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

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Lance's federal and state claims pursuant to 28 U.S.C. §§ 1331 and 1367. This Court has appellate jurisdiction under 28 U.S.C. § 1291. On October 4, 2019, Lance filed a notice of appeal from the final judgment entered on September 20, 2019. The appeal was timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF ISSUES

The issues in this appeal are:

1. Whether a pretrial detainee's claim against correctional officers overcomes qualified immunity where:
   a. the officers knew the detainee was experiencing an abnormal three-day erection, suffering such pain that he could not wear pants or sit down, and pleading for medical help continuously over the course of the three days;
   b. the officers refused to call for medical help or do anything to help the detainee; and
   c. the detainee suffered severe pain and permanent physical injury due to the three-day delay in treatment.

2. Whether a pretrial detainee may prevail against officers who disregarded an obvious and substantial risk of serious harm, even if the officers did not subjectively perceive the obvious risk.
3. Whether a detainee's *Monell* claim against a county survives summary judgment when a three-day delay in medical care results because:
    a. the jail lacks an on-site medical provider from Friday evening to Monday morning; and
    b. the jail provides no training whatsoever about when to contact an off-site medical provider in response to a medical emergency.
4. Whether a detainee's *Monell* claim against a county survives summary judgment where emergency treatment is delayed by a medical release policy that overrides an emergency room doctor's orders to take the detainee straight to a hospital, and instead requires him to be taken back to jail and left to find his way to the hospital on his "own recognizance."

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND[1]

A. Officers Do Nothing In Response To Lance's Three-Day Erection, Complaints Of Pain, And Pleas For Medical Care.

In December 2016, Dustin Lance was in pretrial detention in the Pittsburg County Jail (PCJ) in Eastern Oklahoma after an arrest for drug possession and second-degree burglary. A.761. He was having difficulty sleeping in the jail and, while there, obtained a Trazodone pill, which is a common antidepressant and sleep aid. A.427. After dinner on Thursday, December 15, 2016, Lance took the pill, hoping it would help him sleep. A.425, 478-81, 497.

He woke at midnight with an erection. A.431. He began to worry after waking with an erection several more times throughout the night. A.432. Although he did not know his condition by its medical name, he had developed priapism, which is a prolonged and painful erection of the penis that requires emergency care if it lasts longer than four hours. *Priapism*, Mayo Clinic (June 15, 2019), https://www.mayoclinic.org/diseases-conditions/priapism/symptoms-causes/syc-20352005. Priapism is a side effect of antidepressants like Trazodone. *Id.* If left untreated for too long, the condition destroys tissues in the penis and causes permanent erectile dysfunction. *Id.*

[1] The facts are recited in the light most favorable to Lance, consistent with the applicable standard of review. *Mata v. Saiz*, 427 F.3d 745, 749 (10th Cir. 2005).

That morning, with his condition unchanged, Lance knew something was not right and used the intercom in his cell to alert an officer to his condition. A.434, 441. The intercom rang through to a tower in the housing unit. A.764, 774. Edward Morgan, the officer who answered, told him that since he took a pill that did not belong to him, he needed to collect his things and be ready to move to lockdown. A.435.[2] Lance collected his things and waited by the cell door, but no one showed up. A.441-42. He buzzed the intercom again and told the officer in the tower that he "need[ed] to see a doctor or the nurse" due to an erection caused by a pill. A.444-45. Again, no one showed up. *Id*.

Over the next three days, Lance took every opportunity to tell officers that he was in pain and plead with them for medical care. A.660 (declaring that he made "repeated requests to any and all jail staff" that he came into contact with about his "persistent erection, [his] need for medical attention and the considerable pain [he] was experiencing"). He used the intercom "throughout the whole weekend." A.449. He also talked to the officers in person, asking "anyone that served lunch" and "anyone that c[a]me back there for any reason" to help him. A.451. He was just "[t]rying to get by, trying to get ahold of a nurse, trying to get ahold of somebody"

[2] Both E. Morgan and D. Morgan worked shifts during Lance's ordeal. A.383-84. Lance expressed some confusion about whether there were one or two officers with the last name "Morgan." A.427-28, 526. He then confirmed that E. Morgan was the first officer he spoke to over the intercom on the morning of Friday, December 16, 2016. A.428, 526.

because of the immense pain he was experiencing. A.452; *see also* A.485 (testifying that after lunch on Friday, "it started hurting so bad I couldn't sit down"); A.494 ("I was panicking, it's hurting, I need to see a nurse."); A.495 ("[A]ll I knew I was hurting, I was trying to get to a doctor.").

The pain was so severe that Lance "couldn't wear pants" and "couldn't hardly sit down." A.483. In fact, he "had to tuck [his] pants up underneath [his] groin area so it would relieve enough pressure to where [he] could just even sit down." A.424.

Lance's condition and its painful effect were plain to see. Three detainees submitted declarations stating that they "observed [Lance] walking around the pod with a clearly visible penile erection for several days" and that "[i]t was obvious that [he] was continuously in pain from this erection." A.411; A.412; A.413. At least two of them "heard and observed Dustin Lance reporting the erection to guards and asking them for help and medical treatment." A.411; A.413. A third attested that Lance told him about his repeated requests for care. A.412. Upon seeing Lance in such severe pain, other detainees also pleaded with officers to take Lance to see the nurse. A.451.

The officers on duty during Lance's three-day ordeal include Edward Morgan ("E. Morgan"), who worked night shifts on December 15-16, 16-17, and 17-18; Mike Smead and Dakota Morgan ("D. Morgan"), who both worked day shifts on December 16 and 17; and Daniel Harper, who worked a night shift on December 18-

19. A.377, 383, 384, 389; A.605, 608; A.582; A.626-28; A.642. None of them allowed Lance to see the nurse.[3]

The individual defendants repeatedly observed Lance during his ordeal. Under Oklahoma law, officers are required to do an inmate count at the beginning of each shift change, Okla. Admin. Code 310:670-5-2(2), conduct at least one "visual sight check" every hour, Okla. Admin. Code 310:670-5-2(3), and provide detainees at least three meals each day, Okla. Admin. Code 310:670-5-7(1).[4] They are also required to pass out medicine in the morning, at noon, and in the evening. A.407. Joel Kerns, the sheriff at the time, testified that there was a surveillance camera focused on the day room that officers in the booking area and the tower would have been "constantly" reviewing, A.533-34. For the three days he was suffering from priapism, Lance spent much of his time in that day room, A.489-91. The day room and many of the individual pods were also visible from the tower, which has large, clear windows. A.663.

Moreover, Lance said that he "specifically told" Smead about "[his] need for medical attention and [his] extreme pain." A.661. Smead reacted by "snicker[ing] and kind of ma[king] fun" of Lance's condition. A.491. Smead denied he was

[3] We refer to E. Morgan, Smead, D. Morgan, and Harper as the "individual defendants" or the "officer defendants."

[4] These code sections were in effect at the time of Lance's ordeal. They have since been amended, but the amendments made no substantive changes to these requirements.

laughing, but then commented to Lance that "the whole thing is kind of funny." *Id.* In addition, Smead was the sergeant in charge during the day shifts on December 16 and 17. A.389. As sergeant, he was responsible for passing out medication each morning, A.585, and necessarily interacted with Lance when he gave him his medication on the mornings of December 16 and 17, A.407; A.471-72.

Smead testified that Lance never mentioned his condition, A.597-98, but, construing the facts in the light most favorable to Lance, Smead was lying. Not only is Smead's testimony inconsistent with Lance's, but two jail officials confirmed that Smead had contemporaneous knowledge about Lance's condition. First, an officer working under Smead on December 16 and 17 said that he "told the person in command" about Lance's condition because officers were told to "take it up to their sergeant[s]." A.383, 389, 391; A.410 at 2:59-3:06, 3:15-3:20. Second, Nurse Crawford, who eventually examined Lance, testified that when she asked Smead why he did not call her, Smead told her that he thought Lance "was just playing." A.564-66.

Lance told every officer he came into contact with about his condition and his need for medical assistance. A.475 ("[A]nytime they'd come back there, I'd talk to them, tell them about my situation, tell them I need to see a nurse."). Harper performed a range of duties that put him in direct contact with Lance including passing out breakfast trays, working in the tower, and performing welfare checks,

A.784, and D. Morgan performed welfare checks on everyone in the housing pod and was stationed in the tower when Lance called about his condition, A.784-85. Finally, as to E. Morgan, the district court noted that Lance told him about the pill and erection on the morning of December 16, 2016. A.781. Moreover, E. Morgan worked three nights during Lance's ordeal, A.384; A.605, 608, and was stationed in the tower from 11pm on December 16 to 6am on December 17, during which time he conducted sight checks of the pod, A.614-15, 618-19.

Lance pleaded with officers *for three days* to help him with his condition and the severe pain that accompanied it. He spoke to them over the intercom. A.468. He spoke to them in person. A.475, 485-86. He walked around the housing unit in his boxers with his pants tied a particular way to reduce the pain. A.424, 483. He spent considerable time in the day room where a camera relayed this unusual behavior to the officers in booking and in the tower. A.533-34; A.489-91. His condition was so bad that other detainees in the housing area asked for help on his behalf. A.451. Despite all this, Smead, Harper, D. Morgan, and E. Morgan never took him to the nurse, called the nurse, or took any steps to investigate whether he needed emergency medical care. They did absolutely nothing.[5]

[5] Lance explains that during the ordeal, Smead told him that he tried to call Nurse Crawford, A.450, but Nurse Crawford testified that she did not receive any calls about medical problems at the jail that weekend, A.563.

B. After Three Days, Nurse Crawford Sends Lance To The Emergency Room.

On Monday, December 19, 2016, an officer passing out breakfast trays was surprised to hear that no one had taken Lance to see the nurse and said that he would take him after he finished serving breakfast. A.502.[6] Nurse Crawford testified that when she came in on Monday morning, an officer walked into her office and told her that "there's somebody back there saying they had a problem all weekend long and was ignored." A.551.

She told the officer to bring Lance in and promptly examined him. A.551-53. Lance's penis, she testified, "was purple and engorged." A.555. It "looked terrible" and "painful." *Id.* She immediately knew that something was wrong and sent him to the local emergency room for treatment. A.558, 560. She was worried that "he may lose function of his penis," A.557, and said that the situation upset her because "he should have been taken care of, even with [her] not present" over the weekend, A.562. The transport officer who took Lance to the McAlester Regional Health Center ("McAlester Hospital") emergency room testified that Lance "was visibly in pain" and that his penis "looked bruised . . . [with] purple and black and blue coloring under the skin." A.652, 658.

[6] Lance refers to this officer as "Mickey." A.502-03. This officer's name is Homer McOwen, A.292, 382, and Lance likely used "Mickey" because of the phonetic similarities between "Mickey" and "McOwen."

C. Under The Jail's Practices, The Jail Lacked An On-Site Medical Provider From Friday Night To Monday Morning.

The jail had no on-site medical coverage during the weekend, meaning no medical provider was present each week for the 63 hours between 5pm on Friday and 8am on Monday. A.769-70. During this window—the very period of Lance's priapism—the only way a detainee could get medical help was if an officer called an off-site medical provider. *Id.*

D. Under The Jail's Practices, Staff Were Not Trained On When To Call Off-Site Medical Providers.

Jail staff received no training whatsoever about when to contact a medical provider. Harper testified that he received no training when he became sergeant, let alone training to help him determine whether something constitutes a medical emergency. A.645. Smead testified that "[t]here wasn't any particular training" and explained that when he first started the job "they just showed [him] around the jail and taught [him] how to interact with the inmates and run [the] security system and run the computers and pass trays." A.579. "That was it." *Id.* At most, officers learned first aid and CPR. A.772. In addition, the jail administrator and the undersheriff positions were unfilled and the sheriff was rarely in the jail. A.544-48.

E. An Emergency Room Doctor Orders Lance Transported Directly To Another Hospital For Emergency Treatment By A Specialist.

When Lance arrived at the McAlester Hospital emergency room, Dr. Gary Lee noted that he had an erection for more than four days and that his condition was

"severe." A.270. Dr. Lee gave him three shots in the stomach. A.455-57; A.272. When the shots had no effect on the priapism, Dr. Lee told the officers to take Lance to a urologist at Saint Francis Hospital ("St. Francis"). A.457-58. Dr. Lee documented that he "explained the serious nature of his problem and the need to take him *directly* [to St. Francis] as the specialist was waiting to treat [him]." A.273 (emphasis added). He wrote that the "patient had been sent for transport by the jail with assurance by the officers that they would take him *directly* to the ER at St. Francis." *Id.* (emphasis added). Dr. Lee later testified that he told officers "that there was a physician waiting [at] the receiving facility" and that Lance should "go directly there." A.673. Dr. Oren Miller, the urologist waiting at the other facility, also testified that he communicated that "[Lance] should be moved promptly to at least give [him] the best chance." A.669.

F. Under The Jail's Practices, Lance Is Taken Back To The Jail And Told To Go To The Hospital On His "Own Recognizance."

Instead of taking Lance directly to St. Francis, the transport officers took him back to the jail so they could release him on "medical own recognizance," more commonly referred to as "medical OR." A.523; A.406. After dropping him off at the jail, the transport officers went to lunch before returning and finishing the paperwork to release Lance on medical OR. A.461. Once the paperwork was finalized, Lance

was released and, as Nurse Crawford indicated in her notes, was expected "to take himself to St. Francis." A.406.

This occurred pursuant to a jail practice that forbade officers from taking a detainee directly from the emergency room to another hospital, regardless of a doctor's orders. Instead, Lance had to be taken back to the jail, released, and left to find his own way to the hospital. Sheriff Kerns was asked, "If the doctor had recommended that he be transported directly from the ER to the hospital, would there be a reason why the jail would prevent that from happening?" A.537. He responded, "Yeah . . . we don't release people to go to other facilities." *Id*. Nurse Crawford confirmed this standard practice: when somebody "really need[s] to be hospitalized," the jail "push[es] for medical ORs." A.569.

Pursuant to this practice, Lance was released from the jail at 2:42pm. A.275. Upon learning of his release, Lance called his father from the jail and asked to be picked up and taken to the hospital. A.462-63. Nurse Crawford testified that she did not know how long Lance waited for his father to pick him up. A.572.

When he received the call, Lance's father was picking up groceries with Lance's stepmother, but they immediately drove to the jail with their groceries in tow. A.463. They could not take Lance straight to the hospital because they were responsible for taking care of their grandchildren, who were just finishing school, so they first took Lance's stepmother home to be with the grandchildren. A.464. They

dropped her off along with the groceries and then drove straight to St. Francis. *Id.* The record does not reveal: (1) the distance from the grocery store where Lance's father and stepmother were shopping when they received the call from the jail, (2) how long they had to wait in the jail parking lot before Lance was released; or (3) how long it took to get to the hospital.[7]

Lance arrived at St. Francis at 7:16pm, A.277, four and a half hours after his official release from PCJ. At St. Francis, Dr. Miller, the urologist, explained what was going to happen, put Lance under anesthesia, and operated on him. A.465; A.408-09.

