Appeal No. 19-7050

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DUSTIN LANCE
Appellant-Plaintiff,
v.
CHRIS MORRIS, *et al.*
Appellees-Defendants.

RESPONSE BRIEF OF APPELLEES EDWARD MORGAN AND MIKE SMEAD

Appeal from the United States District Court for the Eastern District of Oklahoma
Honorable Ronald A. White, Case No. CIV-17-378-RAW

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- March 3, 2020 –

PURSUANT 10TH CIR. R. 28.2(C)(4),
APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PRIOR OR RELATED APPEALS

Pursuant to 10TH CIR. R. 28.2(C)(1), Appellees E. Morgan and Smead state this is the first appeal in this matter. There are no prior or related appeals.

ORAL ARGUMENT STATEMENT

Pursuant to 10TH CIR. R. 28.2(C)(4), Appellees E. Morgan and Smead state that oral argument from the parties is not necessary for the Court to resolve the issues in this case.

RESPONSE BRIEF FOR APPELLEES EDWARD MORGAN AND MIKE SMEAD

Appellees Edward Morgan and Mike Smead hereby respond to the Opening Brief of Appellant, Dustin Lance ("Appellant").

I. STATEMENT OF THE ISSUES

1. Did the District Court err in finding Edward Morgan was entitled to judgment as a matter of law under the qualified immunity framework, as focused on the subjective awareness component of deliberate indifference.

2. Did the Court err in finding that Morgan was also entitled to qualified immunity relative to the second, "clearly established" prong of the qualified immunity assessment.

3. Did the Court err in finding that Plaintiff had shown a triable issue on Smead's deliberate indifference or that he was entitled to qualified immunity relative to the second, "clearly established" prong.

II. STATEMENT OF THE CASE/ STATEMENT OF FACTS

On November 11, 2016, Lance was booked into the Pittsburg County Criminal Justice Center (hereinafter Pittsburg County Jail or "PCJ"). [Appx Vol. I, 274-276; Appx. Vol. III, 761; Supp. Appx. 68, 72]. When Lance arrived at PCJ on November 11, 2016, he was not taking or prescribed any medications. [Appx. Vol. III, 761; Supp. Appx. 68-71]. Moreover, before he was placed in general population, a medical questionnaire was completed for and signed by Lance. [Appx. Vol. III, 761; Supp. Appx. 45-47, 72-73]. As shown in that medical questionnaire, Lance indicated he was not currently taking any prescription

medications or medications otherwise prescribed by a doctor nor was he aware of any medical problems PCJ should know about. [Appx. Vol. III, 761; Supp. Appx. 45-47, 72-73]. Lance was eventually placed in A-Pod, per his request, where he was housed until his release. [Appx. Vol. III, 762; Supp. Appx. 74-75].

At no point during Lance's incarceration at PCJ was Lance prescribed Trazadone, nor was Lance provided Trazadone by PCJ staff. [Appx. Vol. II, 407, 424-431; Supp. Appx. 77-78]. Yet, at around 5:00 or 6:00 p.m. on December 15, 2016, Lance took approximately three-fourths of a Trazadone pill. [Appx. Vol. II, 407, 424-431; Appx. Vol. III, 762; Supp. Appx. 77, 79]. Lance knew he was taking Trazadone and knew it was against PCJ rules to take another inmate's medication. [Appx. Vol. I, 426; Supp. Appx. 89].

At some point after taking the Trazadone on December 15, 2016, 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. [Appx. Vol. II, 431; Appx. Vol. III, 763]. At this point, Lance was not concerned about the erection and did not tell anyone about his condition. [Appx. Vol. I, 431-432, 440-441; Appx. Vol. III 763]. Lance awoke one or two more times in early morning hours of December 16, 2016, still with an erection, but was not alarmed. [Appx. Vol. I, 432, 440-441; Appx. Vol. III 763-4]. The last time he awoke which was some time before breakfast on December 16, 2016, and his erection was still present [Appx. Vol. I, 432, 440-441;

Appx. Vol. III 763-4]. At this point he became concerned.

Lance testified that at around breakfast time on December 16, 2016, he used the intercom inside his cell and allegedly informed PCJ sergeant Edward Morgan[1] only that he had taken "that pill I found on the floor" the previous night and presently had an erection during the intercom call; notably, he did not tell Edward Morgan how *long* he had had an erection and claimed he had taken ibuprofen, as that was the only pill he was supposed to be taking. [Appx. Vol II, 427-435, 440, 467; Appx. Vol III, 763-764; Supp. Appx. 80, 83.]. Lance did not speak with Morgan in person, just over the intercom. [*Id.*; Morgan and Smead Supplemental Appendix 089, hereinafter "M&S Supp. Appx."]. PCJ logs show breakfast trays were passed at 04:55 a.m. on December 16, 2016. [M&S Supp. Appx. 072]

Although Lance was confused, during his deposition, about whom he spoke with during this intercom call, he eventually testified it was Edward Morgan. [Appx. Vol II, 427-435, 440]. Lance was very clear that he only communicated with Edward Morgan <u>one single time</u> during the whole weekend during his ordeal, that being the communication through the intercom around 05:00am on December 16, 2016. [Appx. 440]. Morgan worked the nighttime shift at the PCJ, from 6pm from 6am. [M&S Supp. Appx. 038, 057]. So he was not on duty during the day-time over this December 2016 weekend at the PCJ. [*Id.*]

[1] Edward Morgan was known as Tyler Morgan at the PCJ, but will be referred to as Edward Morgan on appeal for the sake of consistency and clarity.

Defendant Smead was a Sergeant who worked the day shift, 6am to 6pm, at the PCJ in December 2016. [M&S Supp. Appx. 126, 141]. However, he only worked Friday 16th and Saturday the 17th; he did not work on Sunday the 18th. [M&S Supp. Appx. 126, 141]. Plaintiff alleges that he was telling inmates and officers during the weekend about his erection and desire to see the nurse, but he did not get into what he had taken or what had led to it. [Appx. Vol. II, 450-51; Supp. Appx. 85-86]. Indeed, the PCJ nurse, on Monday December 19, 2016, had to drag it out of Lance what drug he had taken, as he did not want to get himself or others into trouble. [Appx. Vol. II, 406, 446, 518; Supp. App. 117-119].

The PCJ nurse was not on duty at the facility over the weekend. [Appx. Vol. II, 546]. Unbeknownst to him at the time or to PCJ jailers, 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 go away. [Appx. Vol. I, 270-273, 281; Appx. Vol. II, 406, 408-409, 455-458; Appx. Vol. III, 764]. Lance claims his erection lasted from roughly midnight on December 16, 2016 until he was taken to the emergency room on Monday December 19, 2016, after he had seen the nurse that morning. [Appx. Vol. I, 29-33, 270-273; Appx. Vol. II, 424-25, 427-428, 456-458; Appx. Vol. III 763]. Before this period, an inmate had not experienced a persistent erection at PCJ before. [Supp. Appx. 97, 112, 137-138, 148, 212]. In 2016, Smead, 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. [M&S Supp. Appx. 133].

Under FRAP 28(i), these Appellees hereby adopt and incorporate Appellees Morris, Harper and Dakota Morgan's Statement of the Case relative to the PCJ's Nurse seeing Lance on December 19, 2016 and events that occurred thereafter in the course of Lance's medical release and treatment process.

III. SUMMARY OF ARGUMENT

With various Defendants, the District Court correctly framed the spare facts pertaining to Lance's one, intercom communication with Defendant Edward Morgan. From there, under the qualified immunity burden shifting framework, the Court properly construed those facts on the issue of Morgan's alleged deliberate indifference, keyed to the proper time period. *Sanchez v. Bd. of Cty. Commissioners of Dona Ana Cty., New Mexico*, No. CV 05-1013 WPL/WDS, 2006 WL 8443754 (D.N.M. July 6, 2006)(unpub) states "[t]he subjective inquiry is limited to consideration of the prison official's knowledge of the symptoms displayed by the inmate at the time he has contact with the inmate." *Id.* (emphasis added)(citing *Mata v. Saiz*, 427 F.3d 745, 753 (10th Cir. 2005)). There is a paucity of facts, as borne out by the record, and the meager facts would not have apprised Morgan of Lance then suffering a serious medical condition at approximately 5:00am on December 16, 2016. Adequate facts are indispensable for a court to

deem a jailer had drawn the required inference under prevailing law. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). *Miller v. Calhoun County*, 408 F.3d 803, 821 (6th Cir. 2005) provides:

> '[k]nowledge of the asserted serious needs or **of circumstances clearly indicating the existence** of such needs, is essential to a finding of deliberate indifference.'… ('[T]he official must both be **aware of facts from which the inference** could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.)…. Lindsay would have had to **draw the inference that a substantial risk of serious harm existed before** a jury could be permitted to consider whether her failure to act amounted to deliberate indifference.

(emphasis added). The District Court correctly found Edward Morgan was not deliberately indifferent and granted him judgment on this claim.

Plaintiff's Opening Brief purports to tell "the full story" and import facts into the record where there are none. [Opening Brief, ECF pg. 31]. However, Plaintiff takes liberties with the idea of drawing inferences from established, record facts, and generates a series of "could have beens" in an attempt to create bridges to desired ends. This approach is not consonant with governing evidentiary principles and authorities; nor with the factual record in this matter; nor with the obligations upon a non-moving litigant for the summary judgment process.

Further, Plaintiff delves into matters with Edward Morgan which were either not developed below with respect to him, and his role and time period, or not even mentioned at all. As such, appellate review of these matters has been waived. *Simpson v. Carpenter*, 912 F.3d 542, 567, Fn. 10 (10th Cir. 2018). See also *Lipin v.*

Wisehart, 760 F. App'x 626, 633 (10th Cir. 2019), which states:

> *Margheim v. Buljko*, 855 F.3d 1077, 1088 (10th Cir. 2017) ("Normally when a party presents a **new argument on appeal** and fails to request plain error review, we do not address it."); *Richison v. Ernest Grp., Inc*., 634 F.3d 1123, 1128, 1130-31 (10th Cir. 2011) (explaining that the failure to argue plain error 'marks the end of the road for an argument for reversal' presented for the first time on appeal).

(emphasis added). Plaintiff does not argue for plain error.

Even if the Court should elect to consider them here, the new scenarios are a train of infirm inferences that extend at several removes away from any valid, record fact. This kind of "it's possible" theorizing should not find traction or disturb the District Court's correct ruling as to Edward Morgan. He was not deliberately indifferent to Lance's serious medical needs. In the alternative, should this Court not view the subjective awareness issue similarly, Morgan would still be entitled to qualified immunity on the second, "clearly established" prong.

The District Court's factual findings as to Smead do not rise to the showing required under qualified immunity burden shifting to support his having subjective awareness to premise deliberate indifference to Lance's serious medical needs. Smead's awareness and role rise to, *arguendo*, a heightened negligence, at most.

Both Morgan and Smead are entitled to qualified immunity on the second prong. Plaintiff has failed to identify a qualifying case that would have clearly established, as of December 16, 2016, that Morgan's and Smead's actions violated Lance's rights in the circumstances unfolding at the PCJ in December with Lance.

ARGUMENT AND AUTHORITIES

I. THE COURT BELOW WAS CORRECT AS TO THE LACK OF FACTS TO SUPPORT SUBJECTIVE AWARENESS OF EDWARD MORGAN

The deliberate indifference standard is well known to this Court. It "contains both an objective and a subjective component." *Blackmon v. Sutton*, 734 F.3d 1237, 1244 (10th Cir. 2013). Subjectively, the individual defendant must "know[ ] of and disregard[ ] an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Plaintiffs do not prove deliberate indifference by merely showing that the subject individuals failed "to alleviate a significant risk that [they] should have perceived but did not." *Farmer v. Brennan*, 511 U.S. 825, 826 (1994)

A. Sufficient Facts Must Exist At The Time Of The Pertinent Interaction To Substantiate A Deliberate Indifference Claim

The District Court was correct to focus on what the evidentiary record, construed in Plaintiff's favor, contained as to the universe of facts allegedly known to Edward Morgan when he was speaking to Lance over the intercom around breakfast-time on December 16, 2016. [Appx. 781-82]. Importantly, Plaintiff only claims to have spoken with Edward Morgan **one time**, though the audio intercom, at the PCJ during the *entire episode* with his condition. The Court noted, "Plaintiff claims to have spoken to Edward Morgan only the one time in jail via the intercom around breakfast time on December 16, 2016. Docket No. 130, UMF #17

(admitted in Plaintiff's response thereto)." [Appx. 777, ¶ 87]. Lance did not see Morgan physically at this point. [M&S Supp. Appx. 089]. Of this one, intercom communication, the District Court stated:

> There is no evidence that Plaintiff told Edward Morgan when the erection began, how long it had lasted, or that he was in considerable pain. Plaintiff has not presented evidence sufficient to show that Edward Morgan was deliberately indifferent to his serious medical needs.

[Appx. 782]. The Court's construction of the facts and its conclusion was correct.

Simply put, the material facts are consequentially lacking as to Edward Morgan. Despite considerable discovery undertaken, there is not record evidence to support the subjective component of deliberate indifference as to Defendant Edward Morgan. This component's test requires that, before liability can be imposed, a prison official "must **both be aware of facts from which** the inference could be drawn that a substantial risk of serious harm exists, and he must **also draw** the inference." *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir.1998) (emphasis added). *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

The facts known to a jailer, at the relevant time, frame the inquiry. *Sanchez v. Bd. of Cty. Commissioners of Dona Ana Cty., New Mexico*, No. CV 05-1013 WPL/WDS, 2006 WL 8443754 (D.N.M. July 6, 2006)(unpub) notes that a jailer "may be liable if 'he delays or refuses to fulfill that gatekeeper role **due to deliberate indifference**.'" *Id.* at *3 (emphasis added) (quoting *Sealock*, 218 F.3d at 1211). Importantly, "[t]he subjective inquiry is limited to consideration of the

prison official's **knowledge** of the symptoms displayed by the inmate **at the time he has contact with the inmate**." *Id.* (emphasis added)(citing *Mata v. Saiz*, 427 F.3d 745, 753 (10th Cir. 2005)). Addressing the same temporal focus as applied to medical professionals, *Spencer v. Abbott*, 731 Fed.Appx. 731, 745 (10th Cir. Dec. 5, 2017)(unpub) states:

> We limit our subjective inquiry 'to consideration of the [medical professional's] knowledge at the time he prescribed treatment for the symptoms presented, *not to the ultimate treatment necessary*,'…and the fact that Mr. Maguire's symptoms could have also pointed to other, more serious conditions fails 'to create an inference of deliberate indifference" on Mr. Abbott's part...

(quoting *Self v. Crum*, 439 F.3d 1227 (10th Cir. 2006))(emphasis original). See *supra, Mata*, 427 F.3d 745 ("**Events occurring subsequent** to Ms. Weldon's complete denial of medical care to Ms. Mata **have no bearing** on whether Ms. Weldon was deliberately indifferent **at the time** she refused to treat Ms. Mata.") (emphasis added). It is the "knowledge at the time" that is at issue.

Plaintiff must show that the knowledge at the time, possessed by Mr. Morgan, is sufficient to demonstrate actual awareness of a serious medical need. Plaintiff cites *Sealock v. Colorado*, 218 F.3d 1205 (10th Cir. 2000) and *Mata v. Saiz*, 427 F.3d 745, 752 (10th Cir. 2005) for the proposition that Morgan failed to fulfill his gatekeeper role. Yet the gatekeeper category does not dispense with the requirement to find an individual, whether gatekeeper or not, was subjectively aware of a serious medical need of the particular plaintiff. Rather, it is a way of

characterizing a jailer and examining his action in context of a medical delivery system, but the awareness step is primary. The *Sealock* Court did not ignore the first step, subjective awareness. *Sealock* stated, "The **facts** also demonstrate for summary judgment purposes that **Barrett knew of** and disregarded the excessive risk to appellant's health that could result from the delay." *Id.* at 1210 (emphasis added). A Plaintiff must prove "a 'gate keeping' prison official 'den[ied] or delay[ed] [him] access to medical care' in **conscious disregard** of a substantial risk of serious harm." *Blackmon v. Sutton*, 734 F.3d 1237 (10th Cir. 2013)(quoting *Estelle v. Gamble*, 429 U.S. 97, 105-105 (1976) (emphasis added)).

Sealock and later gatekeeper cases are *markedly different* in what their jailers saw and knew, factually, from the spare information Lance allegedly told Morgan during one communication over the intercom. Specifically, the overt presentation of visible symptoms and/or a prior history, to pair with detainee complaints, is critical in these cases. For instance, *Sealock* states:

> There is evidence that Barrett was informed that appellant might be having a heart attack, and that h**e was present when appellant displayed symptoms consistent with a heart attack**. Barrett allegedly refused to drive appellant to the hospital, and **told appellant not to die** on his shift.

Id. at 1210 (emphasis added). *Sealock* states, "Barrett observed appellant at a time when he was very pale, sweating and had been vomiting." *Id.* There is no *even colorable* analog with Morgan. Lance has admitted he only spoke with him over the intercom one time. [Appx. 162 ¶ 17; Appendix 300, ¶ 17; Appx. 777, ¶ 87].

In *McCowan v. Morales*, 945 F.3d 1276 (10th Cir. 2019), the plaintiff McCowan was pulled over by a police officer. Notably, "McCowan …informed Officer Morale[s] that he had a pending social security disability claim for a neck and shoulder injury…" *Id.* at 1280. The officer cuffed him in the back; did not seatbelt him, and allegedly drove roughly to the police station. During the ride, McCowan complained of the speed and the officer heard this, laughed, and presumably heard McCowan bouncing around in the back seat. On the subjective prong concerning its officer's awareness, the 10th Circuit thus stated:

> McCowan attested that he told the officer that he had **previously injured his shoulder** and that he **re-injured that shoulder during the ride** to the police station, and then at the police station McCowan **repeatedly told** the officer that he was in excruciating shoulder pain—yet Officer Moralez **disregarded all of that** information in delaying McCowan medical care.

Id. at 1292 (emphasis added). Here, as against *McCowan*, there is no viable comparison as respects jailer knowledge of circumstances at the key time at which subjective awareness is to be assessed.

B. The Facts Keyed to Edward Morgan are Spare and Insufficient

The District Court correctly found that the only facts relative to Edward Morgan's awareness, at approximately 05:00am on December 16, were "that he took a pill and had an erection" at the point in time when Lance was talking with Morgan. [Appx. 782; Appx. 162-63, ¶¶ 19]. Those spare facts cannot rise to a level which would have communicated, to Morgan or to any jailer, a serious

medical need and substantial risk of serious harm at that moment. Indeed, the Court below noted, "There is no evidence that Plaintiff told Edward Morgan when the erection began, how long it lasted, or that **he was in considerable pain**." [Appx. 782](emphasis added). The latter factor, considerable pain, is notable and significant both for the deliberate indifference and qualified immunity assessments, given Plaintiff's arguments in his Opening Brief. The absence of all these factors, in total, certainly precludes any finding of subjectively awareness of Morgan, as the Court indicated in the next sentence. *Id.* However, the absence of even the first two factors would have the same result relative to a serious medical need.

Plaintiff has not and cannot show that Morgan was aware of enough of circumstances about his medical situation to show, to one listening via intercom only, that Lance was, at *that very time*, suffering from a serious medical need or a substantial risk of serious harm. For this is the crux of the rubric "must **both be aware of facts from which** the inference could be drawn," i.e. that the totality of facts communicated to the subject officer are *sufficient* to give rise to an inference. *Miller v. Calhoun County*, 408 F.3d 803, 821 (6th Cir. 2005) provides:

> '[k]nowledge of the asserted serious needs or **of circumstances clearly indicating** the existence of such needs, **is essential to** a finding of deliberate indifference.'… ('[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.). When viewed under this standard, the record supports the District Court's conclusion that Miller failed to demonstrate that Lindsay possessed a sufficiently culpable state of mind. There is no dispute that **Lindsay lacked actual knowledge of**

> **Stanford's true health status**. Miller argues instead that Lindsay had knowledge of the circumstances surrounding Stanford's deteriorating condition as they unfolded in the early morning of April 26, 1998, and her failure to take action amounted to deliberate indifference. As the Supreme Court has instructed, however, Lindsay would have had to **draw the inference that a substantial risk of serious harm existed before** a jury could be permitted to consider whether her failure to act amounted to deliberate indifference.

(emphasis added). Plaintiff has not *approached showing* he conveyed to Morgan, over the intercom, "circumstances clearly indicating" that Lance had a serious medical need around 05:00 a.m. on December 16, 2016.

Plaintiff fails to show Edward Morgan's subjective awareness on December 16, 2016 of a serious medical need of Dustin Lance's, the realization of which would only come days later-- after medical assessment and additional details were provided and/or developed. Morgan lacked the medical expertise and pertinent circumstances and details of Lance's erection as of breakfast time, around 0500, on December 16, 2016. The District's Court's Order should be upheld.

II. PLAINTIFF'S SUPPOSITION DOES NOT PROPERLY CREATE A GENUINE DISPUTE OF MATERIAL FACT AS TO MORGAN

Plaintiff's argument, which begins with "But this is not the full story," launches into a realm of speculation knit together by "could be-s" and "what ifs" which are not anchored to the record[2]. [Opening Brief, ECF pg. 31]. For instance,

[2] Further, Plaintiff did not validly make this argument specifically directed to Edward Morgan and *his* awareness in the summary judgment process below. Hence, he has waived appellate review of this argument and this Court need not

Plaintiff alleges that because Sergeant Morgan testified that authorities wanted sergeants to make their "presence known in the booking [area]" and "in the pods," this *might mean* that Morgan was in A pod during a time that Lance was out in the day area *and might* have been talking about his erection. This position alone is a stretch in speculation. Further, it does not account for the actual facts in the record, showing that sergeants typically stayed in the booking area and, most importantly, that Lance only communicated with Edward Morgan one time, around breakfast on December 16. [Appx. 163, ¶ 25; Appx. 162 ¶ 17; Appx. 777, ¶ 87]. These were undisputed material facts below. [Plaintiff's Response, Appx. 300, 301 ¶ 22-34; Appx. 777, ¶ 87 (District Court Order)]. Yet Plaintiff attempts to somehow loosen them on appeal. This is unavailing.

Plaintiff's departure from these established, record facts into the ether of multiple "could haves" is improper. As to a similarly structured evidentiary argument, *Tyrrell v. Dobbs Inv. Co*., 337 F.2d 761, 765 (10th Cir. 1964) states:

> In order to sustain the position of Dobbs, it would be necessary to infer that the documents were first delivered to the County Clerk of Kimball County, **and that** the County Clerk of Kimball County then mistakenly delivered or forwarded the documents to the County Clerk of Banner County. Neither of such inferences can be legitimately drawn from the facts. **Inferences may be drawn only from facts in evidence**. They may not be **based upon mere speculation, guess, or conjecture** as to what might have happened.

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reach it. *Simpson v. Carpenter*, 912 F.3d 542, 567, Fn. 10 (10th Cir. 2018*). Harsco Corp. v. Renner*, 475 F.3d 1179, 1190 (10th Cir. 2007) states, "We have noted that a federal appellate court will generally not consider issues not passed upon below." (citing *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 720 (10th Cir.1993)).

> Further, Dobbs's argument **requires the pyramiding or imposition of one inference upon another** to establish the facts necessary to its case. That is **not permissible** and amounts to mere speculation.

(emphasis added). Here, Plaintiff posits a similar train of infirm inferences from one spare, generalized fact: Morgan testified that sergeants *sometimes* go in pods.[3] Plaintiff then rolls out the following: that Morgan *may have* gone into A Pod *when* Morgan was in the day room area of the pod, **and** that Lance may have said something to Morgan, despite his testimony to the contrary**, and/or** that Morgan may have seen Lance's penis, which is not in the evidentiary record and runs afoul of Lance's own testimony he only talked to Morgan once. [Appx. 162 ¶ 17].

Another gossamer thread of inferences is spun from Morgan allegedly having been in the control tower during the early morning hours of December 17, 2016. [Opening Brief, ECF 31]. Plaintiff offers a photo and the loose idea that the person in such tower could see into A Pod. [Appendix 663]. However, Plaintiff offers nothing to support the idea that a) this photo was taken after lights out in the pod at night, and b) Lance would have been out in the day room after midnight on December 17 in a dark pod *and also* visible to the officer in the control tower. There is no core fact in the record to support mushrooming inferences. Lights

[3] The tenuous notion of Morgan being in A Pod at the "right" time to perhaps see or hear something is further underscored by his unrebutted testimony that sergeants typically stayed in booking to perform multiple tasks there. [Appx. 163, ¶ 25].

were turned on when breakfast was served. [M&S Supp. Appx 142][4].

Hence, the mere fact that Morgan was possibly in the tower does not countenance two large, conjectural leaps that Morgan thus saw Lance in A Pod through the window during the overnight, early morning hours of December 17 **and also** thus *may have* seen Lance's penis or pain somehow. This position is unsupported. Fed.R.Civ.P 56(c)(1). The District Court noted, "'Conclusory allegations that are unsubstantiated do not create an issue of fact and are insufficient to oppose summary judgment." *Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125, 1136 (10th Cir. 2003)'" [Appx. 757]

Plaintiff also adds to this pile of supposition that Morgan may have heard from other detainees over the intercom. This is rank speculation. Indeed, the Declarations submitted by fellow detainees do **NOT** state such detainees used the intercom and radioed concerns to jailers. [Appx. 411-413]. Lance's testimony that some unknown detainees did, and talked to some unknown jailer(s), is immaterial

[4] Plaintiff did not, below, make this *specific* argument as to Morgan and the tower window, and it has consequently been waived. See Footnote 1. However, *to the extent* the Court does consider it, Morgan attaches one page of deposition testimony, for one line, as an exhibit which was not before the District Court; Morgan had no reason to attach it below without the argument of him *maybe* seeing something in A pod, through the window, in the early morning hours of December 16, 2016. Defendant is mindful that such exhibits outside the record are typically not to be submitted, but given this particular scenario, he believes the one page is permissible to meet Plaintiff's new argument and comes within this Court's inherent equitable authority to consider such record. *U.S. v. Kennedy*, 225 F.3d 1187 (10th Cir. 2000); *Dolan v. Madison*, 197 F. App'x 724 (10th Cir. 2006).

to Edward Morgan and would be hearsay, under Fed.Riv.Evid. 802, even if better supported; thus it is not proper summary judgment material. Fed.R.Civ.P 56(c)(2).

Such arguments, of inferences multiplied on themselves, relative to Morgan's subjective awareness of Lance's condition evinces the "pyramiding or imposition of one inference upon another" proscribed in *Tyrrell, supra*. It also shows an overly casual approach to the summary judgment process, which is to be anchored to the record. Fed.R.Civ.P 56. Accordingly, this Court should reject the "full story" which Plaintiff purports to create and which is not consonant with summary judgment evidentiary standards.

III. SMEAD'S AWARENESS, AT MOST, EVINCES CONFUSION OR MISTAKE, SHORT OF DELIBERATE INDIFFERENCE

The Court below found that there were genuine disputes of material fact which precluded judgment to Smead on the constitutional violation, the first prong of qualified immunity. For the purposes of this appeal only, Smead does not challenge any of the District Court's factual findings. However, even proceeding from the facts, in the light most favorable to Plaintiff, these facts would, at most, show a kind of heightened negligence arising from Smead failing to confirm the seriousness of the situation. This falls short of deliberate indifference.

The District Court accepted the following facts as alleged by Plaintiff: Plaintiff told Smead that he took a pill, had a prolonged erection, and needed to see the nurse. Additionally, Plaintiff showed Smead his penis a couple of times and

told Smead about his condition every time he saw Smead." [Appx. 783]. Even crediting, *arguendo*, in the summary judgment process, that Smead may have laughed in Lance's presence and told Nurse Crawford, as she testified, that "I thought he was playing," [Opening Brief, pg. 29; Appx. 564-65], these facts do not reach to Smead having an actual awareness of a substantial risk of serious harm at the time he was hearing of this peculiar situation.

A misunderstanding or even negligence does not rise to deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 826 (1994) ("[A]n officials' failure to alleviate a significant risk that he should have perceived but did not…cannot under our cases be condemned as the infliction of punishment."); *Verdecia v. Adams*, 327 F.3d 1171 (10th Cir. 2003) (Negligence or heightened negligence not enough to rise to deliberate indifference). Further, the only reasonable inference from the Nurse's testimony is that Smead either A) did not see Lance's erection or B) did not see any obvious indicators of pain.

Further, there are no facts of record that Plaintiff's penis looked the same, on Friday the 16th or Saturday the 17th, during the day, as it did on Monday the 19th, when it was engorged and looked problematic. Smead went off work for the weekend at approximately 6:00 p.m. on Saturday December 17, 2016. [M&S Supp. Appx. 141]. Plaintiff does not set out facts that Smead was told what caused the erection or how long it had persisted at any given point, only "longer than it

should" in Lance's words and view. [Appx. 196, ¶ 15; Appx. 776, ¶ 81]. Like Lance himself, Smead did not know how long an erection could persist before it thereby became a medical emergency. [M&S Supp. Appx. 133]. Plaintiff's citation to testimony, regarding what "*could*" be a serious need, is beside the point and tainted with hindsight supposition. [Opening Brief, ECF pg. 29]. A proper inquiry, tied to the facts allegedly presented to Smead in real time, is not definitive of obvious, serious harm to a layperson jailer, who is hearing and/or seeing this kind of situation for the first time ever. [Appx. 776; Supp. Appx. 97, 112, 137-138, 148, 212].

There could be argument that Smead *should have done more* to apprise himself of the true nature of Lance's condition and whether it may be a serious medical need, especially in the nurse's absence. Yet this kind of hindsight critique is both facile and puts the action/ response inquiry before the awareness one. This is backwards. *Miller v. Calhoun County*, 408 F.3d 803, 821 (6th Cir. 2005) provides, "Lindsay would have had to **draw the inference** that a substantial risk of serious harm **existed before** a jury **could be permitted to consider** whether her failure to act amounted to deliberate indifference." (emphasis added). This "should have done more" is also a province of negligence. *Verdecia*, *supra*. The District Court's finding as to Smead should be reversed, as he did not have subjective awareness of a substantial risk of serious harm to Lance.

This Court should affirm the District Court's judgment under qualified immunity to Smead, addressed further *infra*, or it may affirm on the other ground, *supra*, regarding the lack of deliberate indifference on his part. *See Alpine Bank v. Hubbell*, 555 F.3d 1097, 1108 (10th Cir. 2009) ("[O]ur ground for affirmance differs from the ground relied upon by the district court, but we can affirm on any ground supported by the record…").

IV. *KINGSLEY* IS INAPPOSITE AND DOES NOT AND SHOULD NOT GOVERN A DENIAL OF MEDICAL CARE CLAIM

Under FRAP 28(i), these Appellees hereby adopt and incorporate Appellees Morris, Harper and Dakota Morgan's arguments [Corrected Brief, ECF pgs. 24-38] relative to Plaintiff's assertion that *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), and not longstanding precedent, should govern his Section 1983 denial of medical care claim. Neither the governing law nor the underpinning rationales and policies implicated, as set forth in the incorporated arguments, square with Plaintiff's attempt to simply map *Kingsley* onto a denial of medical care claim.

Plaintiff's reliance on *Colbruno v. Kessler*, 928 F.3d 1155 (10th Cir. 2019) is misplaced. The Tenth Circuit found that "any reasonable adult in our society would understand that this involuntary exposure of an adult's nude body is a significant imposition on the victim. And law-enforcement officers have been taught this lesson repeatedly." *Id. at* 1165. Intentional conduct was a predicate there and is for excessive force claims as well. The very mild extension of the

Kingsley standard to the intentional parading of a naked person around in public in *Colbruno* has absolutely no bearing on the applicable standard here, one to use for analyzing a denial of medical care claim. To extend the objective-only test to denial of medical claims would, as the reasonableness standard augurs, ineluctably water-down a Section 1983 medical care claim to negligence or *very close* to it, which has been time-and-again rejected by the Supreme Court and Tenth Circuit.

V. MORGAN AND SMEAD ARE ENTITLED TO QUALIFIED IMMUNITY

The District Court found that Morgan was entitled to qualified immunity on effectively both qualified immunity prongs. It stated, "As the court finds that Edward Morgan did not violate Plaintiff's constitutional rights, Edward Morgan is also entitled to qualified immunity." [Appx. 782]. Hence, the Court below was speaking of the first prong of qualified immunity. On the second, the Court stated, "[U]nder these particularized facts, Plaintiff has failed to show Edward Morgan violated any clearly established constitutional right." *Id.* The Court was correct in both regards, and this Court can affirm on one or both prongs. The Court was also correct to signal Plaintiff had failed to carry his burden with respect to qualified immunity. [Appx. 782]. As to Defendant Smead, the Court found he was entitled to qualified immunity on the second prong only. [Appx. 783].

It has long been the law that once a defendant asserts a qualified immunity defense in a dispositive motion, the responsibility shifts to the plaintiff to "meet a

'heavy two-part burden.'" *Case v. West Las Vegas Indep. Sch. Dist*., 473 F.3d 1323 (10th Cir. 2007). "[T]o avoid judgment for the defendant based on qualified immunity, the plaintiff must show that the defendant's actions violated a specific statutory or constitutional right, and that the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue." *Toevs v. Reid*, 646 F. 3d 752, 755 (10th Cir. 2011) (emphasis added). *Wilson v. Falk*, 877 F.3d 1204, 1209 (10th Cir. 2017) states:

> 'If, and **only if**, the **plaintiff meets** this two-part test does a defendant then bear the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law.'

(emphasis added)(quoting *Clark v. Edmunds*, 513 F.3d 1219, 1222 (10th Cir. 2008)).

Officers are protected in "close cases" by the doctrine of qualified immunity, which serves to protect law enforcement officers from the chilling threat of liability. *Swain v. Spinney*, 117 F.3d 1, 10 (1st Cir. 1997). Generally, there must be a Supreme Court or Tenth Circuit decision on point, or a clearly established weight of authority from other courts for the law to be clearly established. *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). An official sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was "clearly established." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014).

The clearly established inquiry is to be disciplined and tied to the position of the defendant amidst the circumstances as they evolved and existed at the pertinent time. A Defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable officer in the defendant's shoes would have understood that he was violating it. *Id.* "In other words, 'existing precedent must have placed the statutory or constitutional question beyond debate" and "[the Supreme Court] has repeatedly told courts…not to define clearly established law at a **high level of generality** since doing so avoid the crucial question whether the official acted reasonably in the **particular circumstances that he or she faced**." *Id.* (emphasis added). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Crow v. Montgomery*, 403 F.3d at 602. *Gomes v. Wood*, 451 F.3d 1122, 1134 (10th Cir. 2006) states, "The law is clearly established if a reasonable official **in the defendant's circumstances would understand that her conduct** violated the plaintiff's constitutional right." (emphasis added). See also *Perry v. Durborow*, 892 F.3d 1116, 1123 (10th Cir. 2018) ("Perry must identify a case where an official acting under similar circumstances as [Defendant] was held to have violated the Constitution.")

In the present case, Plaintiff cannot meet either prong of the qualified immunity analysis for Morgan. As noted throughout this Motion, Plaintiff cannot

show any valid constitutional violation predicated on Defendant Morgan's acts or omissions done with subjective awareness of a serious risk of harm. Hence, Plaintiff cannot meet the first prong to overcome qualified immunity. The same should be true for Smead if the Court reverses the finding below that there are disputed facts that preclude judgment on the first prong of qualified immunity.

However, the Court can address the second inquiry only in this matter, as it demonstrates both Morgan and Smead are entitled to qualified immunity. *Wilson* states, "When determining whether qualified immunity applies, we may choose which of the two prongs of the qualified immunity analysis should be addressed first." 877 F.3d at 1209 (quoting *The Estate of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1107 (10th Cir. 2016)).

Plaintiff wants this Court to apply a broad brush to the facts at issue herein. That is simply not how qualified immunity is to operate. Recently, the United States Supreme Court has emphasized that the "clearly established law" inquiry is not meant to be an exercise in generalities or principles. Instead, the analysis must be disciplined to the particular facts at issue, from the vantage point of the officer whose actions are under review. *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) states "We have repeatedly told courts … not to define clearly established law at a high level of generality." (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742). In *Mullenix*, a police officer used deadly force and shot at a fleeing felon from an overpass as the

suspect approached. The district court denied qualified immunity because a police officer may not use deadly force when there is a fleeing felon who does not pose a sufficient threat of harm to the officer or others. See *Mullenix*, 136 S.Ct. at 308-09. The *Mullenix* Court was quick to note that this was not the appropriate inquiry. Rather, the correct question was "whether it was clearly established that he Fourth Amendment prohibited the officer's conduct **in the ''situation [she] confronted**': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.' (emphasis added) (citing *Haugen v. Brosseau*, 543 U.S. 194, 199-2000 (2004)). The Supreme Court emphasized "[t]he dispositive question is 'whether the violative nature of **particular conduct** is clearly established.'" *Mullenix*, at 307 (quoting *Al-Kidd*, 563 U.S. at 742)(emphasis added).

Hence, Plaintiff must show similar circumstances to those allegedly facing Defendant Morgan when he was speaking via the intercom with Plaintiff on the morning of December 16, 2016, to prove the right was clearly established. The same goes for the circumstances facing Smead. In *White v. Pauly*, 137 S.Ct. 548, 552 (2017), the Supreme Court held that the Tenth Circuit erred when it "failed to identify a case where an officer acting under similar circumstances as [the defendant officer] was held to have violated the Fourth Amendment." *Id.*

Plaintiff's posited formulation of the clearly established inquiry is in

disconnect with recent authority and its focus on the pertinent circumstances and defendant's position. The Opening Brief states, "[P]ain, no matter its cause, is sufficient to trigger an officer's duty to respond." [Opening Brief ECF pg. 35]. This abstract articulation shows Plaintiff excising the circumstances to leave a general and vague principle, proceeding in the opposite direction, against the grain and weight of recent authorities, *supra.* The Tenth Circuit has recently confirmed that district courts must use this more specific and less generic approach to determining qualified immunity. *Aldaba v. Pickens*, 844 F.3d 870, 872 (10th Cir. 2016); See *also Garcia v. Escalante*, 2017 WL 443610, *4 (10th Cir. Feb. 2, 2017); *Youbyoung Park v. Gaitan*, 2017 WL 782280, *9 (10th Cir. Mar. 1, 2017); *Moore v. Roberts*, 2017 WL 1906953, *6 (10th Cir. April 17, 2017). After the Supreme Court vacated the 10th Circuit's judgment, the Tenth Circuit recently in *Pauly v. White*, 874 F.3d 1197, 1223 (10th Cir. 2017)(*Pauly* III), discussing the disparity in facts between its case and others, stated, 'Because there is no case "close enough on point to make the unlawfulness of [Officer White's] actions apparent,'… we conclude that Officer White is entitled to qualified immunity. (internal citations omitted)(quoting from *Pauly* I, 814 F.3d at 1091). The Tenth Circuit again recently reaffirmed the specificity element of the "clearly established" prong examination. *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1215-15 (10th Cir. 2019).

Plaintiff relies on several cases that are unavailing in the clearly established analysis: *McCowan v. Morales*, 945 F.3d 1276 (10th Cir. 2019); *Mata v. Saiz*, 427 F.3d 745, 753 (10th Cir. 2005); *Sealock v. Colorado*, 218 F.3d 1205 (10th Cir. 2000); and *Al-Turki v. Robinson*, 762 F.3d 1188 (10th Cir. 2014). *McCowan* was decided only recently in 2019. Post-dating the subject events here, it is "of no use in the clearly established inquiry" with respect to Lance's detention in December 2016. *Kiesla v. Hughes,* 138 S.Ct. 1148, 1154 (2018); *Barton v. Taber*, 820 F.2d 958 (8th Cir. 2016).

In *Al-Turki,* the court expressly stated it was only addressing the **objective** prong for deliberate indifference. 762 F.3d at 1192. Plaintiff's mixing of the objective and subjective prongs slightly confused the "pain" issue in briefing below, but no such confusion exists in the law. Additionally, in *Al-Turki* the defendant was a medical professional. Of the disparity between *Al-Turki* and the facts facing Lance and Smead, the District Court noted, "In Al-Turki, at the time the defendant chose to ignore the plaintiff's request for medical treatment, the 'situation she confronted' was a diabetic inmate who had collapsed on the floor, repeatedly vomited, and complained of severe abdominal pain." [Appx. 783].

The other cases are readily distinguishable and also inapplicable to the proper standard here. Speaking to the cases, like *Mata*, which apply to medical professionals in the deliberate indifference context, *Rife v. Oklahoma Dep't of Pub.*

Safety, 854 F.3d 637, 647 (10th Cir. 2017) states:

> We have **not applied these standards** to deliberate indifference claims **against laypersons** such as police officers. Nonetheless, the district court analyzed whether Trooper Jefferson was deliberately indifferent under the standards for medical professionals. Mr. Rife takes a different approach, urging liability of Trooper Jefferson based on cases involving laypersons. This **approach is correct** because Trooper Jefferson was not a medical professional.

(emphasis added). Hence, *Mata* is inapposite and unavailing, and so is *Sealock* to the extent of its finding relative to medical professionals. On the layperson jailer in *Sealock*, there the plaintiff demonstrated more severe symptoms of pain: the plaintiff there was "very pale, sweating, and ha[d] been vomiting" and believed he was having a heart attack. *Sealock v. Colorado*, 218 F.3d 1205, 1210-11 (10th Cir. 2000). These overt, concerning symptoms alone were significant in *Sealock.* The Court further found it very significant that the guard told the inmate not to die on his watch, showing the defendant recognized there was a risk. *Id.* There is no comparison here in terms of either overt symptoms or a jailer's own words that arguably evince a disregard.

In the instant matter, there is not a qualifying case of sufficient similarly to the particular situation that unfolded at the PCJ in December 2016 for the purpose of the clearly established prong. There is no precedential case touching on even somewhat similar circumstances. Indeed, PCF jailers have testified that this situation, of an inmate reporting an involuntary erection, had never happened in

their experience working at the PCJ with inmates over the course of years. [Supp. Appx. 97, 112, 137-138, 148, 212].

There was no clearly established law that would have informed Morgan as of approximately 5:00 a.m. on December 16, 2016 that an erection of unknown duration was a serious medical need at the moment he was speaking with Plaintiff on the intercom. The same is true for the unique and mixed picture allegedly presented to Smead at the PCJ. "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Crow v. Montgomery*, 403 F.3d at 602. Plaintiff cannot carry his burden to show a violation of a clearly established constitutional right for Morgan and Smead.

Lastly, Plaintiff'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. A generalized and inherently private and subjective sensation, like pain, is difficult to posit as a "condition" of which others are to be aware. Obvious "considerable pain" invites a quagmire of dispute over the "level" of pain and whether the officer involved reasonably thought the report of such pain was genuine or overstated, *etc*. Pain is also variable with limited passage of time and variable with individuals, in terms of pain tolerance and anxiety or reaction to pain.

Plaintiff asserts, "[T]he relevant inquiry for immunity purposes centered on the detainee's pain, not on the particular condition afflicting the detainee."

[Opening Brief, ECF pg. 37]. Plaintiff does not mention the salience of symptoms in jurisprudence. Were the law actually as Plaintiff contends, that *reported pain alone,* unaccompanied by any other symptom or circumstances, would suffice for subjective awareness of a jailer of a serious medical need, then ostensibly every detainee or inmate who complains of severe pain would be presenting a constitutional mandate to the jailer at that moment. This would be entirely in a vacuum without the proper considerations of *Sealock* or *McCowen*s regarding overt symptoms and impairment, to pair with and give further context to the report of pain. As a subjective, private sensation, pain alone cannot be "seen" or "verified" typically, and both medical professionals and jailers are justified in assessing other factors and circumstances to corroborate and inform the picture of someone verbally saying they are in pain.

If Plaintiff's formulation is accepted, then every report of internal pain would likewise have to be wholly and simply accepted by this hearer, and this *would have to produce,* under civil penalty, either emergent or semi-emergent medical care for every report of pain and pain alone. Such a simplistic mechanism, set in motion by a singular factor of complaint of pain, would be a complication of large import to the orderly operation of detention facilities. Not only is Plaintiff's clearly established rubric in derogation of the Supreme Court and this Court's recent qualified immunity analysis, it also implicitly invites an unworkable

standard for future cases and for jailers and officers on the ground. Lastly, if Plaintiff's more generalized standard of "considerable pain" as to subjective awareness is accepted by this Court, it would be a first, and this would show the law was not clearly established as such in December 2016 as required.

In short, should this Court differ in some respect with the District Court on its conclusion relative to Morgan's entitlement to judgment on the subjective knowledge prong and deliberate indifference as a whole, he would nonetheless be entitled to qualified immunity on the clearly established prong. Defendant Smead is likewise entitled to qualified immunity, as the District Court found.

CONCLUSION

Based on the foregoing arguments and authorities, Appellees Edward Morgan and Mike Smead respectfully request that the Court affirm the Opinion and Order of the District Court granting them Judgment on Appellant's claims.

Respectfully submitted,

*/s/ Carson C. Smith*______________

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CERTIFICATE OF SERVICE

I, Carson Smith, hereby certify that on this day, March 3, 2020, I electronically transmitted this **RESPONSE BRIEF OF APPELLEES EDWARD MORGAN AND MIKE SMEAD** to the Clerk of the Court using the CM/ECF System for filing and transmittal of Notice of Electronic Filing to the following ECF registrants:

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Date: March 3, 2020

/s/ Carson C. Smith
Carson C. Smith

I, Carson Smith, further certify that the requisite number of true and correct copies of the foregoing brief is being forwarded by first class mail to the Court within two days of the date of electronic transmission. I certify that all necessary copies submitted to the Court are identical copies of the material submitted electronically.

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

/s/ Carson C. Smith
Carson C. Smith

10TH Cir. R. 31.3(B) CERTIFICATE OF COUNSEL ON SEPARATE BRIEFS

Appellee Chris Morris, in his official capacity, is a governmental entity *qua* Pittsburg County, and thus 10th Cir. R.31.3(D) applies to allow separate briefing among the two Appellee groups; Morris filed his Appellee Brief along with individual Appellees Daniel Harper and Dakota Morgan. To the extent more is required in this respect, Defendants Edward Morgan and Mike Smead are not a governmental entity but were governmental actors in reference to the events. I certify that a separate brief in this appeal is required on behalf of these Appellees for a number of reasons.

First, Appellant's claim of deliberate indifference to serious medical needs must be keyed to facts that address each individual Appellee and his alleged knowledge and communication(s) as of a certain period of time. Such focus requires that Edward Morgan and Smead be able to address their set of alleged facts, and deliberate indifference picture, as distinct from Daniel Harper and Dakota Morgan, who will have different facts and arguments to present.

Further, both Morgan and Smead have a qualified immunity defense, as individuals, in contrast to the governmental entity Appellee Morris. Also, this defense, vis-à-vis Smead and Morgan, differs in kind and in contour from that applicable to other individual Appellees given that different roles and facts apply to them in the particularized qualified immunity analysis.

Lastly, the fact that the governmental entity Appellee, Morris, in his Response is responding to different legal claims, including municipal liability (*Monell*) claims, shows a difference in content and task from the appellate issues facing individual Appellees Edward Morgan and Smead. Hence, a separate Appellee Response Brief is both warranted and efficient.

s/ Carson C. Smith_______
Carson C. Smith

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Date: March 3, 2020

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I, Carson Smith, hereby certify that a copy of the foregoing **RESPONSE BRIEF OF APPELLEES EDWARD MORGAN AND MIKE SMEAD**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the TrendMicro Worry-Free Business Security Version 20.0.2035, Server Version 10.0.2128, Virus Scan Engine 15.683.00, last updated 2/13/2020 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

Date: March 3, 2020

By: s/Carson Smith
Carson Smith