No. 19-7050

IN THE

United States Court of Appeals for the Tenth Circuit

DUSTIN LANCE
Plaintiff-Appellant,
v.
CHRIS MORRIS, ET AL.
Defendants-Appellees.

On Appeal from the U.S. District Court for the
Eastern District of Oklahoma, No. CIV-17-378-RAW
Hon. Judge Ronald A. White

RESPONSE OF APPELLANT TO PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTRODUCTION

Rather than identify any broadly applicable law requiring *en banc* review, Petitioners throw a number of arguments at the wall to see what sticks. Nothing does. Although they try to disguise some arguments as "matters of exceptional importance," PFR 2, in truth they are simply unhappy with the panel's careful application of well-established law. This fact-bound case does not warrant rehearing.

I. The unanimous panel's qualified immunity analysis is firmly rooted in Tenth Circuit and Supreme Court jurisprudence. In arguing otherwise, Petitioners contend the panel should not have relied on cases involving medical personnel to clearly establish the law on deliberate indifference for laypersons. This argument fails not only because this Court has previously done exactly that, but also because the panel relied on cases involving *both* medical personnel and laypersons. Likewise, Petitioners' assertion that the law could not be clearly established absent a case about the exact same medical condition conflicts with longstanding circuit precedent.

II. The panel also correctly denied summary judgment on the failure-to-train claim. Petitioners begin by arguing that the panel's analysis was contrary to the evidence, but in so doing, misstate the evidence themselves. Moreover, their objection is not an established basis for *en banc* review. Second, Petitioners try—unsuccessfully—to create internal contradictions between Lance's claims, but the final resolution of those claims belongs to the jury. Third, Petitioners object to the

panel's use of a Second Circuit test, but this test does not differ in any meaningful way from the "plainly obvious" standard for municipal deliberate indifference, which is firmly grounded in Tenth Circuit law. Finally, Petitioners claim—for the first time—that municipal liability requires that the underlying constitutional violation be clearly established, but that argument is irrelevant here where the underlying violation *was* clearly established. It also contradicts Tenth Circuit precedent holding that the underlying violation need not be clearly established.

III. Finally, the panel correctly denied summary judgment on the County's "medical own recognizance" policy. Though Petitioners offer a two-paragraph objection to this holding at the end of the petition, they do not mention it *at all* in their Rule 35(b)(1)(B) statement, forgoing any pretense that their objections relate to jurisprudential uniformity or exceptional questions of law. They only raise arguments about the sufficiency of evidence that are not appropriate for *en banc* review.

This petition should be denied.

STATEMENT OF THE CASE

On December 16, 2016, Dustin Lance developed a dangerous and painful medical condition called priapism—a prolonged erection causing excruciating pain. Panel Opinion ("Op.") 2. If left untreated, priapism can cause permanent tissue damage and erectile dysfunction. Op. 4; Opening Br. 3. For three agonizing days,

Lance made "requests for medical care, reporting a persistent erection, an intense pain, and a need for medical treatment." Op. 4. He was in such severe and obvious pain that other detainees recognized his suffering and need for medical attention. Op. 13-14. Despite this, Petitioners did not call the nurse or otherwise seek medical care for Lance, leaving him in pain for three days while his condition worsened. Op. 3-4.

For much of that time, the jail had no medical professional on site. This is because the jail only employed a single nurse from 8-5 on weekdays and had no on-site medical staff during weeknights and weekends. Op. 25-26. Despite "the inevitability of medical emergencies after hours" when the nurse was off duty, the jail guards "lacked training on how to make the difficult decision of whether to contact the nurse." Op. 26-27.

On the fourth morning of Lance's condition, the nurse came on duty, saw that Lance's penis "might be permanently damaged," and promptly sent him to a local hospital. Op. 4. At the hospital, a doctor instructed that he be taken "directly" to another hospital for surgery. Op. 29. Instead, Lance was taken *back* to the jail and released per the jail's "medical own recognizance" policy. Op. 4. This policy prohibited "transfers of detainees from one medical facility to another" and "instead required detainees to be returned to the detention center for release on their own recognizance." Op. 29. This policy forced Lance to find his own way to the second

hospital and "delayed needed treatment from a specialist." *Id.* As a result of all these delays, Lance "suffered permanent injuries, which will probably include impotence for the rest of his life." Op. 4.

