No. 19-7050

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DUSTIN LANCE,	)
	)
Plaintiffs/Appellant,	)
	)
v.	)
	)
CHRIS MORRIS, in his official capacity, et al.,	)
	)
Defendants/Appellees.	)

On Appeal from the United States District Court
for the Eastern District of Oklahoma
The Honorable Ronald White, United States District Judge
D.C. No. 17-cv-00378-RAW

APPELLEES/DEFENDANTS CHRIS MORRIS, DANIEL HARPER, AND DAKOTA MORGAN'S CORRECTED PETITION FOR REHEARING *EN BANC*

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February 2, 2021

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APPELLEES/DEFENDANTS MORRIS, HARPER, AND D. MORGAN'S CORRECTED PETITION FOR REHEARING *EN BANC*

I. INTRODUCTION

Appellant/Plaintiff Dustin Lance ("Lance") appealed from the District Court's Order of September 20, 2019, in which the District Court granted motions for summary judgment filed by Appellees/Defendants (collectively referred to herein as the "Appellees") Chris Morris, in his Official Capacity, Daniel Harper, in his Individual Capacity ("Harper"), and Dakota Morgan, in his Individual Capacity ("D. Morgan"). On January 19, 2021, the Tenth Circuit panel reversed the District Court's grant of summary judgment to the Appellees and remanded the case back to the District Court for further proceedings. Appellees believe *en banc* consideration is necessary because this proceeding involves questions of exceptional importance.

II. RULE 35(b)(1)(B) STATEMENT

The panel's decision creates new law adopting the three-part municipal deliberate indifference test set forth in *Walker v. City of New York*, 974 F.2d 293, 297–98 (2d Cir. 1992) which, as applied here, improperly collapses municipal liability into *respondeat superior* liability and improperly imposes municipal liability based on mere negligence. The panel's decision also creates new law by holding laymen not entitled to qualified immunity with regard to an inmate's complaints of pain associated with a persistent erection despite the absence of any Supreme Court or Tenth Circuit authority clearly establishing such symptoms to be a

sufficiently serious medical need requiring immediate medical intervention. These matters of exceptional importance merit *en banc* review.

III. FACTUAL AND PROCEDURAL HISTORY OF THE CASE

On November 11, 2016, Lance was booked into the Pittsburg County Criminal Justice Center ("PCCJC").[1] When Lance arrived at PCCJC on November 11, 2016, he was not taking or prescribed any medications,[2] and at no point during his incarceration was he prescribed Trazadone or provided Trazadone by PCCJC staff.[3] Yet, at around 5:00 or 6:00 p.m. on December 15, 2016, Lance took approximately three-fourths of a Trazadone pill.[4]

At some point thereafter, Lance fell asleep; when he awoke at around midnight or one a.m. on December 16, 2016 to use the restroom, he discovered he had an erection.[5] Lance's unauthorized use of another inmate's prescription medication (Trazadone) resulted in a priapism, which is a prolonged erection without stimulation that will not dissipate or go away without medical intervention.[6] At this point, Lance was not concerned about the erection and did not alert anyone

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[1] Appx Vol. I, 274-276; Appx. Vol. III, 761; Supp. Appx. 68, 72.
[2] Appx. Vol. III, 761; Supp. Appx. 68-71.
[3] Appx. Vol. II, 407, 424-431; Supp. Appx. 77-78.
[4] Appx. Vol. II, 407, 424-431; Appx. Vol. III 762; Supp. Appx. 77, 79.
[5] Appx. Vol. II, 431; Appx. Vol. III, 763.
[6] Appx. Vol. I, 270-273, 281; Appx. Vol. II, 406, 408-409, 455-458; Appx. Vol. III, 764.

else to his condition.[7] Lance did not alert anyone about his hours-long erection until approximately twelve hours after he ingested the Trazadone pill, sometime after he woke for breakfast on December 16, 2016.[8] Thereafter, Lance claims he notified PCCJC sergeants Edward Morgan and Mike Smead ("Smead") and Appellees Harper and D. Morgan and requested medical attention from them.

In December 2016, registered nurse Doris Crawford ("Crawford") worked at PCCJC typically from eight a.m. until five p.m. Monday through Friday, including on December 16, 2016.[9] Crawford was on-call, both on weekdays when she was not already present at PCCJC and on weekends, if a situation arose requiring consulting with her.[10] Crawford was not informed of Lance's condition until Monday, December 19, 2016.[11]

On December 19, 2016, at approximately 9:15 a.m., a PCCJC detention officer became aware of Lance's priapism and immediately took Lance to Crawford.[12] After Lance finally disclosed to Crawford that he had taken Trazadone and when he took it, Crawford examined Lance's erection and immediately arranged

[7] Appx. Vol. I, 431-432, 440-441; Appx. Vol. III 763.
[8] Appx. Vol. I, 424-435, 440-441; Appx. Vol. III, 763-4; Supp. Appx. 77-78.
[9] Appx. Vol. II, 546.
[10] Supp. App. 104-105.
[11] Appx. Vol II, 546.
[12] Appx. Vol I. 292; Appx. Vol. II, 406, 555-558; Supp. App. 120-121.

Lance's transport to McAlester Regional Health Center's ("MRHCC") emergency room for further treatment.[13]

At approximately 9:30 a.m., PCCJC detention officer Stephen Sparks ("Sparks") transported Lance to MRHCC.[14] At 11:47 a.m. on December 19, 2016, Lance was seen at MRHCC by Gary R. Lee, M.D. ("Dr. Lee"), who diagnosed Lance with priapism and treated him with injections, which failed to remedy his priapism resulting in Dr. Lee referring Lance to an urologist in Tulsa at St. Francis Medical Center between 12:01 pm and 12:50 pm.[15] Dr. Lee directed Lance be transferred to Saint France immediately although he did not indicate on the Transfer Request form the means by which Lance was to be transported to Tulsa (i.e., by ambulance, helicopter, or other).[16]

By 1:15 p.m., Lance was returned to PCCJC to be discharged on a medical recognizance bond ("Medical OR").[17] While Crawford understood that Lance needed to go to St. Francis as soon as possible, she did not believe he required an ambulance.[18] At 2:42 p.m., Lance was released from PCCJC on a Medical OR and

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[13] Appx. Vol. II, 406, 552-555, 557-560; Appx. Vol. III 765.
[14] Appx. Vol. II, 652-653, 766; Supp. Appx. 63, 81-82, 214-214.
[15] Appx. Vol. I, 270-273; Appx. Vol. II, 454-459; Appx. Vol. III, 766; Supp. Appx. 66, 120-121.
[16] Appx. Vol. II, 569-571; Appx. Vol. III 766; Supp. App. 66, 120-123.
[17] Appx. Vol. I, 270-273; Appx. Vol. II, 406, 459-460, 568-571; Supp. App. 66.
[18] Appx. Vol. III, 767; Supp. App. 122-123.

discharged to his father, who Crawford personally told to take Lance to the urologist "now."[19] After being discharged, Lance accompanied his father on several errands before he drove Lance to St. Francis Medical Center, where Lance arrived nearly five (5) hours after his release from PCCJC and underwent surgery at around 9:00 p.m., some seven (7) hours later.[20]

IV. ARGUMENT AND AUTHORITIES

The Panel's Decision to Reverse the District Court's Grant of Summary Judgment to the Defendants Should be Reviewed *En Banc*

A. Qualified Immunity

Qualified immunity protects public officials from civil liability when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curium) (citations and quotation marks omitted). Deciding when a right is "clearly established" is a crucial part of qualified immunity analysis. "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citations and quotations

[19] Appx. Vol. I, 274-276, 460, 463-64; Appx. Vol. III, 767; Supp. App. 113-115.
[20] Appx. Vol. I, 277-281, 408-409, 460, 462-466; Appx. Vol. III, 767.

omitted). "The question of whether a right is clearly established must be answered in light of the specific context of the case, not as a broad general proposition." *Morris v. Noe*, 672 F.3d 1185, 1196 (10th Cir. 2012) (internal quotations omitted). "The Supreme Court has 'repeatedly told courts not to define clearly established law at a high level of generality since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" *Estate of B.I.C. v. Gillen*, 761 F.3d 1099, 1106 (10th Cir. 2014) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014), alterations omitted); *White v. Pauly*, 137 S.Ct. 548, 552 (2017). Thus, "a general statement of law...is not sufficient to show that the law was clearly established." *Gillen*, 761 F.3d at 1106.