G. Lance Suffers Lifelong Damage Due To The Delay In Treatment.

Dr. Miller informed Lance that he was unlikely to "have any natural erections ever again, regardless of treatment or not, given the length of time of his priapism." A.409. This prediction was accurate. Lance "can't even think about getting an erection unless [he] take[s] Viagra." A.513-14. But he "barely [has] the money to get Viagra." A.516. This has made his romantic life very difficult. He explained that it is "too embarrassing" to be sexually intimate with women and the only relationship

[7] Although not in the record, the distances are not short. The drive from the jail to Gowen, where Lance's father lives, A.463, is approximately 26 miles. After this, Lance and his father drove straight to St. Francis, A.464, a drive of approximately 130 miles.

he has had since his priapism ended in part because of his inability to get an erection. A.511-12.

Lance also feels humiliated by a YouTube video, seen by people he knows, about his ordeal. A.507-08, 519. He cannot find the words "to explain the humiliation o[f] that sort." A.508. One of Lance's co-workers made remarks about his "limp dick." A.436. This led to an altercation and Lance losing his job. A.438.

II. PROCEEDINGS BELOW

Lance filed suit in Oklahoma state court and defendants removed the case to the U.S. District Court for the Eastern District of Oklahoma. A.8. On October 8, 2019, the district court granted summary judgment to all the individual defendants and the County. A.755-88. The court first addressed Lance's deliberate indifference to medical needs claim against the individual defendants. It rejected the argument that the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) altered the standard for medical care claims brought by pretrial detainees. A.780. Although the court recognized that *Kingsley* requires an objective standard for excessive force claims by pretrial detainees, it determined that non-force claims—like medical care claims—should still be assessed under the subjective standard. *Id*.

Applying the subjective standard, it held that a reasonable juror could find that Smead, Harper, and D. Morgan were deliberately indifferent to Lance's serious

medical needs in violation of his constitutional rights. A.782-85. Nonetheless, the court opined that they enjoyed qualified immunity because Lance did not identify a prior case with near-identical facts about "a pill" that caused "a prolonged erection." A.783-85. As to E. Morgan, the court held that he did not violate Lance's constitutional rights. A.781-82. Finally, the district court rejected Lance's *Monell* claim that County policies and practices caused him harm.[8] A.787-88.

STANDARD OF REVIEW

This Court reviews grants of summary judgment, including those based on qualified immunity, de novo. *Mata v. Saiz*, 427 F.3d 745, 749 (10th Cir. 2005). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and one party is entitled to judgment as a matter of law." *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004). The court construes all facts in the light most favorable to the nonmoving party. *Id*.

SUMMARY OF ARGUMENT

I. The lower court correctly determined that a reasonable jury could find three of the officers deliberately indifferent to Lance's medical needs. But it erred in

[8] The litigation also involved other claims and defendants, including a supervisory liability claim against Sheriff Kerns, that Lance does not press on appeal.

concluding otherwise as to the fourth officer and in awarding all four officers qualified immunity.

It is uncontested that all four officers denied Lance access to medical care. They all admitted to knowing that someone with a prolonged and painful erection needed immediate medical attention. A reasonable jury could also conclude that all four officers: (1) heard Lance's repeated complaints of severe pain and pleas for medical assistance; (2) heard other detainees request medical care on behalf of Lance; and (3) saw Lance in severe and obvious pain. Still they did nothing. Because it is clearly established that an officer may not ignore repeated complaints of severe pain and requests for medical assistance, none of the officers are entitled to qualified immunity, and the deliberate indifference claims should be remanded for trial.

In addition, the lower court erred in applying the subjective deliberate indifference standard to the claims against the officers. An objective deliberate indifference standard is compelled by the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and this Court's decision in *Colbruno v. Kessler*, 928 F.3d 1155 (10th Cir. 2019). Although Lance succeeds under both the objective and subjective standards, this Court should address the issue now because application of the proper standard makes the district court's application of qualified immunity all the more indefensible, and will clarify the appropriate jury instruction on remand.

II. The district court erred by dismissing the two *Monell* claims against the County. The first of these claims alleges that the County's failure to train the officers was a moving force behind the denial of medical care. A jury could find that a total absence of training on recognizing medical emergencies constitutes deliberate indifference when the jail does not have on-site medical coverage for long periods of time. The second *Monell* claim alleges that the jail's "medical own recognizance" policy further delayed access to medical care. A jury could find that Lance was denied timely access to emergency medical care because the policy required officers to ignore Dr. Lee's order to transport Lance directly to the hospital for emergency treatment.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THE DELIBERATE INDIFFERENCE CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS.

A. A Reasonable Jury Could Find That The Individual Defendants Were Deliberately Indifferent To Lance's Medical Needs.

Deliberate indifference claims brought by convicted prisoners arise under the Cruel and Unusual Punishments Clause of the Eighth Amendment whereas such claims brought by pretrial detainees, like Lance, arise under the Due Process Clause of the Fourteenth Amendment. *Burke v. Regalado*, 935 F.3d 960, 991 (10th Cir. 2019). The lower court determined that these different constitutional sources do not

entail different constitutional tests. A.780. Accordingly, it assessed Lance's deliberate indifference claims under the two-pronged inquiry that governs claims brought by convicted prisoners under the Eighth Amendment.[9] *Id*.

The first prong of this analysis requires showing that the deprivation alleged is objectively "sufficiently serious." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The officers conceded and the district court accepted that the alleged deprivation—the denial of medical care for Lance's priapism—is sufficiently serious to satisfy this prong. A.781. The second inquiry requires showing that "the official kn[e]w[] of and disregard[ed] an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. To satisfy this subjective component, "the 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." *Id*.

The subjective prong "does not require a finding of express intent to harm." *Mata v. Saiz*, 427 F.3d 745, 752 (10th Cir. 2005). Rather, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Garrett v. Stratman*, 254 F.3d 946, 950 (10th Cir. 2001). "Significantly,

[9] In this section, Lance follows the district court's holding that the subjective deliberate indifference standard for convicted prisoners applies equally to pretrial detainees. But in the subsequent section, Lance demonstrates that the Eighth and Fourteenth Amendment standards differ, and that the Fourteenth Amendment's objective deliberate indifference standard governs Lance's claims. In any case, for the reasons discussed in this brief, Lance succeeds under both standards.

this level of intent can be demonstrated through circumstantial evidence." *Mata*, 427 F.3d at 752; *see also Farmer*, 511 U.S. at 842 ("Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence."). This is so because "if the risk is obvious, so that a reasonable man would realize it, we might well infer that [the defendant] did in fact realize it." *Farmer*, 511 U.S. at 842 (quoting 1 Subst. Crim. L. § 3.7 (1st ed.)).

Where the risk of harm is obvious, officers must take reasonable steps to respond; they are deliberately indifferent if they "fail[] to follow the required protocols, contact the appropriate medical personnel, and/or attempt to assist [the detainee] in any fashion." *Mata*, 427 F.3d at 758. Particularly relevant here is that "deliberate indifference occurs when prison officials prevent an inmate from receiving treatment or deny him access to medical personnel capable of evaluating the need for treatment." *Sealock v. Colorado*, 218 F.3d 1205, 1211 (10th Cir. 2000); *see also Burke*, 935 F.3d at 993 ("[I]f the official knows his role in a particular medical emergency is solely to serve as a gatekeeper for other medical personnel capable of treating the condition, and if he delays or refuses to fulfill that gatekeeper role . . . he also may be liable for deliberate indifference.") (quotation marks omitted). Put simply, jail officials who act as gatekeepers are deliberately indifferent when they "deny[] or delay[] access to medical care." *Estelle v. Gamble*, 429 U.S.

97, 104-05 (1976). They cannot "refuse[] to perform [their] gatekeeping role." *Mata*, 427 F.3d at 756.

This gatekeeper duty is triggered by pain; that is, an officer's refusal to provide access to medical care in the face of "pain and suffering" is sufficient to establish the subjective prong of deliberate indifference. *Sealock*, 218 F.3d at 1210-11; *see also Mata*, 427 F.3d at 755 (explaining that the subjective prong is satisfied "by showing that defendants' delay in providing medical treatment caused either unnecessary pain or a worsening of [the detainee's] condition").

That is precisely what happened here. None of the defendant officers contacted the nurse despite repeatedly hearing about Lance's severe pain and seeing his abnormal condition. Indeed, none of them took *any* steps—like offering him pain medication or asking him how long his condition had persisted, how much pain he was in, or whether he had ever previously experienced a prolonged erection—to help Lance. Their inaction in the face of such obvious harm is more than sufficient to establish their deliberate indifference to Lance's medical needs.

1. Mike Smead

The district court, construing the facts in the light most favorable to Lance, painted the following picture: Lance "told Smead that he took a pill, had a prolonged erection, and needed to see the nurse;" he "showed Smead his penis a couple of times and told Smead about his condition every time he saw Smead." A.782-83.

Smead gave Lance medication for an unrelated dental procedure on December 16 and 17, A.585; A.407; A.471-72, and Lance used that opportunity to tell him about his priapism, A.471-72. Moreover, Smead saw Lance "tuck[ing] [his] pants up underneath [his] groin area." A.424. He asked Lance why he was not wearing pants, A.485-86, and "snickered" and "made fun" of his condition, A.491. As such, there is substantial evidence that Smead discussed the priapism with Lance and saw the measures he took to alleviate some of the pain.

Other jail employees confirmed that Smead had contemporaneous knowledge of Lance's condition. An officer who worked under Smead's supervision specifically said that he told the officer in command about Lance's condition. A.410 at 2:59-3:06, 3:15-3:20. And Nurse Crawford confirmed that Smead had been aware of the situation while it was ongoing. A.564-66. Smead himself admitted a subjective awareness that delaying medical care to someone with priapism could cause him harm. A.593 ("agree[ing]" with counsel that "if somebody had an erection that wouldn't go away[,] delaying medical care could expose that inmate to medical or bodily harm").

In light of this evidence, the district court rightly found a genuine issue of material fact as to Smead's deliberate indifference. A.783.

2. Daniel Harper and Dakota Morgan

The district court found that Harper and D. Morgan performed a number of duties that would have put them in direct contact with Lance. Harper passed out breakfast trays, worked in the tower, and performed welfare checks. A.784. D. Morgan was stationed in the tower when Lance called about his condition and performed sight checks of everyone in the housing pod during his shifts. A.784-85.

Lance told every officer he came into contact with about his pain, his condition, and his need for medical assistance, A.660; A.475-76; A.411; A.413. In addition to speaking with officers in person, Lance repeatedly used the intercom to request help. A.468. Upon seeing him in severe pain, other detainees also called the officers in the tower to seek medical care for Lance. A.451. Finally, Lance attempted to manage his pain by "tuck[ing] [his] pants up underneath [his] groin area," A.424, and other detainees swore that his behavior made it "obvious that [he] was continuously in pain from th[e] erection," A.411; A.412; A.413.

As such, there is evidence that Harper and D. Morgan heard directly from Lance and other detainees about the priapism and need for medical care while performing their duties. They also observed his unusual behavior and saw him in pain. Moreover, both knew that a prolonged and painful erection required medical attention. A.638-40; A.631. The district court rightly concluded that a reasonable

jury could find that Harper and D. Morgan were deliberately indifferent to Lance's medical needs. A.784-85.

3. Edward Tyler Morgan

In the lower court's view, E. Morgan is the only officer that did not commit a constitutional violation. A.782. It assessed the claim against E. Morgan as follows:

> In the early morning hours of December 16, 2016, Plaintiff's erection had persisted for a few hours at most. Plaintiff told Edward Morgan that he took a pill and had an erection. 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.

Id.

But this is not the full story. E. Morgan worked three nights during Lance's ordeal. A.384; A.605, 608. He testified that the jail administrators "wanted the sergeants to move around" and "make their presence known in the booking [area]" and "in the pods." A.614. Thus, there is a genuine dispute of fact as to whether E. Morgan saw Lance during his shifts as he moved around the pods. After all, as discussed above, Lance had to tuck his pants underneath his groin to relieve some pressure and other detainees testified that his behavior made it "obvious that [he] was continuously in pain from th[e] erection." A.424; A.411; A.412; A.413.

In addition, E. Morgan explained that he was in the tower from 11pm on December 16 to 6am on December 17 and that he conducted sight checks of the pods during that time. A.614-15, 618-19. Because Lance testified that he repeatedly called

and spoke to the officers in the tower, A.468, and that other detainees did the same, A.451, there is a genuine dispute as to whether E. Morgan heard about Lance's condition over the intercom. Additionally, the tower has large, clear windows that provide a direct line of sight into the day room and into many of the individual pods. A.663. Where an officer can see "through the large rectangular window providing visual access" to various parts of the jail, this Court has explained, "a jury c[an] reject [the defendant officer's] testimony and infer that he too saw [the] [p]laintiff." *Durkee v. Minor*, 841 F.3d 872, 876 (10th Cir. 2016).

Finally, E. Morgan knew that someone suffering from Lance's condition—someone experiencing an erection lasting longer than four hours—could be experiencing a medical emergency. A.611. There is more than sufficient evidence for a reasonable jury to find that he was deliberately indifferent.

B. The Individual Defendants Are Not Entitled To Qualified Immunity.

To defeat qualified immunity, the "plaintiff must show (1) that the defendant's actions violated a constitutional or statutory right, and (2) that the right allegedly violated was clearly established at the time of the conduct at issue." *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996) (quotation marks and alterations omitted). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Dodds v. Richardson*, 614 F.3d 1185, 1206 (10th Cir. 2010).

1. Qualified immunity does not protect the individual defendants because clearly established law forbids complete inaction in response to an inmate's severe pain.

At the time of Lance's ordeal, the law governing the officers' conduct was clear. The Supreme Court established long ago the unlawfulness of "prison guards [] intentionally denying or delaying access to medical care." *Estelle*, 429 U.S. at 104-05. This Court, too, has been clear that "deliberate indifference occurs when prison officials prevent an inmate from receiving treatment or deny him access to medical personnel capable of evaluating the need for treatment." *Sealock*, 218 F.3d at 1211. This type of deliberate indifference has come to be known as gatekeeper liability: "if the official knows his role in a particular medical emergency is solely to serve as a gatekeeper for other medical personnel capable of treating the condition, and if he delays or refuses to fulfill that gatekeeper role . . . he [] may be liable for deliberate indifference." *Burke*, 935 F.3d at 993 (quotation marks omitted). A gatekeeper must "follow the required protocols, contact the appropriate medical personnel, and/or attempt to assist [the detainee]." *Mata*, 427 F.3d at 758.

It is equally well-established that a gatekeeper's duty is triggered by severe pain—no matter the underlying condition. In *McCowen*, for instance, a detainee "complained to [an officer] repeatedly that he had re-injured his shoulder and was in 'excruciating' pain from that injury." *McCowan v. Morales*, --- F.3d ---, No. 18-2169, 2019 WL 7206045 at *12 (10th Cir. 2019). The officer ignored McCowen's

pain and delayed access to medical care for two hours. *Id*. In denying the officer immunity, this Court explained that the case was "sufficiently analogous" to a prior case about obsessive compulsive disorder and panic attacks. *Id*. "Like the panic attack" in the earlier case, "the pain McCowan suffered was not visible to [the officer], but like [the detainee in the earlier case], McCowan repeatedly told the officer that he was in excruciating pain." *Id*. This Court reasoned that these similarities were sufficient to "have placed [the officer] on notice that his conduct (as McCowan alleges it) unconstitutionally deprived McCowan of medical care needed for a serious medical need." *Id*. at *13.

