IRVINE L. REV. 153, 157 (2015) [hereinafter *Trends*].[3] Similarly, a large volume of civil rights litigation is generated from the prison population. In fiscal year 2012, prisoners initiated 22,662 civil rights filings in federal district court. *Trends*, at 157. Prior review of certain federal dockets found that between 10–25% of inmate litigation is directed to prison medical care. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1570–71 nn. 47 & 48 (2003) (discussing and tabulating results of studies "which between them cover inmate cases filed at various times in a large number of federal courts from 1971 to 1994").

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[3] According to the 2010 U.S. Census, this would make correctional facilities, as a whole, more populous than several states: e.g., New Mexico, Idaho, West Virginia, Hawaii, and New Hampshire. U.S. Census Bureau, 2010 CENSUS BRIEFS: CONGRESSIONAL APPORTIONMENT (C2010BR-08) at 2, tbl. 1 (Nov. 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf.

The matters discussed above have previously reached this Court on at least a couple of occasions, without being ripe for full discussion. *Estelle*, which squarely raised the issue of medical treatment in the Eighth Amendment context, was rendered in the limited context of a motion to dismiss. 429 U.S. at 99. In *West v. Atkins*, 487 U.S. 42 (1988), this Court considered whether contracted physicians operated under color of state law in a case involving a torn Achilles ankle. *See generally id.* While the doctor in that case asserted that the allegations asserted rose only to malpractice or negligence, this Court did not have occasion to reach the issue, as the record was not fully developed. *See Atkins*, 487 U.S. at 48, n.8. This case presents itself subsequent to summary judgment and rounds of fact finding from the district and circuit court. It accordingly allows this Court to engage in a more robust examination of the contours of Eighth Amendment jurisprudence in the medical treatment context.

In light of these factors, the Court's clarification and guidance will have a significant impact on federal civil rights litigation.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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November 21, 2016

APPENDIX A
(*EN BANC* OPINION OF THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, *AS AMENDED*)

In the
United States Court of Appeals
For the Seventh Circuit

No. 14-2674

TYRONE PETTIES,

Plaintiff-Appellant

v.

IMHOTEP CARTER AND SALEH OBAISI,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 12 C 9353 – **George M. Marovich**, *Judge.*

ARGUED APRIL 28, 2015

REARGUED EN BANC DECEMBER 1, 2015

DECIDED AUGUST 23, 2016, AMENDED AUGUST 25, 2016

Before WOOD, *Chief Judge*, and POSNER, FLAUM, EASTERBROOK, KANNE, ROVNER, WILLIAMS, SYKES, and HAMILTON, *Circuit Judges.*

WILLIAMS, *Circuit Judge*. Tyrone Petties suffered a debilitating rupture in his Achilles tendon, which caused him extreme pain and impeded his mobility over the course of three years. He brought a lawsuit under 42 U.S.C. § 1983 against his doctors at Stateville Correctional Facility, alleging they failed to alleviate his suffering and to enable his recovery from the injury. We heard this case *en banc* to clarify when a doctor's rationale for his treatment decisions supports a triable issue as to whether that doctor acted with deliberate indifference under the Eighth Amendment. We conclude that even if a doctor denies knowing that he was exposing a plaintiff to a substantial risk of serious harm, evidence from which a reasonable jury could infer a doctor knew he was providing deficient treatment is sufficient to survive summary judgment. Because we find that Petties has produced sufficient evidence for a jury to conclude that the doctors knew the care they were providing was insufficient, we reverse the district court's grant of summary judgment to the defendants.

I. BACKGROUND

Petties was walking up the stairs of his cell house at Stateville in January 2012 when he heard a loud pop and felt excruciating pain and weakness in his left Achilles tendon. It was not the first time he had suffered such an injury. In 2010 he suffered a partial rupture in his right Achilles tendon at the prison which had not fully healed.

An Achilles tendon rupture is a tear in the tendon which impedes the ability of the foot to point downward, causing pain and limiting mobility.

Walking around on a ruptured tendon exacerbates the injury, increasing the gap between the torn edges of a tendon because of the way that muscles contract in the foot and calf. Immobilizing the injured foot prevents stretching of the tear and allows the torn edges of the tendon to sit together, and scar tissue to form, rejoining the edges. When an Achilles rupture is not immobilized, the stretching apart of the torn tendon edges when the injured foot hits the ground causes severe pain and weakness.

Petties went to Stateville's health clinic and eventually saw Dr. Imhotep Carter, the medical director of Stateville (though his actual employer was Wexford Health Sources, a private contractor of medical services to correctional facilities). Before Petties, Dr. Carter had seen approximately ten Achilles tendon ruptures in his twenty-year career. As the prison's medical director, Dr. Carter was in charge of implementing Wexford's medical policies and procedures, among which was a specific treatment protocol for patients with ruptured Achilles tendons. The protocol advised that patients receive a splint, crutches, and antibiotics if there were lacerations to the site of injury, and then be sent to a specialist for further treatment.

Dr. Carter's notes reflect that he thought Petties had an Achilles tendon rupture, and that he followed some of Wexford's protocol, but not all of it. He gave Petties crutches, ice, and Vicodin. He also authorized one week of "lay-in" meals, which meant that Petties did not have to walk to the cafeteria, but could eat in his cell. Finally, he referred Petties to a specialist, but that appointment did not happen for almost six weeks. In the meantime, Dr. Carter did not provide

Petties with a splint, boot, cast, or other device that would immobilize his foot. About a month later, after Petties reported to the infirmary that his tendon was "killing him" and keeping him from climbing stairs, Petties saw Dr. Carter again and received a renewed prescription for crutches, pain medication, lay-in meals, and assignment to a lower bunk to keep pressure off his foot. But he still did not receive a splint.

In March 2012, Petties had an MRI taken which showed an Achilles tendon rupture. There was a gap between the torn ends of the tendon that measured approximately 4.7 centimeters. About a week later, Petties met with Dr. Anuj Puppala, an orthopedic specialist, who noted that the lack of "any sort of cast" was potentially creating the gapping at the tendon rupture site. He recommended an orthopedic boot to prevent further gapping and to alleviate pain, and gave one to Petties. Finally, he thought that surgery might be necessary due to the gapping, and referred Petties to an ankle specialist. When Petties returned to Stateville, Dr. Carter authorized use of the boot, along with crutches, ice, and assignment to a lower bunk. Petties asserts that Dr. Carter said he would not order surgery because it was too costly.

In July 2012, Petties finally saw an ankle specialist, Dr. Samuel Chmell, who ordered a second MRI after noting weakness in Petties's ankle. Dr. Chmell also ordered physical therapy, gentle stretching exercises, and follow-up treatment. In August 2012, Dr. Carter was replaced as the medical director of Stateville by Dr. Saleh Obaisi, another Wexford employee. Dr. Obaisi approved the order for a second MRI, but did not authorize physical

therapy. According to Petties, he also said that surgery was too expensive.

That September, Petties had his second MRI, which showed a partial tear in his tendon, indicating some healing. But he continued to complain of pain, and Dr. Obaisi gave him Tylenol, approved a low bunk permit, and continued his use of the boot. Dr. Obaisi renewed the low bunk permit and use of the boot in November, and again the following June. Petties experienced pain, soreness and stiffness as late as March 2014, over two years after the injury.

In November 2012, Petties filed a lawsuit under 42 U.S.C. § 1983 against Dr. Carter and Dr. Obaisi for deliberate indifference in violation of the Eighth Amendment. The district court granted summary judgment to Dr. Carter and Dr. Obaisi. Petties appeals.

II. ANALYSIS

We review the district court's grant of summary judgment *de novo*, viewing the record in the light most favorable to Petties, and drawing all inferences in his favor. *Pagel v. TIN Inc.*, 695 F.3d 622, 624 (7th Cir. 2012).

"The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones." *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (internal citations and quotation marks omitted). Every claim by a prisoner that he has not received adequate medical treatment is not a violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). But the Eighth

Amendment safeguards the prisoner against a lack of medical care that "may result in pain and suffering which no one suggests would serve any penological purpose." *Id.* at 103.[1] To determine if the Eighth Amendment has been violated in the prison medical context, we perform a two-step analysis, first examining whether a plaintiff suffered from an objectively serious medical condition, and then determining whether the individual defendant was deliberately indifferent to that condition. *Farmer*, 511 U.S. at 834; *see also Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010).

In evaluating an Eighth Amendment claim, we start by determining if the medical condition the plaintiff suffered was objectively serious. *Farmer*, 511 U.S. at 834; *see also Walker v. Peters*, 233 F.3d 494, 498 (7th Cir. 2000). Here, the parties agree that

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[1] Our dissenting colleagues suggest that *Estelle* shields doctors from liability if they provide palliative care to prisoners. Unless a doctor refuses to provide care or leaves the inmate worse off than before, the dissent would have us draw the legal conclusion that the prison doctor did not intentionally disregard a prisoner's serious medical needs. But *Estelle* explicitly held that a violation of the Eighth Amendment can be established whether "the indifference is manifested by prison doctors *in their response to the prisoner's needs or* by prison guards in intentionally denying or delaying access to medical care *or* intentionally interfering with the treatment once prescribed. *Regardless of how evidenced*, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." 429 U.S. 97, 104-05, 97 S. Ct. 285, 50 L. Ed. 2d 251 (emphasis added). The dissent collapses these distinct avenues to proving deliberate indifference into one—*any* response by a physician, so long as it is not harmful, satisfies the Eighth Amendment. But that is not the holding of *Estelle*, and we decline to make such a leap here.

an Achilles tendon rupture is an objectively serious condition, but they dispute whether in responding to the rupture, the defendants acted with deliberate indifference.

To determine if a prison official acted with deliberate indifference, we look into his or her subjective state of mind. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996) (citing *Farmer*, 511 U.S. at 842). For a prison official's acts or omissions to constitute deliberate indifference, a plaintiff does not need to show that the official intended harm or believed that harm would occur. *Id.* at 992. But showing mere negligence is not enough. *Estelle*, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); *McGee v. Adams*, 721 F.3d 474, 481 (7th Cir. 2013) ("Deliberate indifference is not medical malpractice."). Even objective recklessness—failing to act in the face of an unjustifiably high risk that is so obvious that it *should* be known—is insufficient to make out a claim. *Farmer*, 511 U.S. at 836-38. Instead, the Supreme Court has instructed us that a plaintiff must provide evidence that an official *actually* knew of and disregarded a substantial risk of harm. *Id.* at 837. Officials can avoid liability by proving they were unaware even of an obvious risk to inmate health or safety. *Id.* at 844.