Here, contrary to the requirement that clearly established law not be defined at a high level of generality, the panel broadly found Appellees Harper and D. Morgan were not entitled to qualified immunity on the basis that Plaintiff allegedly told them he was in pain and allegedly requested medical attention from them. However, two of the cases which the panel relied on for support of its decision, *Al-Turki v. Robinson*, 762 F.3d 1188 (10th Cir. 2014), *Mata v. Saiz*, 427 F.3d 745, 755 (10th Cir. 2005), involved medical professional and, therefore, cannot be relied as clearly established law for lay persons such as Appellees Harper and D. Morgan. *See Rife v. Okla. Dep't of Pub. Safety*, 854 F.3d 637, 647 (10th Cir. 2017); *Rife v. Jefferson (Rife II)*, 742 Fed. Appx. 377, 388 (10th Cir. 2018). More

importantly, none of the cases relied upon by the panel involved complaints of pain associated with a persistent erection, thereby violating the Supreme Court's mandate that "clearly established law must be 'particularized' to the facts of the case." *White*, 137 S.Ct. at 552.

Accordingly, the Court should exercise its judicial discretion and grant *en banc* review of the panel's decision reversing the grant of summary judgment to Appellees Harper and D. Morgan.

B. Municipal Liability

The panel held a reasonable jury could find Appellee Morris liable, in his official capacity, for allegedly failing to train employees how to determine the immediacy of inmate medical complaints. (Panel Order, p. 23). But, in so holding, the panel did not conduct a proper municipal causation analysis[21] since its decision

[21] The panel stated Morris "never challenged the evidence of causation on the failure-to-train claim." (Panel Opinion, p. 22 n.4). This is incorrect; Morris argued that "Lance cannot demonstrate a specific deficiency in the training of PCCJC employees that was obvious and closely related to the alleged violations of the Lance's constitutional rights." (Response Brief, p. 47); *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013) ("To establish the causation element, the challenged policy or practice must be 'closely related to the violation of the plaintiff's federally protected right.' This requirement is satisfied if the plaintiff shows that 'the municipality was the 'moving force' behind the injury alleged."') (quoting Martin A. Schwartz, *Section 1983 Litigation Claims & Defenses*, § 7.12[B] (2013), then *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 404 (1997)).

regarding the alleged failure to train jail staff is contrary to the evidence and because municipal causation for denial of medical care claims cannot be based on the theory that a municipality failed to train staff to recognize inmate medical needs. The panel also erred because its adoption and application of the three-part test set forth in *Walker v. City of New York*, 974 F.2d 293, 297–98 (2d Cir. 1992) (Panel Opinion, p. 25) improperly collapsed municipal liability into *respondeat superior* liability.

First, to the extent the panel's decision rests on the alleged failure to train staff regarding their gate-keeping function – *i.e.*, the alleged failure to train staff "when to call a nurse or a doctor when one was not on site" (Panel Opinion, p. 23), the panel's decision is contrary to the undisputed evidence. Indeed, it was undisputed that Harper, D. Morgan, E. Morgan, and Smead all knew and understood the procedure of reporting an inmate's medical needs as outlined by PCCCJ's policy, and that they recognized ***if*** Lance had, in fact, made a jailer aware of his medical condition ***prior*** to Monday, December 19, 2016, but was not granted access to medical care, such conduct would have violated PCCJC's policy.[22] Consequently, the panel's decision that a reasonable jury could find there was municipal causation for the alleged violation of Plaintiff's constitutional rights is

[22] Appx. Vol. II, 591-596; Appx. Vol. III, 612, 620, 630-632, 771; Supp. App. 100, 109-110, 128-131, 133-137, 140-143, 147, 149, 153-156, 160-161, 163, 176-177, 197-199, 207-209, 211-212.

simply unfounded. *See Porro v. Barnes*, 624 F.3d 1322, 1329 (10th Cir. 2010) (where employee knowingly violated policy, "any reasonable fact finder would have to conclude that—far from exhibiting deliberate indifference ... or causing his injury—the county actively sought to protect [plaintiff's] rights and it was (only) [the employee's] improper actions, taken in defiance of county policy, that caused [plaintiff's] injuries").

Further, municipal causation for denial of medical care claims simply cannot be established based upon the theory that the municipality failed to train staff to recognize inmate medical needs. Under this theory, a plaintiff must show staff did not realize plaintiff had a serious medical need requiring attention because they were not adequately trained to recognize inmate medical needs. But, if staff did not realize a plaintiff had a serious medical need requiring attention, then there would be no underlying violation of plaintiff's constitutional rights and, thus, no basis for the imposition of municipal liability. Indeed, to hold a municipality liable, a plaintiff must first show there was underlying violation of his constitutional right to medical care by an agent, employee, or officer of the municipality. *Walker v. City of Orem*, 451 F.3d 1139, 1552 (10th Cir. 2006) (in municipal liability claim, plaintiffs must prove '"(1) a municipal employee committed a constitutional violation, and (2) a municipal policy or custom was the moving force behind the constitutional deprivation"') (quoting *Myers v. Okla. Cty. Bd. of Cty. Comm'rs*, 151 F.3d 1313,

1318 (10th Cir. 1998)). And, to show an underlying violation, a plaintiff must prove that a staff member subjectively knew he had a serious medical need and declined to take any action to obtain medical care for him. *Rife*, 854 F.3d at 647. However, if any staff member had direct knowledge that a plaintiff was suffering from a serious medical need, then any failure to obtain medical care obviously cannot have been caused by any lack of training to recognize inmate medical needs. Likewise, if the jury infers such subjective knowledge on the basis that a plaintiff's medical need was obvious, then the plaintiff cannot demonstrate the alleged failure to obtain medical care on his behalf was caused by any lack of such training as no training is required to recognize an obvious medical need. In either event, the legal requirement that a plaintiff must first establish an agent, employee, or officer of the municipality had subjective knowledge of his medical need means he simply cannot demonstrate municipal causation on this basis as any such lack of training cannot logically have been the moving force behind any failure to provide medical care. In sum, a plaintiff cannot simultaneously maintain that jail staff had subjective knowledge of his medical need while also faulting the municipality for failing to train staff to recognize that need.

Since Lance did not, and could not, prove causation here, the panel did not need to reach deliberate indifference, which the panel also erred in considering. Indeed, there are limited circumstances where inadequacy in training can be a basis

for § 1983 liability. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Inadequacy in training may serve as the basis for municipal liability "only where the failure to train amounts to deliberate indifference . . ." to inmate rights. *City of Canton*, 489 U.S. at 388. "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under § 1983." *Id*. at 389. Yet here, the panel, disregarding the tenuous nature of municipal liability for failure to train claims, instead adopted a three-part test for determining municipal deliberate indifference from the Second Circuit case *Walker v. City of New York*, 974 F.2d 293, 297–98 (2d Cir. 1992) (Panel Opinion, p. 25) and applied it in such a manner as to improperly collapse municipal liability into *respondeat superior* liability and to render municipal liability based on mere negligence.

