CASE NO. 22-6039

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STACY WILLIS, as Personal Representative of the Estate of MITCHELL EVERETT WILLIS, deceased,	)
Plaintiff-Appellee,	)
vs.	)
JOHNATHON JOHNSON and JAMES NEWKIRK,	)
Defendants-Appellants.	)

On Appeal for the United District States District Court
for the Western District of Oklahoma
The Honorable Judge Timothy D. DeGiusti
D.C. No. CIV-18-323-D

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COMES NOW, the Plaintiff, STACY WILLIS, as Personal Representative of the Estate of MITCHELL EVERETT WILLIS, deceased, and submits this Response Brief.

STATEMENT OF RELATED CASES OR APPEAL

Pursuant to 10th Cir. R. 28.2(C)(1), Appellee notifies the Court that no other or related appeals have been filed in this case.

JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Oklahoma had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343. On February 1, 2022, the district court entered its Order denying Defendants' Motions for Summary Judgment. The Notice of Appeal was timely filed in accord with Rule 4(a)(1), F.R.A.P., on March 3, 2022.[1] This Court's appellate jurisdiction derives from 28 U.S.C. § 1291 and 18 U.S.C. § 3742. [Aplt. Appx. Vol. 1 at 25; Aplt. Appx. Vol. 2 at 262].

Circuit courts have appellant jurisdiction under 28 U.S.C. § 1291 for appeals from "final decisions" of the district courts of the United States. The matter being presented to the Court is not over a "final decision" of the Western District of

[1] The District Court's order denying Johnson qualified immunity can be found on pp. 4-13 of Johnson's Order. The District Court's order denying Newkirk qualified immunity can be found on pp. 7-11 of Newkirk's Order.

Oklahoma but, rather, is an interlocutory appeal of the district court's denial of qualified immunity to two (2) detention officers at the at the Oklahoma County Detention Center. Under this appellate jurisdiction, "interlocutory appeals are the exception and not the rule." *Myers v. Okla. Cnty. Bd. of Cnty. Comm'rs*, 80 F.3d 421, 424 (10th Cir. 1996). In order to grant appellant jurisdiction there must be an issue of "whether the constitutional right that was allegedly violated was 'clearly established.'" *Id.*

Any claim that the district court below erroneously determined there were genuine issues of fact for trial is beyond this Court appellate jurisdiction at this phase of the litigation: "[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

STATEMENT OF THE ISSUES

1. An officer is not entitled to qualified immunity when the officer violates a constitutional right that is clearly established. Appellant Johnson used a technique that poses a significant risk of harm if applied improperly. Appellant Johnson used this technique on Mr. Willis who, at the time of the use of force, was not resisting, was following commands, posed no threat to any of the officers, was lying prone, and was

effectively subdued through shackles and handcuffs. Appellant Johnson was also trained to improperly apply the technique and admitted that if Mr. Willis was injured, Appellant Johnson caused the injury. Is Appellant Johnson entitled to qualified immunity?

2. An officer is deliberately indifferent to an inmate's serious medical needs when the medical need is sufficiently serious, and the officer knows of and disregards an excessive risk to the inmate's safety or health. Mr. Willis died. Appellant Newkirk also knew of Mr. Willis's distressed breathing, knew of Mr. Willis's lack of movement for nearly six hours, consulted other detention officers out of concerns for Mr. Willis's wellbeing, could not determine whether Mr. Willis was breathing, and knew Mr. Willis did not respond to his kicks and knocks on the cell door. But Appellant Newkirk never contacted supervisory personnel, and not until three-and-a-half hours after Appellant Newkirk kicked Willis's cell door did Appellant Newkirk call for a nurse and gurney. Is Appellant Newkirk entitled to qualified immunity?

STATEMENT OF THE CASE

I. Statement of the Facts

Mr. Willis's arrival at the OCDC. Sometime on August 18, 2017, Oklahoma City Police Department officers arrested Mr. Willis. The officers took Mr. Willis to the Oklahoma County Detention Center. [Aplt. Appx. Vol. 1 at 33]. Although Mr.

Willis was involved in an altercation with detention officers at the facility, the officers effectively subdued Mr. Willis, placed Mr. Willis in handcuffs and ankle shackles, and then escorted Mr. Willis to detention center medical staff. [Supp. Appx. Vol. 3 at 268]. Once cleared, the detention officers escorted Mr. Willis to the Thirteenth Floor. [Aplt. Appx. Vol. 2 at 262-63].

Mr. Willis's time in cell 13 C 3. Mr. Willis, upon his escort to the Thirteenth Floor, was not combative with officers. [Supp. Appx. Vol. 3 at 268, 274[2], 302-03, 342-43, 350-51, 558-77, 354[3]]. Once escorted to the Thirteenth Floor, detention officers—including Appellant Johnson—decided to house Mr. Willis in cell 13 C 3. Mr. Willis voluntarily entered the cell under his own power and remained handcuffed and shackled. Once in his cell, detention officers began removing Mr. Willis shackles and handcuffs.

Appellant Johnson's actions. In the process of uncuffing Mr. Willis, Appellant Johnson—a man standing six feet three inches and weighing roughly 320 pounds—determined the three-point technique to be most suitable. [Supp. Appx. Vol. 3 at 277, 334]. Unfortunately for Mr. Willis, a fellow detention officer—Mr.

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[2] Appellee will refer to her Supplemental Appendix filed with this brief as "Supp. Appx. at [page numbers]."

[3] Appellee has filed a motion with this Court requesting permission to file this DVD (containing the video) conventionally.

Cornelius—then observed Johnson's knee on, or near, the spine of Mr. Willis. [Supp. Appx. Vol 3 at 270; Supp. Appx. Vol. 2 at 206-211]. Mr. Willis's spine was then severed in the exact area Mr. Cornelius observed Johnson's knee. [Supp. Appx. Vol. 3 at 270, 278, 308-10, 282, 453-454].

After Johnson employed the three-point technique, Mr. Willis was breathing very heavily, indicating distress and a change of condition. [Supp. Appx. Vol. 3 at 270-71; Supp. Appx. Vol. 4 at 565-68]. Mr. Willis never moved after Johnson's application. And Mr. Willis was unable to utter a sound. [Supp. Appx. Vol. 3 at 272; Supp. Appx. Vol. 4 at 555-57].

Subsequent developments. After Johnson's use of the three-point technique, Johnson admitted that he placed weight on Mr. Willis's back while applying the three-point technique on Mr. Willis. [Supp. Appx. Vol. 3 at 277, 282, 334-35; Supp. Appx. Vol. 4 at 546-548, 554, 565-68]. And, in a subsequent demonstration by Johnson of his application of the three-point technique, Johnson placed his knee over the spine of an OSBI investigator and informed the investigator that he could shift his weight onto an inmate's back during the application of the three-point technique. [Supp. Appx. Vol. 3 at 269, 274, 277-78, 305-06, 311-12, 322, 336-37, 354, 388-89, 395; Supp. Appx. Vol. 4 at 559-60, 565-68, 542-43, 548-54]. Not to be outdone, Johnson had also previously applied pressure in the same manner on another inmate. [Supp.