The difficulty is that except in the most egregious cases, plaintiffs generally lack direct evidence of actual knowledge. Rarely if ever will an official declare, "I knew this would probably harm you, and I did it anyway!" Most cases turn on circumstantial evidence, often originating in a doctor's failure to conform to basic standards of care. While evidence of

medical malpractice often forms the basis of a deliberate indifference claim, the Supreme Court has determined that plaintiffs must show more than mere evidence of malpractice to prove deliberate indifference. *Estelle*, 429 U.S. at 106. But blatant disregard for medical standards could support a finding of mere medical malpractice, or it could rise to the level of deliberate indifference, depending on the circumstances. And that is the question we are faced with today—how bad does an inmate's care have to be to create a reasonable inference that a doctor did not just slip up, but was aware of, and disregarded, a substantial risk of harm? We must determine what kind of evidence is adequate for a jury to draw a reasonable inference that a prison official acted with deliberate indifference.

We start this inquiry by examining our existing precedent. As an initial matter, we look at the totality of an inmate's medical care when considering whether that care evidences deliberate indifference to serious medical needs. *Cavalieri v. Shepard*, 321 F.3d 616, 625-26 (7th Cir. 2003). We have identified several circumstances that can be enough to show deliberate indifference. First, and most obvious, is a prison official's decision to ignore a request for medical assistance. *Estelle*, 429 U.S. at 104-05. But an inmate is not required to show that he was literally ignored by prison staff to demonstrate deliberate indifference. *Sherrod v. Lingle*, 223 F.3d 605, 611 (7th Cir. 2000). If a risk from a particular course of medical treatment (or lack thereof) is obvious enough, a factfinder can infer that a prison official knew about it and disregarded it. *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir.

2006); *Cole v. Fromm*, 94 F.3d 254, 260 (7th Cir. 1996).

In the medical context, of course, obviousness of a risk can be obscured by the need for specialized expertise to understand the various implications of a particular course of treatment. So we have found in those cases where unnecessary risk may be imperceptible to a lay person that a medical professional's treatment decision must be "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." *Cole*, 94 F.3d at 261-62; *see also Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 989 (7th Cir. 1998) ("A plaintiff can show that the professional disregarded the need only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, no minimally competent professional would have so responded under those circumstances."). By contrast, evidence that *some* medical professionals would have chosen a different course of treatment is insufficient to make out a constitutional claim. *Steele v. Choi*, 82 F.3d 175, 179 (7th Cir. 1996).

Even among the medical community, the permissible bounds of competent medical judgment are not always clear, particularly because "it is implicit in the professional judgment standard itself...that inmate medical care decisions must be fact-based with respect to the particular inmate, the severity and stage of his condition, the likelihood and imminence of further harm and the efficacy of available treatments." *Roe*, 631 F.3d at 859. So it can

be challenging to draw a line between an acceptable difference of opinion (especially because even admitted medical malpractice does not automatically give rise to a constitutional violation), and an action that reflects sub-minimal competence[2] and crosses the threshold into deliberate indifference. One hint of such a departure is when a doctor refuses to take instructions from a specialist. *Arnett v. Webster*, 658 F.3d 742, 753 (7th Cir. 2011); *Jones v. Simek*, 193 F.3d 485, 490 (7th Cir. 1999). Another is when he or she fails to follow an existing protocol. "While published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison health care gatekeeper knew of a substantial risk of serious harm." *Mata v. Saiz*, 427 F.3d 745, 757 (10th Cir. 2005).

Another situation that might establish a departure from minimally competent medical judgment is where a prison official persists in a course of treatment known to be ineffective. *Walker*, 233 F.3d at 499 (citations omitted). For example, if knowing a patient faces a serious risk of

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[2] Our colleagues take issue with our repeated references to the competence of medical professionals, suggesting we are injecting state malpractice standards into the constitutional test for deliberate indifference. But we do not suggest that incompetent doctors violate the Constitution. We simply note that a medical decision that has no support in the medical community, along with a suspect rationale provided for making it, can support a jury finding that a doctor *knew* his decision created a serious risk to an inmate's health. To hold otherwise would mean that *any* treatment decision a doctor made, regardless of whether it had any scientific basis, would be immune from scrutiny.

appendicitis, the prison official gives the patient an aspirin and sends him back to his cell, a jury could find deliberate indifference even though the prisoner received some treatment. *Sherrod*, 223 F.3d at 612; *see also Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005) (continuing to treat severe vomiting with antacids over three years created material fact issue of deliberate indifference); *Snipes v. Detella*, 95 F.3d 586, 592 (7th Cir. 1996) (holding Eighth Amendment claim may exist if medical treatment is so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition); *Kelley v. McGinnis*, 899 F.2d 612, 616-17 (7th Cir. 1990) (per curiam).

If a prison doctor chooses an "easier and less efficacious treatment" without exercising professional judgment, such a decision can also constitute deliberate indifference. *Estelle*, 429 U.S. at 104 n.10; *Conley v. Birch*, 796 F.3d 742, 747 (7th Cir. 2015) (material fact issue whether provision of only painkillers and ice to an inmate suffering from suspected fracture constituted deliberate indifference). While the cost of treatment is a factor in determining what constitutes adequate, minimum-level care, medical personnel cannot simply resort to an easier course of treatment that they know is ineffective. *Johnson*, 433 F.3d at 1013; *Roe*, 631 F.3d at 863 (although administrative convenience and cost may be permissible factors for correctional systems to consider, the Constitution is violated when they are considered to the exclusion of reasonable medical judgment about inmate health).

Yet another type of evidence that can support an inference of deliberate indifference is an inexplicable delay in treatment which serves no penological interest. *Grieveson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008) (guards could be liable for delaying treatment of broken nose for a day and half); *Edwards v. Snyder*, 478 F.3d 827, 830-31 (7th Cir. 2007) (a plaintiff who painfully dislocated his finger and was needlessly denied treatment for two days stated a claim for deliberate indifference). Of course, delays are common in the prison setting with limited resources, and whether the length of a delay is tolerable depends on the seriousness of the condition and the ease of providing treatment. *Compare Miller v. Campanella*, 794 F.3d 878, 880 (7th Cir. 2015) (given extreme ease of supplying sufferer of gastro-esophageal reflux disease with over-the-counter pills, failing to do so for two months created fact question over deliberate indifference), *Berry*, 604 F.3d at 441 (finding refusal to refer patient to a dentist actionable because "a basic dental examination is not an expensive or unconventional treatment, nor is it esoteric or experimental") (internal quotation marks omitted), *Arnett*, 658 F.3d at 752 (medical personnel could not stand idly by for more than ten months while patient's rheumatoid arthritis progressively worsened), *Simek*, 193 F.3d at 490 (viable claim where doctor delayed scheduling appointment with specialist and then failed to follow specialist's advice, while inmate's condition worsened), *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 832 (7th Cir. 2009) (state employees could be liable for four-day delay where prisoner complained his intravenous therapy was causing him pain), *with Gutierrez v. Peters*, 111 F.3d 1364, 1374 (7th Cir. 1997) (no valid claim for six-day delay

in treating a mild cyst infection). To show that a delay in providing treatment is actionable under the Eighth Amendment, a plaintiff must also provide independent evidence that the delay exacerbated the injury or unnecessarily prolonged pain. *Williams v. Liefer*, 491 F.3d 710, 716 (7th Cir. 2007) (delay actionable where medical records showed it unnecessarily prolonged plaintiff's pain and high blood pressure); *Gil v. Reed*, 381 F.3d 649, 662 (7th Cir. 2004) (hours of needless suffering can constitute harm).

These cases bear a few notable commonalities. Most of them involve treatment, sometimes over an extended period of time. But repeatedly, we have rejected the notion that the provision of some care means the doctor provided medical treatment which meets the basic requirements of the Eighth Amendment. Rather, the context surrounding a doctor's treatment decision can sometimes override his claimed ignorance of the risks stemming from that decision. When a doctor says he did not realize his treatment decisions (or lack thereof) could cause serious harm to a plaintiff, a jury is entitled to weigh that explanation against certain clues that the doctor *did* know. Those context clues might include the existence of documents the doctor regularly consulted which advised against his course of treatment, evidence that the patient repeatedly complained of enduring pain with no modifications in care, inexplicable delays or departures from common medical standards, or of course, the doctor's own testimony that indicates knowledge of necessary treatment he failed to provide. While evidence of malpractice is not enough for a plaintiff to survive summary judgment on an Eighth Amendment claim,

nor is a doctor's claim he did not know any better sufficient to immunize him from liability in every circumstance. Otherwise, prison doctors would get a free pass to ignore prisoners' medical needs by hiding behind the precedent that medical malpractice is not actionable under the Eighth Amendment. Prisoners are not entitled to state-of-the art medical treatment. But where evidence exists that the defendants knew better than to make the medical decisions that they did, a jury should decide whether or not the defendants were actually ignorant to risk of the harm that they caused.

We now turn our attention to Petties's claims against his doctors.

A. Material Factual Dispute Exists as to Whether Dr. Carter Was Deliberately Indifferent

Petties's principal claims against Dr. Carter are that he acted with deliberate indifference to his injury when he failed to immobilize Petties's ruptured tendon for six weeks, delayed Petties's appointment with a specialist, and refused to order surgery to repair the tendon.[3]

Dr. Carter's deposition, as well as Stateville's medical records, confirm that Dr. Carter's initial diagnosis of Petties's injury was an Achilles tear. Dr.

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[3] We reject the dissent's characterization of Petties's claims against both of his doctors as a challenge to the quality of his medical care. Rather, Petties argued that his doctors' treatment decisions—and their harmful consequences—supported his claim that the defendants deliberately refused to pursue care they knew he needed. Petties has never argued that his doctors' poor care by itself violated the Eighth Amendment.

Carter also testified that the appropriate treatment for a complete Achilles rupture is to immobilize the ankle, put it in a non-weight bearing status, and prescribe anti-inflammatory drugs and passive stretching exercises. He explained the purpose of immobilization, stating, "in the acute phase of healing, you are generating an immune system response in the body," and when asked if keeping the tendon in one place enables this healing process to go forward favorably, he replied, "Correct. And if you're continuously injuring it, it hinders that process." He also testified that for both partial and complete Achilles ruptures, he would always immobilize the tendon.

Dr. Carter's opinion was consistent with the deposition testimony of Petties's orthopedic specialist, Dr. Puppala, who testified that he would always immobilize a ruptured Achilles tendon, unless the injury had an open sore that needed to be addressed first. It was also consistent with the testimony of Dr. Chmell, the ankle specialist who treated Petties after Dr. Carter had left Stateville. He testified that immobilization is essential to the healing of an Achilles tendon, and that healing without immobilization is "possible but not very likely."[4] And finally, Wexford's own protocol, which Dr. Carter testified he was responsible for implementing, stated that the primary course of treatment for an Achilles rupture included a splint.

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[4] We are puzzled by the dissent's proposition that the care Petties received did not worsen his condition because his health eventually improved. We do not ascribe to the view that the eventual resolution of a long-ignored medical issue establishes compliance with the Eighth Amendment.

Dr. Carter also testified he was not aware of any shortage of splints at Stateville during the time that he was treating Petties.

Together, these pieces of circumstantial evidence support a reasonable inference that Dr. Carter knew that failure to immobilize an Achilles rupture would impede Petties's recovery and prolong his pain. It is certainly true that Dr. Carter's decision not to immobilize Petties's ankle could have been an oversight, or a fundamental misunderstanding of the proper course of treatment. Some of his testimony suggests that he believed crutches served the same purpose as a boot. But that testimony conflicts with other parts of his deposition that explained the distinct purpose of immobilization, which is not to prevent bearing weight on the injured foot, but to keep the ruptured tendon in one place. It also conflicts with the testimony of the other doctors who treated Petties. A jury could also find suspicious that Dr. Carter did not provide the boot until an outside doctor documented the importance of immobilization in writing. A reasonable inference to draw from this evidence is that Dr. Carter was aware of the need for immobilizing a ruptured tendon, but simply decided not to until he came under scrutiny. Also, a jury could reasonably conclude that Dr. Carter's decision caused substantial harm—Petties's affidavit stated that without a splint, he had nothing to keep his ankle from moving around, which made him feel "constant, severe pain" whenever he got up to walk, and made sleeping difficult.

Besides Dr. Carter's failure to immobilize his foot, Petties also claims that Dr. Carter was responsible for the six-week delay in seeing Dr.

Puppala to confirm Petties's diagnosis, which is when he finally received a boot. As an initial matter, Petties has provided corroborating medical evidence that the delay had a detrimental effect on his condition through Dr. Puppala's treatment notes, which indicate Petties was suffering pain and gapping at the rupture site due to the lack of immobilization. This finding is consistent with Petties's own testimony that he was in constant and severe pain while he waited to see a specialist.

Dr. Carter argues that the delay was attributable to prison lock-downs, which barred visits to outside specialists unless he issued an emergency override order which allowed patients to receive emergency care. But immobilization could have alleviated Petties's pain while he waited, so this explanation does not resolve Dr. Carter's testimony that he was unaware of any shortage of splints at Stateville during the six weeks that Petties suffered severe pain while waiting to see Dr. Puppala. It also does not explain why Dr. Carter did not view Petties's situation as an "emergency" as compared with other serious injuries. The harm stemming from the delay in receiving the boot would have been avoided by sending Petties to the emergency room so he could get an MRI. And the harm from the delay in seeing a specialist would have been mitigated by splinting Petties's foot while security issues were resolved. The delay of both, without a clear justification for either, dooms Dr. Carter's argument that Petties's suffering was unavoidable. On this record, whether the delay was the result of negligence or deliberate indifference is a question for the jury to decide.

Finally, Petties argues that Dr. Carter should have followed Dr. Puppala's recommendation to explore surgery as an option. But Petties did not produce medical evidence confirming that he would have benefited from surgery, and when he visited Dr. Chmell in July 2012, his tendon showed signs of improvement. However, Petties's contention that Dr. Carter said surgery would be "too expensive" is a piece of circumstantial evidence that a jury could view as supporting his other claims. If a jury believes that Dr. Carter cited cost as a reason for refusing one form of treatment, then it would be reasonable to infer that Dr. Carter made other medical decisions in Petties's case — failing to splint his foot, not issuing an emergency override order so he could see a specialist — that were dictated by cost, administrative convenience, or both, rather than medical judgment.

Petties has provided sufficient evidence to survive summary judgment on his § 1983 claims against Dr. Carter.

B. Material Factual Dispute Exists as to Whether Dr. Obaisi Was Deliberately Indifferent

Petties also argues that Dr. Obaisi was deliberately indifferent when he refused to order physical therapy after Dr. Chmell ordered it. Dr. Obaisi responds that Petties did not need a physical therapist because he already knew which exercises to use from a prior Achilles injury. He also argues that Petties could have walked on his injured ankle to strengthen it.

The problem with Dr. Obaisi's arguments is that they are totally at odds with the evidence in this case. He testified that he always follows the advice of specialists, that Petties's specialist recommended physical therapy, and that he did not order physical therapy for Petties. To justify this questionable decision, he states that Petties knew what to do based on prior physical therapy. This is clearly a post-hoc rationalization, because he also testified he did not know whether Petties had previously undergone physical therapy at the time that he decided to refuse him physical therapy. And finally, his contention that walking on an injury is the equivalent of physical therapy is unsupported by any medical evidence, and strains even a lay person's understanding of how to treat an injury. Professional judgment is needed to determine whether, when and how much exertion will heal rather than aggravate the injury. And a reasonable jury could find leaving a patient to make this determination by himself carried an impermissible and unjustifiable risk of pain and prolonged recovery. At the very least, Petties has the right for a jury to hear Dr. Obaisi's justifications for his treatment decisions (or lack thereof) and to determine if Dr. Obaisi was deliberately indifferent, rather than simply incompetent, in treating his injury.

C. Qualified Immunity Inappropriate at Summary Judgment Stage

While the district court did not reach the issue, in the proceedings below, the defendants pursued the additional argument that they were entitled to qualified immunity. But even if the defendants preserved this argument, qualified immunity does

not apply to private medical personnel in prisons. *Shields v. Illinois Dep't of Corrections*, 746 F.3d 782, 794 (7th Cir. 2014). Even if the Wexford employees were entitled in theory to qualified immunity, it could not be granted at this point. If a jury finds that Dr. Carter and Dr. Obaisi knew that the course of treatment they were pursuing was inadequate to meet Petties's serious medical needs, such conduct violates clearly established law under the Eighth Amendment. *See Farmer*, 511 U.S. at 837. Given that the threshold factual questions of the defendants' states of mind remain disputed, summary judgment on the basis of qualified immunity is inappropriate. *See DuFour-Dowell v. Cogger*, 152 F.3d 678, 680 (7th Cir. 1998).

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of summary judgment and REMAND for further proceedings.

EASTERBROOK, *Circuit Judge*, joined by FLAUM and KANNE, *Circuit Judges*, dissenting. My colleagues take it as established that the Constitution entitled Petties to an orthopedic boot, or some other means to immobilize his foot, immediately after his injury. They remand for a trial at which a jury must determine whether the defendants were deliberately indifferent to the pain his ruptured Achilles tendon caused. This approach effectively bypasses one of the two issues that matter to any claim under the Cruel and Unusual

Punishments Clause: first there must *be* a cruel and unusual punishment, and only then does it matter whether the defendant acted with the mental state necessary for liability in damages. See, e.g., *Helling v. McKinney*, 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993). A court should begin with the conduct issue and turn to mental states only if the behavior was objectively cruel and unusual. And *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), the Supreme Court's sole decision addressing the question whether palliative medical treatment (pain relief without an effort at cure) violates the Eighth Amendment, holds that palliation suffices even if the care is woefully deficient.

To understand the Supreme Court's conclusion that medical malpractice is a problem under state law rather than the Constitution, it helps to start with the facts of *Estelle*, which may be found in the Fifth Circuit's opinion, *Gamble v. Estelle*, 516 F.2d 937 (5th Cir. 1975), as well as the Supreme Court's. Gamble alleged that a 600-pound bale had fallen on him and injured his back, leaving him in pain so severe that he frequently fainted (his complaint called the episodes "blankouts"). He visited the prison infirmary and received medicine designed to dull the pain. When he said that this did not work, and that the pain and blackouts were continuing, the prison gave him more of the same medicine. When he said that his pain prevented him from working, he was treated as a shirker and thrown into solitary confinement. Although the prison's medical staff stuck to ineffective medication, it did *nothing* to find out what kind of injury Gamble had suffered and how the problem might be fixed.

The Fifth Circuit ruled that Gamble had established a constitutional claim, because "the State has totally failed to provide *adequate* treatment of [his] condition. Again and again, as the complaint makes clear, the only medication prescribed was to relieve the pain, not to cure the injury; indeed, the exact nature of the back injury remains unknown." 516 F.2d at 941 (emphasis added). The Fifth Circuit thought that the Constitution requires not only palliation but also a medically competent effort to cure, starting with an x-ray, a diagnostic procedure that the prison had not employed.

The reader of today's majority opinion would suppose that the Supreme Court affirmed the Fifth Circuit's demand for competent care. But that's not what happened. The Supreme Court reversed and held that palliation satisfies the Constitution, even if the prison's medical staff does not try to determine how pain is being caused and what might be done to cure it. That some care was given was enough. The Justices said that deliberate indifference to a prisoner's pain violates the Constitution if it leads the staff to do nothing, but that medical care meets the constitutional standard. Gamble received care. He received *wretched* care, but the Court held that a claim based on deficient care depends on state medical-malpractice law. 429 U.S. at 107 & n.15. The Justices disapproved the Fifth Circuit's conclusion that the Constitution entitles prisoners to "adequate" care.

Our initial question therefore ought to be: Did the defendants provide Petties with medical care? That question is easily answered. Petties concedes that he

received medical care—quite a lot of it. The majority opinion outlines the basics. In January 2012 Dr. Imhotep Carter correctly diagnosed a ruptured Achilles tendon and gave Petties crutches, ice, and Vicodin (a pain-reducing drug). He referred Petties to a specialist. In March 2012 an MRI exam confirmed Carter's diagnosis. Dr. Anuj Puppala, an orthopedist, gave Petties an orthopedic boot to reduce motion of the foot (in relation to the tendon) when he walked. Carter authorized the use of the boot in the prison, assigned Petties to a lower bunk, and continued the ice and drug treatments. In July 2012 Carter referred Petties to Dr. Samuel Chmell, an ankle specialist who recommended physical therapy, stretching, and another MRI. After replacing Carter as Stateville's medical director, Dr. Saleh Obaisi continued the course of treatment that Petties was receiving, including use of the boot. The second MRI, which Obaisi approved, showed partial healing.

Petties maintains that Carter and Obaisi should have done more—that Carter should have provided an orthopedic boot in January 2012 rather than waiting until Petties saw Puppala in March, and should have authorized surgery; that Obaisi should have authorized physical therapy in addition to ordering another MRI and continuing the treatment already provided (the boot, the lower bunk, and so on). Nonetheless, there can be no question that Petties received more, and better, medical care than Gamble received. Yet Gamble lost on the pleadings.

Estelle holds that a claim of deficient medical care must proceed under state law rather than the Constitution. When the prison provides *no* care for a

serious medical condition, that counts as cruel and unusual punishment if the physicians or other responsible actors are deliberately indifferent to the condition. (*Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994), supplies the Court's definition of "deliberate indifference".) *Estelle* recognized one more potential category: harmful interventions. 429 U.S. at 104 & n.10. But Petties does not contend that the care he received from Carter and Obaisi made his condition worse, compared with no care at all.

Notes 10 and 12 of *Estelle* suggest a potential way to distinguish malpractice from a violation of the Constitution: whether the prison's staff exercised medical judgment. Petties does not pursue this possibility; he does not deny that the defendants exercised medical judgment. Instead he insists that they exercised *bad* medical judgment, leading to inferior care. And *Estelle* holds that a claim of poor care must be classified under the law of medical malpractice. (Petties complains that Carter and Obaisi deemed surgery and rehabilitative therapy too expensive, but asking whether a potential treatment is cost-justified is part of professional judgment. Outside of prisons, solvent patients and their insurers, as well as physicians, routinely consider whether a particular drug or medical procedure is worth the price.)

At least three circuits ask whether the prisoner received some treatment, rather than whether the treatment was inferior (even grossly deficient). See, e.g., *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979); *Durmer v. O'Carroll*, 991 F.2d 64, 68-69 (3d Cir. 1993); *Self v. Crum*, 439

F.3d 1227, 1230-33 (10th Cir. 2006) (discussing other cases in the circuit); *Farmer v. Moritsugu*, 163 F.3d 610, 614-16, 333 U.S. App. D.C. 319 (D.C. Cir. 1998). Today's decision is incompatible with the approach of those circuits, though it has support in decisions of the Ninth Circuit. See, e.g., *Snow v. McDaniel*, 681 F.3d 978 (9th Cir. 2012); *Hamilton v. Endell*, 981 F.2d 1062, 1066-67 (9th Cir. 1992). The First Circuit may have an intra-circuit conflict. Compare *Perry v. Roy*, 782 F.3d 73 (1st Cir. 2015), with *Feeney v. Correctional Medical Services, Inc.*, 464 F.3d 158 (1st Cir. 2006). Still other circuits are hard to classify.

My colleagues say that prisoners are entitled to relief under the Eighth Amendment when prison physicians do not employ "competent medical judgment" (opinion at 8) or "minimally competent medical judgment" (*id.* at 9). That tracks state tort law and is incompatible with *Estelle*. Other phrases in the opinion, such as "professional judgment" (*id.* at 10 and 17) and "reasonable medical judgment" (*id.* at 10) also seem to be proxies for the law of medical malpractice and equally at odds with *Estelle*.

And if we were authorized to find a "competent medical judgment" standard in the Constitution, why should we *want* to federalize the law of medical malpractice? Prisoners such as Petties have a tort remedy under state law. Carter and Obaisi were employed by Wexford rather than the state. They owe prisoners the same duties as any physician owes to private patients and are subject to the same remedies under Illinois law. See *Jinkins v. Lee*, 209 Ill. 2d 320, 336, 807 N.E.2d 411, 282 Ill. Dec. 787 (2004). Even physicians employed by the state are subject to the normal rules of tort law. See 745 ILCS

10/6-106(d); *Moss v. Miller*, 254 Ill. App. 3d 174, 181-82, 625 N.E.2d 1044, 192 Ill. Dec. 889 (1993). When prison physicians are employed by the state, inmates have an extra remedy by suit against the state itself, see 745 ILCS 5/1; 705 ILCS 505/8(d), just as inmates injured by medical malpractice in federal prisons can use the Federal Tort Claims Act. Perhaps prisoners hope that constitutional claims will produce awards of attorneys' fees under 42 U.S.C. §1988(b), while Illinois requires plaintiffs to bear their own fees, but §1988 is not a good reason to constitutionalize tort law. And federal law comes with complications, such as qualified immunity and the deliberate-indifference standard, missing from state law. *Estelle* told the courts of appeals to relegate bad-treatment situations to state law, and we should carry out its approach.

APPENDIX B

(EXCERPT OF ORIGINAL *EN BANC* OPINION OF THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT)

N.B.: *Only Paragraph C of the* en banc *opinion was amended to reflect the court's determination that qualified immunity was inapplicable to Petitioners; the original Paragraph C and the conclusion are reproduced here.*

C. Qualified Immunity Inappropriate at Summary Judgment Stage

While the district court did not reach the issue, in the proceedings below, the defendants pursued the additional argument that they were entitled to qualified immunity. But even assuming the defendants preserved this argument, if a jury finds that Dr. Carter and Dr. Obaisi knew that the course of treatment they were pursuing was inadequate to meet Petties's serious medical needs, such conduct violates clearly established law under the Eighth Amendment. *See Farmer*, 511 U.S. at 837. Given that the threshold factual questions of the defendants' state of mind remain disputed, summary judgment on the basis of qualified immunity is inappropriate. *See DuFour-Dowell v. Cogger*, 152 F.3d 678, 680 (7th Cir. 1998).

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of summary judgment and REMAND for further proceedings.

APPENDIX C

(PANEL OPINION OF THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT)

In the
United States Court of Appeals
For the Seventh Circuit

No. 14-2674

TYRONE PETTIES,

Plaintiff-Appellant

v.

IMHOTEP CARTER AND SALEH OBAISI,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 12 C 9353 – **George M. Marovich**, *Judge.*

Argued April 28, 2015 — Decided July 30, 2015

Before FLAUM, KANNE, and WILLIAMS, *Circuit Judges.*

PER CURIAM. Tyrone Petties, an Illinois prisoner, claims in this suit under 42 U.S.C. § 1983 that successive medical directors at Stateville

Correctional Center violated the Eighth Amendment by failing to provide adequate medical care for his torn Achilles tendon. Petties appeals the district court's grant of summary judgment for the doctors. We conclude that, on this record, a jury could not reasonably find that the doctors' treatment of Petties's ankle rose to the level of a constitutional violation, and we affirm.

Background

In January 2012 Petties was climbing stairs when he felt a sudden "pop" and extreme pain in his left ankle. He went immediately to the prison infirmary, where the examining physician noted tenderness and abnormal reflex in the left Achilles tendon and observed that Petties could not bear weight on that ankle. The physician, who is not a defendant in this suit, prescribed Vicodin and crutches. He also authorized a week of "meals lay-in" so that Petties could eat in his cell rather than walk to the cafeteria.

That same day the prison's medical director, Dr. Imhotep Carter, noted in the medical file that Petties in fact had suffered an "Achilles tendon rupture." Dr. Carter, an employee of Wexford Health Sources (and one of the defendant physicians) modified his colleague's treatment instructions by directing that Petties be scheduled for an MRI and examination by an orthopedist. He characterized these additional steps as "urgent."

Prison lockdowns during the following week resulted in cancelation of three appointments at the infirmary. By the time Petties was next seen, eight days had passed since his injury, and apparently he

thought he could bear weight on his left foot. That was the understanding of the examining physician, who noted in the medical file that Petties "believes he can bear weight." Petties insists that, at the time, he was experiencing severe pain when he put weight on his left foot, but he does not dispute that the examining physician read the situation differently.

During the weeks after his injury, Petties continued to feel pain even when he used the crutches. He next was seen in the infirmary in February 2012, three-and-a-half weeks after his injury. Petties complained to an infirmary worker that his Achilles tendon was "killing" him and keeping him from climbing stairs because of the pain. The next day, on February 14, 2012, Dr. Carter examined him and noted that the Achilles tendon was shortened and swollen. He extended the prescription for Vicodin for six weeks, directed Petties to continue using crutches, reauthorized him to have a low bunk and "medical lay in" for two months, and told him to avoid stairs and the gym.

On March 6, 2012, Petties was taken offsite for the MRI ordered by Dr. Carter. That diagnostic confirmed a "complete Achilles tendon rupture." The next week Petties again was taken offsite for examination by Dr. Anuj Puppala, an orthopedist. He opined that the absence of "any sort of cast" to immobilize Petties's torn Achilles tendon was "contributing to his pain and likely contributing" to the 2 cm gap in the ruptured tendon. Dr. Puppala gave Petties an orthopedic boot that would function like a cast to immobilize his ankle. The doctor also recommended continued use of crutches and referred Petties to a foot and ankle specialist. A doctor at

Stateville promptly approved use of the orthopedic boot for three months, and another infirmary physician increased the strength of the Vicodin dose prescribed for Petties.

Petties continued to be seen at the infirmary until his appointment with the foot and ankle specialist. A note in his medical file from April 4, 2012, says that Petties was wearing the boot but waiting on special support shoes. On April 10 he was wearing the boot and walking with a cane. In May a doctor renewed his allowance for a low bunk, crutches, and orthopedic boot until August. The prison's medical staff also repeatedly renewed the Vicodin prescription—at the end of April, in May, and in June. Petties's permit for one crutch and the orthopedic boot was extended until December of that year.

Petties was examined by the foot and ankle specialist, Dr. Samuel Chmell, in July 2012. Dr. Chmell apparently had treated Petties before in 2010 when he ruptured the Achilles tendon in his right ankle. Dr. Chmell did not observe evidence of "tenderness with range of motion" but did see signs of decreased ankle strength. He recommended that Petties continue limiting his physical activity, undergo a second MRI to assess the progress of his healing, and receive physical therapy at least twice per week. In August 2012 another Wexford employee, Dr. Saleh Obaisi, replaced Dr. Carter as medical director at Stateville. Dr. Obaisi (the second of the defendant physicians) already had been working weekends at the prison, and had approved the MRI recommended by Dr. Chmell. That second

MRI was performed in September 2012, and showed a partial Achilles tear.

A few weeks after Dr. Obaisi's promotion to medical director, he examined Petties. His notes from his August examination indicate that Petties had not been using his crutches and wanted to return them. During that examination Dr. Obaisi told Petties that physical therapy would not be ordered. The next month Petties was using one crutch when he was seen by a nurse at the infirmary. Near the end of September 2012, Dr. Obaisi noted that Petties had "not seen ortho yet" and prescribed Tylenol.

Petties next saw Dr. Obaisi in November 2012, about 10 months after his injury. The doctor observed that Petties still was experiencing pain and authorized continued assignment to a low bunk, soft-soled gym shoes, and another year's use of the orthopedic boot. From December 2012 to April 2013, other medical staff also tended to Petties on five occasions. On April 16, 2013, Petties visited the infirmary; he complained that he was not getting pain medication or the shoes ordered by Dr. Obaisi, but the practitioner who saw him noted that he had received pain medication and shoes from Dr. Obaisi the previous October. In June 2013 he was given additional pain medication. In his declaration submitted at summary judgment, Petties says that as of early 2014 he still was experiencing "serious pain, soreness, and stiffness" in his left ankle.

Petties filed this suit in November 2012, initially against Wexford as well as Drs. Carter and Obaisi. The district court recruited a lawyer, who later

amended the complaint to drop Wexford and allege that only the two doctors were deliberately indifferent to Petties's torn Achilles tendon. Petties principally argued that Dr. Carter was deliberately indifferent to his torn Achilles tendon by failing to immobilize his ankle with a boot or cast immediately after the injury, and Dr. Obaisi acted with deliberate indifference to the injury when he did not order physical therapy despite Dr. Chmell's recommendation.

The district court granted the doctors' motion for summary judgment. Dr. Carter's decision to wait eight weeks before immobilizing Petties's ankle in a cast or boot could not have constituted deliberate indifference, the court reasoned, because Petties's several physicians in and out of prison held different opinions about whether a boot or cast had been necessary. The court further concluded that a jury could not reasonably find that Dr. Obaisi's rejection of the recommendation for physical therapy had constituted deliberate indifference because, according to the judge, Petties had learned physical therapy exercises a year earlier (when he ruptured his right Achilles tendon) and could have per-formed those same exercises on his own.

Analysis

On appeal Petties first argues that the district court wrongly attributed to a difference of medical opinion Dr. Carter's choice not to immediately immobilize his ankle despite Wexford's treatment protocol. Petties says that the delay between his injury and when his ankle was immobilized left him in "constant, severe pain" and worsened the tendon

rupture. Prolonged and unnecessary pain resulting from a significant delay in effective medical treatment may support a claim of deliberate indifference. *Berry v. Peterman*, 604 F.3d 435, 441 (7th Cir. 2010); *Grieveson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008); *Edwards v. Snyder*, 478 F.3d 827, 832 (7th Cir. 2007). But disagreement with a doctor's medical judgment is not enough to prove deliberate indifference. *Berry*, 604 F.3d at 441; *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006); *Norfleet v. Webster*, 439 F.3d 392, 397 (7th Cir. 2006). Even admitted medical malpractice is not sufficient to show that a doctor acted with deliberate indifference. *McGee v. Adams*, 721 F.3d 474, 481 (7th Cir. 2013); *Norfleet*, 439 F.3d at 397. Rather, the inmate must show that the doctor's treatment strayed so far from accepted professional standards that a jury could infer the doctor acted with deliberate indifference. See *McGee*, 721 F.3d at 481; *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011); *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008).

We agree with the district court that, on this record, a jury could not reasonably conclude that Dr. Carter was deliberately indifferent by waiting to give Petties a splint or boot. Immediately after Petties's injury, a prison doctor exempted him from walking to meals and prescribed pain medication, an anti-inflammatory, and crutches. The walking exemption and prescriptions were renewed repeatedly. And that same day, Dr. Carter—who had treated about 10 ruptured Achilles tendons previously—ordered an urgent referral for an MRI and an appointment with an orthopedist. Although Dr. Carter acknowledged that treatment for a complete Achilles tear typically

includes immobilizing the ankle to minimize putting weight on the ankle, he also explained that he did not employ a splint initially because he believed that giving Petties crutches and minimizing his time on his feet was an effective treatment plan. Additionally, Dr. Puppala, the orthopedist who examined Petties after his MRI in March 2012, testified that although he would almost always immobilize a patient's ankle in a cast or boot, a torn Achilles tendon "would probably heal" without one. This meaningful and ongoing treatment of Petties's injury at Stateville and with outside medical providers—which Dr. Carter oversaw—could not constitute deliberate indifference.

Petties next argues that Dr. Obaisi was deliberately indifferent when he declined to order physical therapy despite the ankle specialist's recommendation in July 2012 for weekly physical therapy. Doctors are entitled to deference in treatment decisions unless no minimally competent professional would have acted similarly. *See McGee*, 721 F.3d at 481; *King v. Kramer*, 680 F.3d 1013, 1018-19 (7th Cir. 2012); *Roe*, 631 F.3d at 857. And although not following the advice of a specialist may constitute deliberate indifference, see *Gil v. Reed*, 381 F.3d 649, 663-64 (7th Cir. 2004); *Jones v. Simek*, 193 F.3d 485, 490 (7th Cir. 1999), whether a doctor is deliberately indifferent depends on the totality of the inmate's care, see *Walker v. Peters*, 233 F.3d 494, 501 (7th Cir. 2000); *Dunigan ex rel. Nyman v. Winnebago County*, 165 F.3d 587, 591 (7th Cir. 1999); *Gutierrez v. Peters*, 111 F.3d 1364, 1375 (7th Cir. 1997). Petties was treated immediately and continuously after he tore his Achilles tendon. He received crutches, regular pain medication, and later

a boot to immobilize his left ankle, and was permitted to minimize time on his feet by eating his meals in his cell and not attending yard and gym time. Doctors at the prison (including Dr. Obaisi) repeatedly renewed those treatments after Dr. Obaisi took over as medical director. And Dr. Chmell, the specialist who had recommended physical therapy, testified that when he examined Petties in July 2012, the ankle had diminished strength but a full range of motion, and the tendon was partially healed, even without receiving any physical therapy before then. Petties's evidence does not show that Dr. Obaisi's treatment was so contrary to accepted professional standards that a jury could infer that it was not based on medical judgment. *See Duckworth*, 532 F.3d at 680; *Norfleet*, 439 F.3d at 396.

Accordingly, the judgment of the district court is AFFIRMED.

WILLIAMS, *Circuit Judge*, dissenting. "The Eighth Amendment safeguards the prisoner against a lack of medical care that may result in pain and suffering which no one suggests would serve any penological purpose." *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 828 (7th Cir. 2009). To succeed on an Eighth Amendment claim based on deficient medical care, a plaintiff must show that he suffered from an objectively serious medical condition and that each individual defendant was deliberately indifferent to that condition. *Berry v. Peterman,* 604 F.3d 435, 440 (7th Cir. 2010). "Deliberate indifference occurs when a defendant realizes that a substantial risk of serious harm to the prisoner exists, but the defendant disregards

that risk." *Id.* It is intentional or reckless conduct, not mere negligence. *Id.* (citing *Gayton v. McCoy*, 593 F.3d 610, 620 (7th Cir. 2010). There is no dispute that Petties's Achilles tendon rupture was objectively serious. So the only issue in this appeal is whether Petties has presented enough evidence from which a reasonable jury could conclude that Dr. Carter and Dr. Obaisi acted with deliberate indifference toward his serious injury. Viewing the facts in the light most favorable to Petties and drawing all reasonable inferences in his favor as we must, *Pagel v. TIN Inc.*, 695 F.3d 622, 624 (7th Cir. 2012), in my view, he has.

A. Dr. Carter

On this record a jury could reasonably conclude that Dr. Carter was deliberately indifferent by failing to immobilize Petties's ankle despite his employer's protocol for a ruptured Achilles tendon and his testimony that immobilization was the appropriate treatment. On January 19, 2012, the day of Petties's injury, Dr. Carter concluded that Petties suffered an "Achilles tendon rupture." However, he did not immobilize Petties's ankle with a splint (or by any other means), even though Wexford's written protocols direct that treatment for a ruptured Achilles tendon is "splint, crutches." Petties met with other medical personnel in the following weeks, including a meeting with Dr. Carter on February 14, but Dr. Carter failed to immobilize his ankle then and Petties did not receive any type of immobilization until March 15, nearly two months after his injury. Evidence that a medical provider failed to abide by an established treatment protocol is evidence from which a jury could infer deliberate

indifference. See *Mata v. Saiz*, 427 F.3d 745, 757-58 (10th Cir. 2005) (reversing summary judgment where nurse's violation of published health-care requirements was circumstantial evidence that she knew of substantial risk of harm); *see also Phillips v. Roane Cnty., Tenn.*, 534 F.3d 531, 542-43 (6th Cir. 2008) (affirming denial of qualified immunity for paramedic whose failure to follow established treatment protocols could constitute deliberate indifference). Wexford's protocol is explicit that a physician attending to a ruptured Achilles tendon employ "splint, crutches, antibiotics if laceration" and also make an "urgent" referral for further treatment. Dr. Carter admitted having seen about ten ruptured Achilles tendons previously, and he himself recognized and diagnosed a "rupture" the same day that Petties was injured. He ordered an urgent referral for an MRI and an appointment with an orthopedist, yet during this lawsuit he has never explained why he disregarded the directive to "splint," or provide a splint for, Petties's ankle.

Failing to immobilize the ankle caused Petties to suffer unnecessary pain during this eight-week period. Dr. Puppala testified that making Petties walk on his left ankle without any form of cast until March had added to his pain and likely widened the gap in his torn tendon. Furthermore, Petties himself testified that he was in extreme pain during those eight weeks. He said he felt "constant, severe pain" even when he used crutches and the pain was so bad he had difficulty sleeping. Two weeks after the injury, on January 27, at an appointment, Petties says that he could not bear weight on his left foot

without severe pain.[4] On February 13, a provider who saw him in the clinic noted in Petties's chart that he had complained that his Achilles tendon was "killing" and he was unable to walk up stairs because of the pain. It is widely known that failing to immobilize an Achilles tendon rupture results in extreme pain and no one has put forward any medical justification for causing Petties this unnecessary additional pain. Petties has presented sufficient evidence to create a material issue of fact about whether Carter intentionally or with reckless disregard denied effective treatment. This deliberate indifference to Petties's prolonged, unnecessary pain can itself be the basis for an Eighth Amendment claim. *See Smith v. Knox Cnty. Jail*, 666 F.3d 1037, 1039-40 (7th Cir. 2012). Prolonged and unnecessary pain resulting from a significant delay in effective treatment may support a claim of deliberate indifference. *Berry*, 604 F.3d at 441. "A delay in treating non-life-threatening but painful conditions may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain." *Arnett v. Webster*, 658 F.3d 742, 753 (7th Cir. 2011). We have said that the length of the delay that is tolerable depends on the seriousness of the condition and the ease of providing treatment. *Id.*; *see also Williams v. Liefer*, 491 F.3d 710, 716 (7th Cir. 2007) (affirming denial of motion for judgment as a matter of law because "a reasonable jury could have concluded from the medical records

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[4] A doctor wrote in his medical records that Petties "believes he can bear weight," but Petties says that that statement is false. At this stage, we must view the facts in the light most favorable to Petties and draw all reasonable inferences in his favor.

that the delay unnecessarily prolonged and exacerbated [the plaintiff's] pain and unnecessarily prolonged" the plaintiff's serious health condition). Dr. Carter testified that he never recalled splints not being available at the prison. But he still failed to splint Petties's ankle at any point during those two months. The length of delay here is intolerable given the seriousness of Petties's injury and the ease of providing the immobilization at the prison. *See Arnett*, 658 F.3d at 753.

In my view, the majority wrongly finds that "a jury could not reasonably conclude that Dr. Carter was deliberately indifferent by waiting to give Petties a splint or boot." As I've discussed, there is ample evidence from which a reasonable jury could conclude Dr. Carter was deliberately indifferent.[5] In drawing its conclusion, the majority minimizes Dr. Carter's inaction in the face of protocol (and medical consensus that proper treatment of an Achilles tendon rupture includes immediate immobilization) on several grounds, though none are persuasive. For one, it follows the district court in seizing on a statement from Dr. Puppala's deposition that a torn Achilles tendon "would probably heal" without a boot. But Dr. Puppala testified that he would always immobilize a patient's ankle unless he could not because of an open sore. And more importantly, Dr. Puppala never suggested that failing to immobilize a ruptured Achilles tendon would not needlessly cause heightened pain even if the tendon would "probably"

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[5] Obviously, there is evidence from which a reasonable jury could conclude otherwise, but our task at this stage is just to determine whether a reasonable jury *could* rule in Petties's favor.

still heal eventually. A delay in treatment need not aggravate an inmate's condition in order to be actionable; pain alone is sufficient to establish a valid Eighth Amendment claim. *See Smith*, 666 F.3d at 1039-40 ("[The plaintiff] contends that even if his condition did not worsen from the delay, deliberate indifference to prolonged, unnecessary pain can itself be the basis for an Eighth Amendment claim. This, too, is correct.").

Second, the majority mentions that Petties was exempted from walking to meals, and prescribed pain medication, an anti-inflammatory, and crutches, and that Dr. Carter ordered an urgent referral for an MRI and an appointment with an orthopedist. It finds that "[t]his meaningful and ongoing treatment" of Petties's injury could not constitute deliberate indifference. First, I note that the referral tells us nothing about whether Dr. Carter was deliberately indifferent to Petties's pain during the seven-week period before Petties was scheduled to receive that MRI. Immobilization was a simple step that Dr. Carter could have taken to ease Petties's pain during the interim. Also, Dr. Carter could have expedited the referral so that Petties would not have to wait seven weeks, but he did not.

More importantly, the "receipt of some medical care does not automatically defeat a claim of deliberate indifference." *Edwards v. Snyder*, 478 F.3d 827, 831 (7th Cir. 2007). A prisoner is not required to show that a doctor completely ignored his pain, but instead a doctor's choice of the easier and less efficacious treatment for an objectively serious medical condition can amount to deliberate indifference. *Berry*, 604 F.3d at 441. Deliberate

indifference may occur where a prison official, having knowledge of a significant risk to inmate health or safety, administers "blatantly inappropriate" medical treatment. *Edwards*, 478 F.3d at 831. Although Petties received some medical attention, he is not required to show that he was "literally ignored" to prevail on his Eighth Amendment claim. *Sherrod v. Lingle*, 223 F.3d 605, 611 (7th Cir. 2000). This is because "[i]f all the Eighth Amendment required was that prison officials provide some 'immediate and ongoing attention,' they could shield themselves from liability (and save considerable resources) by shuttling sick or injured inmates to perfunctory medical appointments wherein no meaningful treatment is dispensed." *Perez v. Fenoglio*, No. 12-3084, 792 F.3d 768, 2015 U.S. App. LEXIS 11672, 2015 WL 4092294 at *4 (7th Cir. July 7, 2015). But "the responsibilities imposed by the Constitution are not so easily avoided." *Id.* In many ways, this case is similar to Berry where we reversed summary judgment for the prison official defendants where a doctor and nurse gave an inmate pain medication and other directions for minimizing pain, but would not provide the more effective treatment, a referral to a dentist. Immobilization was needed to prevent Petties from experiencing severe pain whenever the ankle moved. The ineffective treatment provided here should not shield Dr. Carter from, at a minimum, facing a jury to determine whether he acted with deliberate indifference.

Third, the majority suggests that Dr. Carter's failure to immobilize Petties's ankle was somehow a difference of medical judgment, without using such words. It notes that Dr. Carter "did not employ a

splint initially because he believed that giving Petties crutches and minimizing his time on his feet was an effective treatment plan." But this testimony is at odds with Dr. Carter's own testimony that the appropriate treatment for a complete Achilles tear is to immobilize the ankle with a boot and also ensure that the patient was not putting weight on the ankle. A failure to exercise medical judgment when making a treatment decision violates the Eighth Amendment. *Roe v. Elyea*, 631 F.3d 843, 863 (7th Cir. 2011). Also, when a doctor's decision is so far from accepted professional judgment, practice, or standards that it demonstrates that his decision was not based on medical judgment, deliberate indifference may be inferred. *See McGee v. Adams*, 721 F.3d 474, 481 (7th Cir. 2013); *King v. Kramer*, 680 F.3d 1013, 1018-19 (7th Cir. 2012); *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006). A jury could conclude that the treatment provided here was blatantly inappropriate and so far afield from accepted professional judgment that it did not represent a medical decision at all.

Whether a prison official had the requisite knowledge of a substantial risk is a fact question that can be demonstrated by drawing an inference from circumstantial evidence. *Walker v. Peters*, 233 F.3d 494, 498 (7th Cir. 2000). "For example, a fact finder could conclude that the official was aware of the substantial risk from the very fact that the risk was obvious." *Id.* at 498-99 (citing *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)). Where symptoms plainly call for a particular medical treatment (for example, the leg is broken, so it must be set), a doctor's deliberate decision not to furnish the treatment is actionable.

Id. at 499. Here, a reasonable jury could conclude that Petties's symptoms plainly called for a particular medical treatment. That is because every doctor that testified in this case has agreed that a ruptured Achilles tendon should be immobilized. Wexford's own protocol called for immobilization. And crutches do not prevent the ankle from moving, which causes pain.

Dr. Carter's testimony that he did not employ a splint initially because he believed that giving Petties crutches and minimizing his time on his feet was an effective treatment plan conflicts with his own testimony that treatment for an Achilles rupture typically includes immobilizing the ankle and Dr. Puppala's and Dr. Chmell's testimony that they would always immobilize (absent circumstances that are not present here). A reasonable jury could conclude that Dr. Carter's statement that he believed crutches was an effective treatment plan was a post hoc rationalization, not a statement that Dr. Carter exercised medical judgment at the time he treated Petties, to not provide a splint or boot. And Dr. Carter did not recall whether he referenced Wexford's treatment guidelines at the time he treated Petties. By giving no explanation at all for not following the protocol, Dr. Carter has opened himself up to a jury finding that he deliberately failed to treat Petties in such a way that he would likely aggravate Petties's injury.

B. Dr. Obaisi

I believe that construing the record in the light most favorable to Petties, a jury could find that Dr. Obaisi was deliberately indifferent when he refused

to order physical therapy despite the ankle specialist's recommendation that Petties receive physical therapy two to three times a week. Failure to follow the advice of a specialist or treating physician may constitute deliberate indifference. *See Gil v. Reed*, 381 F.3d 649, 663-64 (7th Cir. 2004) (allegation that prison doctor prescribed medication to inmate that specialist warned against gave rise to genuine issue of material fact precluding summary judgment, even though the doctor had an explanation for his alternate course of action); *Jones v. Simek*, 193 F.3d 485, 491 (7th Cir. 1999) (fact that doctor denied inmate medical care for a period of time and thereafter refused to provide specific treatments that were order for the inmate was sufficient to survive motion for summary judgment). Dr. Obaisi has never said in this litigation that he disagreed with Dr. Chmell's recommendation. Rather, at his deposition, he first asserted that authorizing physical therapy would have been unnecessary because Petties could do "the same exercises" he learned when he tore his right Achilles tendon a couple years earlier. Yet, when pressed, Dr. Obaisi was forced to admit that he did not even know if Petties had received physical therapy for his previous injury. Worse, he could not recall instructing Petties to perform physical therapy exercise appropriate for a torn Achilles tendon and the medical file does not reflect that such a discussion took place. Failing, without medical justification, to follow Dr. Chmell's recommendation, despite the availability of a physical therapist at the prison, could constitute deliberate indifference. *See Gil,* 381 F.3d at 663.

The majority does not attempt to justify Dr. Obaisi's decision not to provide physical therapy for Petties (presumably because it is obvious that there is no justification). Instead, it focuses on the totality of Petties's care and concludes that Dr. Obaisi's "treatment" was not so contrary to accepted professional standards that a jury could infer that it was not based on medical judgment. First, much of the "care" the majority cites occurred before Dr. Obaisi became the medical director, so it is unclear how these acts could be considered part of Dr. Obaisi's "treatment." Also, as mentioned, an inmate does not need to show that he was literally ignored. If the treatment provided was perfunctory and less efficacious, then a decision to provide such treatment can still constitute deliberate indifference. *Berry*, 604 F.3d at 441. Our totality of the inmate's care analysis shows that where an inmate complains of a few isolated incidents of delay or neglect during a course of treatment, but the record as a whole shows that the defendant did not disregard a serious medical risk because he provided meaningful treatment throughout the inmate's recovery, then the defendant has not acted with deliberate indifference. *See Walker*, 233 F.3d at 501; *Dunigan ex rel. Nyman v. Winnebago Cnty.*, 165 F.3d 587, 591 (7th Cir. 1999); *Gutierrez v. Peters*, 111 F.3d 1364, 1375 (7th Cir. 1997). That is not the case here. Permitting Petties to use a lower bunk and avoid walking around the prison cannot excuse a failure to provide actual medical treatment for the injury. In July 2012—over two years after Petties's injury—Petties's tendon had only partially healed and he had diminished strength. In November 2012, Dr. Obaisi noted in Petties's medical file that he was in chronic pain from the injury. These are not signs of a

reasonable provision of total care. His injury should likely have been completely healed much sooner and he should not have been in pain nearly three years afterwards.

I think it is worth examining Dr. Obaisi's testimony just to see how readily a reasonable jury could infer that Dr. Obaisi was deliberately indifferent to Petties's injury. When determining whether a doctor's treatment plan is appropriate, the court must focus on what the doctor knew at the time of treatment. *Duckworth v. Ahmad*, 532 F.3d 675, 680 (7th Cir. 2008). Deliberate indifference can be inferred from a physician's treatment decision which is so far afield from accepted professional standards as to raise the inference that it was not actually based on a medical judgment. *See Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006). Dr. Obaisi knew Petties had a serious ankle injury and that a specialist had recommended physical therapy. At first, Dr. Obaisi claimed that he did not think physical therapy was necessary because Petties's could perform exercises on his own, but Dr. Obaisi had no apparent knowledge of Petties's prior ankle injury or any information regarding prior physical therapy. Therefore, when making the decision not to follow Dr. Chmell's recommendation, Dr. Obaisi was not basing it on a belief that Petties could perform physical therapy exercises on his own. It was not a medical judgment at all. This suspicious testimony could be used to infer deliberate indifference. Then, seeking another justification since his reliance on prior physical therapy was lacking foundation, Dr. Obaisi claimed that he believed walking was physical therapy for a ruptured Achilles tendon. This claim is absurd. It is also not consistent with the

medical judgment of the specialist, Dr. Chmell, and Dr. Obaisi testified that he would always defer to the decisions of specialists (yet inexplicably chose not to in Petties's case):

> Counsel: As far as the care and treatment that should be rendered to an Achilles tendon injury you would defer to an orthopedic surgeon?
>
> Dr. Obaisi: Always.
>
> Counsel: And as far as the care and treatment that was suggested or ordered from orthopedic surgeons in this case specifically, you would defer to them?
>
> Dr. Obaisi: Yes.

Common sense dictates that walking on a ruptured Achilles tendon is not the equivalent of twice- or thrice-weekly physical therapy. It falls into this category of treatment decisions so far afield from accepted professional standards that deliberate indifference can be inferred. Failing to exercise medical judgment when making a treatment decision violates the Eighth Amendment. *Roe*, 631 F.3d at 863. Dr. Obaisi's decision to not provide Petties with physical therapy was a failure to exercise medical judgment. And the totality of Petties's care cannot excuse this neglect because the totality itself evinced deliberate indifference.

I would remand this case for further proceedings on Petties's claims that Dr. Carter was deliberately indifferent by failing to immobilize Petties's ankle and that Dr. Obaisi was deliberately indifferent by

not following Dr. Chmell's recommendation for physical therapy. For these reasons, I dissent.

APPENDIX D

(MEMORANDUM OPINION AND ORDER OF THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TYRONE PETTIES,	)	
	)	
Plaintiff,	)	
v.	)	12 C 9353
	)	
IMHOTEP CARTER, and SALEH OBAISI,	)	Judge George M. Marovich
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Dissatisfied with the treatment he received in prison after he injured his Achilles tendon on his left leg, plaintiff Tyrone Petties ("Petties") filed suit against defendants Dr. Imhotep Carter ("Dr. Carter")[1] and Dr. Saleh Obaisi ("Dr. Obaisi"). Defendants move for summary judgment. For reasons set forth below, the Court grants defendants' motion for summary judgment.

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[1] The parties disagree about the spelling of defendant's first name. Defendant (who ought to know) says it is spelled Imhot. The Court uses the spelling listed on the docket sheet.

I. Background

Unless otherwise noted, the following facts are undisputed.[2]

Plaintiff Petties is a 48-year-old inmate of the Illinois Department of Corrections and is (and was at all relevant times) incarcerated at Stateville Prison ("Stateville") in Lockport, Illinois. The Illinois Department of Corrections contracts with Wexford Health Services, Inc. ("Wexford") for certain health care services at Stateville.

Wexford employed defendant Dr. Carter as medical director at Stateville Prison from July 25,

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[2] Local Rule 56.1 outlines the requirements for the introduction of facts parties would like considered in connection with a motion for summary judgment. The Court enforces Local Rule 56.1 strictly. Facts that are argued but do not conform with the rule are not considered by the Court. For example, facts included in a party's brief but not in its statement of facts are not considered by the Court because to do so would rob the other party of the opportunity to show that such facts are disputed. Where one party supports a fact with admissible evidence and the other party fails to controvert the fact with citation to admissible evidence, the Court deems the fact admitted. *See Ammons v. Aramark Uniform Services, Inc.*, 368 F.3d 809, 817-818 (7th Cir. 2004). This, of course, does not absolve the party putting forth the fact of its obligation to support the fact with admissible evidence. See *Keeton v. Morningstar, Inc.*, 667 F.3d 877, 884 (7th Cir. 2012). It is not enough at the summary judgment stage for either party to *say* a fact is disputed. The Court considers a fact disputed *only* if both parties put forth admissible evidence of his or its version of the fact. Asserted "facts" not supported by deposition testimony, documents, affidavits or other evidence admissible for summary judgment purposes are not considered by the Court.

2011 through May 10, 2012. The other defendant, Dr. Obaisi, has been medical director at Stateville Prison since August 2, 2012. The medical director is responsible for all health care provided by Wexford at Stateville and for "ensuring timely and efficient response" to inmates' health care needs.

On January 19, 2012, Petties required medical treatment when he injured his Achilles tendon on his left ankle. This was not his first Achilles tendon injury. Petties had previously (it is unclear when) injured the Achilles tendon on his right ankle, which was still healing when he injured his left. That day in January, Petties felt a pop while he was walking up a flight of stairs and fell to the floor in pain. Petties was taken to Stateville's health care unit, where he complained of left lower leg pain and weakness in his ankle. Dr. Dubrick prescribed Vicodin (a painkiller), ice, crutches and "lay-in meals," which is to say Petties's meals were brought to him so he did not need to walk to eat his meals. The same day, Dr. Carter signed a referral for an ankle MRI for Petties. The referral says the reason for the MRI is "Achille's tendon rupture playing sports." Dr. Baker approved the MRI on January 25, 2012.

Although he had crutches, ice and painkillers, Petties was not initially prescribed a splint, brace or bandage to immobilize his ankle. Petties felt terrible pain when his ankle moved. An outside physician, Dr. Puppala, who treated Petties, testified that an Achilles tendon rupture did not always need to be immobilized. He stated, "I think it provides a lot of comfort being immobilized, but it doesn't have to be done. The Achilles would probably heal without it."

Petties' other outside treating physician, Dr. Chmell, testified that he would always immobilize an Achilles tendon rupture unless the patient had an open wound.

In the weeks that followed Petties's injury, security issues sometimes kept Petties from doctor appointments. On January 25 and 26, 2012, Petties was unable to see prison medical personnel due to a prison lockdown. Petties saw a prison doctor on January 27, at which time Petties told medical personnel that he had weakness in his left foot, but it could bear weight. Another security problem delayed an X-ray, which Petties was scheduled to have on February 8, 2012. The medical director had the authority to have a prisoner referred out for medical treatment only in emergency and urgent situations.

Petties saw Dr. Carter on February 14, 2012. Dr. Carter noted that Petties had a shortened and swollen left Achilles tendon. Dr. Carter put in an order for Petties to have a low bunk, crutches and a medical lay-in. That order did not expire until April 14, 2012. Dr. Carter also ordered Petties to walk slowly and avoid stairs. Also on February 14, Dr. Carter prescribed Petties Vicodin (for pain), as well as Motrin and Toradol (both NSAIDs to reduce inflammation).

On March 6, 2014, Petties finally received the ordered MRI at Provena St. Joseph Medical Center. The MRI showed that Petties had suffered a complete Achilles tendon rupture measuring between 2.0 and 4.7 centimeters. Next, on March 14, 2012, Petties was examined by Dr. Puppala at

Hinsdale Orthopaedics. In his report, Dr. Puppala noted:

> Petties has not been placed into any sort of cast on his left side. He has been walking on this. I think this is contributing to his pain and also likely contributing to some gapping at his rupture site. I think immobilization in a boot will be of great benefit to him. It should allow him to walk with less pain. He may of course use crutches for minimization of weight bearing. I will refer him to a foot and ankle specialist for definitive treatment. I think he could benefit from repair of his Achilles tendon; however, at this juncture being 2 months out from injury, he might even need graft augmentation of this rupture to have the best possible outcome.

(Plaintiff's Exh. E at 9).

By the next day, Petties's ankle was in a boot. On March 15, 2012, Dr. Carter examined Petties. Dr. Carter ordered Petties a daily bag of ice and to remain in the boot. The orders were to stay in place until June 15, 2012. Dr. Carter told Petties he would not order surgery to fix the tendon, because that would be too expensive. Dr. Carter told Petties that his job was to save money for Wexford. Nonetheless, Dr. Carter referred Petties to the orthopedic clinic at the University of Illinois at Chicago.

Petties continued to see medical staff at Stateville regularly.[3] Petties was given a prescription for Norco (for pain) on March 23 and April 6. On April 5, Petties was given a prescription for Vicodin and ibuprofen. In April, a doctor ordered Petties support shoes. Petties's prescription for Vicodin was renewed on April 19, May 30 and June 18. On May 11, 2012, Petties's prescription for the orthopedic boot, the low bunk and the crutches was extended. On June 18, the prescription for the boot, the low bunk and the crutches was extended until December 18, 2012.

On July 2, 2012, Petties saw the ankle specialist, Dr. Chmell, at UIC. Dr. Chmell found that Petties had a full range of motion in his left ankle. Dr. Chmell recommended both a follow-up MRI and "physical therapy and gentle stretching exercises at least 2 times per week." Dr. Chmell testified that Petties was not a surgical candidate with respect to his left Achilles tendon.

At some point thereafter, Petties had an appointment with Dr. Obaisi at Stateville. Dr. Obaisi informed Petties that he could not have physical therapy. Dr. Obaisi testified that Petties had had physical therapy when he injured his right Achilles tendon and that he could do the same exercises for his left. Dr. Obaisi told Petties that he could not have surgery, because Wexford would not pay for it. On July 20, 2012, Dr. Obaisi approved another MRI for Petties.

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[3] The parties do not say which doctor(s) ordered the various treatments and pain medications.

On September 4, 2012, Petties had a second MRI. This MRI showed a partial tear in Petties's left Achilles tendon. According to Dr. Chmell, this meant Petties's Achilles tendon was healing. On September 26, 2012, Dr. Obaisi examined Petties and concluded that Petties had tendinitis. Dr. Obaisi ordered Tylenol for Petties. Over the next few months, Dr. Obaisi continued to treat Petties's tendonitis with Tylenol, a low bunk and a boot.

On November 19, 2012, Petties mailed his complaint to federal court. Prior to filing his complaint here, Petties had filed grievances with the Illinois Department of Corrections. On February 1, 2012, for example, Petties filed a grievance. On the grievance form, Petties wrote:

> On 1-19-12 I came from the gym and was walking up the front of Charlie House Stateville CC Stairway when my left lower leg bend on the stairs on account of my putting presher on it because my right lower leg has been injured over 1 1/2 years I've been compensating presher on my left lower leg because stateville medical staff have neglicted helping me with the pain I have been having on my right lower leg. I have told "med tech" Joe, my physical therapist (Jose), my psych Doctor, Ms. Taller, Ms. Hart and numerous other nurses. On August 14, 2011, I went to the Health care and seen the medical Director Carter I hold him about my pain.
>
> I wont my $5 dollars return to me because my injury was clearly a emergency. I wont Dr.

> Carter and the medical staff investigated for neglict of my medical.

(Def. Exh. I at 195). The grievance officer construed this grievance as a complaint that Petties was not receiving proper medical care. The officer denied the grievance on April 30, 2012, saying, "Issue appears to be resolved as grievant appears to be receiving appropriate medical care at this time. There is no justification for co-pay reimbursement." (Def. Exh. I at 194). Petties appealed the denial of his grievance to the Administrative Review Board, which upheld the denial on May 21, 2012.

Petties filed another grievance on April 24, 2012. In that grievance, Petties complained:

> I have been to a orthopedics and he has recommended me to go to a foot specialist. It have been over 2 months since he assigned me to a foot specialist and I was told that I have been approved to go out since 3-19-12 but I am still waiting.

(Def. Exh. I at 213). This grievance was denied on the grounds that Petties "went out to the orthopedic doctor on 3/15/12."

Petties filed three more grievances on August 4, August 8 and August 11, 2012. On August 4, 2012, Petties complained that he needed more pain medication. On August 8, Petties complained that the pain medication he was given the day before was ineffective and upset his stomach. On August 11, 2012, Petties complained that he had not had physical therapy and that he needed different pain medication. On August 29, 2012, the Department of

Corrections acknowledged receipt of the three August grievances and stated that they would forward the grievances to the medical department for comment. Petties received no further response to his August grievances.

II. Summary judgment standard

Summary judgment should be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" Fed. R. Civ. P. 56(a). When making such a determination, the Court must construe the evidence and make all reasonable inferences in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Summary judgment is appropriate, however, when the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party." *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005).

III. Discussion

Petties claims that Dr. Carter and Dr. Obaisi were deliberately indifferent to his serious medical needs. Petties argues that Dr. Carter violated the Eighth Amendment prohibition against cruel and unusual punishment by: (1) failing to immobilize

Petties's ankle for eight weeks; (2) making Petties wait six weeks for an MRI; and (3) refusing to provide surgery to repair Petties's tendon. Petties argues that Dr. Obaisi violated the Eighth Amendment prohibition against cruel and unusual punishment by: (1) failing to provide physical therapy; and (2) refusing surgery to repair Petties's tendon.

Pursuant to §1983, one may bring suit against any person who caused a violation of his constitutional rights under color of state law. 42 U.S.C. § 1983; *Berry v. Peterman*, 604 F.3d 435, 439 (7th Cir. 2010). Although the constitution does "not mandate comfortable prisons," it does prohibit cruel and unusual punishments. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (internal citations omitted). "Deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment['s]" prohibition on cruel and unusual punishments. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (internal citation omitted). The Supreme Court elaborated on the meaning of deliberate indifference in *Farmer v. Brennan*, where it said:

> a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he

> must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.' An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of cruel and unusual punishment.

Farmer v. Brennan, 511 U.S. at 837-38 (internal citations omitted). Thus, neither negligence nor malpractice constitutes a violation of the constitution. *See Gayton v. McCoy*, 593 F.3d 610, 620 (7th Cir. 2010) ("Evidence that the official acted negligently is insufficient to prove deliberate indifference."); *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008) ("Deliberate indifference is not medical malpractice; the Eighth Amendment does not codify common law torts.").

An inmate's disagreement about a treatment decision ordinarily is not evidence of a constitutional violation. As the Supreme Court explained in *Gamble*:

> [T]he question whether an X-ray or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice . . .

Gamble, 429 U.S. at 107. Thus, "[m]ere differences of opinion among medical personnel over questions of treatment do not give rise to an Eighth Amendment claim." *Taylor v. Dutton*, 85 F.3d 632, [published in full-text format at 1996 U.S. App. LEXIS 12620], 1996 WL 253856 at *2 (7th Cir. 1996). Instead, "[t]o infer deliberate indifference on the basis of a physician's treatment decision, the decision must be so far afield of accepted professional standards as to raise the inference that it was not actually based on a medical judgment." *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006).

Sometimes treatment to prisoners is delayed by the realities of imprisonment. A prisoner cannot be sent to an outside hospital without guards. Even within a prison, safety affects the timing of prisoner movements. So, "the mere fact of delay does not amount to an Eighth Amendment violation unless the delay can be attributed to defendants' willful neglect or reckless disregard." *Goosby v. Whitmore*, 986 F.2d 1424, [published in full-text format at 1993 U.S. App. LEXIS 2339], 1993 WL 33924 at *8 (7th Cir. 1993); *see also Bieber v. Wisconsin Dep't of Corrections*, 62 Fed.Appx. 714, 718 (7th Cir. 2003) (affirming grant of summary judgment to defendant

where "it is not even clear that the prison's medical staff was responsible for any delays."). An inmate who complains that a delay in treatment constitutes a constitutional violation "must place *verifying medical evidence* in the record to establish the detrimental effect of delay in medical treatment to succeed." *Langston v. Peters*, 100 F.3d 1235, 1240 (7th Cir. 1996).

Petties claims that Drs. Carter and Obaisi caused a violation of his Eighth Amendment right to be free from cruel and unusual punishments. Drs. Carter and Obaisi move for summary judgment, and the Court considers each defendant, in turn.

1. Dr. Carter

Petties argues that Dr. Carter subjected him to cruel and unusual punishment by failing to immobilize his Achilles tendon in a boot for the first eight weeks after the injury and by making him wait six weeks for an MRI. The Court does not agree.

The delay with respect to the boot is simply a matter of different medical opinions, which is, at best, malpractice. The treating physicians had different opinions with respect to the necessity of immobilizing an Achilles tendon rupture. One outside physician, Dr. Chmell, testified that he always immobilizes an Achilles rupture. The other outside physician, Dr. Puppala, testified that it was not always necessary to immobilize an Achilles rupture, because the tendon "would probably heal without it." Such differences of medical opinion do not a constitutional violation make.

It is also important to remember that the time period before Petties's ankle was immobilized in a boot was the time period before the MRI, which is the diagnostic test that is necessary in order to determine whether the Achilles had actually been ruptured. Once the MRI showed a complete Achilles rupture, Petties was referred to Dr. Puppala, who promptly ordered the boot. Of course, Dr. Carter must have *suspected* a rupture as soon as Petties was injured, because Dr. Carter ordered the MRI on the same day (January 19, 2012) that Petties was injured. Ordering an MRI on the same day as the injury does not constitute deliberate indifference. The MRI was approved about one week later (on January 25, 2012) and was scheduled for March 6, 2012. Petties has put forth no evidence that the passage of time between when the MRI was ordered and when Petties actually received it was Dr. Carter's fault or that it was possible for a patient to have scheduled an MRI at Provena St. Joseph Medical Center any sooner.

In the meantime, Petties received treatment for his ankle. Immediately (as in the same day as his injury) Petties was given crutches so that he could avoid putting weight on his left ankle. He was granted lay-in meals and a low bunk for the same reason. Dr. Carter did not wantonly and unnecessarily leave Petties to suffer in pain. Rather, on the same day that Petties was injured, Petties was prescribed Vicodin and ice. For months, Petties continued to receive these treatments and painkillers, plus NSAIDS to reduce inflammation. No reasonable jury could conclude that Petties was subjected to cruel and unusual punishment.

Next, Petties argues that Dr. Carter subjected him to cruel and unusual punishment when he refused to provide Petties surgery for his ankle, telling him that it was too expensive. This claim fails. Only Petties thought surgery was the appropriate treatment, and inmates have no constitutional entitlement to a particular treatment. No doctor ordered or recommended surgery for Petties's ankle. Dr. Puppala suggested that repair *might* help and then referred Petties to an ankle specialist "for definitive treatment." That ankle specialist, Dr. Chmell, did not recommend surgery. In fact, Dr. Chmell testified that Petties was not a surgical candidate. Even if a doctor had recommended surgery, it still would not have been cruel and unusual punishment not to have provided it, because the medical evidence shows that Petties's Achilles tendon had begun to heal with the conservative treatment the prison provided him: a boot, painkillers, anti-inflammatory medicine, crutches and a low bunk.

For these reasons, the Court concludes that Petties has not put forth sufficient evidence from which a reasonable jury could conclude that Dr. Carter subjected Petties to cruel and unusual punishment. Accordingly, the Court need not consider Dr. Carter's affirmative defenses (failure to exhaust and qualified immunity). The Court grants Dr. Carter summary judgment with respect to Petties's claims against him.

2. Dr. Obaisi

Petties claims that Dr. Obaisi subjected him to cruel and unusual punishment when he failed to

provide surgery and when he failed to provide Petties with physical therapy.

With respect to the surgery, the claim against Dr. Obaisi fails for the same reasons as the claim against Dr. Carter.

As for the physical therapy, it is undisputed that on July 2, 2012, Dr. Chmell recommended that Petties do "physical therapy and gentle stretching exercises at least 2 times per week." It is also undisputed that the prison doctors did not provide Petties physical therapy sessions for his left Achilles. Notwithstanding these facts, no reasonable jury could conclude that Dr. Obaisi subjected Petties to cruel and unusual punishment (as opposed to malpractice) by not providing physical therapy sessions. Petties had previously been given physical therapy for his right Achilles tendon, and, therefore, Petties could have, as Dr. Obaisi testified, performed the same exercises on his own. Furthermore, the alternative treatment Petties was provided was working, as evidenced by the September 2012 MRI, which showed that the complete rupture had healed into a partial tear. The prison continued to provide Petties treatment after that.

For these reasons, Dr. Obaisi is entitled to judgment as a matter of law on Petties's § 1983 claim. The Court need not consider Dr. Obaisi's affirmative defenses. The Court grants Dr. Obaisi summary judgment.

IV. Conclusion

For the reasons set forth above, the Court grants defendants' motion for summary judgment.

Defendants are granted summary judgment on all of plaintiff's claims. The Court thanks plaintiff's appointed attorneys for their service on this case. Case closed.

ENTER:
/s/ George M. Marovich

George M. Marovich
United States District Judge
DATED: June 30, 2014

APPENDIX E

EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Excessive bail shall not be imposed, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number

of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and boundaries for services in suppressing insurrection or rebellion, should not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.