Indeed, to be deliberately indifferent, a municipality must have "actual or constructive notice that its action or [inaction] is substantially certain to result in a constitutional violation." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998). Notice is typically proven by "the existence of a pattern of tortious conduct." *Id.* "Deliberate indifference 'may be found absent a pattern of unconstitutional behavior' only in 'a narrow range of circumstances' where 'a violation of federal

rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction."' *Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1284 (10th Cir. 2019) (quoting *Barney*, 143 F.3d at 1307-08). Here, the panel completely ignored the lack of any "pattern of unconstitutional behavior" here and instead applied the Second Circuit's *Walker* standard in considering whether jailers were properly trained to assess if inmates' medical conditions constituted medical emergencies. But this was improper and untenable. Indeed, using the *Walker* standard, instead of notice via patterns of unconstitutional behavior, in considering jail staff's training to assess any and all medical conditions' (instead of what was at issue here, priapism) emergent nature is untenable—it would effectively result in findings of deliberate indifference for all cases where plaintiffs allege failure to train as it relates to jail staff in their gatekeeper role. Further, since it was undisputed that priapism was NOT a frequent medical condition faced by inmates at PCCJC,[23] it was clearly improper for the panel to stray from the typical pattern-of-unconstitutional-behavior requirement in proving deliberate indifference. *Cf. Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1319-20 (10th Cir. 2002) (since OCD was a frequently occurring disorder and jail staff received no training on OCD reasonable factfinders could find constitutional violations were a "plainly obvious consequence").

[23] Supp. App. 97, 112, 137-138, 212.

Additionally, Lance cannot demonstrate municipal deliberate indifference because neither the Supreme Court nor the Tenth Circuit has held it was clearly established that Plaintiff's complaint of pain associated with a persistent erection was a sufficiently serious medical need requiring medical treatment.

There is a justifiably high bar to impose municipal liability based on failure to train theories. "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Brown,* 520 U.S. at 405.

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability … In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident… Thus, permitting cases against cities for their "failure to train" employees … on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities—a result we rejected in [*Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978)]. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs [,which they are] ill-suited to undertake…

City of Canton, 489 U.S. at 391-92 (citations omitted).

Imposing municipal liability for alleged failures to train where the underlying constitutional violation has not been clearly established improperly collapses the

municipal liability standard into *de facto respondeat superior* liability, amounting to an imposition of municipal liability without regard to fault. This is because "a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established." *Szabla v. City of Brooklyn Park Minnesota*, 486 F.3d 385, 393 (8th Cir. 2007); *Young v. County of Fulton*, 160 F.3d 899, 904 (2d Cir. 1998) (failure to train claim "cannot be sustained unless the employees violated a clearly established right"); *Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505, 511 (6th Cir. 2012); *Arrington-Bey v. City of Bedford Heights Ohio*, 858 F.3d 988, 994-95 (6th Cir. 2017); *Williamson v. City of Virginia Beach*, 786 F.Supp. 1238, 1264-65 (E.D. Va. 1992), *aff'd*, No. 92-1420, 1993 WL 127961 (4th Cir. Apr. 16, 1993) (unpub) (*per curiam*); *Watson v. Sexton*, 755 F.Supp. 583, 587-88 (S.D.N.Y. 1991); *Zwalesky v. Manistee County*, 749 F.Supp. 815, 820 (W.D. Mich. 1990). "The violated right in a deliberate-indifference case thus must be clearly established because a municipality cannot *deliberately* shirk a constitutional duty unless that duty is clear." *Arrington-Bey*, 858 F.3d at 995 (citing *Szabla*, *supra*.)

> Clarity of the municipal obligation is important in this context, because "[w]ithout some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault."

Szabla, 486 F.3d at 393 (quoting *City of Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part)). Furthermore, "...requiring that the right be clearly established does not give qualified immunity to municipalities; it simply follows *City of Canton*'s and *Brown*'s demand that deliberate indifference in fact be deliberate." *Arrington-Bey*, 858 F.3d at 995 (citing *Szabla*, 486 F.3d at 394).

Because no Supreme Court or Tenth Circuit authority has found it is clearly established that Plaintiff's symptoms presented a sufficiently serious medical need which required immediate medical intervention, then it would be irrational to hold Appellee Morris was deliberately indifferent in failing to train jail staff to identify that Plaintiff's complaints of those symptoms required staff to obtain medical care on his behalf. The decision in this regard improperly results in Appellee Morris being held liable on mere negligence, not deliberate indifference.

The panel further held a reasonable jury could find that municipal deliberate indifference with regard to the alleged policy or practice of requiring inmates be returned to PCCJC for release before seeking further specialized medical care. (Panel Opinion, pp. 28-31). The panel's decision is premised upon an alleged violation of Plaintiff's constitutional rights based upon his assertion that his pain intensified in the six hours between the time he was returned to PCCJC and the time he was taken to the second hospital. (Panel Opinion, p. 29). In that regard, the panel stated "Mr. Lance languished in pain while he waited for transportation to the

second hospital." (Panel Opinion, p. 30). However, what the panel omits to mention is the majority of that delay was caused by Plaintiff himself, not by PCCJC.[24]

Moreover, the panel's determination that PCCJC had a policy or practice of requiring inmates to be returned to PCCJC for release before seeking further specialized medical care is without factual support. Rather, Nurse Crawford clarified that inmates were usually given a medical OR for any hospitalization and the determination of whether the medical OR was processed before the inmate was released from PCCJC to go to the hospital or after the inmate was already admitted to the hospital depended upon various factors including the nature of the inmate's charges as well as the inmate's medical needs. According to Nurse Crawford, Lance's priapism did not require jail employees to directly transport him to St. Francis.[25]

Thus, for all the reasons addressed above, the Court should exercise its judicial discretion and grant *en banc* review of the panel's decision reversing the grant of summary judgment to Appellee Morris.

V. CONCLUSION

For the reasons discussed above, Appellees/Defendants Chris Morris, Daniel Harper, and Dakota Morgan respectfully request that this Court review the panel's

[24] Appx. Vol. I, 277-281, 408-409, 460, 462-466; Appx. Vol. III, 767.
[25] Supp. Appx. 120-122.

decision *en banc* because this proceeding involves questions of exceptional importance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I, Michael L. Carr, certify that this brief complies with Fed. R. App. P. 32(a)(7)(B), in that it is proportionally spaced and contains 3,887 words. I relied upon my word processor, Microsoft Word, to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Michael L. Carr
Michael L. Carr

CERTIFICATE OF DIGITAL SUBMISSION

I certify that all required privacy redactions have been made and, with the exception of those redactions, the digital submission is an exact copy of the written document filed with the Clerk, and the digital submissions have been scanned for

viruses with TREND MICRO Security Agent, Version 16.513.00, updated February 2, 2021 and, according to the program, is free of viruses.

s/ Michael L. Carr
Michael L. Carr

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Appx. P. 25(d)(2), I hereby certify that on February 2, 2021, the foregoing Brief was filed electronically the CM/ECF system with the Court and that the requisite number of true and correct copies of the version submitted electronically of the foregoing Brief is being forwarded by First Class Mail to the Court within five days of the Court issuing Notice that the electronic brief has been accepted:

Clerk of the Court
United States Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257

Further, pursuant to Fed. R. Appx. P. 25(d)(1), I hereby certify that on February 2, 2021, which caused the following parties or counsel in this matter to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

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Tenth Circuit

January 19, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DUSTIN LANCE,

Plaintiff - Appellant,

v.