ARGUMENT

I. The Panel Correctly Denied Qualified Immunity To Petitioners Harper And Morgan.

Petitioners disagree with the panel's clear and correct qualified immunity analysis, but their concerns are untethered from both the panel decision and qualified immunity jurisprudence. Their arguments do not warrant *en banc* review because (1) the Tenth Circuit has previously relied on cases involving medical professionals to clearly establish the law for laypersons and, in any case, the panel relied on cases involving *both* medical personnel and laypersons, and (2) Supreme Court and Tenth Circuit precedent make clear that the panel was not required to identify a prior case about priapism to find the law clearly established.

Petitioners first argue that "two of the cases which the panel relied on for support of its decision . . . involved medical professional[s] and, therefore, cannot be relied [*sic*] as clearly established law for lay persons." PFR 6. But this argument was already raised and rejected: the panel explained that "it's not fatal that some of the cited opinions involved medical professionals" as "those opinions do not vitiate the duty of lay officials." Op. 20. Indeed, this Court has applied the same deliberate indifference analysis to both laypeople and medical professionals in the prison

context when they serve as gatekeepers to additional medical care and the plaintiff's medical need is exceedingly obvious. For instance, in *Sealock v. Colorado*, a lay official was found deliberately indifferent when he "refused to drive [the plaintiff] to the hospital" and a medical prison official was found deliberately indifferent when he failed to "summon an ambulance." 218 F.3d 1205, 1210-12 (10th Cir. 2000). These analyses are nearly identical because, despite different levels of medical training, both officials played the same gatekeeping role: their only responsibility in the face of an obvious medical need was connecting the plaintiff to medical care. This logic undergirds other decisions in which this Court has done *exactly* what Petitioners object to here: rely on cases about medical professionals to clearly establish law in cases about non-medical jail officials. *See, e.g.*, *Quintana v. Santa Fe Cnty. Bd. of Comm'rs*, 973 F.3d 1022, 1033 (10th Cir. 2020).

In addition to relying on two cases involving medical professionals, the panel also relied on four cases involving laypersons when finding the law clearly established. *See* Op. 20-21 (relying on *McCowan v. Morales*, 945 F.3d 1276 (10th Cir. 2019), *Olsen v. Layton Hills Mall*, 312 F.3d 1304 (10th Cir. 2002), and *Sealock*); Op. 21 (relying on *Rife v. Okla. Dep't of Pub. Safety*, 854 F.3d 637 (10th Cir. 2017) by reference to discussion at Op. 13-14). Thus, the panel's reliance on two cases about medical professionals does not change the analysis—the law was clearly established even if those cases were removed from the equation.

Petitioners next argue that the law was not clearly established because "none of the cases relied upon by the panel involved complaints of pain associated with a persistent erection." PFR 6-7. But this level of particularity is unnecessary for the law to be clearly established. Petitioners badly misread Supreme Court precedent and ignore this Court's recognition that the clearly established requirement "does *not* mean that there must be a published case involving identical facts." *York v. City of Las Cruces*, 523 F.3d 1205, 1212 (10th Cir. 2008) (emphasis added); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) ("[T]his Court's caselaw does not require a case directly on point for a right to be clearly established.") (quotation marks and citation omitted); *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (per curiam) (reaffirming that a prior case with identical facts is not required to defeat qualified immunity).

Moreover, accepting Petitioners' argument that the law is not clearly established absent a prior case about the exact same medical condition would throw this Court's decisions into disarray. Just last year, this Court found that a jail official who took no action in the face of "bloody vomiting . . . violated clearly established law." *Quintana*, 973 F.3d at 1033. In so holding, it relied on two cases where jail officials ignored reports of chest pain—a completely different medical condition. *Id.* Likewise, in *McCowan*, this Court relied on a prior case about obsessive compulsive disorder to deny qualified immunity to an officer who delayed medical care for a

shoulder injury; even though the prior case concerned a different medical condition, it was "sufficiently analogous" to put the officer on notice that his conduct was unconstitutional. *McCowan*, 945 F.3d at 1293. Petitioners' condition-matching proposal thus finds no support in Tenth Circuit caselaw, and to succeed they would need this Court to reverse not only the panel decision but also depart from several of its prior published cases. Ironically, it is therefore Petitioners' position that would undermine the uniformity of this circuit's decisions.