Appx. Vol. 3 at 270, 336-37].

Further complicating matters, in a subsequent investigation, the investigation supervisor for the OCDC determined that excessive force caused Mr. Willis's death. [Supp. Appx. Vol. 3 at 279, 434-36]. The same investigation disclosed that Mr. Willis's spine was severed when Johnson placed his knee into the middle of Mr. Willis's back. [Supp. Appx. Vol. 3 at 278; Supp. Appx. Vol. 4 at 573-74].

These conclusions were later buttressed by an Oklahoma Medical Examiner, who concluded that Mr. Willis's death was caused by a positional restraint utilized by law enforcement. Mr. Willis's death was classified as a homicide resulting from blunt force trauma to the thoracic spine. [Supp. Appx. Vol. 3 at 280-81, 452-54, 467-68, 471-80]. Ms. Willis's expert confirmed these conclusions. [Supp. Appx. Vol. 3 at 281, 356-58, 360, 488].

The three-point technique. Johnson, in uncuffing Mr. Willis, made use of the three-point technique. This technique is taught to OCDC officers and is considered a use of force. [Supp. Appx. Vol. 3 at 275, 413-16]. In its proper application, the three-point technique should position an officer's knee parallel to a detainee's spine. [Supp. Appx. Vol. 3 at 420, 422-23, 425]. As well, an officer's foot should stay away from the neck of the detainee. [Supp. Appx. Vol. 3 at 429-31].

Additionally, OCDC officers are not to implement the three-point restraint

unless a detainee is combative. [Supp. Appx. Vol. 3 at 275, 349, 397]. Appellant Johnson's own belief was that force—such as the three-point technique—should not be used if an inmate was not combative. [Supp. Appx. Vol. 3 at 323, 340-41]. Mr. Willis was not combative. [Supp. Appx. Vol. 3 at 268, 274, 302-03, 342-43, 350-51, 354; Supp. Appx. Vol. 4 at 559-577]. This fact alone strips Johnson's use of force of any justification. [Supp. Appx. Vol. 3 at 282, 491-93, 514-15].

The dangers of the three-point restraint. Johnson later admitted concerns that be believed the three-point restraint to be dangerous. [Supp. Appx. Vol. 3 at 278, 339]. This subjective awareness included classifying the three-point restraint as a "bad move" and a risk to the spine of the detainee. [Supp. Appx. Vol. 3 at 278, 301, 313, 338-39; Supp. Appx. Vol. 4 at 565-68, 575-77].

Additionally, when applying the three-point restraint, an officer should never be trained to shift their weight forward onto the detainee's back. [Supp. Appx. Vol. 3 at 275, 413-16]. Johnson, however, was trained to shift his weight from his toes to his knees, onto the detainee's back. [Supp. Appx. Vol. 3 at 270, 322, 334-35].

Johnson was also trained to place his knee at a forty-five-degree angle over the detainee's spine and to place his foot in the pocket of a detainee's neck. [Supp. Appx. Vol. 3 at 274-76, 398, 330-31, 321-35, 390, 399-400, 406-07, 426-27]. But, in the proper application of a three-point technique, an officer's knee should be parallel to

a detainee's spine and the officer's foot should not be near the neck of the detainee. [Supp. Appx. Vol. 3 at 420, 422, 425, 429-31].

Even when demonstrating the technique to investigators, Johnson placed his knee directly on the spine of an investigator and applied pressure, despite his own self-serving belief that he did not apply pressure to the back of the investigator. [Supp. Appx. Vol. 3 at 278, 309-10, 384-87].

Appellant Newkirk's attempts at contact. After Johnson's use of force, Appellant Newkirk was assigned to perform sight checks of Mr. Willis. Prior to Newkirk's lunch break, Newkirk observed Mr. Willis grunting and taking deep breaths. [Supp. Appx. Vol. 2 at 239-42, *see especially* 240]. After Newkirk returned from lunch, Mr. Willis had not moved. [Supp. Appx. Vol. 2 at 239-242, 249-250].

This lack of movement inspired Newkirk to peek in Mr. Willis's cell three separate times to encourage a response from Mr. Willis. [Supp. Appx. Vol. 2 at 138[4]]. And, on three separate occasions, Newkirk hit and kicked Mr. Willis's cell door. [Supp. Appx. Vol. 1 at 138]. Mr. Willis never responded. [Supp. Appx. Vol. 1 at 138].

Newkirk enlists assistance. Because of concerns regarding Mr. Willis's positioning, Newkirk then employed the assistance of fellow detention officers. [Supp. Appx. Vol. 1 at 138; Supp. Appx. Vol. 2 at 233, 241]. Despite Newkirk's stabs at

[4] Appellee has filed a motion with this Court requesting permission to file this DVD (containing the video) conventionally and under seal.

soliciting second opinions, the other officers informed Newkirk that they were afraid of Mr. Willis and would not give Newkirk answers to help decide if Mr. Willis was in fact moving or breathing. [Supp. Appx. Vol. 1 at 138; Supp. Appx. Vol. 2 at 239-42, 252].

Newkirk's concerns culminate. After 13:20, Newkirk's only documentation of Mr. Willis's activity was "sleep." [Aplt. Appx. Vol. 2 at 365]. Despite Mr. Willis's lack of breathing and lack of movement during his sight checks at 13:59 and 14:45, Newkirk failed to contact medical, or supervisory, personnel. [Supp. Appx. Vol. 1 at 176-177]. Newkirk also had concerns about Mr. Willis during meal pass a 17:17 but failed to advise a nurse until 17:45. [Supp. Appx. Vol. 2 at 233]. Finally, at 17:45, Newkirk finally advised medical personnel that he was concerned about Willis. [Supp. Appx. Vol. 2 at 226-27, 233; Supp. Appx. Vol. 1 at 138].

Medical personnel entered Mr. Willis's cell. [Supp. Appx. Vol. 2 at 226]. Mr. Willis's body was cold and his hands rigid. [Supp. Appx. Vol. 2 at 226]. Rigor had already set in. [Supp. Appx. Vol. 2 at 226].

Newkirk's awareness of Mr. Willis's condition. Throughout this timeframe, Newkirk was also aware that Willis was barely breathing and grunting, indicating a distressed respiratory condition. [Supp. Appx. Vol. 1 at 182-83]. Because of Mr. Willis's distressed condition, affirmative contact should have been made. [Supp.

Appx. Vol. 1 at 88]. Since affirmative contact was not made, medical staff should have been called. [Supp. Appx. Vol. 1 at 88]. In any event, if a detainee is observed with distressed breathing, medical should always be called. [Supp. Appx. Vol. 1 at 55-56].

In the end, Newkirk's sight checks were, by every account, improper. [Supp. Appx. Vol. 1 at 131-32, 133, 160]. Newkirk, during his sight checks, failed to document, or observe, proof-of-life signs such as chest rise and movement. [Supp. Appx. Vol. 2 at 252]. With timely medical intervention, Mr. Willis would have survived. [Supp. Appx. Vol. 1 at 140-41, 146, 07]. Thus, Newkirk's improper sight checks came to an end with the death of Mr. Willis.

II. Proceedings Below

The United States District Court for the Western District of Oklahoma considered Appellants' Motions for Summary Judgment. On February 1, 2022, the District Court entered an order denying Appellant Johnson's Motion for Summary Judgment. [Aplt. Appx. Vol. 2 at 385-98]. On the same date, the District Court entered a separate order denying Appellant Newkirk's Motion for Summary Judgment. [Aplt. Appx. Vol. 2 at 367-84].

The District Court held that Appellant Johnson was not entitled to qualified immunity because Johnson violated Mr. Willis's clearly established right to be free

from excessive force. [Aplt. Appx. Vol. 2 at 385-98]. The District Court also held that Appellant Newkirk was not entitled to qualified immunity because Newkirk exhibited deliberate indifference to Mr. Willis's serious medical need. [Aplt. Appx. Vol. 2 at 367-84].

SUMMARY OF THE ARGUMENT

First, Appellant Johnson is not entitled to qualified immunity for his use of force on Mr. Willis. Clearly established law dictates that an official uses excessive force when the official uses force against an individual that is effectively subdued. Mr. Willis was handcuffed, shackled, lying face down, non-combative, and posed no threat to the detention officers. Johnson used the three-point technique—a use of force known to be dangerous—to an effectively subdued Mr. Willis. Johnson's use of force violated clearly established law.

Second, Appellant Newkirk is not entitled to qualified immunity. A pretrial detainee—such as Mr. Willis—possesses a constitutional right to be free from deliberate indifference to their serious medical needs. Mr. Willis died. Newkirk knew of Mr. Willis's lack of movement for a period of over six hours, knew Mr. Willis was non-responsive, and knew of Mr. Willis's distressed conditions. Yet Newkirk took no action to assist Mr. Willis. Newkirk was deliberately indifferent to Mr. Willis's serious medical need.

STANDARD OF REVIEW

1. *This Court Applies a De Novo Standard of Review to a District Court's Denial of Summary Judgment on Qualified Immunity Grounds*

"[O]rders denying summary judgment are ordinarily not appealable final orders for purposes of 28 U.S.C. § 1291." *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 753 (10th Cir. 2013). This Court does, however, "[h]ave jurisdiction under the collateral order doctrine to review a state official's appeal from the denial of qualified immunity at the summary judgment stage, but only to the extent the appeal involves abstract issues of law." *Ralston v. Cannon*, 884 F.3d 1060, 1066 (10th Cir. 2018).

> That is, this court has jurisdiction to review (1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation. In contrast, this court has no interlocutory jurisdiction to review whether or not the pretrial record sets forth a genuine issue of fact for trial. The Supreme Court has indicated that, at the summary judgment stage at least, it is generally the district court's exclusive job to determine which facts a jury could reasonably find from the evidence presented to it by the litigants. So, for example, if a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own *de novo* review of the record might suggest otherwise as a matter of law.

Roosevelt-Hennix, 717 F.3d at 752 (10th Cir. 2013) (cleaned up). Although a defendant is entitled to invoke a qualified immunity defense, the defendant "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*

v. Jones, 515 U.S. 304, 319-20 (1995).

In undertaking this limited review, a circuit court lacks jurisdiction to review the district court's factual conclusions. *See Sawyers v. Norton*, 962 F.3d 1270, 1281 (10th Cir. 2020) (holding a circuit court generally "lacks jurisdiction at this stage to review a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference.")(internal citations and quotation marks omitted). "[W]hen reviewing the denial of a summary judgment motion asserting qualified immunity, [a circuit court] lack[s] jurisdiction to review the district court's conclusions as to what facts the plaintiffs may be able to prove at trial." *Fancher v. Barrientos*, 723 F.3d 1191, 1194 (10th Cir. 2013).

In the present interlocutory appeal, this Court may not review factual disputes. *Crowson v. Washington Cnty. Utah*, 983 F.3d 1166, 1177 (10th Cir. 2020), *cert. denied sub nom. Washington Cnty. v. Crowson*, 142 S. Ct. 224 (2021) ("Generally, we lack jurisdiction to review factual disputes in this interlocutory posture.").

When reviewing a district court's denial of qualified immunity on summary judgment, a circuit court is required to "take, as given, the facts that the district court assumed when it denied summary judgment." *Johnson v. Jones*, 515 U.S. 304, 319

(1995).[5] Therefore, a circuit court will "[o]rdinarily defer to the district court's factual determinations and ask only whether those determinations would entail the violation of a clearly established right." *McWilliams v. Dinapoli*, 40 F.4th 1118, 1122 (10th Cir. 2022).[6]

Additionally, in conducting its review of this interlocutory appeal, the plaintiff's version of the facts are accepted as true. *Sturdivant v. Fine*, 22 F.4th 930, 937, n. 8 (10th Cir. 2022) (citing *A.M. v. Holmes*, 830 F.3d 1123, 1136 (10th Cir.

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[5] *See also Ralston v. Cannon*, 884 F.3d 1060, 1066-67 (10th Cir. 2018) (holding a circuit court "usually must take [a district court's factual determinations] as true." (internal citation omitted)); *Lynch v. Barrett*, 703 F.3d 1153, 1159 (10th Cir. 2013) ("[I]f a district court concludes a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own de novo review of the record might suggest otherwise as a matter of law." (internal quotations omitted)).

[6] The *only* time an appellate court may question a district court's version of the events is "[w]hen the version of events the district court holds a reasonable jury could credit is blatantly contradicted by the record." *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1164 (10th Cir. 2021) (internal citations and quotations omitted). This standard is satisfied only when "the version of events is so utterly discredited by the record that no reasonable jury could have believed" it, constituting "visible fiction." *Id.* "The standard is a very difficult one to satisfy." *Cordero v. Froats*, 613 F. App'x 768, 769 (10th Cir. 2015) (unpublished). The officers do not attempt to argue or suggest the district court's version of the facts and events leading up to and surrounding the killing of Mr. Willis are "blatantly contradicted by the record." The simple truth is the district court's factual determinations are supported by and consistent with a thoroughly developed record, thus the factual determinations should be accepted as true by this Court.

2016))[7] ("In considering qualified immunity, [this Court] ordinarily accept[s] the plaintiff's version of facts.") This follows the universally accepted rule that when addressing a summary judgment motion raising a qualified immunity claim, the court ordinarily must "adopt" plaintiff's "version of the facts." *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1325 (10th Cir. 2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

A court "may not simply accept what may be a self-serving account by the police officer. Rather, "it must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably." *Pauly v. White*, 874 F.3d 1197, 1218 (10th Cir. 2017)[8] (internal brackets and quotation marks omitted)(emphasis added). In this regard, statements made by officers and interviews of the officers in connection with the investigation of the incident in

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[7] *See also Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009) (Holding that in an interlocutory appeal, a court is "limited to addressing legal questions" and the Court will "accept the facts as the plaintiff alleges them …"). The officers' arguments that this Court should not limit itself to considering facts in favor of the plaintiff is contrary to established law and should be rejected

[8] *See also Harte v. Bd. of Comm'rs of the Cnty. of Johnson*, 864 F.3d 1154, 1163 (10th Cir. 2017) (in holding the district court erred in granting summary judgment, the Court stated: "It cannot be the case that a jury would be legally obligated to accept the word of a government agent-based on his say-so alone-when that agent had every motive and opportunity to dissemble.")

question are highly relevant to the subjective motivation, action or inaction of the officers during the events.[9]

2. *This Court Lacks Jurisdiction to Address the Detention Officers' Fact-Based Challenges*

To the extent that Appellants invite this Court to review the district court's factual findings and challenge the sufficiency of Ms. Willis's evidence, instead of asking for review of some specific abstract legal question, this Court must forgo that invitation. In the same vein, to the extent that Appellants argue their version of the facts and inferences support a qualified immunity defense, contrary to the district court's conclusion, this Court lacks jurisdiction to consider those arguments. *See Henderson v. Glanz*, 813 F.3d 938, 948 (10th Cir. 2015) (determining the circuit court lacked jurisdiction to consider the appellant's argument which was limited to the appellant's version of the facts and inferences and only challenged the district court's conclusion.)

Where the "appellate filings cannot reasonably be read as raising the kind of abstract legal question over which this court has jurisdiction" this Court must dismiss the "appeal for lack of appellate jurisdiction." *Gamel-Medler v. Almaguer*, 835 F.

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[9] *See Huff v. Reeves*, 996 F.3d 1082, 1089 (10th Cir. 2021)("[A] report of an interview of [the defendant officer] by fellow officers a little more than three weeks after the incident states that he believed that the white female had been an active participant in the crime and had shot at him.").

App'x 354, 356 (10th Cir. 2020). This Court has simply has no jurisdiction to review the officers' fact-based challenges. *Id.* at 356, n. 2. The Court is "not at liberty to review a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference." *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008).

ARGUMENT

3. *The Detention Officers Are Not Entitled to Qualified Immunity*

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established ... constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Qualified immunity will not protect "the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). To overcome an officer's assertion of qualified immunity, a plaintiff bears the initial burden to show: (1) that defendants violated the constitution and (2) that the law as to the constitutional right at issue was clearly established. *Thomson*, 584 F.3d at 1325. "If the plaintiff successfully establishes the violation of a clearly established right, the burden shifts to the defendant, who must prove that there are no genuine issues of material fact and that he or she is entitled to

judgment as a matter of law." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (internal quotation marks omitted).

"The 'dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *modified on other grounds, Pearson v. Callahan*, 555 U.S. 223, 240-43 (2009)). "A plaintiff may show clearly established law by pointing to either a Supreme Court or Tenth Circuit decision, or the weight of authority from other courts, existing at the time of the alleged violation." *T.D. v. Patton*, 868 F.3d 1209, 1220 (10th Cir. 2017). A plaintiff need not point to "a case directly on point for a right to be clearly established." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). "[T]here will almost never be a previously published opinion involving exactly the same circumstance" in an excessive force case given the "all-things-considered inquiry" that must be undertaken in each case. *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). Although a plaintiff "must demonstrate a substantial correspondence between the conduct in question and prior law," the plaintiff "need not show that the specific action at issue has previously been held unlawful." *Riggins v. Goodman*, 572 F.3d 1101, 1111 (10th Cir. 2009) (internal quotation marks omitted). It suffices that

"the alleged unlawfulness [is] apparent in light of preexisting law." *Id.* (internal quotation marks omitted). That is, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Taylor v. Riojas*, 141 S.Ct. 52, 53-54 (2020) (internal quotation marks omitted).

Additionally, "there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018). For example, in *Taylor v. Riojas*, the Supreme Court recently reversed the grant of qualified immunity under the "obvious clarity" standard where a prisoner was housed in a cell "teeming with human waste for ... six days." 141 S.Ct. at 53 (internal quotation marks omitted).

The inquiry is an objective one: "a court must assess whether the right was clearly established against a backdrop of the objective legal reasonableness of the actor's conduct." *Gonzales v. Duran*, 590 F.3d 855, 860 (10th Cir. 2009). "[S]ubjective good faith or bad faith of government actors is ordinarily irrelevant to the objective inquiry whether a reasonable officer would have realized that his conduct was unlawful." *Meyer v. Bd. of Cnty. Comm'rs*, 482 F.3d 1232, 1242 (10th Cir. 2007).

When addressing the qualified immunity issue, the Court must answer these

questions:

> 1. Do the district court's factual determinations show that Detention Officers Johnson and Newkirk violated Mr. Willis's constitutional rights?
>
> 2. Was the law on these constitutional rights clearly established at the time of the interactions with Mr. Willis in 2017?

See McCowan v. Morales, 945 F.3d 1276, 1282 (10th Cir. 2019).

4. *At the Time of Mr. Willis's Injury, the Law Was Clearly Established that Placing Excessive Pressure to a Detainee's Spine Was Dangerous, Objectively Unreasonable and a Violation of Clearly Established Constitutional Rights*

In this case, the parties classified Mr. Willis as a pretrial detainee.[10] A pretrial detainee possesses a clearly recognized Fourteenth Amendment right not to be subject to excessive uses of force.[11] The Due Process Clause of the Fourteenth Amendment

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[10] The district court below, suggested "[t]he Fourth Amendment, not the Fourteenth, governs excessive force claims arising from 'treatment of [an] arrestee detained *without a warrant*' and '*prior* to any probable cause hearing.'" (quoting *Estate of Booker v. Gomez*, 745 F.3d 405, 419 (10th Cir. 2014) (quoting *Austin v. Hamilton*, 945 F.2d 1155, 1160 (10th Cir. 1991)). [Aplt. Appx. Vol. 2 at 390]. The district court stated it would reach the same conclusions regardless of whether the Fourteenth or Fourth Amendment standard applies. *Id.* (citing *McCowan v. Morales*, 945 F.3d 1276, 1283 (10th Cir. 2019) (explaining that "the same objective standard now applies to excessive-force claims brought under either the Fourth or the Fourteenth Amendment")).

[11] *See Bell v. Wolfish*, 441 U.S. 520, 536 (1979) (It is therefore well-established that the Fourteenth Amendment governs any claim of excessive force brought by a pretrial detainee -- one who has a "'judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.'") (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)).

provides the appropriate constitutional standard for the excessive force claim. *Estate of Booker v. Gomez*, 745 F.3d 405, 421 (10th Cir. 2014) ("Accordingly, we hold the Fourteenth Amendment standard governs excessive force claims arising from post-arrest and pre-conviction treatment if the arrestee has been taken into custody pursuant to a warrant supported by probable cause.").

The Supreme Court also held that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Kingsley v. Hendrickson*, 576 U.S. 389, 397-98 (2015) (quoting *Graham v. Connor*, 490 U.S. 386, 395, n.10 (1989)). To succeed on an excessive force claim, "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." *Id.* at 396-97. The appropriate standard for a pretrial detainee's excessive force claim is solely an objective one.

Whether a defendant's actions were objectively unreasonable turns on the "facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The following considerations may bear on the reasonability of the use of force:

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Kingsley, 576 U.S. at 397.

Ms. Willis demonstrated that the force used—Johnson's improper use of the three-point technique which severed Mr. Willis's spine—was objectively unreasonable. When the detention officers escorted Mr. Willis to the cell on the Thirteenth Floor, his hands were cuffed and his legs were shackled. In the cell, Mr. Willis was first placed on his knees and then placed lying face-down on the cell floor. The moment Appellant Johnson implemented the deadly three-point technique, Mr. Willis's hands were still cuffed and his legs still shackled. There were officers located at Mr. Willis's right shoulder, his left shoulder, and both of his legs. Mr. Willis was not resisting. Mr. Willis was following commands. Mr. Willis posed no threat to any of the officers. Appellant Johnson's use of force was clearly excessive.

A pretrial detainee can prevail on an excessive force claim by showing that the force "is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." *Kingsley*, 576 U.S. at 398. So too here, Appellant Johnson's use of force on Mr. Willis was not rationally related to a legitimate governmental objective and, even if it were, the use of force was excessive in relation to that purpose.

Appellants detail Mr. Willis's alleged uncooperative and resistive conduct during his *initial* arrest, processing, receiving, and transfer until his arrival on the

Thirteenth Floor, where he was killed. This pre-homicide discussion is intended to sway this Court into the conclusion that the excessive use of force inflicted on Mr. Willis was somehow warranted or justified. The detainee's prior non-compliance or resistance, however, does not justify the use of excessive force. "[T]he fact that a suspect was non-compliant or resisted arrest in isolation does not authorize the use of excessive force." *Bridges v. Yeager*, 352 F. App'x 255, 259 (10th Cir. 2009).

The district court held "[t]here is evidence a reasonable detention officer would have known that placing excessive pressure on Mr. Willis's spine as he lay on his stomach created a significant risk of spinal injury, which could lead to paralysis or even death." [Aplt. Appx. Vol. 2 at 391]. Further, the district court determined that "[t]here is evidence suggesting Johnson's knee contacted Mr. Willis's back with force sufficient to cause the spinal injuries sustained by Mr. Willis." [Aplt. Appx. Vol. 2 at 392]. The district court also concluded that there "is evidence Johnson used a stabilization technique that he knew was unnecessary to restrain Mr. Willis and that a reasonable detention officer would have known posed a significant risk, if applied incorrectly, of paralysis and death. If true, this constitutes an unreasonable use of force under the Fourteenth Amendment." [Aplt. Appx. Vol. 2 at 392].

5. *Detention Officer Johnson's Actions Violated Clearly Established Law*

The law at the time of Mr. Willis's death clearly established that applying

pressure to a detainee's upper and middle back, once the detainee was restrained or subdued, was constitutionally unreasonable due to the significant risk of spinal injury or of positional asphyxiation.

For instance, this Circuit concluded, in 2008, that it was "clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force." *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) (quoting *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004)).[12]

Later, in *McCoy v. Meyers*, 887 F.3d 1034 (10th Cir. 2018), this Circuit reinforced the fact that three Tenth Circuit cases, decided in 1991, 2007 and 2008,

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[12] *See also Lynch v. Bd. of Cty. Commissioners of Muskogee Cnty., Oklahoma*, 786 F. App'x 774, 782 (10th Cir. 2019) (regarding an April of 2015 incident, the court stated: "Here, (the officers) kept leaning into (the arrestee's) back and lower body with their knees after (the arrestee's) hands and legs were restrained, and another officer was standing on the chain connecting the leg shackles. In both *Weigel* and *Booker*, we held that a jury could reasonably conclude the officers used excessive force because they applied pressure to the individual-in-question's back after the individual was subdued; we hold the same here."); *Giannetti v. City of Stillwater*, 216 F. App'x 756, 766 (10th Cir. 2007) (recognizing *Abdullahi v. City of Madison*, 423 F.3d 763, 771 (7th Cir. 2005) summary judgment on the excessive force claim denied where the plaintiff identified the specific misconduct at issue--the officer's placing his knee on the decedent's back with "chest-crushing force" and also introduced competent medical evidence establishing that this act produced and directly caused deadly injuries including a collapsed lung and other injuries consistent with extreme external pressure.); *Ornder v. Elkins*, No. 18-CV-0342-GKF-JFJ, 2020 WL 5636895, at *9 (N.D. Okla. Sept. 21, 2020) ("[I]n August 2016, it was clearly established that the use of force against an arrestee who is face down on the ground, in handcuffs, and no longer resisting arrest constitutes excessive force.").

"made it clear to any reasonable officer," by 2011, "that the use of force on effectively subdued individuals violates the Fourth Amendment." 887 F.3d at 1052. This Court noted that even though those other cases were not factually identical to *McCoy*, "the cases all share the decisive factual circumstance that the defendants used excessive force on the plaintiff when he was already subdued." *Id.* at 1052-53. This Court further concluded that, "[i]n light of those cases, it should have been obvious [to the officers in that case] that continuing to use force on [the arrestee] after he was rendered unconscious, handcuffed, and zip-tied was excessive." *Id.* at 1052.

"[I]t is ... clearly established that officers may not continue to use force against a suspect who is effectively subdued." *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016); *see also McCoy*, 887 F.3d at 1050, n.19 ("[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." (quoting *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005)).[13]

In the proceedings below, the district court concluded that "Tenth Circuit precedent places the question of whether Johnson's conduct violated Mr. Willis's clearly established rights 'beyond debate.'" [Aplt. Appx. Vol. 2 at 396-97, quoting

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[13] *See also Estate of Smart v. City of Wichita*, 951 F.3d 1161, 1176 (10th Cir. 2020); *Herrera v. Bernalillo Cty. Bd. of Cnty. Comm'rs*, 361 F. App'x 924, 929 (10th Cir. 2010) (unpublished); *Gouskos v. Griffith*, 122 F. App'x 965, 977 (10th Cir. 2005) (unpublished); *Dixon v. Richer*, 922 F.2d 1456, 1463 (10th Cir. 1991).

Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)]. Based upon the facts and circumstances of this case, the district court correctly determined "Johnson was on notice that applying pressure to Mr. Willis's back while he was face-down in a prone position and restrained by handcuffs and shackles could violate Mr. Willis's constitutional rights" and ruled "Johnson is not entitled to qualified immunity." [Aplt. Appx. Vol. 2 at 397].

The district court properly held a reasonable jury could conclude Johnson used excessive force because he applied excessive, deadly pressure to Mr. Willis's back and spine after Mr. Willis was subdued, handcuffed, leg-shackled and lying prone on the cell floor. Johnson inflicted excessive, deadly force on Mr. Willis at a time when Mr. Willis presented no immediate threat to anyone's physical safety.

Similarly, the district court correctly concluded reasonable minds could differ on the issue of whether Johnson's use of force was objectively reasonable and whether the force was "inspired by malice or by unwise, excessive zeal amounting to an abuse of official power." *See Roska v. Peterson*, 328 F.3d 1230, 1243 (10th Cir. 2003). "[T]he overwhelming number of factual divergences scream the obvious — that material disputed facts obviously remain as to the excessive force claim." *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002). Under these facts, it would have been reversible error to grant summary judgment on the excessive force issue.

Johnson's appeal of the ruling should fail.

6. *At the Time of Mr. Willis's Injury, the Clearly Established Law Prohibited Deliberate Indifference to a Pretrial Detainee's Serious Medical Needs.*

After detention officers placed Mr. Willis in his cell, and before Appellant Newkirk took his lunch break, Appellant Newkirk observed Mr. Willis grunting and taking deep breaths (sighs). [Supp. Appx. Vol. 2 at 237, 240]. Newkirk's training mandated that, if a detention officer could not get a response or movement from an inmate, then Newkirk was required to call for a nurse and gurney by radio. [Supp. Appx. Vol. 2 at 236; Aplt. Appx. Vol. 2 at 370]. The district court correctly noted: "Paul Harmon, the investigator for the Oklahoma County Sherriff's *[sic]* Office who interviewed Newkirk, testified that he asked Newkirk what response Mr. Willis gave to the knocks and kicks on the door; Newkirk told Harmon Mr. Willis gave no response." [Aplt. Appx. Vol. 2 at 370; Supp. Appx. Vol. 1 at 133]. The district court observed that "Newkirk also told Harmon it was difficult to determine if Mr. Willis was breathing." [Aplt. Appx. Vol. 2 at 370; Supp. Appx. Vol. 2 at 241]. These facts concerned Newkirk and Newkirk began asking multiple officers to look in Mr. Willis's cell. Newkirk, however, stated he could not get confirmation from detention officer Williamson whether Willis was "okay," including whether he could get confirmation of movement and/or breathing. [Supp. Appx. Vol. 2 at 239-42, 252]. The district court highlighted this fact:

> Nearly two hours after he returned from his lunch break, Newkirk asked Williamson and another officer to look at Mr. Willis; he wanted their opinions on whether it looked like Mr. Willis was breathing. ... Williamson testified that Newkirk asked her to look at Mr. Willis's position because he had been lying "in the same weird position."

[Aplt. Appx. Vol. 2 at 370].

"Newkirk throughout the interview stated he tried to get second opinions and even other officers were afraid of WILLIS and wouldn't give him answers to help decide if WILLIS was in fact moving or breathing." [Supp. Appx. Vol. 2 at 239-42, 252]. It cannot be disputed that Newkirk's *subjective* concerns about whether an inmate is breathing is sign of a serious medical need that requires prompt, appropriate action.

As the Supreme Court recognized, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989).

A pretrial detainee is "protected under the Due Process Clause rather than the Eighth Amendment ... [,but] [i]n determining whether [plaintiff's] rights were violated, however, [the Court applies] an analysis identical to that applied in Eighth Amendment cases brought pursuant to § 1983." *Lopez v. LeMaster*, 172 F.3d 756,

759, n. 2 (10th Cir. 1999) (citations omitted), *abrogated in part on other grounds*, *Brown v. Flowers*, 974 F.3d 1178, 1182 (10th Cir. 2020). "Under the Fourteenth Amendment due process clause, 'pretrial detainees are ... entitled to the degree of protection against denial of medical attention which applies to convicted inmates' under the Eighth Amendment." *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009) (quoting *Garcia v. Salt Lake Cnty.*, 768 F.2d 303, 307 (10th Cir.1985)).[14] "The Fourteenth Amendment prohibits deliberate indifference to a pretrial detainee's serious medical needs." *Strain v. Regalado*, 977 F.3d 984, 987 (10th Cir. 2020).[15] A violation of the pretrial detainee's Fourteenth Amendment rights gives rise to a civil rights claim under 42 U.S.C. § 1983.

"[J]ail guards cannot act with deliberate indifference to a pretrial detainee's serious medical needs." *Lance v. Morris*, 985 F.3d 787, 793 (10th Cir. 2021). "A

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[14] *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true 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.").

[15] *See Estate of Booker v. Gomez*, 745 F.3d 405, 429 (10th Cir. 2014)("Prison doctors and prison guards may thus be liable under § 1983 for 'indifference ... manifested ... in their response to the prisoner's needs or by ... intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed.'") (citation omitted).

claim for inadequate medical attention will be successful if the plaintiff shows 'deliberate indifference to serious medical needs.'" *Martinez*, 563 F.3d at 1088 (quoting *Estate of Hocker v. Walsh*, 22 F.3d 995, 998 (10th Cir. 1994)). "[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (internal quotation marks omitted). This Court holds "deliberate indifference" to the medical needs of a pretrial detainee involves both an objective and a subjective component. *Strain,* 977 F.3d at 990-91.

A. *The Objective Component*

"The objective component is met if the deprivation is 'sufficiently serious.'" *Sealock v. Colo.*, 218 F.3d 1205, 1209 (10th Cir. 2000) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). A medical need is "sufficiently serious" if it "'is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Id.* (citation omitted). Medical delays can be sufficiently serious if they cause substantial harm, such as "lifelong handicap, permanent loss, or considerable pain." *Requena v. Roberts*, 893 F.3d 1195, 1216 (10th Cir. 2018) (quoting *Garrett v. Stratman*, 254 F.3d 946, 950 (10th Cir. 2001)). A detainee's death meets this requirement "without doubt." *Burke v. Regalado*, 935 F.3d 960, 994 (10th Cir. 2019) (quoting *Martinez*, 563 F.3d at 1088 ("Obviously, death satisfies this requirement.")).

B. *The Subjective Component*

The evidence shows Newkirk's subjective concerns about Mr. Willis's well-being hours before Newkirk contacted medical. Newkirk admits to investigators he saw and heard Mr. Willis's grunting—evidence of distressed breathing—that Lieutenant Carter stated was a sign and symptom that required a detention officer to contact medical. Newkirk made no attempts to contact anyone. Newkirk's sight checks do not document any activity, movement, or responses. And when confronted by OSBI and internal investigators, Newkirk made no mention that Mr. Willis made any change in position or activity other than his "sleeping" notations in his sight checks.

Further, Investigator Harmon testified that Newkirk confirmed his concerns about Mr. Willis when he began asking detention officer Williamson to look at Mr. Willis's odd position and specifically inquired whether she or others could tell whether Mr. Willis was breathing. This occurred at 2:45 pm, hours before Newkirk contacted Nurse Yebit at 5:45 pm. For three hours—but likely longer due to Newkirk's observation of distressed breathing and lack of movement documented—Newkirk consciously decided Mr. Willis's fate and sanctioned his suffering and death in cell 13 C 3. The district court specifically referenced Newkirk's final sight-check entry, just prior to Mr. Willis being found unresponsive on the floor

of the jail cell: "Newkirk wrote 'sleep' in the final 17 sight-check logbook entries for cell 13C-03." [Aplt. Appx. Vol. 2 at 371].

Under appropriate protocols, Newkirk should not have contacted non-supervisory and non-medically trained personnel upon his concerns about Mr. Willis's health and condition. Detention officer Williamson had no medical certifications and was not Newkirk's supervisor. Both Investigator Harmon and Ms. Willis's expert, Tim Gravette, agreed that Newkirk had a duty, and a responsibility, to contact medical or a supervisor when he observed Mr. Willis not changing positions and had concerns. When confronted about Mr. Willis's death, Newkirk became emotional and told internal investigators that he wonders if Mr. Willis would be alive if he did something different. Newkirk further admitted to investigators that he "really tried to get reassurance from others he was seeing WILLIS breathe or move, but couldn't get anyone to say yes he was." [Supp. Appx. Vol. 2 at 242]. Medical testimony by both the forensic pathologist at the Office of the Chief Medical Examiner, Edana Stroberg, and Ms. Willis's expert, Robert Bux, confirms that Mr. Willis would have survived with timely, appropriate intervention—such as Newkirk contacting medical.

The district court agreed: "The facts, taken in the light most favorable to Plaintiff, show Newkirk subjectively perceived Mr. Willis's need for medical care" and "show that a reasonable jury could find Mr. Willis's symptoms were such that

Newkirk knew there was an excessive risk to his health and Newkirk disregarded that risk." [Aplt. Appx. Vol. 2 at 376-78]. The district court then summarized the evidence:

> First, Plaintiff provides sufficient evidence showing Newkirk was aware of facts from which he could have drawn an inference that Mr. Willis was subject to a substantial risk of serious harm. Some evidence suggests Mr. Willis did not move positions for nearly six hours, and Newkirk conducted sight-checks for most of that period. Newkirk also stated it was difficult to see if Mr. Willis was breathing. He asked two other detention officers to look at Mr. Willis to get a second and third opinion on Mr. Willis's well-being. Specifically, he asked the officers whether they thought Willis was breathing; neither officer gave him a clear "yes" answer. Three hours later, Newkirk asked a nurse, who just happened to be in the pod, for a fourth opinion on Mr. Willis's well-being. This evidence is sufficient for a jury to find Newkirk could have drawn an inference that a significant risk to Mr. Willis's well-being existed. In fact, Plaintiff provides sufficient evidence showing Newkirk did draw that inference and disregard it.
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> The video surveillance of Newkirk's sight checks shows his outward concern for Mr. Willis. At one point he looked into Mr. Willis's cell three times before logging the sight-check, and he knocked and kicked the cell door numerous times. Newkirk told an investigator Mr. Willis did not respond to the kicks and knocks on the cell door. He also testified that, when knocking does not evoke a reaction, officers are trained to call for a nurse and gurney. But Newkirk did not call for a gurney until after the nurse directed him to, nearly three-and-a-half hours after he first kicked the cell door. ... The facts, when viewed in the light most favorable to Plaintiff, show that a reasonable jury could find Mr. Willis's symptoms were such that Newkirk knew there was an excessive risk to his health and Newkirk disregarded that risk.
>
> Despite his obvious concern for Willis's need for medical care, Newkirk continued his sight checks. Plaintiff has provided evidence that Newkirk manifested indifference in response to Mr. Willis's obvious need for medical attention. The facts, thus, demonstrate that Newkirk violated Mr. Willis's Fourth Amendment right to custodial medical care.

[Aplt. Appx. Vol. 2 at 376-77].

The district court's conclusions are correct. The evidence presented questions for the jury regarding whether Mr. Willis's symptoms were such that Newkirk knew of an excessive risk to his health and whether Newkirk disregarded that risk. "The subjective component is met if a prison official 'knows of and disregards an excessive risk to inmate health or safety.'" *Burke*, 935 F.3d at 994 (quoting *Farmer*, 511 U.S. at 837). "[T]he question is: 'were the symptoms such that a prison employee knew the risk to the prisoner and chose (recklessly) to disregard it?'" *Martinez*, 563 F.3d at 1089 (quoting *Mata v. Saiz*, 427 F.3d 745, 753 (10th Cir. 2005)). "A plaintiff may prove awareness of a substantial risk through circumstantial evidence that the risk was obvious." *Lance,* 985 F.3d at 794. "Deliberate indifference" is defined as knowing of and disregarding an excessive risk to an inmate's health or safety. *Farmer*, 511 U.S. at 827; *Estelle*, 429 U.S. at 104-05. "[D]eliberate indifference often stems from inaction." *Strain*, 977 F.3d at 991. The subjective component may be satisfied "by showing that defendants' delay in providing medical treatment caused either unnecessary pain or a worsening of [his] condition." *Mata*, 427 F.3d at 755.

Importantly, not demanded from Ms. Willis is proof that Newkirk intended to harm Mr. Willis. *See Mitchell v. Maynard*, 80 F.3d 1433, 1442 (10th Cir. 1996) ("Deliberate indifference does not require a finding of express intent to harm."). Ms.

Willis also does not shoulder the burden of proving Newkirk knew the precise harm to which Mr. Willis might succumb. This is so because Ms. Willis "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate." *Farmer*, 511 U.S. at 842. "*[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.*" *Id.* (emphasis ours).

It is also true that Newkirk cannot "escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." *Farmer*, 511 U.S. at 843, n. 8. Newkirk's repeated assertions that Mr. Willis's serious medical need was not obvious to him belies the evidence.

Within the province of the jury is the determination of whether Newkirk had the requisite knowledge that Mr. Willis's serious medical need was obvious. That determination does not present a question of law for the district court or this Court to decide. Here, Newkirk completely failed to verify the underlying facts he suspected to be true and failed to confirm the risks that were suspected to exist. Because of this, Newkirk may not escape liability for his conduct.

To the extent that Newkirk—and Johnson—suggest they did not know of Mr. Willis's severe injuries because Mr. Willis did not complain about being injured, that fact-based argument should be rejected. The Tenth Circuit addressed a similar issue

in *Rife v. Oklahoma Department of Public Safety*, 854 F.3d 637 (10th Cir. 2017). There, a detainee alleged deliberate indifference to serious medical needs consisting of stomach pain. *Id.* at 641-42, 652. The guards argued that they had not known of the pain because the detainee "never complained of pain." *Id.* at 652. But another detainee stated under oath that the plaintiff groaned loudly, had repeatedly complained, and displayed obvious pain. *Id.* Given this sworn account, this Court reversed the grant of summary judgment to the jail guards even though they had denied knowledge of the plaintiff's pain. *Id.*

In the same vein, here, Newkirk observed Mr. Willis grunting and taking deep breaths (sighs) after Mr. Willis was placed in the cell and before Newkirk took his lunch break, clear signs of distress and pain. Newkirk knew that if a detention officer could not get a response or movement from an inmate, that he was required to call for a nurse and gurney by radio. Yet Newkirk failed to do so when Mr. Willis's failed to respond or move. [Supp. Appx. Vol. 2 at 239].

To make matters worse, Newkirk stated "it was hard to tell if [Mr. Willis] was breathing," yet took no steps to confirm Mr. Willis was okay. [Supp. Appx. Vol. 2 at 241]. Newkirk started thinking something might be wrong with Mr. Willis when he began asking multiple officers to look in the cell. Newkirk stated could not get confirmation from detention officer Williamson whether Willis was "okay," including

whether he could get confirmation of movement and/or breathing. [Supp. Appx. Vol. 2 at 239-42, 252]. "Newkirk throughout the interview stated he tried to get second opinions and even other officers were afraid of Willis and wouldn't give him answers to help decide if Willis was in fact moving or breathing." [Supp. Appx. Vol. 2 at 252].

Appellant Johnson produced Mr. Willis's serious condition through his use of force against Mr. Willis, which included a three-point maneuver that placed considerable crushing weight and force on Mr. Willis's back and spinal cord. Appellant Newkirk took a front-row seat to Mr. Willis's rapid and continuing deterioration. Newkirk was in the best position to know of a substantial risk to Mr. Willis's health and safety.[16] Ms. Willis's expert, Tim Gravette, testified Newkirk violated the standard of care during sight checks. [Supp. Appx. Vol. 1 at 159-60.]. His

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[16] *See Est. of Booker v. Gomez*, 745 F.3d 405, 431-32 (10th Cir. 2014) ("In light of this training and Mr. Booker's limp appearance, a reasonable jury could conclude the Defendants inferred that Mr. Booker was unconscious and needed immediate medical attention. If a jury concludes the Defendants made this inference, then it could also conclude they were deliberately indifferent in failing to respond sooner."); *Lemire v. California Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1083 (9th Cir. 2013) ("While the failure to provide CPR to a prisoner in need does not create an automatic basis for liability in all circumstances, a trier of fact could conclude that, looking at the full context of the situation, officers trained to administer CPR who nonetheless did not do so despite an obvious need demonstrated the deliberate indifference required for an Eighth Amendment claim."); *McRaven v. Sanders*, 577 F.3d 974, 983 (8th Cir. 2009) ("An officer trained in CPR, who fails to perform it on a prisoner manifestly in need of such assistance, is liable under § 1983 for deliberate indifference.").

opinion confirms Investigator Harmon's finding that ultimately resulted in Newkirk's termination.

"[W]hether a prison official had the requisite knowledge of a substantial risk is a *question of fact* subject to demonstration in usual ways, including *inference* from circumstantial evidence." *Gonzales v. Martinez*, 403 F.3d 1179, 1183 (10th Cir. 2005) (quoting *Farmer*, 511 U.S. at 842) (emphasis added). In any event, "the *factfinder* may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842 (*emphasis ours*). This is so because "if a risk is obvious so that a reasonable man would realize it, we might well infer that [the defendant] did in fact realize it." *Garrett*, 254 F.3d at 950 (internal citation omitted).

The evidence and testimony in this case shows Mr. Willis laying naked on the jail cell floor for more than six (6) hours, never changing positions, and never communicating with jail personnel. These are signs of an obvious medical need.[17]

[17] *See Barton v. Taber*, 820 F.3d 958, 965 (8th Cir. 2016) (the detainee had an obvious medical need a layperson would recognize as requiring medical attention as he had fallen to the ground unresponsive, could only communicate with slurred speech, and could not walk independently and "when viewed in their totality and in the light most favorable to the non-moving party, they were sufficient to establish that [the detainee] suffered from an objectively serious medical need."); *Spears v. Ruth*, 589 F.3d 249, 254 (6th Cir. 2009) ("[a] detainee lying face down, unresponsive and exhibiting symptoms of delirium tremens showed medical need sufficient for lay people to recognize he needed medical attention."); *Taylor v. Franklin County, Ky.*, 104 F. App'x 531, 543 (6th Cir. 2004) ("Acknowledging, but yet ignoring, the obviously

Newkirk was not entitled to qualified immunity on the claim that Newkirk was deliberately indifferent to Mr. Willis's serious medical need. Where, as here, "disputed material facts implicate [both] of the two questions of whether a serious medical need existed [and] whether an officer was deliberately indifferent to it, a court may not grant summary judgment." *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315-16 (10th Cir. 2002). Newkirk, in addition to not documenting any change in Mr. Willis's position as he lay dying on the cell floor, admitted he had concerns about Mr. Willis at least three hours before he contacted medical. Detention officer Williamson, the only person Newkirk stated he specifically expressed a concern to, could not tell him whether Mr. Willis was breathing or moving.

Newkirk, however, should have contacted medical or a supervisor before ever contacting a fellow detention officer. What is more, Newkirk should have summoned a gurney the second Williamson could not definitively tell him whether Mr. Willis was breathing.

Any attempts at downplaying that moment as simply a call for a check on his "odd position" are negated by his admissions to internal investigators that his concerns

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debilitated state of a prisoner in need of medical attention is conduct that would alert a reasonable person to the likelihood of personal liability."); *Fitzke v. Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972) (noting "[w]here the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness, the denial of such aid constitutes the deprivation of constitutional due process.").

about Willis's breathing were not resolved with a second set of eyes. The discrepancies between his statements to investigators and his self-serving testimony (much of which Newkirk failed to even present to district court below) creates questions of fact that only a jury can resolve.

In the instant case, Newkirk was subjectively aware of a substantial risk of serious harm to the health and safety of Mr. Willis and chose to disregard that risk. It would only follow that the district court was correct in determining a jury could conclude that Newkirk knew of a substantial risk from the very fact that the risk was obvious and that Newkirk manifested indifference in response to Mr. Willis's obvious need for medical attention. Where, as here, disputed material facts implicate both of the two questions of whether a serious medical need existed and whether an officer was deliberately indifferent to it, summary judgment is improper and the district court correctly denied Newkirk's motion.

CONCLUSION

Appellants are not entitled to qualified immunity. Appellant Johnson put to use a three-point technique on Mr. Willis at a time when Mr. Willis was not resisting, was following commands, posed no threat to any of the officers, was lying prone, and was effectively subdued through shackles and handcuffs.

Appellant Newkirk knew of Mr. Willis's distressed breathing, knew of Mr.

Willis's lack of movement and response, and could not determine whether Mr. Willis was breathing. In the face of this, Appellant Newkirk never contacted supervisory personnel, and not until three-and-a-half hours after Appellant Newkirk kicked Willis's cell door did Appellant Newkirk call for a nurse and gurney. As such, neither Appellant Newkirk nor Appellant Johnson are entitled to qualified immunity.

WHEREFORE, premises considered, Ms. Willis prays this Honorable Court to affirm the District Court's rulings below which denied the qualified immunity motions for summary judgment of the Defendants/Appellants.

STATEMENT REGARDING ORAL ARGUMENT

The issues before the Court involve the intricacies of the doctrine of qualified immunity and the standards applicable to inmate safety. To assist the Court in interpreting the cases that have presented similar issues to the issues currently before the Court, Ms. Willis respectfully requests oral argument.

Dated: September 16, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that a copy of the foregoing Appellee's Opening Brief, was submitted in digital form via the Court's ECF system is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the most recent version of Microsoft Defender and according to the program is free of any viruses.

/s/ Derek S. Franseen

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