CHRIS MORRIS, Sheriff of Pittsburg County, Oklahoma, in his official capacity; MIKE SMEAD, in his individual capacity; DAKOTA MORGAN, in his individual capacity; EDWARD MORGAN, in his individual capacity; DANIEL HARPER, in his individual capacity,

Defendants - Appellees,

and

MCALESTER REGIONAL HEALTH CENTER AUTHORITY, d/b/a McAlester Regional Hospital; BOARD OF COUNTY COMMISSIONERS OF PITTSBURG COUNTY, OKLAHOMA; STEPHEN SPARKS, in his individual capacity; JOEL KERNS, former Sheriff of Pittsburg County, in his individual capacity,

Defendants.

No. 19-7050

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:17-CV-00378-RAW)

Megha Ram, Roderick & Solange MacArthur Justice Center, Washington, D.C. (J. Spencer Bryan and Steven J. Terrill, Bryan & Terrill Law, Tulsa, Oklahoma, and David M. Shapiro, Roderick & Solange MacArthur Justice Center, Chicago, Illinois, with her on the briefs), on behalf of the Plaintiff-Appellant.

Michael L. Carr, Collins Zorn & Wagner, P.C., Oklahoma City, Oklahoma (Taylor M. Riley, Collins, Zorn & Wagner, P.C., Oklahoma City, Oklahoma, with him on the briefs), on behalf of the Defendants-Appellees Chris Morris, Daniel Harper, and Dakota Morgan.

Carson C. Smith, Pierce Couch Hendrickson Baysinger & Green, L.L.P., Oklahoma City, Oklahoma (Robert S. Lafferrandre, Pierce Couch Hendrickson Baysinger & Green, L.L.P. Oklahoma City, Oklahoma, with him on the brief) on behalf of the Defendants-Appellees Edward Morgan and Mike Smead.

David A. Russell and Emily Jones Ludiker of Rodolf & Todd, Tulsa, Oklahoma, filed a brief on behalf of McAlester Regional Health Center.

Before **MATHESON**, **BACHARACH**, and **McHUGH**, Circuit Judges.

BACHARACH, Circuit Judge.

This case involves a denial of medical treatment for Mr. Dustin Lance at a detention center in McAlester, Oklahoma. Mr. Lance needed treatment for priapism (a persistent, painful erection), but he had to wait three days for the treatment. He ultimately sued the current sheriff in his official capacity[1] and four jail guards in their personal capacities, invoking

[1] Mr. Lance also sued the former sheriff (Mr. Joel Kerns) and the McAlester Regional Health Center Authority, but the appeal does not address the claims against these parties.

42 U.S.C. § 1983 and the Fourteenth Amendment's Due Process Clause. The district court granted summary judgment to the defendants.

We affirm in part and reverse in part. Like the district court, we conclude that one of the jail guards, Edward Morgan, has qualified immunity because he didn't violate Mr. Lance's constitutional right to medical care. But we conclude that qualified immunity was unavailable to the three other jail guards: Mike Smead, Dakota Morgan, and Daniel Harper. Finally, we conclude that the sheriff, Chris Morris, was not entitled to summary judgment in his official capacity because the factfinder could reasonably determine that the county's policies had violated Mr. Lance's constitutional right to medical care.

1. Mr. Lance's Priapism and Permanent Injuries

The parties attribute the priapism to a pill that Mr. Lance obtained from another inmate. He took the pill on a Thursday evening and awoke the next morning with an erection that would not go away.

After awaking, Mr. Lance used his cell's intercom to call Edward Morgan, admitting consumption of another person's pill and stating that the pill had caused an erection that would not go away.

According to the plaintiff, Edward Morgan responded by stating that he would put Mr. Lance in lockdown for taking the pill in violation of jail policy. But no one came to put Mr. Lance in lockdown, so he called again; this time, he requested medical attention.

Over the next three days, Mr. Lance made more requests for medical care, reporting a persistent erection, an intense pain, and a need for medical treatment.

2. Mr. Lance's Trip to the Hospital After Three Days of Intense Pain

The three-day period ended on a Monday when the detention center's nurse came on duty. She examined Mr. Lance's engorged penis and saw that it was purple and might be permanently damaged. Alarmed, she asked jail guards to take Mr. Lance to a local hospital. At the hospital, an emergency physician examined Mr. Lance and provided medication. But the medication did not help, and the physician said that Mr. Lance needed to go to another hospital about 90 miles away.

Rather than go to the second hospital, the guards returned Mr. Lance to the McAlester jail. When they returned, jail officials obtained a judicial order releasing Mr. Lance on his own recognizance. His father came to the jail that afternoon and later drove Mr. Lance to the second hospital, arriving at about 7:15 p.m.

After they arrived, a urologist operated. But Mr. Lance suffered permanent injuries, which will probably include impotence for the rest of his life.

3. Mr. Lance's Claims Against the Sheriff and Jail Guards

For the claims against the jail guards, Mr. Lance alleged denial of medical care under the Fourteenth Amendment's Due Process Clause based on a failure to timely respond to requests for medical treatment. For the claims against the sheriff, Mr. Lance alleged the adoption of policies violating his constitutional right to medical treatment for serious medical needs.

The jail guards and sheriff moved for summary judgment. The sheriff denied a constitutional violation, and the four jail guards urged qualified immunity. The district court granted the motions for summary judgment.

4. The Standard of Review

For these rulings, we engage in de novo review. *Talley v. Time, Inc.*, 923 F.3d 878, 893 (10th Cir. 2019). Summary judgment is required when "the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). We consider the evidence in the light most favorable to Mr. Lance and draw all reasonable inferences in his favor. *Id.*

5. The Four Jail Guards' Defense of Qualified Immunity

Drawing reasonable inferences in favor of Mr. Lance, we consider whether he created a genuine issue of material fact on qualified immunity for the jail guards.

A. The Elements of Qualified Immunity

Because the jail guards asserted qualified immunity, the burden fell on Mr. Lance. *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1212–13 (10th Cir. 2019). To meet that burden, Mr. Lance needed to show the violation of a constitutional or statutory right and the clearly established nature of that right. *Donahue v. Wihongi*, 948 F.3d 1177, 1186 (10th Cir. 2020).

B. Violation of the Constitutional Right to Medical Care

The Fourteenth Amendment's Due Process Clause entitles pretrial detainees to the same standard of medical care that the Eighth Amendment requires for convicted inmates. *Strain v. Regalado*, 977 F.3d 984, 989 (10th Cir. 2020). Under that standard, jail guards cannot act with deliberate indifference to a pretrial detainee's serious medical needs. *Id.* To establish a violation of this right, a pretrial detainee must satisfy objective and subjective prongs of the test. *Id.*[2]

(1) The Objective and Subjective Prongs

The objective prong is satisfied if the medical need is sufficiently serious. *Self v. Crum*, 439 F.3d 1227, 1230 (10th Cir. 2006). A medical need is sufficiently serious if

- a physician directed further treatment after diagnosing the condition or

[2] Mr. Lance argues that *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) abolished the subjective component for claims of denial of due process by denial of medical care for pretrial detainees. We recently rejected that argument in *Strain v. Regalado*, 977 F.3d 984, 993 (10th Cir. 2020).

- the need for a doctor's attention would be obvious to a lay person.

Clark v. Colbert, 895 F.3d 1258, 1267 (10th Cir. 2018). Medical delays can be sufficiently serious if they cause substantial harm, such as "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)).

In district court, the jail guards conceded satisfaction of the objective prong because the priapism had constituted a sufficiently serious medical need.[3] But the parties disagree on the subjective prong, which turns on the defendant's state of mind. *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005). To satisfy this prong, the plaintiff must show that the defendant

- was aware of a substantial risk of serious harm and
- chose to disregard that risk.

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[3] Several jail guards testified that priapism is a serious medical condition that requires treatment. For example, Mr.Smead acknowledged "that if somebody had an erection that wouldn't go away[,] delaying medical care could expose that inmate to medical or bodily harm." Appellant's App'x vol. II, at 593. Similarly, Mr. Dakota Morgan admitted that a prolonged erection warrants medical attention. Appellant's App'x vol. III, at 631–32. And Mr. Harper admitted that "medical would need to be called" if a detainee experienced a prolonged, painful erection. Deposition of Daniel Harper, *Lance v. Pittsburg Cty. Bd. of Cty. Comm'rs*, No. 6:17-cv-00378-RAW (E.D. Okla. 2019), ECF No. 172, Ex. 17, at 48–49.

See Martinez v. Garden, 430 F.3d 1302, 1304 (10th Cir. 2005) (aware of a "substantial risk of serious harm" (quoting *Riddle v. Mondragon*, 83 F.3d 1197, 1204 (10th Cir. 1996))); *Martinez v. Beggs*, 563 F.3d 1082, 1089 (10th Cir. 2009) (disregards the risk). A plaintiff may prove awareness of a substantial risk through circumstantial evidence that the risk was obvious. *Farmer v. Brennan*, 511 U.S. 825, 842–43 (1994).

On this prong, the district court reached different conclusions for the four jail guards. For Edward Morgan, the court concluded that Mr. Lance had not satisfied the subjective prong. For three other guards (Mike Smead, Dakota Morgan, and Daniel Harper), the court concluded that the factfinder could reasonably infer awareness of a substantial risk of serious harm and knowing disregard of that risk.

In this appeal, Mr. Lance argues that the district court

- erroneously assessed the evidence on Edward Morgan and
- properly analyzed the evidence involving the other guards.

In contrast, the other guards maintain that a factfinder could not reasonably infer awareness of a substantial risk and knowing disregard of that risk.

(2) Edward Morgan

After taking the pill, Mr. Lance awoke with an erection that would not subside. Concerned, he called the control tower. According to Mr. Lance, Edward Morgan answered. Mr. Lance said that he had taken a pill

and developed an erection that would not go away. But he did not complain of pain or say that he needed to see a doctor or nurse.

Later that day, Mr. Lance made more calls to the control tower, reporting considerable pain and asking for medical treatment. But Mr. Lance testified that the other calls had involved other guards, and there is no evidence that Edward Morgan had heard those calls. Because Edward Morgan had been contacted only once and given only limited information, the district court concluded that he had not acted with deliberate indifference.

On appeal, Mr. Lance argues that the factfinder could reasonably infer deliberate indifference from

- jail administrators' recommendation for sergeants, such as Edward Morgan, to move around in the booking area and pods,
- Edward Morgan's presence in the control tower (where he conducted sight checks) on Friday and Saturday nights, and
- repeated calls to the tower from Mr. Lance and other detainees.

We reject these arguments, for a claim of deliberate indifference cannot be based on speculation about what Edward Morgan might have seen or heard. *See Quintana v. Santa Fe Cty. Bd. of Comm'rs*, 973 F.3d 1022, 1031 & n.3 (10th Cir. 2020); *see also Self v. Crum*, 439 F.3d 1227, 1235 (10th Cir. 2006) (rejecting an argument based on speculation that a defendant had a culpable state of mind). Mr. Lance's arguments entail only speculation about Edward Morgan's awareness of the condition.

According to Mr. Lance, he had only one conversation with Edward Morgan. In that conversation, Mr. Lance did not provide enough information to suggest a serious medical need; and he cannot avoid summary judgment with speculation that he or other detainees might have had other conversations with Edward Morgan.

Apart from speculation, Mr. Lance lacked evidence about what Edward Morgan might have seen. For example, Mr. Lance points out that guards sometimes entered the pods. But the summary-judgment record doesn't contain any evidence suggesting that Edward Morgan had entered the pods when working the late shift on Friday or Saturday night.

We addressed a similar gap in the complaint in *Quintana v. Santa Fe Cty. Bd. of Comm'rs*, 973 F.3d 1022 (10th Cir. 2020). There a guard saw an inmate who was allegedly suffering from a severe illness. *Id.* at 1030 (discussing the dismissal of a claim against Officer Valdo). But we upheld the dismissal because the complaint hadn't identified symptoms that the guard would have seen. *Id.*

Here too we have only speculation that Edward Morgan might have entered the pods and seen Mr. Lance suffering from priapism. But the summary-judgment record contains no evidence on

- whether Edward Morgan entered the pods,
- whether he would have seen Mr. Lance, or

- whether Edward Morgan's observation would have reflected the intensity or duration of Mr. Lance's pain.

Mr. Lance also relies on Edward Morgan's presence in the tower on Friday and Saturday nights. For example, Mr. Lance presents statements that

- he strolled the dayroom with a visible erection and
- his pain was obvious.

From the tower, Edward Morgan might have seen into the dayroom if there had been adequate lighting. But Mr. Lance presented no evidence about

- the lighting in the dayroom during Edward Morgan's shifts on Friday and Saturday nights or
- Mr. Lance's possible presence in the dayroom on Friday and Saturday nights.

We thus conclude that Edward Morgan's job responsibilities—moving around the facility and conducting sight checks from the control tower during the night shifts—do not show knowledge about Mr. Lance's priapism and need for treatment.

Mr. Lance also argues that Edward Morgan

- was in the tower from 11:00 on Friday night until 6:00 on Saturday morning and
- must have received a call from Mr. Lance during that time because Mr. Lance later testified that he had called the tower every shift to report pain and request medical attention.

For this argument, Mr. Lance relies on testimony about unclear log entries and speculation that Edward Morgan entered the tower about 2:30 a.m. But Mr. Lance admits that he talked only once with Edward Morgan and didn't complain of pain or ask for medical help.

Because Mr. Lance failed to satisfy the subjective prong, the district court properly granted summary judgment to Edward Morgan.

(3) Mike Smead

On the two days after Mr. Lance took the pill, Mr. Mike Smead worked from 6:00 a.m. to 6:00 p.m. Mr. Lance testified that

- he had told Mr. Smead about taking the pill, the existence of a prolonged erection, and the need to see the nurse,
- he had shown his penis to Mr. Smead a couple of times and complained about the condition whenever he saw Mr. Smead,
- Mr. Smead had seen Mr. Lance with his pants off and Mr. Lance explained that he was tucking his pants underneath his groin to diminish the pain when sitting down, and
- Mr. Smead had snickered when he saw Mr. Lance's erection.

In addition to this testimony, Mr. Lance points to the nurse's account of her discussion with Mr. Smead on Monday. The nurse had asked Mr. Smead why he had not reported the condition, and he responded: "I thought he [Mr. Lance] was just playing." Appellant's App'x vol. II, at 565.

Mr. Smead argues that this evidence doesn't show deliberate indifference because

- he didn't know when a prolonged erection would become a medical emergency,
- Mr. Lance hadn't described the duration or cause of the priapism, and
- there was no indication that the symptoms were alarming when Mr. Smead had seen Mr. Lance.

But Mr. Lance satisfies the subjective prong through reports of pain, his repeated requests for medical treatment, and other detainees' insistence that the need for medical attention was obvious. *See McCowan v. Morales*, 945 F.3d 1276, 1292 (10th Cir. 2019) (concluding that the subjective prong was satisfied when a detainee repeatedly complained that he was in excruciating shoulder pain and the officer disregarded the complaints for about two hours); *see also Mata v. Saiz*, 427 F.3d 745, 755 (10th Cir. 2005) (concluding that a prisoner can satisfy the subjective prong through evidence of pain caused by a delay in obtaining medical treatment).

Mr. Smead points out that he might not have recognized the severity of Mr. Lance's condition. But other detainees stated that Mr. Lance was obviously continuing to suffer pain throughout the weekend. From the other detainees' accounts, "a factfinder [could] conclude that a [jail] official knew of a substantial risk from the very fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

We 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 hadn't known of the pain because the detainee did not complain. *Id.* at 652. But another detainee stated under oath that the plaintiff had groaned loudly, had repeatedly complained, and had displayed obvious pain. *Id.* Given this sworn account, we reversed the award of summary judgment to the jail guards even though they had denied knowledge of the plaintiff's pain. *Id.*

The same is true here because

- three detainees stated under oath that Mr. Lance had obviously experienced pain throughout the weekend and
- Mr. Lance testified that he had reported his pain to Mr. Smead.

Given these sworn statements, Mr. Smead's denial of awareness does not justify summary judgment.

* * *

Like the district court, we conclude that a reasonable factfinder could infer that Mr. Smead had been aware of a substantial risk of serious harm and had knowingly disregarded that risk.

(4) Dakota Morgan

Among the jail guards was Mr. Dakota Morgan, who manned the control tower on Friday afternoon. Mr. Lance stated that he had called the control tower that afternoon and reported "[his] persistent erection, [his] need for medical attention[,] and the considerable pain [he] was

experiencing." Appellant's App'x vol. III, at 660. While in the control tower, Dakota Morgan would have conducted sight checks of the pod where Mr. Lance was housed.

Given this evidence, the district court concluded that a reasonable factfinder could infer that Dakota Morgan had been aware of a substantial risk and had knowingly disregarded that risk. We agree.

In arguing to the contrary, the defendants

- point out that Mr. Lance couldn't remember talking to Dakota Morgan,
- discount the statements from other detainees that Mr. Lance appeared to be in pain, and
- contrast Mr. Lance's behavior when suffering from priapism with readily observable symptoms like "collapsing, vomiting, paleness, sweating or a repeatedly stated belief [that] his condition was life threatening."

Appellees' (Chris Morris, Daniel Harper, & Dakota Morgan) Resp. Br. at 36–37. But Mr. Lance satisfies the subjective prong through his report of pain and his request to see a nurse or a doctor. *See McCowan v. Morales*, 945 F.3d 1276, 1292 (10th Cir. 2019); *Mata v. Saiz*, 427 F.3d 745, 755 (10th Cir. 2005).

Even though Mr. Lance couldn't remember talking to Dakota Morgan, a factfinder could reasonably infer that they had talked when Mr. Morgan was in the control tower. After all, Mr. Lance testified that he had called the control tower on Friday afternoon, complaining of pain and

requesting medical treatment. And only one person manned the control tower at any one time. On Friday afternoon, that person was Dakota Morgan. So a reasonable factfinder could infer that Mr. Lance had complained to Dakota Morgan about the pain.

The evidence suggests that Dakota Morgan not only responded to Mr. Lance's call but also saw into the pods through a large glass window separating the tower from the common area.

See Durkee v. Minor, 841 F.3d 872, 876 (10th Cir. 2016) (rejecting a jail guard's summary-judgment argument that he hadn't seen an inmate in the visiting room partly because he could be seen through a large rectangular window). Mr. Lance explained that any guard in the tower could see the

dayroom, which was only about ten yards away. And the former sheriff testified that guards in the tower could view a surveillance video from a camera in the pod.

Given the evidence of the call on Friday afternoon and Dakota Morgan's view of the dayroom, a reasonable factfinder could infer that he had been aware of a substantial risk of serious harm and had knowingly disregarded that risk.

(5) Daniel Harper

Another jail guard was Daniel Harper. The district court concluded that the factfinder could reasonably infer that Mr. Harper had known about Mr. Lance's persistent erection, and we agree based on two facts:

1. Mr. Harper had distributed breakfast trays on Monday morning, three days into Mr. Lance's priapism.

2. Mr. Lance had asked for medical treatment whenever the meal trays were delivered.

From these facts, a factfinder could reasonably infer that Mr. Lance complained to Mr. Harper when he delivered the breakfast tray on Monday morning. Mr. Lance has thus satisfied the subjective prong for the claim against Mr. Harper.

C. Violation of a Clearly Established Right

Although Mr. Lance satisfied the objective and subjective prongs for the claims against Mike Smead, Dakota Morgan, and Daniel Harper, they

alternatively urge qualified immunity based on the lack of a clearly established right.

A constitutional right is clearly established if all reasonable jail guards would have understood that their conduct had violated the Constitution. *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam). This understanding may arise from a precedent or weighty authority from other courts. *Halley v. Huckaby*, 902 F.3d 1136, 1144 (10th Cir. 2018).

Mr. Lance argues that our precedents have clearly established a jail guard's constitutional obligation to obtain medical care when (1) a detainee experiences severe pain and (2) the jail guard controls access to medical care. For this argument, Mr. Lance relies on *McCowan v. Morales*, 945 F.3d 1276 (10th Cir. 2019). There a detainee repeatedly complained that he had reinjured his shoulder and was in "excruciating" pain. *Id.* at 1293. An officer ignored the detainee's complaints and waited two hours before providing access to medical care. *Id.* at 1292. We denied qualified immunity, likening the facts to *Olsen v. Layton Hills Mall*, 312 F.3d 1304 (10th Cir. 2002). *McCowan*, 945 F.3d at 1293.

In *Olsen*, we had concluded that qualified immunity was unavailable for an official who ignored reports of a detainee's mental health problems and a panic attack. 312 F.3d at 1309, 1317. *Olsen*'s reasoning led the *McCowan* panel to conclude that "[t]his constitutional violation [had been]

clearly established by August 2015," which is when the *McCowan* plaintiff had complained of shoulder pain. *McCowan*, 945 F.3d at 1292.

Mr. Lance also relies on another opinion involving a guard's delay in providing medical care to a prisoner: *Sealock v. Colorado*, 218 F.3d 1205 (10th Cir. 2000). There a prisoner was sweating, appeared pale, and reported "crushing" chest pain, difficulty breathing, and vomiting. *Id.* at 1208. But a guard waited more than a day before sending the prisoner to the hospital, where doctors discovered that he had suffered a major heart attack. *Id.* We held that the prisoner had shown a guard's deliberate indifference in delaying medical treatment. *Id.* at 1210–11.

Finally, Mr. Lance relies on two other opinions stating that medical delays may violate the constitution: *Al-Turki v. Robinson*, 762 F.3d 1188, 1195 (10th Cir. 2014) and *Mata v. Saiz*, 427 F.3d 745, 755 (10th Cir. 2005).

In response, the defendants make four arguments:

1. *McCowan v. Morales*, 945 F.3d 1276 (10th Cir. 2019), cannot clearly establish the right because the opinion came after the events here (December 2016).

2. Some of the cited opinions involve medical professionals and did not supply notice of standards applicable to lay officers.

3. Some of the cited opinions involved conditions more serious than Mr. Lance's priapism.

4. "[Mr. Lance's] articulation of qualified immunity yoked only to 'pain,' severe or not, however defined, would present a host of practical problems in the jail context."

Appellees' (Edward Morgan & Mike Smead) Resp. Br. at 30. We reject these arguments.

First, even though *McCowan v. Morales*, 945 F.3d 1276 (10th Cir. 2019) came after the delay in treating Mr. Lance's priapism, we held there that the right had been clearly established in August 2015, before the events involving Mr. Lance. *Id.* at 1294; *see* pp. 18–19, above.

Second, it's not fatal that some of the cited opinions involved medical professionals. We did address the liability of medical professionals in *Al-Turki v. Robinson*, 762 F.3d 1188, 1192 (10th Cir. 2014) and *Mata v. Saiz*, 427 F.3d 745, 755–61 (10th Cir. 2005). But those opinions do not vitiate the duty of lay officials. In *McCowan* and *Olsen*, we held that lay officials (just like medical professionals) can incur liability for delays in providing medical treatment. *See* pp. 18–19, above.

Third, the scope of the constitutional duty isn't diminished just because some of our prior opinions involved potentially life-threatening conditions. *See, e.g.*, *Sealock v. Colorado*, 218 F.3d 1205, 1208 (10th Cir. 2000) (potential heart attack). We've not required a life-threatening condition to trigger a constitutional duty to provide adequate medical care. For example, we've held that guards acted with deliberate indifference by waiting two hours to treat shoulder pain even though the pain wasn't life-

threatening. *McCowan v. Morales*, 945 F.3d 1276, 1293–94 (10th Cir. 2019); *see* pp. 18–19, above.

Fourth, we reject the jail guards' argument about the impracticality of a standard based on pain. Mr. Lance's arguments are grounded in the controlling law, which establishes that a delay in providing medical care may be sufficiently serious if the delay leads to substantial pain. *See* pp. 7, 13–14, above.

For these four reasons, we conclude that Mr. Lance's evidence shows that Mike Smead, Dakota Morgan, and Daniel Harper violated a clearly established constitutional right. The district court thus erred in granting their motions for summary judgment.

6. The County Policies

Mr. Lance sued the sheriff based on two of the county's policies:

1. failing to train non-medical personnel on how to respond to medical emergencies when the nurse was off site

2. releasing detainees who needed further medical attention rather than driving them to a second hospital

On both claims, the district court granted summary judgment to the sheriff, reasoning that

- the county's policy on training had been adequate and
- the sheriff had not acted with deliberate indifference by releasing detainees needing further hospitalization because Mr. Lance was not harmed by the delay.

We disagree with these conclusions.

A. Failure to Train

To recover for a failure to train, Mr. Lance needs to prove three elements:

1. the existence of a county policy or custom involving deficient training
2. the policy or custom's causation of an injury
3. the county's adoption of a policy or custom with deliberate indifference

Waller v. City & Cty. of Denver, 932 F.3d 1277, 1283–84 (10th Cir. 2019). On appeal, Mr. Lance contends that a factfinder could reasonably infer satisfaction of the first and third elements.[4]

On the first element, the sheriff argues that Mr. Lance failed to identify a policy that was obvious and "closely related" to his injury. *See Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999) (setting out the test for the first element), *abrogated in part on other grounds*, *Brown v. Flowers*, 974 F.3d 1178, 1182 (10th Cir. 2020). We disagree.

The county adopted a policy stating that "[s]upervisors will determine the immediacy of medical complaints and take the appropriate action." Appellant's App'x vol. II, at 404. But Mr. Lance presented

[4] On the second element (causation), Mr. Lance needed to show that "the injury [would] have been avoided had the employee been trained under a program that was not deficient in the identified respect." *City of Canton v. Harris*, 489 U.S. 378, 391 (1989). But the sheriff has never challenged the evidence of causation on the failure-to-train claim.

evidence that the county hadn't trained employees how to determine "the immediacy of medical complaints," particularly when medical personnel were away from the detention center. A reasonable factfinder could infer that this deficiency in the training was both obvious and closely related to Mr. Lance's injury.

The former sheriff testified that county employees had taken courses in first aid and CPR, had shadowed more experienced employees, and had attended monthly safety meetings. But Mr. Lance presented evidence that the employees had obtained no training on when to call a nurse or a doctor when one was not on site. For example, two officers (Edward Morgan and Daniel Harper) reported that they had not obtained any training on when a medical condition involved an emergency. Edward Morgan testified:

> Q. Was there any training that you were provided in being able to assess the inmates from a medical standpoint?
>
> A. No, sir, none.
>
> Q. Are the jailers allowed to independently determine whether a medical issue is serious?
>
> . . . .
>
> A. Yes.
>
> Q. Okay. And you'd agree that there's no training that provides them the ability to assess somebody independently, right?
>
> A. Correct. Yes, sir.
>
> Q. Would that be the same for the sergeant also?

A. Yes.

Appellees' (Daniel Harper, Dakota Morgan, & Chris Morris) Supp. App'x at 144.[5] Given this evidence, the factfinder could reasonably infer that the county had provided deficient training on how to detect a medical emergency.

On the third element, the plaintiff must show deliberate indifference. *See* p. 22, above. Deliberate indifference can exist when a county fails to train jail guards on how to handle recurring situations presenting an obvious potential to violate the Constitution. *Allen v. Muskogee*, 119 F.3d 837, 842 (10th Cir. 1997). But how can we tell, after the fact, that a

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[5] In responding to the summary-judgment motion, Mr. Lance also submitted this deposition testimony from Stephen Sparks on the lack of training:

> Q. Are the individual jailers allowed to independently determine whether somebody is going through a serious medical event?
>
> A. No.
>
> Q. And why not?
>
> . . . .
>
> [A.]: Because we didn't have the proper training to determine whether it was a serious emergency or not.

Deposition of Stephen Sparks, *Lance v. Pittsburg Cty. Bd. of Cty. Comm'rs*, No. 6:17-cv-00378-RAW (E.D. Okla. 2019), ECF No. 172, Ex. 18, at 27. But this deposition excerpt does not appear in the appellate appendices.

problem would recur often enough to require training? *See Carr v. Castle*, 337 F.3d 1221, 1230 (10th Cir. 2003) (discussing "the omniscience of hindsight" to determine whether additional training could have helped police officers in an encounter). Given the difficulty of answering after the fact, the Second Circuit Court of Appeals has devised a three-part test:

1. [T]he county's policymakers know "'to a moral certainty' that [their] employees will confront a given situation."

2. "[T]he situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult."

3. "[T]he wrong choice . . . will frequently cause the deprivation of a citizen's constitutional rights."

Walker v. City of New York, 974 F.2d 293, 297–98 (2d Cir. 1992) (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989)); *see also Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 440 (2d Cir. 2009) (same test).

We are persuaded by the logic of this test, for it provides a sensible, workable way to determine whether a particular problem is likely to recur enough to alert county officials to an obvious deficiency in the training. In applying the three-part test, we conclude that a factfinder could reasonably infer deliberate indifference.

First, a factfinder could reasonably determine that county policymakers had known "to a moral certainty" that jail guards would need to independently assess detainees' medical conditions. The only medical

professional on site was a nurse, who worked 8–5 during the workweek. But medical emergencies will obviously occur sometimes on evenings and weekends, when the nurse was off duty. Given the inevitability of medical emergencies after hours, jail guards would frequently need to decide whether a medical condition warranted an after-hours call to the nurse.

Second, a factfinder could reasonably determine that training would have helped jail guards make the difficult decision of whether to call the nurse when she was off duty. The defendants themselves underscore the difficulty of deciding whether to call the nurse when detainees complain of pain after hours and on weekends. For example, Edward Morgan and Mike Smead argue on appeal:

> A generalized and inherently private and subjective sensation, like pain, is difficult to posit as a "condition" of which others are to be aware . . . . Pain is also variable with limited passage of time and variable with individuals, in terms of pain tolerance and anxiety or reaction to pain.

Appellees' (Edward Morgan & Mike Smead) Resp. Br. at 30.

Given the difficulty of assessing the seriousness of a pain complaint, jail guards were directed to notify the shift sergeant whenever a medical problem arose that might require the nurse's involvement. Appellant's App'x vol. III, at 644; *see also* Appellees' (Chris Morris, Daniel Harper, & Dakota Morgan) Resp. Br. at 50 (arguing on appeal that "jailers were required to submit [detainees'] medical request form[s] up their chain-of-command, i.e., to their shift sergeant").

But the sergeants themselves lacked training on how to make the difficult decision of whether to contact the nurse. For example, Mr. Smead was a sergeant who urged summary judgment based in part on his own lack of medical knowledge on whether a condition would constitute a medical emergency:

> [Mr. Smead][6] was a Sergeant, a shift supervisor jailer, and not a medical professional. He cannot be imputed with medical knowledge. Apart from the obvious medical emergencies, such as excessive bleeding or someone unconscious, it was not his decision whether something constituted a medical emergency or required medical care. He was not certain on the timeframe of when a persistent erection could become harmful or a medical emergency.

Appellant's App'x vol. I, at 200 (citation omitted). And Mr. Smead argues on appeal that "[i]n 2016, [he], as a layperson sergeant, did not have an informed or medically correct understanding of how long an erection could persist before it was harmful or a medical emergency." Appellees' (Edward Morgan & Mike Smead) Resp. Br. at 4–5 (citing Appellees' (Edward Morgan & Mike Smead) Supp. App'x at 133); *see also id.* at 20 (Mr. Smead arguing on appeal that he "did not know how long an erection could persist before it thereby became a medical emergency").

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[6] The motion says "Morgan" rather than "Smead," but the name reflects a typographical error. The motion was Mike Smead's, not Edward Morgan's. The same counsel represented both Mike Smead and Edward Morgan, and a similar statement appears in Edward Morgan's motion for summary judgment.

Third, a factfinder could reasonably determine that the jail guards' lack of training would frequently lead to disregard of serious pain complaints, violating detainees' constitutional right to medical care. Here, for example, Mr. Smead testified that he would regard a lengthy erection as a medical issue after one or two days. Mr. Smead's standard departs from the medically informed view, for the urologist testified that medical attention was necessary when Mr. Lance's erection had persisted for four hours. Even the former sheriff admitted that he would "want to joke about" a detainee's priapism lasting multiple days. Appellees' (Daniel Harper, Dakota Morgan, & Chris Morris) Supp. App'x at 97. A factfinder could thus reasonably infer that constitutional violations would frequently occur because jail guards would mistakenly choose not to call the nurse when detainees complain of a subjective sensation like pain.

For these reasons, we conclude that the district court erred in granting summary judgment to the sheriff on the failure-to-train claim.

B. The Policy Requiring Release Before Further Hospitalization

Mr. Lance also challenges the grant of summary judgment on his claim involving the county's policy on release before further hospitalization. Mr. Lance maintains that he presented evidence on each of the three elements: (1) a county policy or custom, (2) causation, and (3) deliberate indifference. *Waller v. City & Cty. of Denver*, 932 F.3d

1277, 1283–84 (10th Cir. 2019); *see* p. 22, above. The sheriff challenges the existence of evidence on each element.

For the first element, the plaintiff points to evidence that a physician directed guards to take Mr. Lance directly to a hospital about 90 miles away, where a urologist was waiting to operate. The county argues that this evidence conflicts with the physician's discharge form. But this conflict creates a fact issue, which we must resolve favorably to Mr. Lance on summary judgment. *See* Part 4, above.

Mr. Lance also presents evidence of the policy itself, explaining that the county would not allow transfers of detainees from one medical facility to another. The county instead required detainees to be returned to the detention center for release on their own recognizance.

For the second element, Mr. Lance observes that this policy delayed needed treatment from a specialist. After unsuccessful treatment at the local hospital, county employees returned Mr. Lance to the detention facility at about 1:00 p.m. Roughly 6 hours later, Mr. Lance finally arrived at the second hospital. Mr. Lance testified that his pain had intensified during this 6-hour period.

For the third element, Mr. Lance contends that the policy showed deliberate indifference. We agree. The factfinder could reasonably infer that delays in specialized treatment would inevitably result from the county's policy. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1318 (10th

Cir. 2002) (stating that a municipality is deliberately indifferent when it obtains actual or constructive notice that an action is substantially certain to cause a constitutional violation and the municipality chooses to disregard this risk).

The sheriff disagrees, arguing that the county had policies in place to ensure appropriate medical care from outside sources. For this argument, the sheriff cites testimony from the nurse that

- she did not believe that Mr. Lance had needed immediate transportation to the second hospital and
- officials decided on a case-by-case basis whether to release inmates from the jail.

The sheriff's argument does not support the grant of summary judgment. Although the policy may have been applied differently in other circumstances, a factfinder could reasonably attribute the delay in Mr. Lance's treatment to the decision to release him rather than take him to the second hospital. *See Ramos v. Lamm*, 639 F.2d 559, 577–78 (10th Cir. 1980) (upholding a finding of deliberate indifference based partly on deficiencies in the prison's resources for transporting prisoners to civilian medical facilities). Mr. Lance languished in pain while he waited for transportation to the second hospital. That pain resulted directly from the jail guards' refusal to drive Mr. Lance to the second hospital.

* * *

We conclude that the district court erred in granting summary judgment to the sheriff on the claim involving a policy requiring release before further hospitalization.

7. Conclusion

We affirm the grant of summary judgment to Edward Morgan in his individual capacity. But we reverse the grant of summary judgment on

- the individual-capacity claims against Mike Smead, Dakota Morgan, and Daniel Harper; and
- the official-capacity claim against Chris Morris.

FILED
United States Court of Appeals
Tenth Circuit

January 19, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DUSTIN LANCE,

Plaintiff - Appellant,

v.

CHRIS MORRIS, Sheriff of Pittsburg County, Oklahoma, in his official capacity; MIKE SMEAD, in his individual capacity; DAKOTA MORGAN, in his individual capacity; EDWARD MORGAN, in his individual capacity; DANIEL HARPER, in his individual capacity,

Defendants - Appellees,

and

MCALESTER REGIONAL HEALTH CENTER AUTHORITY, d/b/a McAlester Regional Hospital; BOARD OF COUNTY COMMISSIONERS OF PITTSBURG COUNTY, OKLAHOMA; STEPHEN SPARKS, in his individual capacity; JOEL KERNS, former Sheriff of Pittsburg County, in his individual capacity,

Defendants.

No. 19-7050
(D.C. No. 6:17-CV-00378-RAW)
(E.D. Okla.)

JUDGMENT

Before **MATHESON**, **BACHARACH**, and **McHUGH**, Circuit Judges.

This case originated in the Eastern District of Oklahoma and was argued by counsel.

The judgment of that court is affirmed in part and reversed in part. The case is remanded to the United States District Court for the Eastern District of Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk