In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 10-3743

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

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 09 C 6137 — Joan H. Lefkow, *Judge*.

BRIEF OF THE UNITED STATES

PATRICK J. FITZGERALD
United States Attorney
for the Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

THOMAS P. WALSH
Assistant United States Attorney
Civil Division Chief

SAMUEL S. MILLER
Assistant United States Attorney
(312) 886-9083

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Jurisdictional Statement

Appellant's jurisdictional statement is not complete and correct. Accordingly, appellee provides the following jurisdictional statement pursuant to Circuit Rule 28(b).

This wrongful death action was brought against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. R. 1.[1] Although this action was dismissed for lack of subject matter jurisdiction pursuant to the *Feres* doctrine (the sole issue on appeal), district courts generally have jurisdiction to decide cases brought under the FTCA. 28 U.S.C. § 1346(b); *Collins v. United States*, 564 F.3d 833, 837-38 (7th Cir. 2009).

On October 14, 2010, the district court dismissed this action based on the longstanding *Feres* doctrine (*Feres v. United States*, 340 U.S. 135 (1950)). App. 57-65. A notice of appeal was filed on November 24, 2010, within the 60 days allowed by Fed. R. App. P. 4(a)(1)(B). App. 66. This appeal is from a final judgment that disposed of all claims with respect to all parties. Accordingly, this court has jurisdiction to review the district court's final decision pursuant to 28 U.S.C. § 1291.

Issue Presented for Review

Whether the district court correctly dismissed this action pursuant to the *Feres* doctrine.

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[1] "R." references are to numbered items in the record on appeal. "App." references are to appellant's appendix.

Statement of the Case

The complaint was filed in district court on October 1, 2009. R. 1. It alleged that the United States negligently failed to prevent a suicide by Navy hospital corpsman Christopher Purcell while he was stationed at the Brunswick Naval Air Station in Brunswick, Maine. *Id.* ¶ 17. On March 8, 2010, the United States moved for dismissal pursuant to the *Feres* doctrine (R. 11) and, after full briefing (R. 12, 15, 16, 17, 20), the district court granted the United States' motion on October 14, 2010. App. 57-65. Michael Purcell, personal representative of the estate of Christopher Purcell, filed a timely notice of appeal on November 24, 2010. App. 66.

Statement of Facts

At the time of his death, Christopher Purcell was a twenty-one-year-old Navy hospital corpsman on active duty at the Brunswick Naval Air Station (Brunswick NAS). App. 58. According to the complaint, Navy and Department of Defense personnel came to Purcell's barracks on January 27, 2008, after being notified that he had a gun and was suicidal. R. 1 ¶¶ 5- 8, 17(b) and (e). An initial search of the premises revealed an empty gun case and bullets, but no weapon was found, and none of the officers searched Purcell himself to see if he had a gun on his person. *Id.* ¶ 9, 15. After the initial search, Purcell was taken outside, became irate, and was put in handcuffs after a struggle. *Id.* ¶¶ 10-11. Soon thereafter, however, Purcell was returned to his room and freed from one of his handcuffs so that he could go to the bathroom. *Id.* ¶¶ 12-14. Purcell then pulled a gun from his waistband and shot himself in the chest while being accompanied to the bathroom. *Id.* ¶ 16.

Prior to this lawsuit, an administrative tort claim was submitted to the Navy on behalf of Purcell's estate, as is required by 28 U.S.C. § 2675(a). R. 12, Def. Ex. 1. Consistent with the district court complaint now at issue, the final autopsy report and death certificate included with the administrative claim confirm that Purcell was an active-duty Navy hospital corpsman at the time of the incidents at issue, that his residence at the time was barracks at the Brunswick NAS, and that the officers who allegedly failed to prevent Purcell's suicide were all Navy or other Department of Defense personnel. R. 1 ¶¶ 4, 5, 6, 17; R. 12, Def. Ex. 1 at Boxes 3, 8, Def Ex. 2, Def. Ex. 3 at Boxes 15, 47, 48.[2]

After reviewing the relevant circumstances, the Navy denied the administrative claim arising out of Purcell's death based on the Supreme Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). R. 12, Def. Ex. 4. Purcell's personal representative then initiated the present lawsuit, claiming that the United States negligently failed to prevent Purcell's suicide. R. 1. Among other things, the complaint alleges that the United States was negligent because its agents failed to calm a disturbed and agitated

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[2] The court may consider materials outside of the complaint when ruling on a motion to dismiss for lack of subject matter jurisdiction. *Selbe v. United States*, 130 F.3d 1265, 1266 (7th Cir. 1997). In addition, even if jurisdiction were not at issue, the administrative records from this case can be considered at the pleadings stage because they are referred to in the complaint (R. 1 ¶ 18), and because matters of public record, including administrative records, are subject to judicial notice. *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993) (materials are considered part of pleadings if they are referred to in complaint and central to claim); *Martinez v. Universal Laminating, Ltd.*, 2002 WL 31557621, *1 (N.D. Ill. 2002) (administrative records are subject to judicial notice); *McGee v. United Parcel Service, Inc.*, 2002 WL 449061, *2 (N.D. Ill. 2002) (same); *Morris v. Albertson, Inc.*, 2001 WL 936118, *1 (N.D. Ill. 2001) (same).

individual who they were sent to help, failed to search Purcell in accordance with Navy regulations, failed to maintain proper custody of Purcell after removing the restraints, irritated Purcell with profane, derogatory and threatening comments that were contrary to standard operating procedures, and failed to transport Purcell to the Brunswick NAS security precinct in accordance with Brunswick NAS standard operating procedures. R. 1 ¶ 17.

The United States moved for dismissal pursuant to the *Feres* doctrine, because the claim arose out of activity incident to Purcell's military service and because review of the claims alleged would involve the judiciary in military supervision and management. R. 11, 12. On October 14, 2010, after full briefing (R. 12, 15, 16, 17, 20), the district court granted the United States' motion. App. 57-65. In reaching this decision, the district court emphasized that Purcell's death occurred while he was an active-duty service member in his barracks on a military base, that Purcell was under military discipline and jurisdiction at the time, and that military officers, not local law enforcement, responded when notified that Purcell posed a threat to his own safety. *Id.* 62. As a consequence, Purcell's death arose out of activity incident to his military service and the *Feres* doctrine barred this action. *Id.* The district court also observed that the allegedly negligent officers who came to Purcell's barracks were acting pursuant to military duties and regulations and were later court-martialed according to Purcell's personal representative. *Id.* 62-63. Hence, an inquiry into their conduct would implicate the concerns about interference with military discipline underlying the Supreme Court's decision in *United States v. Shearer*, 473 U.S. 52 (1985). *Id.*

Summary of Argument

This lawsuit arises out of the suicide by Navy hospital corpsman Purcell, and the United States sympathizes with his family and others close to him. Nevertheless, the district court correctly found that this action is barred by the *Feres* doctrine, because the occurrence at issue arose out of activity incident to Purcell's military service and because review of the claims alleged would involve the judiciary in military supervision and management.

The appellate brief submitted by Purcell's personal representative does not attempt to identify any specific error in the district court's decision. Rather, it just restates the arguments that the district court rejected based on well-settled law. For example, Purcell's personal representative argues that Purcell's presence in his barracks on a military base does not matter under the circumstances of this case, but this is flatly inconsistent with the original *Feres* decision and subsequent caselaw in this and other circuits. Likewise, Purcell's personal representative contends that the *Feres* doctrine does not apply because Purcell was not engaged in a military *mission* at the time of his death, but this position too has been rejected by the Supreme Court, this court, and various other circuits. Because these and the other arguments raised by Purcell's personal representative are directly contradicted by binding precedent, the district court's decision dismissing this action pursuant to the *Feres* doctrine should be affirmed.

Argument

I. Standard of Review

The district court's dismissal of this action for lack of subject matter jurisdiction is reviewed *de novo*. *Selbe v. United States*, 130 F.3d 1265, 1266 (7th Cir. 1997).