Indeed, the principle that severe pain triggers an officer's gatekeeper duty was established in this circuit long before *McCowen*. In *Sealock*, a jail official refused to drive an inmate experiencing severe chest pain to the hospital. 218 F.3d at 1210. Instead, he offered the inmate an antacid. *Id*. at 1208. This Court reasoned that while "not every twinge of pain suffered as the result of delay in medical care is actionable," the inmate had produced sufficient evidence of "pain and suffering" to establish the objective prong of the deliberate indifference analysis. *Id*. at 1210 & n.5. And the officer's refusal to take the inmate to the hospital in the face of such harm was sufficient to satisfy the subjective prong. *Id.* at 1210-11. A subsequent case explained that the *Sealock* Court "addressed the prisoner's symptoms . . . *not* to determine whether they were strong evidence of a heart attack, but to evaluate

whether they constituted sufficient harm *in themselves* to satisfy the objective component." *Mata*, 427 F.3d at 754 (emphasis added). Thus, inherent in *Sealock* is the same principle made explicit in *McCowen*: pain, no matter its cause, is sufficient to trigger an officer's duty to respond.

A few years after *Sealock*, this Court decided a case in which "[the prisoner] complained of a single symptom to [the nurse]—chest pain." *Id.* at 765 (Baldock, J., dissenting). This Court "reiterated" that "the Eighth Amendment forbids such unnecessary and wanton infliction of pain." *Id*. at 754-55 (Seymour, J., majority) (quotation marks omitted). It thus concluded that "evidence of pain and suffering . . . is sufficient to establish the objective element of the deliberate indifference test" and that the subjective component may be satisfied "by showing that defendants' delay in providing medical treatment caused either unnecessary pain or a worsening of her condition." *Id*. at 755.

This Court's decision in *Al-Turki v. Robinson*, 762 F.3d 1188 (10th Cir. 2014), provided defendants with additional warning that denying or delaying medical care to Lance was unconstitutional. In *Al-Turki*, a detainee told officers that he was in severe pain and asked to go to the medical center, but he was not seen until his pre-existing appointment the following day. *Id*. at 1191-92. At the appointment, it was determined that he had kidney stones, which were not life-threatening, but were very painful. *Id*. at 1192. "Regardless of the relatively benign cause of Plaintiff's pain,"

this Court explained, *id*. at 1193, the "several hours of untreated severe pain" he suffered were "actionable," *id*. at 1194. The Court then denied qualified immunity, explaining that the defendant "violated clearly established law by choosing to ignore Plaintiff's repeated complaints of severe abdominal pain and requests for medical assistance." *Id.* at 1195.

These cases clearly establish that total inaction in the face of severe pain violates the Constitution. In this case, however, the district court ignored this clearly established law and granted the officers immunity because there was no previous case about officers confronting "similar circumstances" involving "a pill" and "a prolonged erection." A.783. But this is a perverse application of qualified immunity jurisprudence. The clearly established requirement decidedly "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). If it were otherwise, courts "would be required to find qualified immunity wherever [they] have a new fact pattern." *Id*. (quotation marks omitted).

Rather, immunity must be denied if "in the light of pre-existing law the unlawfulness [of the officers' conduct is] apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). There is no need for "a case directly on point" as long as "existing precedent [has] placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *see also Casey v. City of*

Fed. Heights, 509 F.3d 1278, 1285 (10th Cir. 2007) ("[W]e need not have decided a case involving similar facts to say that no reasonable officer could believe that he was entitled to behave as [defendant officer] allegedly did.").

In the context of gatekeeper liability, this Court has repeatedly held that officials violate the Constitution when they ignore a detainee's repeated complaints of pain no matter the underlying condition. For instance, a case about obsessive compulsive disorder and panic attacks clearly established the law in a case about back pain. *McCowan*, --- F.3d ---, 2019 WL 7206045 at *13. And a case about chest pain clearly established the law in a case about kidney stones. *Al-Turki*, 762 F.3d at 1194. In these cases, the relevant inquiry for immunity purposes centered on the detainee's pain, *not* on the particular condition afflicting the detainee.

By granting immunity because there was no prior case concerning "a pill" and a "prolonged erection," A.783, the court below ignored this Court's repeated pronouncements that an officer "violate[s] clearly established law by choosing to ignore [] repeated complaints of severe [] pain and requests for medical assistance," *Al-Turki*, 762 F.3d at 1195. This Court should reverse.

2. Qualified immunity does not protect the individual defendants because the constitutional violation was obvious.

Even if the host of Tenth Circuit cases discussed above did not directly and clearly establish the law in this case, the officers would not be entitled to qualified

immunity because their constitutional violations were obvious. This is so because "officials can still be on notice that their conduct violates established law even in novel factual circumstances" so long as the state of the law gave them "fair warning" that their acts were unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). When conduct is particularly "egregious," general precedents apply "with obvious clarity." *Lowe v. Raemisch*, 864 F.3d 1205, 1210 (10th Cir. 2017). "[S]ome things are so obviously unlawful that they don't require detailed explanation." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) (Gorsuch, J.).

This is such a case. Lance's pain and the need to act was exceedingly obvious. Lance himself testified to his severe pain: "I was panicking, it's hurting, I need to see a nurse." A.494; *see also* A.448 ("I was under so much pain."); A.485 ("[I]t started hurting so bad I couldn't sit down."); A.504 ("I been in so much pain . . . I just remember being in pain."). Other detainees explained that "[i]t was obvious that [he] was continuously in pain." A.411; A.412; A.413. An officer confirmed that Lance "was visibly in pain" and that his penis "looked bruised . . . [with] purple and black and blue coloring under the skin." A.652, 658. Nurse Crawford, too, said that Lance's penis "was purple and engorged" and that "it looked terrible," and "painful." A.555. And Lance *showed* the officers his penis in this state. A.499.

Everyone knows that an extremely painful, three-day erection is a serious problem. And it is obviously unlawful to prevent someone in such a condition from

receiving medical assistance. No one would permit a family member to sit at home for three days in such a state without so much as calling a medical provider. But all the officer defendants let Lance suffer without making any effort to help him. Not only did their inaction cause Lance unnecessary pain and suffering, but it also led to a permanent injury that continues to cause Lance pain and embarrassment to this day.

Recall also that Smead made fun of Lance's condition to his face, A.491, and two jail officials confirmed that Smead had contemporaneous knowledge about Lance's condition, A.383, 389, 391; A.410 at 2:59-3:06, 3:15-3:20; A.564-66. Smead later equivocated about his knowledge, first testifying that he "[didn't] recall" whether he knew about Lance's condition, A.588, then testifying that he did not know about or see Lance's condition, A.597-98. Finally, Lance explains that during the ordeal, Smead told him that he was trying to get in touch with Nurse Crawford, A.450, but Nurse Crawford testified that she did not receive any calls about medical problems at the jail that weekend, A.563. From all this evidence, a jury could easily find that Smead laughed at Lance, lied to him about contacting the nurse, and then lied about what he knew. Qualified immunity does not protect "the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

3. The doctrine of qualified immunity should not be extended unnecessarily.

The reasons above are more than sufficient to demonstrate that the district court erred in awarding qualified immunity to the individual defendants. But it bears mention nonetheless that in recent years, a growing chorus of jurists have registered their concern with qualified immunity jurisprudence. Justice Thomas noted that qualified immunity analysis "is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act," and has devolved into "freewheeling policy choice[s]," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring). Justice Sotomayor has written, "a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

Moreover, qualified immunity may harm the reputation and effectiveness of law enforcement and jail officials by fueling the perception that bad actors escape accountability. *See* Amicus Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability at *21-24, *Allah v. Milling*, 139 S Ct. 49 (2018) No. 17-8654, 2018 WL 3388317. The functional rationale for qualified immunity—that it is necessary to insulate officers from personal financial exposure—has also been discredited because indemnification practices ensure that officers virtually never pay out of pocket. Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 888, 890 (2014).

Of course, qualified immunity remains the law of the land, and this Court is not free to revisit it.[10] But given the widespread dissatisfaction and uncertain future, this Court should not expand the doctrine by replicating the district court's error—taking qualified immunity to an extreme.

C. Pretrial Detention Officers Who Disregard Obvious Risks Of Serious Medical Harm Violate The Fourteenth Amendment, Regardless Of Whether They Subjectively Perceive The Risk.

The district court determined that the deliberate indifference standard applicable to post-conviction prisoners also applies to claims by pretrial detainees. A.780. But this is not so. A different standard must apply to medical care claims by pretrial detainees after the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and this Court's decision in *Colbruno v. Kessler*, 928 F.3d 1155 (10th Cir. 2019). As the Second, Seventh, and Ninth Circuits have held, in the wake of *Kingsley*, a pretrial detainee may prevail in medical care and failure-to-protect cases where officers disregard an obvious risk of serious harm—regardless of whether the officers subjectively perceived the risk. *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017); *Castro v. Cty. of L.A.*, 833 F.3d 1060 (9th Cir. 2016); *Miranda v. Cty. of Lake*, 900 F.3d 335 (7th Cir. 2018). This test has been called "objective"

[10] That said, Lance raises and preserves for potential further review the argument that qualified immunity should be rejected entirely for the reasons stated in these paragraphs.

deliberate indifference and is the proper standard to apply here. *See Farmer v. Brennan*, 511 U.S. 825, 838 (1994). By contrast, the "subjective deliberate indifference" test requires the defendant to be subjectively aware of a risk of serious harm. *See id*. at 845.

The issue is raised here even though Lance succeeds under both standards. It was preserved in the lower court and is relevant at this stage for two reasons. First, *Kingsley*'s heightened protection for pretrial detention conditions makes the district court's extreme application of qualified immunity in this case all the more indefensible. Second, in the event this Court remands some or all of the individual officer claims for trial, resolving the issue will clarify the appropriate jury instruction. *Miranda*, 900 F.3d at 352 (explaining that it is "appropriate to address the proper standard" because "the answer may make a difference in the retrial").

Pretrial detention operates in a separate constitutional realm than postconviction imprisonment. Claims brought by convicted prisoners arise under the Cruel and Unusual Punishments Clause of the Eighth Amendment whereas such claims brought by pretrial detainees arise under the Due Process Clause of the Fourteenth Amendment. *Kingsley*, 135 S. Ct. at 2475. These different constitutional sources entail different constitutional tests. Claims brought under the Eighth Amendment are governed by subjective standards of fault. *See, e.g.*, *Estelle*, 429

U.S. at 106 (medical care claim); *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (excessive force claim).

By contrast, in *Kingsley*, the Supreme Court held that a claim of excessive force brought under the Fourteenth Amendment is governed by an objective standard of fault. In doing so, it abrogated federal appellate precedent that applied a subjective standard to such claims. *Kingsley*, 135 S. Ct. at 2472. The Court explained that "the language of the two Clauses differs" and that "pretrial detainees (unlike convicted prisoners) cannot be punished at all." *Id.* at 2475. Therefore, when analyzing an excessive force claim by a pretrial detainee, "the relevant standard" to determine excessiveness "is objective not subjective." *Id*. at 2472. In other words, "the defendant's state of mind is not a matter that a plaintiff is required to prove." *Id*.

Although *Kingsley* did not expressly consider whether an objective standard of fault also governs non-force claims[11] brought by pretrial detainees, all the circuits to decide that question in a reasoned opinion since *Kingsley* have concluded that it does. Currently, four federal courts of appeal apply an objective standard to non-force claims brought by pretrial detainees. This circuit is one of them.

In *Colbruno*, a group of officers unnecessarily walked a pretrial detainee naked through the public halls of a hospital rather than obtaining clothing. 928 F.3d

[11] The phrase "non-force claims" refers to deliberate indifference to medical needs claims (like Lance's claims), failure-to-protect claims, and living conditions claims.

at 1159, 1165. This Court explained that *Kingsley* "eliminated any ambiguity" about the proper standard for claims by pretrial detainees. *Id*. at 1163. After *Kingsley*, it explained, "a pretrial detainee can establish a due-process violation by providing only objective evidence." *Id*. (quotation marks omitted). In applying an objective standard, the *Colbruno* Court recognized that *Kingsley*'s logic applied equally to non-force claims. *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019) (citing *Colbruno* for the proposition that "the Tenth Circuit has joined those [circuits] that apply *Kingsley*'s objective inquiry to a claim other than excessive use of force").

This Court should reject the district court's approach and reaffirm its decision in *Colbruno* by applying the objective standard to Lance's claims. This approach is consistent with the Supreme Court's ruling and analysis in *Kingsley* and with every sister circuit that has considered, in a reasoned opinion, the impact of *Kingsley* on non-force claims by pretrial detainees.

1. Pretrial detainees are entitled to greater constitutional protection than convicted prisoners.

The Supreme Court has long held that the Eighth Amendment forbids the "wanton infliction of pain." *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947). A "wanton" state of mind is—by definition—akin to subjective deliberate indifference. *Wanton*, Black's Law Dictionary (10th ed. 2014) (defining "wanton" as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences"). Thus, in *Estelle*, the Court derived a subjective

deliberate indifference standard for medical care claims brought by convicted prisoners from the Eighth Amendment's prohibition of "wanton" punishment. 429 U.S. at 104. In *Whitley v. Albers*, the Court applied another subjective standard to excessive force claims brought by convicted prisoners. 475 U.S. 312, 320-21 (1986).

By contrast, the Supreme Court has never applied a subjective test to a case about treatment in pretrial detention. On the contrary, it has differentiated sharply between post-conviction detention and pretrial detention, noting in *Bell v. Wolfish* that the Fourteenth Amendment prohibits not just wanton punishment of pretrial detainees, but *all* punishment: "[T]he proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, *a detainee may not be punished* prior to an adjudication of guilt in accordance with due process of law." 441 U.S. 520, 535 (1979) (emphasis added).

The Court explained that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Id*. at 535 n.16. This is so because "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *Id*. When it comes to a plaintiff who has not been adjudicated guilty of any crime, "the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." *Id*.

In *Kingsley*, the Supreme Court expanded on this distinction and on how to properly apply the objective standard. It concluded that Eighth Amendment culpable state of mind rules arising out of the prohibition of wanton punishment cannot be extended to pretrial detainees, who have a Fourteenth Amendment right to be free from all punishment. "The language of the two Clauses differs," the Court reasoned, "and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all . . ." *Kingsley*, 135 S. Ct. at 2475. Therefore, "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." *Id*. at 2473-74. As a result, "the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one." *Id.* at 2473.

2. After Kingsley v. Hendrickson, federal courts of appeal have applied objective standards to non-force claims brought by pretrial detainees.