II. The Panel Correctly Denied Summary Judgment On The Failure-To-Train Claim.

The panel correctly held that a reasonable jury could find the County liable for failing to train employees on how to properly handle medical crises. Op. 22-23. The County's arguments to the contrary should be rejected because (1) the record supports the panel decision and, in any case, disputes about the sufficiency of evidence are not appropriate bases for rehearing *en banc*, (2) the panel decision did not create an internal contradiction and, even if it did, it must be resolved by a jury, (3) the Second Circuit test applied by the panel comports with Tenth Circuit precedent; and (4) municipal liability does not require that the underlying constitutional violation be clearly established and, in any case, the panel found that the underlying constitutional violation *was* clearly established here.

A. The panel decision is well supported by the record and, in any case, Petitioner's objection is not an appropriate basis for rehearing.

Petitioners argue that the panel's municipal liability analysis was "contrary to the evidence." PFR 7-8. Not only do Petitioners misstate the evidence, but this type of fact-specific dispute does not merit *en banc* review.

Petitioners contest the panel's recognition that "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." Op. 23; *see* PFR 8. But this finding is well-supported by the record. As the panel recognized, three jail officials expressly admitted that they received no such training. Op. 23-24 & n.5. When asked whether he was trained to refer people with serious medical needs to medical providers, Mike Smead said "no" and "[n]ot that I recall." A.591-92. Similarly, Officers Daniel Harper, Edward Morgan, and Stephen Sparks testified that they were not trained to determine when medical problems were serious enough to constitute medical emergencies. Op. 23-24 & n.5; A.645. A jury could conclude—based on testimony that there was no training—that there was, in fact, no training. Op. 24.

In any case, "[a]ttempts to overcome deficiencies in the record . . . will not prompt a change of mind," and "a petition for rehearing based on [such a] premise[] is without merit." *Westcot Corp. v. Edo Corp.*, 857 F.2d 1387, 1388 (10th Cir. 1988) (internal quotation marks omitted). A petition for rehearing *en banc* should only be granted if doing so is necessary to "maintain uniformity of the court's decisions" or

if "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a); *see also Day v. Bond*, 511 F.3d 1030, 1032 (10th Cir. 2007) (concluding that the "Plaintiffs' arguments do not justify rehearing because our decision does not conflict with prior decisions of the Supreme Court, the Tenth Circuit, or our sister circuits"). Petitioners' fact-bound quarrel presents neither: it is no more than a disagreement with the panel's interpretation of the record and thus falls squarely outside the domain of *en banc* review.

B. The panel decision did not create an internal contradiction and, even if one exists, it must be resolved by the jury.

Petitioners next argue that Lance cannot claim that officers knew he was at risk of harm while also faulting the municipality for failing to train staff on when they must call a medical professional. PFR 10. This is incorrect. An officer who knows that a detainee is at risk of serious harm may nonetheless lack the training to handle that risk appropriately. Training makes the officer's obligation clear. Here, however, as the panel explained, "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." Op. 23. Therefore, the supposed contradiction that Petitioners consider fatal to Lance's failure-to-train claim is no contradiction at all.

In any case, even if the claims are inconsistent, it does not matter at the summary judgment stage. At this stage, the court's role is "not [] to weigh the evidence and determine the truth of the matter but to determine whether there is a

genuine issue for trial." *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1251 (10th Cir. 2015) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). The panel did just that. It held that the County was not entitled to summary judgment on the failure-to-train claim because there was sufficient evidence for a factfinder to determine that the "lack of training would frequently lead to disregard of serious pain complaints." Op. 28. The panel independently held that there was sufficient evidence for a reasonable factfinder to infer that Officers Mike Smead, Dakota Morgan, and Daniel Harper were aware of a substantial risk of serious harm and ignored it. Op. 14-17. Accordingly, there is sufficient evidence for a jury to decide both claims. And if there is any tension between the two claims, that too is for a jury to decide. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805 (1999) (explaining that parties are permitted "to state as many separate claims or defenses as the party has regardless of consistency" (citation and quotation marks omitted)).

C. The panel's municipal deliberate indifference analysis was correct.

Petitioners then take issue with the panel's municipal deliberate indifference analysis. PFR 11-12. Petitioners first contend that the panel erred in holding that a factfinder could reasonably infer municipal deliberate indifference absent a pattern of unconstitutional behavior. PFR 12. But Petitioners *themselves* recognize that municipal deliberate indifference "may be found absent a pattern of unconstitutional behavior . . . where a violation of federal rights is a highly predictable or plainly

obvious consequence of a municipality's action or inaction." PFR 11-12 (quoting *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1284 (10th Cir. 2019)). And this "plainly obvious" theory of deliberate indifference is the one on which Lance has always relied. *See* Opening Br. 49-50; Reply Br. 22-23. Petitioners' emphasis on the lack of a pattern of unconstitutional behavior, then, is beside the point.

Petitioners also oppose the panel's application of a Second Circuit test from *Walker v. City of N.Y.*, 974 F.2d 293 (2d Cir. 1992). Under this test, a court asks whether there is sufficient evidence that (1) the county's policymakers knew "to a moral certainty" that their employees would confront a given situation, (2) the situation presents a difficult choice that training would make less difficult, and (3) the wrong choice would frequently cause the deprivation of constitutional rights. Op. 25. This test does not differ in any meaningful way from the "plainly obvious" standard for deliberate indifference, which is firmly grounded in Tenth Circuit law. Put another way, knowing something "to a moral certainty" under the Second Circuit test is equivalent to it being "plainly obvious" under Tenth Circuit precedent. In fact, the panel explained that the Second Circuit test is merely "a sensible, workable way" to determine whether a municipality is deliberately indifferent via the plainly obvious route, *id.*—a route this Court has long recognized.

Perhaps recognizing this, Petitioners do not appear to challenge the use of the Second Circuit test itself—just how the panel applied it. *See* PFR 1 (taking issue

with *Walker* "as applied here"); *see also* PFR 11 (similar). Specifically, in applying the Second Circuit test and asking whether the County's policymakers knew "to a moral certainty" that their employees would confront a given situation, Petitioners say the panel should have considered whether jail employees were likely to confront priapism specifically rather than medical emergencies more generally. PFR 12. In their view, not limiting the question to priapism would "collapse municipal liability into *respondeat superior* liability" and "would effectively result in findings of deliberate indifference for all cases." PFR 11-12. But the slippery slope is not so slippery. The panel's deliberate indifference holding was closely tied to the specific facts of this case: the facility only had a medical professional on site from 8-5 during the workweek and, even though medical emergencies will "obviously occur sometimes on evenings and weekends," the sergeants testified they were not trained to handle such emergencies in the nurse's absence. Op. 25-27.

D. Petitioners' argument that clearly established law is a prerequisite to *Monell* liability is irrelevant and directly contradicts this Court's precedent.

Finally, Petitioners argue that courts may not impose municipal liability when the individual officer who commits the underlying constitutional violation successfully raises a qualified immunity defense. PFR 13. But this argument is completely irrelevant to this case, was not raised prior to this petition, and directly contradicts controlling Tenth Circuit precedent.

First, Petitioners' argument is irrelevant because the panel determined that the underlying constitutional violation *was* clearly established and that the individual defendants were *not* entitled to qualified immunity. Op. 17-21. So, even if this Court granted *en banc* review and overturned circuit precedent to hold that an underlying constitutional violation must be clearly established for municipal liability, it would not change the outcome of this case unless the *en banc* court also revisited the panel's accurate and fact-bound conclusion that the individual defendants were not entitled to qualified immunity. *En banc* review should be rejected on this basis alone.

Second, Petitioners raise this argument here for the first time. Unsurprisingly, this Court has declined to "rehear" arguments that were not previously made, stating that this is not an appropriate basis for *en banc* review. *See Grubb v. FDIC*, 833 F.2d 222, 231 (10th Cir. 1987) ("We decline to address an issue not raised prior to the petition for rehearing.").

Third, the Tenth Circuit has repeatedly rejected the proposition that a violation of clearly established law is required for municipal liability. *See Lynch v. Barrett*, 703 F.3d 1153, 1164 (10th Cir. 2013) ("There is nothing anomalous about allowing a suit against the city to proceed when immunity based on a lack of clearly established law shields the individual defendants." (citations, quotation marks, and alterations omitted)); *Cox v. Glanz*, 800 F.3d 1231, 1256 (10th Cir. 2015) (similar); *Myers v. Okla. Cnty. Bd. of Cnty. Comm'rs*, 151 F.3d 1313, 1317 (10th Cir. 1998)

(similar). Most recently, in *Quintana v. Santa Fe Cnty. Bd. of Comm'rs*, a pretrial detainee died from heroin withdrawal while in custody, and this Court dismissed claims against every individual defendant who handled the decedent's intake because no clearly established law barred their conduct. 973 F.3d 1022, 1033-34 & n.5 (10th Cir. 2020). Nonetheless, it found that the complaint stated a claim against the municipality for its deficient medical intake protocol. *Id.* at 1034. Indeed, the Tenth Circuit's position on this question is so clear that Petitioners cited only out-of-circuit cases to support their contrary view of the law. PFR 14-15.

In sum, Petitioners ask this Court to grant *en banc* review and overturn longstanding precedent on this issue even though doing so would not alter the outcome of this case. The Court should reject this request.

III. The Panel Correctly Denied Summary Judgment On The "Medical Own Recognizance" Policy.

The panel properly denied summary judgment on the County's "medical own recognizance" policy as there was sufficient evidence for a factfinder to determine that it caused several additional hours of pain and suffering. Op. 30. Petitioners raise a half-hearted, two-paragraph objection to this holding at the end of their petition, asserting that it was "without factual support" because (1) the additional delay in care was attributable to Lance and (2) the jail nurse testified the policy was not mandatory. PFR 15-16. But these objections have nothing to do with jurisprudential uniformity or an exceptional question of law. Indeed, Petitioners do not even

mention them in their Rule 35(b)(1)(B) statement. We nonetheless address them here.

With respect to the first assertion, Petitioners suggest that Lance shoulders the blame for not getting treatment sooner. PFR 15-16. Petitioners may argue this theory before a jury, but as the panel explained, there is sufficient evidence in the record for a reasonable factfinder to determine that Lance spent several extra hours in pain due directly to the policy. Op. 30. As the panel noted, after Lance was seen at the local hospital and jail officials were instructed to transport Lance "directly" to another hospital for surgery, it was the policy that instead dragged Lance back to the jail and required him to sit through a release process. Op. 29. And when Lance was finally permitted to leave the jail, it was the policy that denied him immediate transportation, instead forcing him to find alternate means of travel at the eleventh hour. Op. 29-30. The panel relied on this evidence to conclude that there was a genuine jury issue. Petitioners simply rehash old arguments without providing the Court any real reason to revisit the panel's conclusion.

Petitioners' second assertion is that, according to Nurse Crawford's testimony, inmates are "usually given a medical OR for any hospitalization," but that the policy is not mandatory. PFR 16. But Petitioners ignore conflicting testimony from Sheriff Kerns and Officer Sparks stating the opposite. A.537, 655. Sheriff Kerns testified that the jail's policy prevented inmates from being released directly

from one hospital to another. A.537. And Officer Sparks testified that inmates were required to return to the jail before going to any other facilities. A.655. Thus, the panel properly determined that Lance "presents evidence" that the county "required detainees to be returned to the detention center for release on their own recognizance." Op. 29. The invocation of contrary testimony from Nurse Crawford merely presents a classic dispute of material fact that prevents the grant of summary judgment. Thus, by restating testimony from one person and ignoring testimony from two others, Petitioners incorrectly claim that the panel erred in its reading of the record.

Petitioners do not point to any legitimate reasons for *en banc* review of the "medical own recognizance" holding. Their qualms are no more than dissatisfaction with the panel's holdings on the sufficiency of the evidence and do not merit *en banc* review.

CONCLUSION

Petitioners do not raise any potential conflicts with decisions by the Tenth Circuit or the Supreme Court, nor do they present any exceptional questions in need of resolution. The petition for rehearing *en banc* should be denied.

Dated: March 5, 2021

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) because it contains 3,889 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: March 5, 2021

s/ Megha Ram
Megha Ram

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

a. all required privacy redactions have been made;

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Dated: March 5, 2021

s/ Megha Ram
Megha Ram

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, I electronically filed the foregoing *Response of Appellant to Petition for Rehearing En Banc* with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: March 5, 2021

s/ Megha Ram
Megha Ram