II. Injury Incident to Military Service

In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court held that the United States is not liable under the FTCA for injuries that "arise out of or are in the course of activity incident to [military] service." *Id.* at 146. In reaching this decision, the Supreme Court emphasized that prior to the enactment of the FTCA, no American law ever permitted a soldier to recover for negligence against his superior officers or the government he was serving. *Id.* at 141. Moreover, no state law had ever permitted a member of the militia to maintain a tort action for injuries suffered in the service. *Id.* at 142. Accordingly, the court concluded that Congress had not intended to waive sovereign immunity for injuries that arose incident to military service. *Id.* at 146.

Since the *Feres* decision, both the Supreme Court and the Seventh Circuit have repeatedly reaffirmed the vitality of the *Feres* doctrine. *See, e.g. United States v. Johnson*, 481 U.S. 681 (1987); *United States v. Stanley*, 483 U.S. 669 (1987); *Shearer*, 473 U.S. 52 (1985); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977); *Selbe,* 130 F.3d 1265; *Smith v. United States*, 196 F.3d 774 (7th Cir. 1999); *Stephenson v. Stone*, 21 F.3d 159 (7th Cir. 1994); *Walls v. United States*, 832 F.2d 93 (7th Cir. 1987). In addition, the Supreme Court has identified three broad rationales supporting the *Feres* doctrine: (1) the need to protect the distinctively federal

relationship between the government and the armed forces, which could be adversely affected by applying differing tort laws; (2) the existence of statutory compensatory schemes; and (3) the need to avoid interference with military discipline and effectiveness. *Johnson*, 481 U.S. at 688-91. Importantly, however, the Supreme Court has also explained that courts should rely upon the "incident to service" test in applying the *Feres* doctrine rather than attempting to ascertain whether the underlying rationales are present in any given case. *Johnson*, 481 U.S. at 687-88; *see also Maas v. United States*, 94 F.3d 291, 295 (7th Cir.1996); *Selbe*, 130 F.3d at 1268; *Loughney v. United States*, 839 F.2d 186, 188 (3rd Cir. 1987); *Verma v. United States*, 19 F.3d 6446, 6448 (D.C. Cir. 1994).

In the present case, Purcell died while he was an active-duty service member in his barracks on a military base. In addition, it was military officers, not local law enforcement, who came to Purcell's barracks after being notified that he was suicidal. Accordingly, the district court correctly held that Purcell's death arose out of activity incident to his military service. Indeed, several appellate courts have already reached this same conclusion in other suicide cases. *Skees v. United States*, 107 F.3d 421, 423-26 (6th Cir. 1997); *Johnson v. United States*, 631 F.2d 34 (5th Cir. 1980); *Yolken v. United States*, 590 F.2d 1303 (4th Cir. 1979).

In his appellate brief, Purcell's personal representative does not identify any specific error in the district court's decision, and thus fails to provide a proper basis for a reversal. *Matter of Scarlata*, 979 F.2d 521, 527 (7th Cir. 1992) ("We will not reverse the district court's decision when the appellants have failed to identify, let alone

explain, any error committed by the district court.") (internal quotation marks omitted). More fundamentally, moreover, the arguments that Purcell's personal representative does attempt to raise are plainly without merit.

For example, Purcell's personal representative argues that Purcell's presence in his barracks on a military base does not matter, relying heavily on older decisions from California, Pennsylvania, and elsewhere. However, none of these early cases was decided by a court within the Seventh Circuit, and all of them precede the much broader understanding of *Feres* expressed by both the Supreme Court and the Seventh Circuit over the past 30 years. *See, e.g, Johnson*, 481 U.S. 681; *Stanley*, 483 U.S. 669; *Shearer*, 473 U.S. 52; *Selbe,* 130 F.3d 1265; *Smith*, 196 F.3d 774; *Stephenson*, 21 F.3d 159; *Walls*, 832 F.2d 93. In addition, none of the cases cited by Purcell's personal representative involve an active-duty serviceman who committed suicide in his own barracks, or any other circumstances even remotely similar to the present matter. In contrast, the Supreme Court's original *Feres* decision involved a much more analogous situation — an active-duty Army lieutenant who died in a barracks fire — and is, of course, a binding precedent. *Feres*, 340 U.S. 135; *see also Stephenson*, 21 F.3d 159 (*Feres* barred lawsuit by active-duty soldier who was murdered in his Army barracks by an active-duty sergeant; decedent had engaged in a homosexual act with the sergeant and was about to testify about the act in a court-martial); *Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678 (1st Cir. 1999) (*Feres* barred Air National Guard airman's suit for injuries sustained in hazing incident in which officers attacked plaintiff in his barracks and continued the attack outside where he was sexually

assaulted); *Dozler v. United States*, 869 F.2d 1165 (8th Cir. 1989) (*Feres* barred claim for wrongful death of soldier murdered in Army barracks).

Purcell's personal representative also attempts to suggest that *Feres* does not apply because Purcell was alone in his apartment, out of his uniform, chatting on the internet, drinking, and not engaged in a military mission at the time of his suicide, but this misses the mark by a wide margin. Even when a service member is "off duty" in his barracks engaged in the activities alleged by Purcell's personal representative, he is still an "active-duty" service member who remains subject to military regulations and discipline and is readily available for emergency service or temporary duties. *Stewart v. United States*, 90 F.3d 102, 105 (4th Cir. 1996); *Mason v. United States*, 568 F.2d 1135, 1136 (5th Cir. 1978). As a consequence, *Feres* still applies to active-duty service members even if they were off duty and not engaged in a military mission at the time of their injury. *Smith*, 196 F.3d at 777-78 (soldier's suit for sexual assault by drill sergeant while soldier was off duty and off post is barred by *Feres*); *Borden v. Veterans Administration*, 41 F.3d 763 (1st Cir. 1994) (soldier's claim for medical malpractice involving knee injury sustained while playing basketball off-duty is barred by *Feres*); *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986) (lawsuit by off-duty sailor injured while using Navy recreational facility is *Feres* barred); *Chambers v. United States*, 357 F.2d 224 (8th Cir. 1966) (lawsuit by airman is barred by *Feres* because of claimant's active-duty status and presence on base, even though engaged in off-duty recreation).

Lastly, Purcell's personal representative argues that this case should not be dismissed under *Feres* because doing so would supposedly be inconsistent with the original rationales for the *Feres* doctrine. As noted above, however, the Supreme Court's decision in *Johnson* made clear that courts should rely on the "incident to service" test in applying the *Feres* doctrine rather than attempting to ascertain whether the underlying rationales are present in any given case. *Johnson*, 481 U.S. at 687-88; *see also Maas*, 94 F.3d at 295 ("Application of the *Feres* doctrine does not depend on the extent to which its rationales are present in a particular case."); *Selbe*, 130 F.3d at 1268 (applying *Feres* in an instance of medical malpractice at a military hospital, "notwithstanding the tenuous link between these rationales and malpractice cases"); *Loughney*, 839 F.2d at 188 ("*Johnson* confirms the correctness of our previous view that *Feres* prohibits any case-by-case inquiry into whether judicial review of a service member's tort claim would unduly interfere with military operations."); *Verma*, 19 F.3d at 6448 ("[W]hether or not the circumstances of a case implicate the rationales for the *Feres* doctrine, the doctrine bars any damage suit against the United States for injuries incurred incident to military service."). Even if this court were to scrutinize the *Feres* rationales, however, all three of them apply.

As explained by the Supreme Court in *Johnson*, the three broad rationales supporting *Feres* are: (1) the need to protect the distinctively federal relationship between the government and the armed forces, which could be adversely affected by applying differing tort laws; (2) the existence of a separate, uniform, comprehensive, no-fault compensation scheme for military personnel who experience service-related

injuries; and (3) the need to avoid interference with military discipline and effectiveness. *Johnson*, 481 U.S. at 688-91; *see also Feres*, 340 U.S. at 144. The first of these rationales — the distinctively *federal* relationship — applies here because allowing FTCA claims based on suicides by military personnel in their barracks would require the application of differing tort laws based on the situs of the alleged negligence. 28 U.S.C. § 1346(b) (United States is liable under the FTCA to the same extent as a private person "in accordance with the law of the place where the act or omission occurred."). Likewise, the second rationale — a comprehensive, no-fault compensation scheme — applies because Congress has created a compensation system for survivors of a service member who dies on active duty. 10 U.S.C. § 1475. Finally, the third rationale — avoiding interference with military discipline — applies here because the complaint itself alleges violations of Navy and Brunswick NAS regulations and standard operating procedures, and seeks to hold the United States liable for actions taken by Navy and Department of Defense personnel who are subject to military discipline. Indeed, Purcell's personal representative highlights this point with his assertion that Navy and Department of Defense personnel have already been disciplined (court-martialed) for their conduct on the night that Purcell died. App. 32. Accordingly, this action is barred by the *Feres* doctrine.

III. Claims That Involve the Judiciary in Military Supervision and Management

In *United States v. Shearer*, 473 U.S. 52 (1985), the Supreme Court expanded the *Feres* doctrine, holding that it barred suit against the government for the off-base, off-duty murder of one serviceman by another, even if the government knew that the

murderer had been convicted of a prior manslaughter overseas. The court found that claims like this did not fall within the FTCA because they were the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs regarding the supervision and management of military personnel. *Shearer*, 473 U.S. at 58-59. Unlike the incident-to-service test, the *Shearer* standard does not focus on the injured service member, but on the nature of the challenged activity. *See, e.g., Smith*, 196 F.3d at 777-78; *Stephenson*, 21 F.3d at 163; *Skees*, 107 F.3d at 424. This aspect of the *Feres* doctrine grows out of separation of powers concerns and the Supreme Court's general reluctance to review military judgments. *See generally Chappell v. Wallace*, 462 U.S. 296 (1985); *see also Smith*, 196 F.3d at 778 ("Congress has made it clear that an FTCA action, in which the service member seeks damages from the United States and necessarily calls into question the management decisions of those who exercise military leadership, is not the appropriate avenue for a wronged service member seeking redress for such a grave wrong.").

In the present case, the complaint make several claims of negligence that would involve the judiciary in military supervision and management. In particular, the complaint alleges that Navy and Department of Defense personnel failed to search Purcell in accordance with Navy regulations, failed to transport Purcell to the Brunswick NAS security precinct in accordance with Brunswick NAS standard operating procedures, and failed to contact local law enforcement. R. 1 ¶ 17(c), (e) and (h). The complaint also alleges that the officer who removed Purcell's handcuffs failed to consult with the on-scene commander or the watch commander, and that the

arresting officer irritated Purcell with profane, derogatory and threatening comments that were contrary to standard operating procedures. *Id.* ¶ 17(f) and (g). Because these claims focus heavily on compliance with Navy and Brunswick NAS regulations and standard operating procedures, review of them would necessarily enmesh this court in military supervision and management. Accordingly, the district court correctly found that this action would implicate the *Shearer* concerns about interference with military discipline.

Purcell's personal representative does not address the *Shearer* extension separately in his brief. As noted above, however, he has asserted that Navy and Department of Defense personnel were court-martialed for the conduct at issue (App. 32), and thereby reinforced the conclusion that going forward with this action would involve the judiciary in military supervision and management. Accordingly, this action is separately barred by the *Shearer* extension and the district court should be affirmed.

Conclusion

For the foregoing reasons, the district court's decision dismissing this action should be affirmed.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

THOMAS WALSH
Assistant United States Attorney
Civil Division Chief

SAMUEL. S. MILLER
Assistant United States Attorney

Certificate of Compliance with Rule 32(a)

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) along with Circuit Rule 32 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using WordPerfect's proportionally spaced, Century Schoolbook, 12-point typeface.

Dated: March 28, 2011

SAMUEL S. MILLER
Assistant United States Attorney

Certificate of Service

SAMUEL S. MILLER, an attorney of record, certifies that on March 28, 2011, he served two printed copies of the foregoing brief and one digital copy of the brief on diskette by *first-class* mail on the person listed below.

SAMUEL S. MILLER
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 886-9083

HOWARD MILLER
ALEXANDER HATTIMER
Fichera & Miller, P.C.
415 N. LaSalle Street, Suite 301
Chicago, Illinois 60654