As this Court already recognized in *Colbruno*, the logic of *Kingsley*'s rationale extends beyond excessive force claims. 928 F.3d at 1163. The *Kingsley* Court relied heavily on its earlier decision in *Bell* and understood that decision to require the use of an objective standard for many claims brought by pretrial detainees: "The *Bell* Court applied [an] objective standard to evaluate a variety of prison conditions . . . . In doing so, it did not consider the prison officials' subjective

beliefs about the policy." *Kingsley*, 135 S. Ct. at 2473. The mandate of *Kingsley*, in short, is that objective standards, not the subjective standards that characterize Eighth Amendment jurisprudence, must govern all claims by pretrial detainees. *Id*.; *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018) ("Notably, the broad wording of *Kingsley* . . . did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally.") (quotation marks omitted). In addition to this Court, three other circuits have considered *Kingsley*'s effect on non-force claims by pretrial detainees in reasoned decisions, and all three have concluded that *Kingsley* requires application of an objective standard.

In *Darnell*, the Second Circuit recognized that *Kingsley* abrogated *Caiozzo v. Koreman*, 581 F.3d 63 (2d Cir. 2009), which had applied the subjective standard to medical care claims brought by pretrial detainees. 849 F.3d at 34-35. It concluded that "[a]fter *Kingsley*, it is plain that punishment has no place in defining the *mens rea* element of a pretrial detainee's claim under the Due Process Clause." *Id*. at 35. It reasoned that *Kingsley* extended to pretrial detainees' conditions of confinement claims because "[a] pretrial detainee may not be punished at all under the Fourteenth Amendment, whether through the use of excessive force, by deliberate indifference to conditions of confinement, or otherwise." *Id*. It later applied the objective standard to a claim of deliberate indifference to medical needs. *Bruno v. City of Schenectady*, 727 F. App'x 717, 720-21 (2d Cir. 2018).

In *Castro*, the Ninth Circuit applied *Kingsley* to a failure-to-protect claim by a pretrial detainee. 833 F.3d at 1070. Although circuit precedent previously required a subjective inquiry, *see Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1242 (9th Cir. 2010), the Ninth Circuit concluded that *Kingsley* had "cast [*Clouthier*'s] holding into serious doubt," *Castro*, 833 F.3d at 1068. It reasoned that *Kingsley* underscored the differing protections afforded by the Eighth and Fourteenth Amendments and emphasized that pretrial detainees "cannot be punished at all." *Id*. at 1069-70 (quoting *Kingsley*, 135 S. Ct. at 2475). It therefore applied an objective deliberate indifference test to the plaintiff's claim. *Id*. at 1073-74. In a subsequent case, the Ninth Circuit applied the objective test to a medical care claim, explaining that "logic dictates" such a result after *Kingsley*. *Gordon*, 888 F.3d at 1124.

The Seventh Circuit applied *Kingsley* to non-force claims brought by pretrial detainees in *Miranda*, 900 F.3d at 350. The court reasoned that under *Kingsley*, "[p]retrial detainees stand in a different position: they have not been convicted of anything, and they are still entitled to the constitutional presumption of innocence." *Id*. Accordingly, the Seventh Circuit held, "along with the Ninth and Second Circuits, that medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*." *Id*. at 352.

These well-reasoned opinions stand in stark contrast to those issued by the Fifth, Eighth, and Eleventh Circuits, which addressed the issue only in cursory footnotes. The Fifth Circuit said it was constrained by pre-*Kingsley* circuit law applying the subjective standard. *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017). The footnote suggested that the case would be a poor vehicle for the *en banc* court to consider the effect of *Kingsley* on pre-*Kingsley* circuit law because the plaintiff, a self-represented detainee, would lose under either the subjective or objective standard. *Id*.

The Eighth Circuit's analysis was also perfunctory, consisting of two sentences in a footnote. *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018). The entire discussion reads: "[Plaintiff] asserts that the Supreme Court's conclusion in *Kingsley v. Hendrickson*, that the relevant standard is objective not subjective should apply here. *Kingsley* does not control because it was an excessive force case, not a deliberate indifference case." *Id*. (quotation marks and citation omitted).

The Eleventh Circuit declined to even analyze the issue. It first stated that "[it] cannot and need not reach this question." *Nam Dang v. Seminole Cty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017). But despite this *explicit* statement that it did not decide the question in *Nam Dang*, a subsequent Eleventh Circuit opinion relied on *Nam Dang* for the proposition that the Eighth Amendment standard applies to claims

by pretrial detainees. *Bryant v. Buck*, No. 19-11913, 2019 WL 6609698, at *3 n.3 (11th Cir. 2019).

While the Fifth, Eighth, and Eleventh Circuits offer little to no analysis and brush the issue aside in footnotes, every other circuit to consider the issue in a reasoned opinion—including this Court in *Colbruno*—has concluded that a fair reading of *Kingsley* requires applying the objective standard to non-force claims by pretrial detainees.

3. The objective deliberate indifference test requires pretrial detainees to prove more than negligence but less than subjective intent.

In addition to comporting with Supreme Court and circuit precedent, the objective deliberate indifference test properly balances the constitutional rights of pretrial detainees and the interests of jail officials. It requires more than mere negligence. *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding that Fourteenth Amendment rights are "not implicated by a *negligent* act of an official"). As such, courts that have adopted the objective test have rejected the argument that it would find officials liable for acting negligently. *Darnell*, 849 F.3d at 36.

Rather, the objective standard requires pretrial detainees "to prove more than negligence but less than subjective intent—something akin to reckless disregard." *Castro*, 833 F.3d at 1071. As far back as 1994, "[t]he [Supreme] Court noted that recklessness could be defined according to an objective standard akin to that used in

the civil context, which would not require proof of an official's actual awareness of the harms associated with the challenged conditions, or according to a more exacting subjective standard akin to that used in the criminal context, which would require proof of such subjective awareness." *Darnell*, 849 F.3d at 32.

Accordingly, those circuits that have adopted the objective standard for pretrial detainees have required plaintiffs to show that "[t]he defendant did not take reasonable available measures to abate th[e] risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious." *Castro*, 833 F.3d at 1071; *see also Darnell*, 849 F.3d at 35. That is, the objective test asks whether a defendant disregarded an obvious risk of substantial harm to a plaintiff, irrespective of whether the defendant subjectively knew of the risk. *Farmer*, 511 U.S. at 836-37.

This standard strikes an appropriate balance. On the one hand, it ensures that jail officials receive more protection in constitutional claims than in mere tort actions. On the other hand, it ensures the reasonable safety of pretrial detainees, who have not been convicted of any crime, but who are exposed to danger as an incident of their incarceration.

* * *

In sum, the lower court did not follow the Supreme Court's logic in *Kingsley*, this Court's own decision in *Colbruno*, or the weight of circuit authority. Rather, it

largely relied on pre-*Kingsley* precedent to apply a standard that ignores the different levels of protection provided by different constitutional guarantees. But this circuit's pre-*Kingsley* cases do precisely what *Kingsley* now forbids: they reduce the protections afforded to pretrial detainees by equating them with the standards applicable to convicted prisoners.

This Court should reject the lower court's approach, apply the objective standard, and require the district court on remand to instruct the jury on the objective deliberate indifference standard at trial. And because there are genuine disputes of material fact as to whether Smead, Harper, D. Morgan, and E. Morgan were deliberately indifferent to Lance's serious medical needs under the more exacting subjective standard, the same finding is necessarily warranted under the proper objective standard.

II. THE DISTRICT COURT ERRED IN DISMISSING THE *MONELL* CLAIMS AGAINST THE COUNTY.

Lance brings two claims against Chris Morris in his official capacity as the sheriff of PCJ. "[A]n official-capacity suit is . . . to be treated as a suit against the entity [of which the officer is an agent]." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Here, the claims against Morris are in effect against Pittsburg County ("County"). The first of these claims alleges that the County failed to properly train and supervise the officers and that these failures in management led the officers to disregard Lance's serious medical condition. The second claim alleges that the

County enforced a practice requiring officers to disregard physician orders to transport detainees to higher level care, instead requiring them to bring detainees back to the jail before releasing them on medical "own recognizance."

Under *Monell v. Dep't of Soc. Servs.* and its progeny, the County may be liable for these failures and the resulting constitutional violations. 436 U.S. 658, 692 (1978). To establish liability, Lance must show the existence of (1) "a municipal policy or custom," (2) "a direct causal link between the policy or custom and the injury alleged," and (3) "that the municipal action was taken with 'deliberate indifference.'" *Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1284 (10th Cir. 2019).

A. A Reasonable Jury Could Find The County Liable For Failing To Provide Any Training To Officers About How To Recognize When A Detainee Needs Medical Attention.

Pursuant to jail policy, there was no on-site medical staff from Friday night through Monday morning. A.769-70. During this block of time, detainees would receive medical care only if an officer phoned an off-site nurse. *Id.* Because there was no medical staff on site during this long window, a reasonable jury could find that failing to provide officers *any training whatsoever* in recognizing emergency medical conditions created an obvious risk of serious harm.

The point is not that jails must always provide training in recognizing medical emergencies. Nor is it that jails must always have an on-site nurse during the

weekend. But a jury could find that if a jail does not have on-site medical coverage for long periods of time, a total absence of training on recognizing medical emergencies creates an obvious risk. The obvious risk is that a detainee will experience an emergency medical condition and no one will recognize the need to call for medical help over the weekend.

In *Olsen v. Layton Hills Mall*, for instance, this Court denied summary judgment to a municipality that "manifested deliberate indifference by failing to train its jail's prebooking officers to recognize OCD and handle sufferers appropriately." 312 F.3d 1304, 1319 (10th Cir. 2002). It explained that "prebooking officers receive[d] absolutely no training on OCD" and the policy manual that officers were required to consult when unsure about an inmate's condition contained "no discussion of OCD." *Id*. Despite the lack of training and the incomplete policy manual, the officers were "left with discretion in determining whether an inmate suffers from a psychological disorder requiring medical attention." *Id*. The situation at PCJ was worse.

Harper testified that he received training only on CPR and first aid. A.638. Then, when he became sergeant, he received no additional training whatsoever. A.645. And at no time did he receive training to help him determine whether something constitutes a medical emergency. A.638. Smead also testified that "[t]here wasn't any particular training" and explained that when he first started the

job "they just showed [him] around the jail and taught [him] how to interact with the inmates and run security system and run the computers and pass trays." A.579. "That was it." A.579. And when asked whether sergeants were "trained to refer people with serious medical needs to a medical provider," Smead replied, "[n]ot that I recall." A.591-92.

And unlike *Olsen*, where officers were at least given a policy manual containing *some* discussion of medical issues, there is no evidence that a similar manual was given to officers at PCJ. It is true that PCJ officers received a manual with a "Medical Screening" section requiring them to screen inmates upon their admission to the jail. A.400-01. But this section spans a mere 1.5 pages and does not provide any guidance about how to determine whether someone has a medical issue or needs medical attention. *Id.*

These failures in training were compounded by failures of supervision. At the time of Lance's ordeal, the jail administrator and the undersheriff positions were unfilled and the sheriff was rarely in the jail, A.544, 546-49—in any case, there is no testimony that the people in these positions (when filled) received training on recognizing medical emergencies.

Despite all this, the officers were tasked with deciding whether a medical issue was serious enough to alert medical personnel. A.592 (Smead agreeing with counsel that "if the sergeant had a question about whether an inmate was having a serious

medical need, they would need to contact the nurse"). This was even more true on evenings and weekends when there was no one with medical training at the jail at all. A.594-95. Thus, officers were required to make decisions about the need for medical care even though they were not trained to identify medical emergencies and were not provided with a medical manual.

On this evidence, a reasonable jury could easily find that the officers were not adequately trained. To be sure, Lance does not contend that the officers had to be trained to recognize priapism or other specific medical conditions.[12] Rather, proper training would have equipped the officers to respond appropriately to a detainee exhibiting unusual symptoms and complaining of pain.

The requisite causation may be shown by establishing that "the identified deficiency in [the municipality's] training program [is] closely related to the ultimate injury so that it actually caused the constitutional violation." *Brown v. Gray*, 227 F.3d 1278, 1290 (10th Cir. 2000) (quotation marks and citations omitted). This involves asking whether "the injury [would] have been avoided had the employee been trained under a program that was not deficient in the identified respect." *City*

[12] It is worth noting, however, that Trazodone (the pill Lance took) is an antidepressant commonly known to be misused in correctional settings. *Practice Resource: Prescribing in Corrections*, 46 J. OF AM. ACAD. OF PSYCHIATRY AND L. S38 (Supp. 2018), available at https://www.aapl.org/docs/pdf/Corrections-Resource-Document.pdf. And Nurse Crawford explained that she had actually seen Trazodone cause priapism previously in the correctional setting. A.522; A.554-56.

of Canton v. Harris, 489 U.S. 378, 391 (1989). The jury must "[p]redict[] how a hypothetically well-trained officer would have acted under the circumstances." *Id*.

Here, a reasonable jury could find that a hypothetically well-trained officer or one with a manual about medical issues would have alerted a medical professional when faced with a detainee in severe pain and an hours-long erection. For instance, a jury could find that if Smead had been properly trained or had access to such a manual, he would not have laughed at Lance and discounted the seriousness of his condition, but would have instead called the jail nurse. At the very least, a jury could find that adequate training would have led him to ask Lance when the erection started, how much pain he was in, or whether he had ever before had a prolonged erection. But Smead and the other officers did not do any of that; rather, on Monday morning when Nurse Crawford returned to the jail, an officer told her that "there's somebody back there saying they had a problem *all weekend long and was ignored*." A.551 (emphasis added).

Finally, Lance must show that the County acted with deliberate indifference. "In the municipal liability context, deliberate indifference is an objective standard which is satisfied if the risk is so obvious that the official should have known of it." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 n.5 (10th Cir. 1998). This standard may be satisfied if, "in light of the duties assigned to specific officers or employees[,] the need for more or different training is so obvious, and the inadequacy so likely to

result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390.

For instance, in the context of police training, "city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons" and "[t]he city . . . arm[s] its officers with firearms . . . to accomplish this task." *Id.* at 390 n.10. "Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference.'" *Id.* (quotation marks and citation omitted). Ultimately, "the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." *Id*. at 390.

Here, policymakers knew "to a moral certainty" that their officers would be required to identify detainees with medical needs and then refer those detainees to the nurse. A.592. They also knew that there was no doctor on staff and that the nurse was only at the jail between 8am and 5pm on weekdays. A.594. If officers are required to make first-line decisions about the need for medical care and there is no medical staff at the jail in the evenings or on weekends, detainees are left at the mercy of the officers' decision-making. In this context, the need to train officers to recognize medical problems is obvious, and the failure to do so constitutes deliberate indifference to the rights of detainees.

B. A Reasonable Jury Could Find The County Liable For Enforcing Practices And Customs That Denied Adequate Medical Care.

Lance's second claim against the County is centered on its adoption and enforcement of practices that delayed emergency medical care. Specifically, the County enforced a practice requiring officers to disregard a physician order to transport Lance directly to higher level care, instead requiring officers to bring Lance back to the jail and then release him on medical OR.

Sheriff Kerns confirmed this practice. He was asked: "If the doctor had recommended that [Lance] be transported directly from the ER to the hospital, would there be a reason why the jail would prevent that from happening?" A.537. He responded clearly, explaining that the jail "[did not] release people to go to other facilities." A.537. An officer also confirmed this practice, testifying that detainees who required additional medical care had to be brought back to the jail before being released on medical OR. A.655.

Thus, the jail requires officers to bring a detainee back to the jail to be released on medical OR *even if* a physician orders that he be taken directly to the hospital. Officers were not permitted to take detainees directly to the hospital and complete the medical OR process on the way even in medical emergencies.

There is sufficient evidence to connect this practice to the constitutional injury that Lance suffered. At McAlester Hospital, Dr. Lee "explained the serious nature

of [Lance's] problem and the need to take him *directly* [to St. Francis]." A.273 (emphasis added). In a follow-up note, Dr. Lee wrote that the "patient had been sent for transport by the jail with assurance by the officers that they would take him *directly* to the ER at St. Francis*." Id.* (emphasis added).

Instead of complying with these orders, the officers took Lance back to the jail so they could release him on medical OR. At that point, as Nurse Crawford said, Lance was expected "to take himself to St. Francis." A.406. Dr. Miller, the urologist at St. Francis, testified that Lance should have been "moved promptly to at least give the best chance." A.669. He further explained that Lance "is likely to not have any natural erections ever again" because of "the length of time of his priapism." A.409.

Where "the medical staff must [] rely on medical services provided by civilian health care facilities" it is obvious that "an integral part of the prison health care program is the transportation of inmates to and from the locations where the medical care is given." *Ramos v. Lamm*, 639 F.2d 559, 577 (10th Cir. 1980). Here, the staff clearly relied on civilian facilities, but the jail's medical OR practice did not permit officers to transport detainees to those locations. Based on this evidence, a reasonable jury could infer that the officers disregarded physician orders *because* of the medical OR practice, and that this disregard led to delayed surgical intervention and contributed to the permanent damage with which Lance must now live.

Finally, Lance can show deliberate indifference because the violation of his rights was "a highly predictable or plainly obvious consequence" of the County's actions. *Olsen*, 312 F.3d at 1318 (quotation marks omitted). There is sufficient evidence for a jury to determine that the delayed receipt of physician-ordered medical care is a "highly predictable" and "plainly obvious consequence" of the jail's medical OR practice.

If a physician orders *immediate* transport to higher level care, it is commonsense that any delay would be harmful. Yet delay is inherent in the medical OR policy because it requires a return trip to the jail where the detainee must wait until the medical OR process is complete; it does not permit officers to complete the process while transporting the detainee to the hospital and it makes no allowances for emergencies or for individuals who cannot secure transportation upon release. The "constitutional obligation" to provide medical care "necessarily requires that the [entity] make available to inmates a level of medical care which is reasonably designed to meet the routine and *emergency health care needs* of inmates." *Ramos*, 639 F.2d at 574 (emphasis added) (quotation marks omitted). The medical OR policy plainly violates this obligation.

The district court made much of the fact that four-and-a-half hours passed between the official time of Lance's release and his arrival at the second emergency room. A.786-87. It appeared to infer that this suggested a lack of urgency, but such

a conclusion assumes facts about distances and reasons for delay that are not in the record and makes inferences not permissible on summary judgment.

The record shows that Lance called his father for a ride to the hospital when he learned of his release. A.462-63. At that time, Lance's father was picking up groceries with Lance's stepmother, but they immediately drove to the jail. A.463. They could not take Lance straight to the hospital because Lance's stepmother needed to be home with her grandchildren who were just finishing school, A.464, but Lance and his father drove straight to the hospital after dropping her off at home. *Id.* Altogether, they drove approximately 155 miles. *See* note 7. Construing these facts in Lance's favor, then, a lapse of four-and-a-half hours between Lance's official release and arrival at the hospital is more than reasonable.

* * *

This Court should reverse the lower court's finding and permit Lance's claims against the County to proceed to trial.

CONCLUSION

The district court held that Lance has no recourse for the days he spent in excruciating pain or the lifetime of medical problems he must now bear. For the reasons above, that conclusion is wrong and this Court should reverse and remand the case for a trial on the merits.

Dated: January 17, 2020

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument given that this case presents a question of first impression in this circuit, namely, whether *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), alters the standard applicable to medical care claims brought by pretrial detainees.

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 12,977 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: January 21, 2020

/s/ Megha Ram
Megha Ram
Counsel for Appellant Dustin Lance

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;

b. the hard copies that have been submitted to the Clerk's Office are exact copies of the ECF filing; and

c. the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender, version 80948, last updated January 21, 2020, and according to the program is free of viruses.

Dated: January 21, 2020

/s/ Megha Ram
Megha Ram
Counsel for Appellant Dustin Lance

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, I electronically filed a true, correct, and complete copy of the foregoing Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: January 21, 2020

/s/ Megha Ram
Megha Ram
Counsel for Appellant Dustin Lance

ATTACHMENT 1:

DISTRICT COURT OPINION AND ORDER FILED SEPTEMBER 20, 2019

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

DUSTIN LANCE, *Plaintiff*, v. 1. BOARD OF COUNTY COMMISSIONERS OF PITTSBURG COUNTY, OKLA. 2. CHRIS MORRIS, Sheriff of Pittsburg County, Okla. in his official capacity 3. MIKE SMEAD, in his individual capacity, 4. DAKOTA MORGAN, in his individual capacity, 5. EDWARD MORGAN, in his individual capacity, 6. STEPHEN SPARKS, in his individual capacity, 7. MCALESTER REGIONAL HEALTH CENTER AUTHORITY, d/b/a McAlester Regional Hosptal, 8. GARY R. LEE, M.D., 9. JOEL KERNS, former sheriff of Pittsburg County, in his individual capacity, and 10. DANIEL HARPER, in his individual capacity, *Defendants.*	Case No. CIV-17-378-RAW

ORDER AND OPINION[1]

This action was originally filed in the District Court of Pittsburg County, Oklahoma. It was removed to this court on October 10, 2017. With leave to amend, Plaintiff filed two amended complaints, on December 8, 2017 and on September 7, 2018. In his Second Amended

[1] For clarity and consistency herein, when the court cites to the record, it uses the pagination assigned by CM/ECF.

Complaint, Plaintiff alleges that Defendants were indifferent and failed to provide him with constitutionally adequate medical care in response to an emergent health condition.

Plaintiff brings the following claims:

I. Indifferent training and supervision pursuant to 42 U.S.C. § 1983 against Defendants Kerns and Morris[2];

II. Deliberate indifference to serious medical needs pursuant to § 1983 and the Oklahoma Constitution against Defendants Smead, Dakota Morgan, Edward Morgan,[3] Sparks, Harper, and the Board of County Commissioners of Pittsburg County, Oklahoma ("Board"); and

III. Unconstitutional policies or practices to deny adequate medical care pursuant to § 1983 against Defendants Kerns and Morris.[4]

Plaintiff requests judgment in his favor and damages in excess of $5,000,000.00. Now before the court are motions for summary judgment filed by former Sheriff Joel Kerns [Docket No. 129], by Edward Morgan [Docket No. 130], by Mike Smead [Docket No. 131], by the Board [Docket No. 135], by Sheriff Chris Morris [Docket No. 136], and by Daniel Harper, Dakota Morgan, and Stephen Sparks [Docket No. 137].[5]

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[2] Defendants Kerns and Morris are the former and current sheriffs of Pittsburg County, respectively. Plaintiff sued Defendant Kerns, the former sheriff, in his individual capacity. He sued Defendant Morris, the current sheriff, in his official capacity. At times Plaintiff refers to Defendant Morris as "County," and at other times as "Morris." The court refers to him as "Morris."

[3] Edward Morgan is also known as "Tyler" Morgan. Docket No. 130, at 10.

[4] Plaintiff also brings a claim for violation of the emergency medical transportation and active labor act pursuant to 42 U.S.C. § 1395DD ("EMTALA") against the McAlester Regional Health Center Authority ("MRHC" or "hospital") and Dr. Lee.

[5] Also at issue is a motion for summary judgment filed by MRHC [Docket No. 128]. As the issues in MRHC's motion are distinct from the issues here, a separate Order will be entered on it simultaneously with this Order.

I. Standard of Review

The court will grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In applying the summary judgment standard, the court views the evidence and draws reasonable inferences therefrom in the light most favorable to the nonmoving party. *Burke v. Utah Transit Auth. & Local 382*, 462 F.3d 1253, 1258 (10th Cir. 2006). At this stage, however, Plaintiff may not rely on mere allegations, but must have set forth, by affidavit or other evidence, specific facts in support of the Complaint. *Id.*

"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) (citation omitted).

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

While at the summary judgment stage evidence need not be submitted in a form that would be admissible at trial, the substance of the evidence must be admissible. For example, the court disregards "inadmissible hearsay statements *contained* in affidavits, as those statements could not be presented at trial in any form." *Id.* (emphasis in original). "[A]ffidavits must be based upon personal knowledge and set forth facts that would be admissible in evidence;

conclusory and self-serving affidavits are not sufficient." *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991). Similarly, "[t]estimony which is grounded on speculation does not suffice to create a genuine issue of material fact to withstand summary judgment." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 876 (10th Cir. 2004).

Additionally, unauthenticated documents "cannot support a summary judgment motion, even if the documents in question are highly probative of a central and essential issue in the case." *Bell v. City of Topeka, Kan.*, 496 F.Supp.2d 1182, 1185 (D. Kan. 2007) (citation omitted). "To determine whether genuine issues of material fact make a jury trial necessary, a court necessarily may consider only the evidence that would be available to the jury." *Argo*, 452 F.3d at 1199.

Qualified Immunity

The affirmative defense of qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). "When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

When a defendant raises a qualified immunity defense in response to a motion to dismiss or a motion for summary judgment,[6] the burden shifts to the plaintiff and the court employs a two-part test. *Morris v. Noe*, 672 F.3d 1185, 1191 (10th Cir. 2012); *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011). The burden is a heavy one. *Perry v. Durborow*, 892 F.3d 1116, 1120 (10th Cir. 2018). A plaintiff must show that: (1) the defendant violated a constitutional

[6] "The legally relevant factors for a qualified immunity decision will be different at the summary judgment state – no longer can the plaintiffs rest on facts as alleged in the pleadings." *Stonecipher v. Valles*, 759 F.3d 1134, 1148, n.9 (10th Cir. 2014).

right, and (2) the constitutional right was clearly established at the time of the defendant's alleged misconduct. *Id.*

"A plaintiff may show clearly established law by pointing to either a Supreme Court or Tenth Circuit decision, or the weight of authority from other courts, existing at the time of the alleged violation." *Knopf v. Williams*, 884 F.3d 939, 944 (10th Cir. 2018) (citation omitted). A law is not clearly established unless existing precedent has "placed the statutory or constitutional question beyond debate." *Id.* (citation omitted). This is an objective test. *Brown*, 662 F.3d at 1164.

The court must not "define clearly established law at a high level of generality." *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (citing *Ashcroft*, 563 U.S. at 742); *Knopf*, 884 F.3d at 944 (citing *Ashcroft*, 563 U.S. at 742). A prior case need not have *identical* facts. *Perry*, 892 F.3d at 1126; *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017). Still, the "clearly established law must be 'particularized' to the facts of the case." *Knopf*, 884 F.3d at 944 (citation omitted).

A plaintiff must establish both prongs to defeat a qualified immunity defense. *Id.* Only if a plaintiff first meets this two-part test does the defendant bear the traditional summary judgment burden to show that there are no genuine disputes of material fact and that he or she is entitled to summary judgment as a matter of law. *Koch v. City of Del City*, 660 F.3d 1228, 1238 (10th Cir. 2011). The court has discretion to decide which of the two prongs to address first in light of the circumstances of the case. *Brown*, 662 F.3d at 1164.

II. State Law Claims

Plaintiff brought claims for deliberate indifference to serious medical needs in violation of Article II, Section 7 of the Oklahoma Constitution through *Bosh v. Cherokee Cnty.*

Governmental Bldg. Auth. 305 P.3d 994 (Okla. 2013) against Defendants Smead, Dakota Morgan, Edward Morgan, Sparks, Harper, and the Board.

In an Opinion issued on December 4, 2018, the Oklahoma Supreme Court declined to extend its ruling in *Bosh v. Cherokee Cnty. Governmental Bldg. Auth*. 305 P.3d 994 (Okla. 2013) "to include tort claims brought by inmates alleging violations of their rights to due process and to be free from cruel or unusual punishments." *Barrios v. Haskell Cnty. Pub. Facilities Auth., et al*., 432 P.3d 233, 235-41 (Okla. 2018). The Court recognized that the Oklahoma Legislature responded to its decision in *Bosh* by amending the Oklahoma Governmental Tort Claims Act "to clarify that the State's immunity from suit extended even to so-called 'constitutional' torts." *Id*.

In his responses to Defendants' summary judgment motions, Plaintiff states that based on *Barrios*, he is no longer pursing any state law claims. Docket Nos. 163 at 14, 168 at 29, 169 at 24, 171 at 1, and 197 at 15. Accordingly, the motions are granted as to the state law claims.[7]

III. The Board

In his brief response to the Board's motion for summary judgment, Plaintiff states that he is no longer pursuing any claim against the Board. Docket No. 171 at 1. Accordingly, the Board's motion is granted.[8]

IV. Undisputed Material Facts[9]

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[7] The court declines Plaintiff's request to find the motions moot as to the state law claims. Based on the briefing, they are granted.

[8] Again, the court declines Plaintiff's request to find the Board's motion moot. Based on the briefing, it is granted.

[9] Where statements of material fact are admitted or undisputed, the court includes cites to the listed fact number in the motion or response as "UMF."

The court notes that the "statement of facts" in the motions filed by Sheriff Morris [Docket No. 136] and by Dakota Morgan, Stephen Sparks, and Daniel Harper [Docket No. 137]

1. Plaintiff was booked into the Pittsburg County Criminal Justice Center ("PCCJC" or "jail") on November 11, 2016 on charges of burglary in the second degree, possession of a controlled substance, and unlawful possession of paraphernalia. *Docket Nos. 130, 131, 136, and 137, UMF# 1 (admitted in Plaintiff's responses thereto).*
2. During Plaintiff's November 11, 2016 through December 18, 2016 incarceration at PCCJC, Joel Kerns was the Sheriff of Pittsburg County and as Sheriff, he oversaw the operation and supervision of the PCCJC. *Docket Nos. 136 and 137, UMF #2 (admitted in Plaintiff's responses thereto).*
3. PCCJC had a policy requiring all inmates be medically screened upon entering the facility "and before being placed in the general population or housing area." *Docket Nos. 136 and 137, UMF #3 (admitted in Plaintiff's responses thereto).*
4. Pursuant to PCCJC policy, a medical questionnaire was completed for and signed by Plaintiff. *Docket Nos. 136 and 137, UMF #4 (admitted in Plaintiff's responses thereto).*
5. As indicated on the medical questionnaire, during Lance's initial medical screening Lance indicated he was not: taking any prescription medication, medical treatments, or medical programs at that time; currently taking any medications prescribed by a doctor; having anyone bring him medications to the PCCJC; or aware of any medical problems that PCCJS should know about. *Docket Nos. 136 and 137, UMF #5 (admitted in Plaintiff's responses thereto).*

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are identical. Appropriately, Plaintiff adopts his response to the "statement of facts" in the former motion in his response to the latter motion.

The court further notes that although the facts and issues in the motions filed by Sheriff Kerns [Docket No. 129] and Sheriff Morris [Docket No. 136] are quite different, Plaintiff filed a combined response to the two motions.

6. Prior to Plaintiff's arrest on November 11, 2016, Plaintiff had previously been incarcerated at PCCJC and experienced no issues or problems during those previous incarcerations. *Docket Nos. 136 and 137, UMF #6 (admitted in Plaintiff's responses thereto).*
7. Prior to Plaintiff's arrest in November 2016, a doctor had never prescribed him prescription drugs. *Docket Nos. 136 and 137, UMF #7 (admitted in Plaintiff's responses thereto).*
8. While incarcerated at the PCCJC from November 11, 2016 to December 19, 2016, Plaintiff was housed in A-Pod per his request. *Docket Nos. 136 and 137, UMF #8 (admitted in Plaintiff's responses thereto).*
9. While incarcerated at PCCJC on November 25, 2016, Plaintiff filled out a "medical request" form requesting that his wisdom teeth be pulled. On November 28, 2016, Plaintiff was taken to the Indian Clinic for dental treatment per his request. *Docket Nos. 130 and 131, UMF #2; 136, and 137, UMF #9 (admitted in Plaintiff's responses thereto).*
10. Following Plaintiff's dental work on November 28, 2016, Plaintiff was prescribed ibuprofen and penicillin. Jail staff administered the prescribed ibuprofen and penicillin to Plaintiff without incident. *Docket Nos. 136 and 137, UMF #10 (admitted in Plaintiff's responses thereto).*
11. On the evening of Thursday, December 15, 2016, shortly after dinnertime at around 5:00 p.m. or 6:00 p.m., Plaintiff took approximately three-fourths of a Trazadone pill given to him by another inmate. *Docket Nos. 130 and 131, UMF #3; 136, and 137, UMF #11 (admitted in Plaintiff's responses thereto).*

12. Plaintiff traded his next morning's breakfast for the Trazadone pill, which Plaintiff hoped to use as a sleeping aid on the night of Thursday, December 15, 2016. *Docket Nos. 130 and 131, UMF #4; 136, and 137, UMF #12 (admitted in Plaintiff's responses thereto).*
13. Plaintiff had taken smaller doses of Trazadone from this inmate on previous occasions during his November 11, 2016 through December 19, 2016 stay at PCCJC, but before December 15, 2016, he had never taken up to three-fourths of a Trazadone pill. *Docket Nos. 130 and 131, UMF #5; 136, and 137, UMF #13 (admitted in Plaintiff's responses thereto).*
14. Plaintiff was not prescribed Trazadone and was not provided Trazadone through a "pill pass" by jailers or any other employee of the PCCJC. *Docket Nos. 130 and 131, UMF #6; 136, and 137, UMF #14 (admitted in Plaintiff's responses thereto).*
15. Plaintiff knew that the pill he took was Trazadone. *Docket Nos. 130 and 131, UMF #7; 136, and 137, UMF #15 (admitted in Plaintiff's responses thereto).*
16. Sometime after Plaintiff took the Trazadone pill, he fell asleep and then re-awoke in the early hours of Friday, December 16, 2016 with an erection. He used the restroom, and as he was unconcerned about his erection, he made no one aware of his condition. *Docket Nos. 130 and 131, UMF #8; 136, and 137, UMF #16 (admitted in Plaintiff's responses thereto).*
17. Plaintiff claims he had a prolonged erection from the early hours of Friday, December 16, 2016 to the morning of December 19, 2016 when he was sent to the emergency room for treatment. *Docket Nos. 130 and 131, UMF #9 (admitted in Plaintiff's responses thereto).*
18. Plaintiff testified that he awoke maybe three times in the early morning hours of December 16, 2016, but did not become alarmed until around breakfast time. Plaintiff

testified that early in the morning hours of December 16, 2016, he used the intercom inside his cell and informed Edward "Tyler" Morgan that he had taken "that pill [he] found on the floor" the previous night and had an erection. *Docket Nos. 136 and 137, UMF #s 17 and 18 (admitted in part and disputed in part[10] in Plaintiff's responses thereto); and Plaintiff's Depo., Docket No. 138-2, at 16-24.*

19. Plaintiff took the Trazadone approximately twelve hours before he notified anyone of his hours-long erection. There is no evidence, however, that Plaintiff experienced any painful or negative side-effects that would warrant reporting until sometime after 5:00 a.m. on December 16, 2016. *Docket Nos. 136, 137, UMF #19; and 168.*
20. Plaintiff's unauthorized use of another inmate's prescription Trazadone resulted in a priapism, which is a prolonged erection without stimulation that will not dissipate or go away without medical intervention. *Docket Nos. 136 and 137, UMF #20 (admitted in Plaintiff's responses thereto).*
21. Plaintiff testified that he was in so much pain that he removed his jail pants on Friday and kept them off until he saw the nurse on Monday. *Docket No. 168, UMF #17; Docket No. 172-11 at 38-39 and 137-39.*
22. Plaintiff claims that from the morning of December 16, 2016 through the morning of December 19, 2016, he made repeated requests for help utilizing the intercom system and to each and every jailer he encountered. *Plaintiff Depo., Docket No. 172-11 at 73, 93, 113-14, 118 and 124; Plaintiff Decl., Docket No. 172-19 at 1-2.*

[10] Defendants maintain Plaintiff used the intercom at approximately 6:00 a.m. In his response, Plaintiff maintains it was sometime after 5:00 a.m., but before 6:00 a.m. Docket No. 168, at 8, responses to UMF #s 17, 18, and 19.

23. All Defendants deny that Plaintiff made anyone aware of his condition until about 9:20 a.m. on Monday, December 19, 2016, when a jailer became aware of Plaintiff's condition and immediately took him to Jail Nurse Doris Crawford.[11] *Docket Nos. 136, and 137, UMF #21 ("disputed as phrased" in Plaintiff's responses thereto).* As noted by Plaintiff, however, there is evidence that other jailers knew, particularly Mike Smead. *Nurse Crawford's Depo., Docket No. 172-13 at 70-72; Declarations of Plaintiff and other inmates, Docket Nos 172-19, 172-8, 172-9, and 172-10.*
24. Two inmates signed declarations stating that in December 2016, they observed Plaintiff walking around the pod with a visible erection, that it was obvious he was in pain from it, and that they heard and observed him reporting it to guards and asking them for help and medical treatment. *Declarations of Jones and Stewart, Docket Nos. 172-8 and 172-10.*
25. None of the jailers contacted Nurse Crawford about Plaintiff from December 16-18, 2016. *Docket No. 169, UMF. # 8.*
26. During Plaintiff's initial interview with Nurse Crawford, he was a little apprehensive in telling her what medication he took and when he took it. *Nurse Crawford Depo., Docket No. 138-9 at 14 and PCCJC Progress Note, Docket No. 138-15.*
27. After Plaintiff disclosed to Nurse Crawford that he had taken Trazadone and when he took it, she examined his erection and immediately arranged his transport to MRHC's emergency room for further treatment. *Docket Nos. 129, UMF #1; 136 and 137, UMF #23 (admitted in Plaintiff's responses thereto).*

[11] Doris Crawford was previously, but after Plaintiff's Second Amended Complaint, is no longer a Defendant to this action.

28. Plaintiff received no medical care for his condition at the jail until he saw Nurse Crawford at 9:20 a.m. on December 19, 2016. *Docket No. 169, UMF #9.*

29. At approximately 9:30 a.m., Detention Officer Stephen Sparks transported Plaintiff to MRHC, but was relieved by jailer Brandon Wilkins[12] while at the hospital and did not bring Plaintiff back to the jail following his medical visit at the hospital. *Docket Nos. 136 and 137, UMF #24 (admitted in Plaintiff's responses thereto).*

30. At 11:47 a.m. on December 19, 2016, Lance was seen at MRHC by Dr. Lee, who diagnosed Plaintiff with priapism and treated him with injection, which failed to remedy the priapism. Between 12:01 p.m. and 12:50 p.m., Dr. Lee referred Plaintiff to a urologist in Tulsa at St. Francis Medical Center. *Docket Nos. 136 and 137, UMF #25 (admitted in Plaintiff's responses thereto).* Dr. Lee directed that Plaintiff be transported to St. Francis immediately, but did not indicate on the transfer request form the means by which Plaintiff was to be transported. *Docket Nos. 129, UMF #2 and 168, response to UMF #2.*

31. By 1:15 p.m., Plaintiff was returned to the PCCJC to be discharged on a medical recognizance bond. *Docket Nos. 136 and 137, UMF #26 ("disputed as phrased" in Plaintiff's responses thereto).* Plaintiff adds that Dr. Lee unequivocally instructed the jailers to immediately transport him to St. Francis. *Note by Dr. Lee, Docket No. 172-6.*

[12] Brandon Wilkins is not and never was a Defendant to this action.

32. While Nurse Crawford understood that Plaintiff needed to go to St. Francis as soon as possible, she did not believe he required an ambulance. *Docket Nos. 136 and 137, UMF #27 ("disputed as phrased" in Plaintiff's responses thereto).*[13]

33. At 2:42 p.m. Plaintiff was released from the PCCJC on a medical recognizance bond and discharged to his father, who Nurse Crawford personally told to take Plaintiff to the urologist "now." *Docket Nos. 136 and 137, UMF #28 (admitted in Plaintiff's responses thereto).*

34. After being discharged, Plaintiff accompanied his father and stepmother on several errands before his father drove him to St. Francis Medical Center in Tulsa, arriving at 7:16 p.m. Plaintiff underwent surgery for his priapism around 9:00 p.m. *Docket Nos. 136 and 137, UMF #29 (admitted in Plaintiff's responses thereto).*

PCCJC Policies & Training

35. In December of 2016, PCCJC inmates were observed through direct supervision from a jailer in a tower, through video surveillance in the tower, and by two jailers in the booking area. *Docket No. 168, UMF #11; Manual, Docket No. 172-2 at 45-46.*

36. The tower post for the jailer supervising the housing unit Plaintiff occupied has large glass windows allowing close supervision of the population and the physical condition of the inmates. *Docket No. 197, UMF #20; Tower photo, Docket No. 172-20.*

37. Pursuant to PCCJC policy, jail staff kept a detailed log, often referred to as "the bible" of the daily activity within the male tower. These logs show who was on duty per each shift and further indicate itemized items for shift changes, site checks, medication pass, meal

[13] Plaintiff argues this is irrelevant and that it is not supported by evidence that she was qualified to render opinions about the need for transport by ambulance in cases of a 96-hour priapism.

pass, any significant incidents, and anyone making any request to the jailers during these time frames. There are no entries in these logs with regard to Plaintiff's medical condition until Monday, December 19, 2016 at 9:15 a.m. when Detention Officer Homer McOwen takes "one male inmate from A-Pod to Booking." *Docket Nos. 136 and 137, UMF #40 ("disputed as phrased" in Plaintiff's responses thereto).* Plaintiff argues that the log contains a variety of entries that are unreliable and unverified.

38. The Booking Log for December 19, 2016 states that at 9:30 a.m. Sparks took Plaintiff to the doctor. The Log further indicates that at 1:15 p.m. Plaintiff was back from MRHC and at 2:45 p.m. Plaintiff was released on a medical personal recognizance bond. *Docket Nos. 136 and 137 (admitted in Plaintiff's responses thereto).*

39. The PCCJC had a policy in reference to Oklahoma State Jail Standards: "to provide adequate medical care in a jail facility by maintaining an established healthcare plan that states what is to be done in situations involving the health and medical care of inmates in this facility." *Docket Nos. 129, UMF # 5 (admitted in Plaintiff's responses thereto); Docket Nos. 136 and 137, UMF #42 ("disputed as phrased" in Plaintiff's response thereto).* Plaintiff argues the policy relates to medical care "in the facility" and that PCCJC has a practice of disregarding physicians' orders to transport inmates with emergent medical needs and instead transporting them back to the jail to be released first. *Docket No. 168, responses to Kerns' UMF #5 and Morris' UMF #42, (citing Kerns Depo., Docket No. 172-12 at 32-33 and 55-57).*

40. Oklahoma has standards for jail facilities that require a prisoner count at the beginning of each shift change and "at least one (1) visual sight check every hour which, shall include all areas of each cell and such sight checks shall be documented." OKLA. ADMIN. CODE.

§ 310:670:5-2(2) and (3). Oklahoma further requires that each prisoner be served three meals per day. OKLA. ADMIN. CODE. § 310:670:5-7(1).[14]

41. Pursuant to PCCJC policy, prior to sending a prisoner to the medical facility, an officer must fill out a medical clearance form. "Instructions on the medical clearance form must be followed. If the conditions that are prescribed cannot be carried out by the jail staff, the shift supervisor will be notified immediately to attempt to get the prisoner OR'd." *Docket No. 168, UMF #3; Manual, Docket No. 172-2 at 7.*

42. Pursuant to PCCJC policy, the MRHC and the ambulance service provided PCCJC with the necessary medical services to inmates and Sheriff's Office personnel on an as needed basis. Due to the close proximity to this facility, medical care was less than five minutes away and available to use twenty-four hours daily. *Docket Nos. 129, UMF # 5 (admitted in Plaintiff's response thereto); Docket Nos. 136 and 137, UMF #43 ("disputed as phrased" in Plaintiff's responses thereto).* Plaintiff argues the policy is one in name only. *Docket No. 168, response to Morris' UMF #43.*

43. Once at the MRHC, if a doctor recommends an inmate be transported directly from the ER to another hospital, the sheriff and his staff do not have the discretion to release the inmate without the higher authority of the district attorney or a judge. *Docket No. 168, UMF #12 and 15; Manual, Docket No. 172-2 at 55-57.*

44. The only medical services provided at the jail were through the nurse who was at the jail Monday through Friday from 8:00 a.m. to 5:00 p.m. There was no physician on call. If the nurse was not there, a jailer, usually a jail administrator, could call the attending

[14] Plaintiff points out that under Oklahoma's jail standards, from December 16 – 19, 2016, the jailers would have had contact with Plaintiff a total of 97 times for site checks, meals, pill passes, and head counts. *Docket No. 169, UMF #18.*

physician at MRHC. *Docket No. 168, UMF #6; Kerns Depo., Docket No. 172-12 at 13-14 and 18.* While Nurse Crawford did not work on the weekends, she was on call if situations arose that required consultation with her. *Docket No. 131, UMF 11 (admitted in Plaintiff's response thereto).*

45. Pursuant to PCCJC policy, inmates are informed upon admission to PCCJC the process for gaining access to medical and healthcare services. This information is given to said inmates in writing along with a copy of the jail rules. *Docket Nos. 136 and 137, UMF #44 (admitted in Plaintiff's responses thereto).*[15]

46. Pursuant to PCCJC policy, inmates are informed that a medical request form can be filled out and submitted to the jailers or to jail staff if an inmate needs medical care. *Docket Nos. 136 and 137, UMF #45 (admitted in Plaintiff's responses thereto).*[16]

47. Pursuant to PCCJC policy, supervisors determine the immediacy of medical complaints and take appropriate action. *Docket Nos. 136 and 137, UMF #46 (admitted in Plaintiff's responses thereto); Docket No. 168, UMF #1.*

48. Pursuant to PCCJC policy, jailers address an inmate's medical request by using their own discretion and common sense to assess the severity of the medical need, by immediately referring all such requests up the "chain-of-command" to their shift sergeant, Nurse Crawford, and the Jail Administrator. *Docket Nos. 129, UMF # 6; 136 and 137, UMF # 47 (admitted in Plaintiff's responses thereto); Docket No. 168, UMF #7.*

49. Pursuant to PCCJC policy, jailers are responsible for ensuring that inmates who request medical attention are given the proper form to fill out and that the appropriate supervisor

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15 Plaintiff argues this is not relevant.

16 Plaintiff argues this is not relevant.

is notified so said supervisor can determine if the inmates requesting medical attention require transport to the MRHC emergency room. *Docket Nos. 136 and 137, UMF # 48 (admitted in Plaintiff's responses thereto); Docket No. 168, UMF #2*.

50. Pursuant to PCCJC policy, inmate prescription medication is administered in compliance with the orders of a licensed physician or designated medical authority. *Docket Nos. 136 and 137, UMF #49 (admitted in Plaintiff's responses thereto).*
51. Following policy was mandatory. *Docket No. 168, UMF #4; Kerns Depo., Docket No. 172-12 at 10*.
52. Sheriff Kerns testified that he agreed that any deviation from a policy could expose an inmate to a greater risk. *Docket No. 168, UMF #5; Kerns Depo., Docket No. 172-12 at 10-11*.
53. The jailer Defendants knew and understood the procedure of reporting an inmate's medical needs as outlined by the PCCJC policies. *Docket Nos. 129, UMF #7 (admitted in Plaintiff's response thereto); 136 and 137, UMF #50 ("disputed" in Plaintiff's response thereto).* Plaintiff does not actually dispute the fact, but argues the jailers here did not report Plaintiff's medical needs.
54. The jailer Defendants recognized that if Plaintiff 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 violate PCCJC policy. *Docket Nos. 136 and 137, UMF #51 (admitted in Plaintiff's responses thereto).*

55. PCCJC jailers completed a state mandated training course that included lessons in basic First Aid and CPR. *Docket Nos. 129, UMF #10 ("disputed" in Plaintiff's response thereto); 136 and 137, UMF #52 (undisputed in Plaintiff's responses thereto).*[17]

56. In addition to the state mandated course, the PCCJC also utilized mentoring or shadowing on-the-job training practice whereby newly hired jailers would shadow or be mentored by a more experienced jailer on policies and practices. Such shadowing or mentoring would last anywhere from a month to two months. *Docket Nos. 129, UMF #11 (admitted in Plaintiff's response thereto); 136 and 137, UMF #53 (undisputed in Plaintiff's responses thereto).*

57. Sheriff Kerns testified that he was not aware of any additional or special training for the jail staff regarding handling inmates with medical needs. Any such training would have been under the normal jail standards or whatever the State provides. *Docket No. 168, UMF #8; Kerns Depo., Docket No. 172-2 at 32-22.*

58. PCCJC held monthly safety meetings for jail staff. *Docket Nos. 136 and 137 (undisputed in Plaintiff's responses thereto).*

59. For every shift at PCCJC, a staff sergeant oversaw PCCJC and supervised the detention officers on shift. *Docket Nos. 136 and 137, UMF #51 (admitted in Plaintiff's responses thereto).*

[17] In his response to Sheriff Kerns' motion, Plaintiff states that he disputes this fact, but cites no support. He simply states that it is not supported by testimony of every jailer. This is insufficient to dispute the fact. Additionally, Plaintiff does not dispute the very next listed fact that in addition to the state mandated course, the PCCJC provided further on-the-job training. In response to Sheriff Morris' motion, Plaintiff states the fact is vague and not relevant.

Daniel Harper

60. In December of 2016, Daniel Harper was a jailer at PCCJC. *Docket Nos. 136 and 137, UMF #30 (admitted in Plaintiff's responses thereto).*

61. During the relevant period, December 15, 2016 to December 19, 2016, Harper worked one shift, as a supervisor, from 6:00 p.m. Sunday, December 18, 2016 to 6:00 a.m. Monday, December 19, 2016. *Timesheets, Docket No. 172-1, at 5; Harper Depo., Docket No. 172-17 at 20-25*.

62. Harper testified that he has no recollection of any interaction with Plaintiff. *Harper Depo., Docket No. 172-17 at 24*.

63. Harper passed out breakfast trays at 5:29 a.m. on December 19, 2016. The meal trays are placed on a rolling cart. The jailer takes the cart to each housing unit, waits for the inmate to come up to the "bean hole," and hands him a tray. *Harper Depo., Docket No. 172-17 at 25-26.*

64. Harper testified that did he not hear of the Plaintiff's medical condition while he was on night shift the evening of December 18, 2016. *Harper Depo., Docket No. 172-17 at 33.*

65. Harper subjectively knew that a prolonged and painful erection required medical attention. *Harper Depo., Docket No. 172-17 at 48-49.*

66. Harper was in the tower that night and was to perform welfare checks from the tower and while cleaning. *Harper Depo., Docket No. 172-17 at 30-31 and 39*. Plaintiff argues that his condition would have been obvious from the vantage point of the tower. *Tower photo, Docket No. 172-20.*

Dakota Morgan

67. In December of 2016, Dakota Morgan was a Detention Officer at PCCJC. *Docket Nos. 136 and 137, UMF #34 (admitted in Plaintiff's responses thereto).*

68. During the relevant period, December 15, 2016 to December 19, 2016, Dakota Morgan worked three day shifts from 6:00 a.m. through 6:00 p.m. on December 15, 16, and 17. *Docket Nos. 136 and 137, UMF #36 (admitted in Plaintiff's responses thereto); Timesheets, Docket No. 172-1 at 11; Morgan Depo., Docket No. 172-16 at 9-10; Docket No. 197, UMF #1.*

69. Dakota Morgan testified that during his December 15-17 shifts, Plaintiff would have been in his care and his responsibility. *Docket No. 197, UMF #3; D. Morgan Depo., Docket No. 172-16 at 29.*

70. Dakota Morgan worked in the tower from noon until 6:00 p.m. on Friday, December 16, 2016. *Docket No. 197, UMF #4; D. Morgan Depo., Docket No. 172-16 at 48.* The intercom that was in Plaintiff's cell rings through to the tower. *Docket No. 197, UMF #5; D. Morgan Depo., Docket No. 172-16 at 32-33.*

71. Plaintiff had no recollection of speaking with Dakota Morgan at any point during his incarceration. *Plaintiff Depo., Docket No. 172-11 at 236.* Plaintiff, however, claims that he contacted the person in the tower during the time Dakota Morgan was posted there and told the person of his priapism and considerable pain. *Plaintiff Decl., Docket No. 172-19 at 1-2.*

72. Dakota Morgan testified that first he knew of Plaintiff after his return from the hospital. *D. Morgan Depo., Docket No. 172-16 at 28-29.*

73. Dakota Morgan testified that he understood that an erection that would not go away would be a serious medical issue. He testified that if informed of such, he would immediately inform the sergeant and if he felt the sergeant was not handling it properly, he would inform the nurse. *Docket No. 197, UMF #2; D. Morgan Depo., Docket No. 172-16 at 15*.

Stephen Sparks

74. During the relevant period, December 15, 2016 to December 19, 2016, Stephen Sparks worked the day shift in the PCCJC kitchen – from 8:00 a.m. to 5:00 or 6:00 p.m. – on December 18 and 19. *Docket Nos. 136 and 137 (admitted in Plaintiff's responses thereto); Docket No. 197, UMF #17.*

75. Sparks also worked as a transport jailer. *Docket No. 197, UMF #18, Sparks Depo., Docket No. 172-18 at 10-11*.

76. Other than to transport Plaintiff to MRHC on the morning of December 19, 2016, Sparks testified that he did not interact with Plaintiff on December 18 or 19, 2016 and had no knowledge of any medical condition of Plaintiff. *Sparks Depo., Docket No. 172-18 at 29-30.*[18]

77. When Sparks took Plaintiff to the ER, he observed that Plaintiff was visibly in pain. *Docket No. 197, UMF #s 19 and 20; Sparks Depo., Docket No. 172-18 at 36 and 42*.

Mike Smead

78. In December 2016, Mike Smead was a sergeant who worked on the day shift from 6:00 a.m. to 6:00 p.m. *Docket No. 131 (admitted in Plaintiff's response thereto); Docket No. 169, UMF #1*.

[18] Plaintiff argues this is not relevant.

79. During the relevant period, Smead worked the day shifts for December 15-17, 2016. He did not work Sunday, December 18, 2016. *Docket No. 131, UMF #24 (admitted in Plaintiff's response thereto); Docket No. 169, UMF #2*.

80. Mike Smead testified that he was not aware of Plaintiff's condition until it was reported in the McAlester New Capital. *Smead Depo., Docket No. 172-14 at 75*. He testified that he has no memory of being told. *Id. at 87-88*. He further testified that if he had been told about an inmate having a prolonged erection, that he thinks it would stand out in his memory. *Id. at 88-89*. He testified that if he had heard of an inmate having such a condition, he would have contacted the nurse, and if he could not reach her, then the jail administrator, and he would take the steps necessary to get the inmate medical treatment. *Id. at 89*.

81. Plaintiff testified that he spoke with Smead around lunchtime, telling him that "I took a pill, I've had a hard-on for longer than I should, and I needed to see the nurse." *Docket No. 131, UMF #15 (admitted in Plaintiff's response thereto) Plaintiff Depo., Docket No. 172-11 at 99*. Plaintiff testified that he showed Smead his penis probably a couple of times throughout the weekend and that he told him every time he saw him about his condition. *Plaintiff Depo., Docket No. 172-11 at 118 and 124*.

82. Plaintiff testified that during the times he spoke with Smead about his condition, Smead "kind of snickered," but then would also try to be sympathetic and say he was trying to get ahold of the nurse. *Plaintiff Depo., Docket No. 172-11 at 155-56*.

83. Nurse Crawford testified that when she asked Smead why no one called her, Smead replied that he thought Plaintiff was just playing. *Crawford Depo., Docket No. 172-13 at 70-71*.

Edward "Tyler" Morgan

84. In December 2016, Edward Morgan was a sergeant who worked only night shifts from 6:00 p.m. to 6:00 a.m. the following day. *Docket No. 130, UMF #10 (admitted in Plaintiff's response thereto).*

85. During the night shift, sight checks of the male pods were generally done by the jailer in the tower, not a jailer in the pod area. *Docket No. 130, UMF #11 (admitted in Plaintiff's response thereto).*

86. Plaintiff testified that Edward Morgan was the first jailer he told about his erection problem, doing so via the intercom before or after breakfast on December 16, 2016. *Docket No. 130, UMF #14 and 15 (admitted in Plaintiff's response thereto).*

87. 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).* Plaintiff testified that he knew it was "Tyler" Morgan because he remembered his voice. *Lance Depo. Docket No. 172-11 at 94.*

88. Edward Morgan disputes that Plaintiff informed him of his condition via the intercom, as he was not in the control tower. *Edward Morgan Depo., Docket No. 172-15 at 73 and 95-98.* Edward Morgan further testified that the fact that there is no notation in the tower logbook suggests that Plaintiff did not use the intercom and inform any jailer. *Id.* at 98. Edward Morgan testified that he was not aware of Plaintiff's priapism until at least December 29, 2016 when he returned to work after taking vacation days. *Id. at 49-50 and 92.*

89. The tower log shows that Edward Morgan moved an inmate and was passing out medications on the December 15, 2016 night shift. *Tower Log, Docket No. 130-7.*

90. Edward Morgan testified that if informed of a medical problem, he would start with the chain of command unless there was a pressing medical need and he had to act right then. *Id*. at 99-100.

Sheriff Kerns

91. Sheriff Kerns was not aware of Plaintiff's priapism on or before Monday, December 19, 2016, and was not involved in the assessment, diagnosis, transportation, or treatment of Plaintiff. *Docket No. 129, UMF # 3 (undisputed in Plaintiff's response thereto).*[19]

92. Sheriff Kerns performed his duties maintained normal office hours in December 2016. *Kerns Depo., Docket No. 129-13 at 4-5; Edward Morgan Depo., Docket No. 126-6 at 5; Sparks Depo., Docket No. 129-15 at 5*.[20]

V. Claims Against Defendants Sued in their Individual Capacities[21]

Plaintiff brought § 1983 claims against Edward Morgan, Mike Smead, Daniel Harper, Dakota Morgan, and former sheriff Joel Kerns in their individual capacities. These Defendants deny that they violated Plaintiff's constitutional rights. They also assert the affirmative defense of qualified immunity.

Plaintiff alleges that Defendants Smead, Harper, Dakota Morgan, and Edward Morgan were deliberately indifferent to his serious medical needs in violation of his constitutional rights.

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[19] Plaintiff argues this fact is not relevant, as Sheriff Kerns' personal involvement is not required for supervisor liability.

[20] While Nurse Crawford speculated that Kerns was absent in December following the loss of his son and the November election, she also acknowledged that she did not actually know whether he was in the office. Docket No. 129-7 at 11.

[21] Plaintiff has abandoned his claim against Defendant Stephen Sparks based on evidence that Sparks was not the transport jailer who returned him to the PCCJC. *Plaintiff's Resp., Docket No. 197 at 1-2*. Accordingly, Sparks' motion for summary judgment is granted.

Specifically, he claims that despite knowledge of his condition, they did not get him any medical help on December 16, 17, and 18, 2016. He also claims he should have been taken directly to St. Francis from MRHC on December 19, 2016.

Plaintiff claims that Defendant Sheriff Kerns failed to provide supervision over the PCCJC and that Sheriff Kerns adopted and enforced policies or practices that permitted jail staff to ignore Plaintiff's emergent medical needs and the physician's order to immediately transport him to St. Francis. He claims Sheriff Kerns' failures were the moving force behind the jailers' delaying and denying Plaintiff medical treatment.

Pretrial detainees are protected from deliberate indifference to their serious medical needs under the Fourteenth Amendment rather than the Eighth Amendment. *Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999). Nevertheless, the analysis is identical. *Id*. To prevail on a § 1983 claim of deliberate indifference to serious medical needs, proof of negligence or "inadvertent failure to provide adequate medical care" is not enough. *Self v. Crum*, 430 F.ed 1227, 1230 (10th Cir. 2006). A plaintiff must show "acts or omissions sufficiently harmful to evidence *deliberate indifference to serious medical needs*." *Id*. (emphasis added).

To that end, a plaintiff must satisfy a two-pronged inquiry, comprised of an objective and subjective component. *Id*. (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)). "Under the objective inquiry, the alleged deprivation must be 'sufficiently serious' to constitute a deprivation of constitutional dimension." *Id*. (citation omitted). Under the subjective inquiry, the official "must have a 'sufficiently culpable state of mind.'" *Id*. at 1230-31 (citation omitted). An official "cannot be liable unless the official knows of and disregards an excessive risk to inmate health or safety; the 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." *Id*.

at 1231. (citation omitted). "The fact that a serious medical need was 'obvious' could be evidence of deliberate indifference, although a 'prison official may show that the obvious escaped him' and avoid liability." *Id*. (citation omitted).

Citing *Kingsley v. Hendrickson*, --- U.S. ---, 135 S.Ct. 2466 (2015), Plaintiff argues that because he was a pretrial detainee protected under the Fourteenth Amendment, the court must apply only the objective component of the traditional analysis to determine whether Defendants were deliberately indifferent to his medical needs. The Tenth Circuit has noted that *Kingsley* involved "an excessive-force claim where there was no question about the intentional use of force against the prisoner," and the analysis therein "may not apply to a failure to provide adequate medical care or screening, where there is no such intentional action." *Crocker v. Glanz*, 752 Fed.Appx. 564, 569 (10th Cir. 2018) (unpublished).

While the Tenth Circuit has not yet definitively ruled on the issue,[22] the court believes that the subjective element – the defendant's state of mind, that he acted *deliberately* – is necessary to prove a claim of *deliberate indifference* to serious medical needs under either a Fourteenth Amendment or an Eighth Amendment analysis. Like the Northern District of Oklahoma, this court will follow existing Tenth Circuit precedent. *See Burke v. Regalado*, No. 18-CV-231-GKF-FHM, 2019 WL 1371144, *4 (N.D. Okla. Mar. 26, 2019) ("Because *Kingsley* did not address the standard applicable to a pretrial detainee's denial of medical care claim, this court follows existing Tenth Circuit precedent as to the appropriate standard.").

[22] The Tenth Circuit has since noted the split amongst the Circuits on this issue, but has not yet definitively ruled on it. *Burke v. Regalado*, --- F.3d ---, No. 18-5042 and 18-5043, 2019 WL 3938633 at * 14, n. 9 (10th Cir. Aug. 20, 2019); *Estate of Vallina v. County of Teller Sheriff's Office*, 757 Fed.Appx. 643, 646-47 (10th Cir. 2018) (unpublished).

Plaintiff has produced evidence that he suffered from a priapism at the jail from the early morning hours of Friday, December 16, 2016 until he was sent to MRHC on the morning of Monday, December 19, 2016. He testified and two other inmates also declared that he told every guard with whom he came into contact about his condition and need for medical assistance. He has presented evidence that under the rules and practices of the jail, he would have come in contact with guards on numerous occasions during the weekend. He has presented evidence that he took off his pants and walked around his cell without them over the weekend.

Defendants do not argue the objective prong of the test for deliberate indifference to a serious medical need, conceding that Plaintiff has submitted sufficient evidence that the deprivation was "sufficiently serious" to constitute a deprivation of constitutional dimension. Instead, Defendants argue that there is not evidence to support the subjective prong of the deliberate indifference test. They each deny knowledge of his condition. They also argue that they did not violate a clearly established constitutional right. The court, of course, considers the claims against and defenses of each Defendant separately.

Edward "Tyler" Morgan – Sergeant[23]

In December 2016, Edward Morgan worked night shifts from 6:00 p.m. to 6:00 a.m. Plaintiff claims that sometime in the early morning of December 16, 2016, the first jailer he told of his condition was Edward Morgan over the intercom. Plaintiff claims he recognized Edward Morgan's voice. Plaintiff claims to have spoken to Edward Morgan only the one time. *Lance Depo., Docket No. 172-11 at 60 and 234.* He told Edward Morgan that he had taken a pill he

[23] Plaintiff makes no claims against Edward Morgan with regard to being taken directly from MRHC to St. Francis.

found on the floor and had an erection he could not "get rid of." *Lance Depo., Docket No. 172-11 at 42-43, 51-52, 59 and 93-95*. While Edward Morgan disputes these allegations, viewing the evidence in the light most favorable to Plaintiff, for purposes of the motion for summary judgment, the court accepts them as true.

Taking the facts in the light most favorable to Plaintiff, he has not shown that Edward Morgan was deliberately indifferent to his serious medical needs. He has failed to prove the subjective prong of the deliberate indifference test. In the early morning hours of December 16, 2016, Plaintiff's erection had persisted for a few hours at most. Plaintiff told Edward Morgan that he took a pill and had an erection. 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.

As the court finds that Edward Morgan did not violate Plaintiff's constitutional rights, Edward Morgan is also entitled to qualified immunity. Moreover, under these particularized facts, Plaintiff has failed to show Edward Morgan violated any clearly established constitutional right. Accordingly, Edward Morgan's motion for summary judgment is granted.

Mike Smead – Sergeant[24]

In December 2016, Mike Smead worked day shifts from 6:00 a.m. to 6:00 p.m. Smead worked on December 15, 16, and 17. He did not work on Sunday, December 18. Viewing the evidence in the light most favorable to Plaintiff, for purposes of this motion, the court accepts as true the following facts: Plaintiff told Smead that he took a pill, had a prolonged erection, and

[24] Plaintiff makes no claims against Mike Smead with regard to being taken directly from MRHC to St. Francis.

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. Plaintiff has raised material issues of fact as to whether Smead was deliberately indifferent to his serious medical needs.

Nevertheless, as Smead has asserted the defense of qualified immunity, Plaintiff has the heavy burden to show not only that his constitutional right was violated, but that the right was clearly established. Plaintiff need not identify a case with identical facts, but must identify a case where an official acting under similar circumstances as Smead was held to have violated the Constitution. *Perry*, 892 F.3d 1123-26. In response to Smead's assertion of qualified immunity, Plaintiff argues that a detainee's right to medical care is clearly established.

Plaintiff further argues that severe pain triggers a duty for a medical professional to respond. *See Al-Turki v. Robinson*, 762 F.3d 1188 (10th Cir. 2014). *Al-Turki* is the most analogous case cited by Plaintiff. In that case, the plaintiff, a diabetic, had pain so severe, he had collapsed, vomited, and believed he was dying. Ultimately, it was determined that his pain was caused by a kidney stone, so the defendant nurse argued it was not serious. The Circuit Court held that the pertinent question for determining entitlement to qualified immunity depends on the facts known at the time. 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.

In this case, Plaintiff told Smead that he had taken a pill and had a prolonged erection. Plaintiff does not point to any case where an official acting under similar circumstances as Smead was held to have violated the Constitution. Plaintiff has not met his heavy burden. Accordingly, Smead is entitled to qualified immunity, and his motion is granted.

Daniel Harper – Jailer[25]

During the relevant period, Daniel Harper worked one night shift on from 6:00 p.m. on Sunday, December 18 to 6:00 a.m. on Monday, December 19. Harper passed out breakfast trays before his shift ended on Monday, December 19. He also worked in the tower that night and was to perform welfare checks from the tower and while cleaning. Plaintiff does not make any allegations with regard to speaking to Harper specifically.[26] Viewing the facts in the light most favorable to Plaintiff, however, there is a genuine issue of material fact as to whether Harper knew of Plaintiff's persistent erection and was deliberately indifferent to Plaintiff's serious medical needs.

Nevertheless, as Harper has asserted the defense of qualified immunity, Plaintiff has the heavy burden to show not only that his constitutional right was violated, but that the right was clearly established. Plaintiff does not point to any case where an official acting under similar circumstances as Harper was held to have violated the Constitution. Plaintiff has not met his heavy burden. Accordingly, Harper is entitled to qualified immunity, and his motion is granted.

Dakota Morgan – Detention Officer[27]

During the relevant period, Dakota Morgan worked two day shifts from 6:00 a.m. to 6:00 p.m. on Friday and Saturday, December 16 and 17.[28] Dakota Morgan worked in the tower from noon until 6:00 p.m. on Friday, December 16. Plaintiff argues that he called the tower during that time complaining of his condition and pain. Plaintiff further argues that consistent with

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[25] Plaintiff makes no claims against Daniel Harper with regard to being taken directly from MRHC to St. Francis.

[26] *Lance Depo., Docket No. 172-11 at 30-32.*

[27] Plaintiff makes no claims against Dakota Morgan with regard to being taken directly from MRHC to St. Francis.

[28] Dakota Morgan also worked a day shift on Thursday, December 15, but would have been finished with his shift by the time Plaintiff took the trazadone.

Oklahoma's jail standards, Dakota Morgan would have performed a total of seven sight checks from noon to 6:00 p.m. on December 16, 2016, and that there is no evidence that Dakota Morgan failed to conduct these hourly sight checks. *Docket No. 197, UMF #s 9 & 10*. While Plaintiff did not have any specific testimony about speaking with Dakota Morgan,[29] viewing the facts in the light most favorable to Plaintiff there is a genuine issue of material fact as to whether Dakota Morgan knew of Plaintiff's persistent erection and was deliberately indifferent to Plaintiff's serious medical needs.

Nevertheless, as Dakota Morgan has asserted the defense of qualified immunity, Plaintiff has the heavy burden to show not only that his constitutional right was violated, but that the right was clearly established. Plaintiff does not point to any case where an official acting under similar circumstances as Dakota Morgan was held to have violated the Constitution. Plaintiff has not met his heavy burden. Accordingly, Harper is entitled to qualified immunity, and his motion is granted.

Joel Kerns – Former Sheriff

Plaintiff claims that Kerns failed to adequately train the jailer Defendants, that he failed to provide any supervision or oversight, and that he adopted and enforced unconstitutional policies or practices that permitted the jailer Defendants to ignore his medical needs and his physician's orders. Kerns had no personal contact with Plaintiff or direct and contemporaneous knowledge of Plaintiff's treatment by jail officials during the relevant period.

Thus, for Plaintiff to prevail on his supervisory claims against Kerns, he must show an "affirmative link" between Kerns and a constitutional violation. *Cox v. Glanz*, 800 F.3d 1231, 1248 (10th Cir. 2015). To show an "affirmative link" between Kerns and the alleged

[29] *Lance Depo., Docket No. 172-11 at 236.*

constitutional harm, Plaintiff must show: "(1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind." *Id*. (citing *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010)). Plaintiff has failed to establish all three prongs.

First, as to the failure to get Plaintiff medical care over the weekend, Plaintiff has not shown that any policy or practice caused the failure. In fact, the policies instructed jailers to go up the chain of command as necessary to get inmates needed medical assistance. The Defendant jailers were trained by state standards and also given on-the-job mentoring. Plaintiff has failed to show any personal involvement by Kerns, supervisory or otherwise, in the alleged constitutional violation. Plaintiff failed to show any causal connection between Kerns' training, supervision, policies or practices and the alleged constitutional violation. Plaintiff has also failed to show that Kerns was deliberately indifferent to any such failure.

Second, Plaintiff argues that his constitutional rights were violated because he was not taken by ambulance directly from MRHC to St. Francis. Plaintiff argues that Kerns's policies and practices caused this violation of his rights. Dr. Lee directed that Plaintiff be transported to St. Francis immediately, but did not indicate on the transfer request form the means by which Plaintiff was to be transported. Plaintiff was transported back to the jail to be released on a medical recognizance bond. The total amount of time between Dr. Lee's direction and Plaintiff being released from the jail was less than two hours. When Plaintiff was released, Nurse Crawford told his father that he needed to be transported directly to St. Francis. Rather than transport him directly to St. Francis, his father ran errands and took him to St. Francis nearly five hours later.

"Where a prisoner claims that harm was caused by a delay in medical treatment, he must 'show that the delay resulted in substantial harm' in order to satisfy the objective prong of the

deliberate indifference test." *Al-Turki*, 762 F.3d at 1193. Plaintiff has not shown that the less than two-hour delay in releasing him on the medical recognizance bond resulted in substantial harm. Moreover, Plaintiff has failed to show any personal involvement, sufficient causal connection, or culpable state of mind.

Sheriff Kerns has also asserted the defense of qualified immunity. Plaintiff, therefore, has the heavy burden to show not only that his constitutional rights were violated, but that the rights were clearly established. Plaintiff must show that "clearly established law . . . would . . . have put a reasonable official in [Kerns'] position on notice that his *supervisory conduct* would" violate Plaintiff's constitutional rights. *Perry*, 892 F.3d 1123. Plaintiff has not pointed to any case where an official acting under similar circumstances as Kerns was held to have violated the Constitution. Plaintiff has not met his heavy burden. Accordingly, Kerns is entitled to qualified immunity, and his motion is granted.

VI. Official Capacity Claims Against Sheriff Morris

Plaintiff brings a claim against Sheriff Morris in his official capacity under § 1983 for indifferent training and supervision and for unconstitutional policies or practices to deny adequate medical care. For Plaintiff to prevail, he must show an underlying constitutional violation and that such violation was caused by a policy, practice, or custom of the PCCJC or that an official with final policy-making authority, *i.e.* former Sheriff Kerns, personally participated in the alleged violation. *Board of Cnty. Comm'rs. Of Bryan Cnty., Okl. V. Brown*, 530 U.S. 397, 402-06 (1997).

As the court held above, Plaintiff has failed to show that any violation was caused by a policy, practice or custom of the PCCJC or that former Sheriff Kerns personally participated in any alleged violation. Accordingly, Sheriff Morris' motion for summary judgment is granted.

VII. Conclusion

For the reasons set forth herein, the motions for summary judgment are disposed of as follows:

- The motion by the Board [Docket No. 135] is GRANTED.
- The motion by Edward Morgan [Docket No. 129] is GRANTED.
- The motion by Mike Smead [Docket No. 131] is GRANTED.
- The motion by Daniel Harper, Dakota Morgan, and Stephen Sparks [Docket No. 137] is GRANTED.
- The motion by Joel Kerns [Docket No. 129] is GRANTED.
- The motion by Chris Morris [Docket No. 136] is GRANTED.

IT IS SO ORDERED this 20th day of September, 2019.

THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

ATTACHMENT 2:

DISTRICT COURT JUDGMENT FILED SEPTEMBER 20, 2019

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

DUSTIN LANCE, *Plaintiff,* v. 1. BOARD OF COUNTY COMMISSIONERS OF PITTSBURG COUNTY, OKLA. 2. CHRIS MORRIS, Sheriff of Pittsburg County, Okla. in his official capacity 3. MIKE SMEAD, in his individual capacity, 4. DAKOTA MORGAN, in his individual capacity, 5. EDWARD MORGAN, in his individual capacity, 6. STEPHEN SPARKS, in his individual capacity, 7. MCALESTER REGIONAL HEALTH CENTER AUTHORITY, d/b/a McAlester Regional Hosptal, 8. GARY R. LEE, M.D., 9. JOEL KERNS, former sheriff of Pittsburg County, in his individual capacity, and 10. DANIEL HARPER, in his individual capacity, *Defendants.*	Case No. CIV-17-378-RAW

JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure and in accordance with the Orders entered contemporaneously herewith and the stipulation of dismissal without prejudice of Dr. Lee filed on March 11, 2019, the court hereby enters this judgment dismissing this action. The claims against Dr. Lee are dismissed without prejudice. The remainder of the claims are dismissed with prejudice.

IT IS SO ORDERED this 20th day of September, 2019.

THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA