CASE NO. 10-3743

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL PURCELL, Individually and as Personal Representative of the Estate of Christopher Lee Purcell, deceased

PLAINTIFF-APPELLANT

v.

UNITED STATES

DEFENDANT-APPELLEE

Appeal from the United States District Court
For the Northern District of Illinois
Case No. 09 C 6137
Judge Joan Lefkow

REPLY BRIEF OF PLAINTIFF-APPELLANT MICHAEL PURCELL

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ORAL ARGUMENT REQUESTED

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This is a case about the negligence of local law enforcement in the apprehension of a mentally ill individual. This is not a question of obeying orders or challenging military policy and procedures. Local law enforcement employed by the Navy and Department of Defense ("DoD") was called to apprehend a suicidal individual with a gun and they failed to even search his person for a weapon. A-3. After concluding he was a danger to himself they removed Purcell's restraints and allowed him to shoot himself in the chest. A-4. Nothing about the response of local law enforcement has anything to do with the special relationship between soldier and his superiors nor is it incident to Purcell's service in the Navy.

I. THE FERES DOCTRINE DOES NOT BAR PLAINTIFF-APPELLANT'S CLAIM BECAUSE THE OCCURRENCE COMPLAINED OF WAS NOT INCIDENT TO CHRISTOPHER PURCELL'S SERVICE IN THE NAVY.

A. The district court erred by applying the *Feres* doctrine to bar Plaintiff-Appellant's claim because duty status and location are not determinative.

Controlling precedent makes clear that neither the duty status of the claimant nor the situs of the death is determinative of whether a claim is barred by *Feres*. *United States v. Shearer,* 473 U.S. 52, 59 (1985). When examining whether a servicemember's injuries were incurred "incident to service," this Court should consider various factors, with no single factor being dispositive. *Appelhans v. United States*, 877 F.2d 309, 311 (4th Cir. 1989).

On the night of January 27, 2008 Christopher Purcell's family learned he was suicidal and contacted local law enforcement. A-2. Since Purcell lived on a military base the local law enforcement were employees of the Navy and DoD. A-4. They were called

to apprehend a suicidal individual who was chatting on the internet, intoxicated, and alone in his apartment with a gun. A-3. Local law enforcement was negligent in its response. A-4. Nothing about the response of local law enforcement was incident to Purcell's service in the Navy.

This Court should look to factors other than duty status and location when determining whether the occurrence complained of was incident to service. The Supreme Court has made clear that, "The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *Shearer,* 473 U.S. at 57. This Court should scrutinize the underlying facts of this case to determine whether Purcell was engaged in activity incident to service when alone in his apartment, out of uniform, chatting on the internet, contemplating suicide, and drinking. The inquiry must be focused on how Purcell's last moments were parallel to civilian life.

B. The present case is distinguishable from cases cited by Defendant-Appellee involving suicide because the acts and omissions Plaintiff-Appellant complains of are parallel to civilian life.

United States relies on several other cases involving suicide to argue that Plaintiff-Appellant's claim should be barred by *Feres* (*Skees, Johnson,* and *Yolken*) but all are factually distinguishable from the present case. The present case is unique because nothing about the occurrence complained of directly relates to Purcell's service in the Navy. Everything that led to Purcell's death could have occurred had he not been enlisted in the Navy. The only difference is who local law enforcement was employed by.

The Sixth Circuit in *Skees v. U.S.*, 107 F.3d 421, 424 (6th Cir. 1997), held that *Feres* barred plaintiff's claim because the plaintiff alleged that members of plaintiff's

decedent's chain of command negligently supervised him. There is no civilian parallel to negligent supervision by a commanding officer. Purcell's case is entirely different because it does not allege negligence of anyone in his chain of command. A-2. This suit does not challenge the actions of Purcell's superior officers. Instead Purcell is alleging military police and outside contractors were negligent. A-2. Unlike *Skees,* Purcell is alleging negligence of those outside of his chain of command. Thus *Skees* does not apply.

In *Johnson v. U.S.*, 631 F.2d 34 (5th Cir. 1980), the plaintiff alleged the Army was negligent in allowing *Johnson* leave. The court reasonsed *Feres* applied because there was no parallel in civilian life to allowing an individual leave. *Id.* at 36. Plaintiff-Appellant's case is distinguishable from *Johnson* because the same incident occurs in civilian life, the only difference is who employs local law enforcement. In this case, Christopher Purcell died in his apartment on a military base. A-3. His base apartment was no different from an apartment anywhere else. His interaction with local law enforcement employed by the Navy and DoD was no different than his interaction would have been with Brunswick city police. Plaintiff does not allege Navy and DoD owed Purcell any greater duty than Brunswick city police would have.

The Fourth Circuit in *Yolken v. U.S.*, 590 F.2d 1303 (4th Cir.1979), followed the same reasoning as *Johnson.* The court reasoned a claim involving the decision to induct plaintiff's decedent into the Air Force was barred by *Feres* because there was no parallel in civilian life. *See Id.* Here, Plaintiff-Appellant's claim does not rely on allegations that the Navy committed any act or omission that any other law enforcement agency would not be equally negligent for committing. A-4.

The *Johnson* court also relied on the fact that the plaintiff alledged medical

malpractice. *Johnson,* 631 F.2d at 36. The court held "To the extent Sgt. Johnson's death is attributable to release from the hospital, the courts have consistently followed *Feres* and held that the medical care given servicemen in army hospitals is so entwined with the military relationship that a serviceman cannot bring an action under the FTCA for the negligent provision thereof." *Id.* This case does not allege any medical malpractice and it should not be treated as such. A-1. This case is distinguishable and is not controlled by the precedent of medical malpractice cases.

There is no clear controlling precedent barring Plaintiff-Appellant's claims. All suicide cases cited by United States are factually distinguishable because none are parallel to civilian life. Purcell being enlisted in the Navy at the time had no impact on his death other than whom employed the officers that negligently in detained him.

II. THIS CLAIM DOES NOT INVOLVE THE JUDICIARY IN MILITARY SUPERVISION AND MANAGEMENT.

There is no question presented in this case regarding the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force." *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). Plaintiff-Appellant's complaint does not require this Court to second-guess military decisions. His complaint does not question the validity of any military rules or procedures, it does not question the relationship between a sailor and his superiors, nor does it question military discipline. Rather the complaint only addresses the negligence of local law enforcement acting outside the chain of command.

Furthermore this suit does not question how those responsible were punished by military justice. This suit will have no effect on military discipline. There are no allegations of negligence in supervision or management of the military. This is a very

simple question of following normal police procedure and disarming someone how is an immediate threat to himself or others.

United States erroneously cites several cases where the plaintiff challenged the decisions of superior officers made within the chain of command. This case does not involve any dispute within the chain of command. Plaintiff-Appellant does not allege that anyone violated any orders, gave improper orders, or acted improperly in administration of military justice.

United States mistakenly relies on *Smith v. United States*, 196 F.3d 774 (7th Cir. 1999), where the plaintiff alleged that her superior officer sexually assaulted her. This Court barred plaintiff's claim because "The wrongs allegedly perpetrated by Staff Sergeant Robinson upon then-Private First Class Smith were made possible by his status as her military superior." *Id.* at 777. In the present case none of the allegations in Plaintiff's complaint are dependant on anyone's rank. This court reasoned, "the relationship between the alleged tortfeasor and his victims is critical." *Id.* at 778. In this case it is critical to consider that Plaintiff's allegations are against local law enforcement that act outside the chain of command. The relationship in this case is between law enforcement and a suicidal individual. Plaintiff's complaint raises no issues of the relationship of soldier and superior or of military policy.

Stephenson v. Stone, 21 F.3d 159 (7th Cir. 1994) involved claims that the military's policy on homosexuality led to plaintiff's suicide. This Court reasoned the claim was barred by *Feres* because it questioned military policy. *Id.* at 164. The present case involves no such policy issues. It is simply a question of ordinary negligence. It does not involve any larger policy questions. Plaintiff's claims do not question how the military is managed or its policies.

In *Skees v. U.S.*, 107 F.3d 421, (6th Cir. 1997) the plaintiff alleged that members of plaintiff's decedent's chain of command negligently supervised him. The case at bar is completely distinguishable because plaintiff is alleging negligence on the part of local law enforcement who act outside the chain of command. The court reasoned that questioning how superiors supervised the decedent goes directly to the 'management' of the military. *Id*. at 424. Plaintiff's complaint does not allege any negligence on the part of Purcell's superior officers. No one in Purcell's chain of command is implicated in this suit. The relationship in this case is between law enforcement and a suicidal individual.

III. EXPANSION OF THE FERES DOCTRINE IS CONTRARY TO THE CONGRESSIONAL INTENT OF THE FTCA.

Barring Plaintiff-Appellant's claim would expand the *Feres* doctrine far beyond the original Congressional intent. This case involves a situation completely analogous to civilian life and alleges no negligence within the chain of command. There is no Seventh Circuit or Supreme Court case absolutely controlling this situation. This Court is not bound to expand *Feres* any further then Congress originally intended.

The *Feres* doctrine and its progeny misinterpret the FTCA. The original intent of Congress was clearly stated to only exclude claims related to combatant activities. The incident to service test created by *Feres* should not be expanded any further. This Court should stop the expansion of the *Feres* doctrine.

There is no textual support for the holding of *Feres*. In his *Johnson* dissent Justice Scalia wrote that Congress did not intend to exclude servicemen from the FTCA. *United States v. Johnson,* 481 U.S. 689, 700 (1987) (Scalia, J. Dissenting). The original intent of the FTCA was to render "the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *Id at 701*. All of the

exceptions to the FTCA "including one for '[a]ny claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war,*' 28 U.S.C. § 2680(j) (emphasis added), make clear that Congress specifically considered, and provided what it thought needful for, the special requirements of the military." *Id.*

This is a case about the negligence of local law enforcement in the treatment of a mentally ill individual. This is not a question of obeying orders or challenging military policy and procedures. Navy and DoD personnel were called to apprehend a suicidal individual with a gun and they failed to even search his person for a weapon. A-3. After concluding he was a danger to himself they removed Purcell's restraints and allowed him to shoot himself in the chest. A-4. Nothing about the response of local law enforcement has anything to do with the special relationship between soldier and his superiors nor is it incident to Purcell's service in the Navy.

CONCLUSION

For all the reasons stated herein, this Court should reverse the trial court's holding that Plaintiff-Appellant lacks subject matter jurisdiction and its erroneous application of *Feres*.

Respectfully Submitted,

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/s/Howard Miller
/s/Alexander N. Hattimer
Attorneys for Plaintiff-Appellant
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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Plaintiff-Appellant, Michael Purcell, furnishes the following in compliance with F.R.A.P Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 2,475 words.

Dated April 11, 2011

FICHERA & MILLER, P.C
/s/Howard Miller
/s/Alexander N. Hattimer
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PROOF OF SERVICE

The undersigned, counsel of record for the Plaintiff-Appellant, Michael Purcell hereby certifies that on April 11, 2011, two copies of the Brief as well as a digital version containing the brief, were hand delivered to counsel for the Defendant-Appellee, United States.

Dated April 11, 2011

FICHERA & MILLER, P.C
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CIRCUIT RULE 30(e) CERTIFICATION

The undersigned hereby certifies that I have field electronically, pursuant to Circuit Rule 31(e), versions of the brief and of all the appendix items that are available in non-scanned PDF format.

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