No. 22-7054

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MISTY HARDEN and ROBERT HARDEN, as guardians and next friends of Shaun Smith, an incapacitated adult; SAVANAHA WORKS,

Plaintiffs-Appellees,

v.

TIMOTHY BYERS,

Defendant-Appellant,

and

B.J. HEDGECOCK, Sheriff of Pushmataha County, Oklahoma,

Defendant.

On Appeal from the United States District Court
for the Eastern District of Oklahoma
No. 6:19-cv-00379-EFM
The Honorable Eric F. Melgren

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ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF RELATED CASES

Pursuant to 10th Circuit Rule 28.2(c)(3), Appellee states there are no prior or related appeals.

INTRODUCTION

After lights out, the only jailer on duty, Defendant-Appellant Byers, ordered Plaintiff-Appellee Savanaha Works to leave her cell and go to the laundry room, where he then ordered her to pull down her pants and assaulted her. The district court denied Byers qualified immunity for his sexual abuse of Works.

On interlocutory review of that decision, this Court conducts its qualified immunity analysis based on the facts that the district court concluded a reasonable jury could find. Among those facts is that Works "did not consent to sexual relations with Byers." App. Vol. VI at 000743. Accepting that critical fact as true, it is clearly established under this Circuit's precedent that Byers violated the Eighth Amendment. This Court has long held that "nonconsensual, coerced sex between a jailer and an inmate violates the Constitution." *Brown v. Flowers*, 974 F.3d 1178, 1186 (10th Cir. 2020). Byers's attempts to cast doubt on the district court's thorough, cogent, and legally sound opinion are all unavailing.

STATEMENT OF THE CASE

I. Factual Background[1]

Savanaha Works was incarcerated at the Pushmataha County Jail for approximately five months in 2017 when she was 18 years old. App. Vol. VI at 000723; App. Vol. III at 000191. On the night of the events in this case, Timothy Byers was the only officer on shift at the jail. App. Vol. VI at 000723–000724. Around 11 p.m., after lights out, Byers told Works to retrieve a jumpsuit and a piece of paper from the laundry room, which she was authorized to do as a "trustee" – a detainee granted more freedom of movement to perform work such as cooking, cleaning, and laundry. App. Vol. VI at 000723; App. Vol. III at 000229. Works followed his instructions, exiting the women's pod and entering the laundry room as Byers followed her. App. Vol. VI at 000724. In the laundry room, Works

[1] The background facts are presented here in the light most favorable to the non-moving party. *Est. of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). These facts are drawn principally from the district court's order. Where necessary to provide additional background, the brief cites to undisputed facts in the parties' summary judgment motions and exhibits. Because Defendant-Appellant impermissibly challenges the district court's factual findings on this interlocutory appeal and cites facts that are irrelevant and inappropriate in an attempt to undermine Plaintiff-Appellee's credibility, Plaintiff-Appellee restates the facts here.

found the jumpsuit and handed it to Byers, who took it over to the men's side of the jail. *Id.*

Byers returned to the laundry room, where Works was looking for the paper. *Id.* He ordered her to "drop them," referring to her pants. *Id.* She refused, saying, "I don't think so," but Byers again told her to "drop them." *Id.* She was unable to leave the laundry room: it is a small room and Byers was blocking the exit. *Id.* Works is five feet tall. App. Vol. III at 000191. She was frightened, and later testified that she was too scared to call for help, and didn't think it would do any good since Byers was the only guard on shift. App. Vol. VI at 000724–000725. She complied with his command and pulled down her pants. App. Vol. VI at 000724. Byers then told her to bend over and touch her toes while he stood behind her, at which point he penetrated her vagina with either a finger or his penis. *Id.* While doing so, he asked her "what the problem was" and "why [she] was dry." *Id.*; *see also* App. Vol. III at 000234. Works responded: "I don't want to do this." App. Vol. III at 000234. She then felt something push inside her four to five times. *Id.* Other detainees heard "a banging noise" coming from the laundry room. App. Vol. VI at 000725. Surveillance video

partially captured the incident and shows Byers engaging in sexual activity with Works.[2] *Id.*

Byers told Works to pull her pants up and she returned to her cell. App. Vol. VI at 000724. She was shaking, and told her cellmate that she was "tripping" and that what just happened "wasn't cool." *Id.* Her cellmate later reported to investigators that when Works returned to her cell, she "was shaking and said, 'He fucked me down.'" *Id.* She was upset and crying, but was scared to report the assault out of fear that officers would retaliate against her. *Id.* at 000726.

The next morning, another detainee reported to a detention officer that Byers had removed Works from her cell the previous night and "'forced' her to have sex in the laundry room." App. Vol. VI at 000726 (quoting App. Vol. III at 000229–000230). The jail administrator and sheriff were notified, and officers reviewed surveillance footage that showed Byers taking Works into the laundry room around 11 p.m. the previous evening. *Id.*; *see also* App. Vol. III at 000229.

[2] The camera has a limited view of the incident: Works is blocked from view for much of the recording, and it does not have audio. App. Vol. VI at 000725.

The Oklahoma State Bureau of Investigation (OSBI) began an investigation. App. Vol. VI at 000726. Special Agent Steven Carter interviewed Works, as well as other detainees in the jail, and the jail nurse performed a rape examination on Works. *Id.* OSBI ultimately concluded there was probable cause to believe Byers had committed a crime, and the state charged Byers with second degree rape by instrumentation.[3] App. Vol. VI at 000727; *see also* App. Vol. III at 000288–000290. The jail terminated Byers two days after the incident. App. Vol. VI at 000727.

Works was transferred to a different jail three days after the assault. *Id.* She has suffered from nightmares and anxiety ever since. *Id.*; *see also* App. Vol. III at 000164, 000168.

II. Procedural Background

Works filed suit against Byers under 42 U.S.C. § 1983 for violation of her Eighth Amendment right to be free from excessive force. App. Vol.

[3] The charges were later dismissed after the state apparently lost contact with Works. App. Vol. VI at 000727.

I at 000016.[4] The parties proceeded to conduct discovery. During his deposition, Byers invoked the Fifth Amendment and refused to answer any questions. App Vol. VI at 000630.

After discovery, Byers moved for summary judgment. App. Vol. II at 000075. He argued that he was entitled to qualified immunity because Works, he claimed, consented to the sexual conduct. *Id.* at 000093. Byers conceded that, under this Circuit's caselaw, if Works "can show that her encounter with Byers was nonconsensual, then his conduct would violate" the Constitution. App. Vol. II at 000096. He also conceded that "[t]he law has been clearly established since August 11, 2015 that forceful or coerced sexual abuse violates the Eighth Amendment." *Id.* at 000100. Nonetheless, he argued that this law did not apply to his conduct because Works consented to sex. *Id.* at 000098, 000100.

The district court disagreed and denied summary judgment. App. Vol. VI at 000716. After reviewing all the evidence in the case, including

[4] Works also brought a *Monell* claim against Sheriff B.J. Hedgecock in his official capacity for constitutionally inadequate policies and practices related to sexual abuse at the jail. App. Vol. I at 000033. Additionally, the complaint contained claims by another detainee at the Pushmataha County Jail for a separate incident of sexual assault by a guard. App. Vol. I at 000020–000023. Only Works's claim against Byers is at issue in this interlocutory appeal.

Works's testimony and surveillance video of the incident, the court determined that a jury could rationally conclude Works did not consent to the sexual contact. *Id.* at 000742. It summarized the evidence:

> Works has described the contact as a "rape." She testified that she was unable to leave the room because Byers was in the way, that his preemptory instruction to "drop them," indicating her pants, frightened her. She testified that "whenever you're in jail where you don't know anybody, you know, they have all the power over you. They can do whatever they want to." She was concerned that Byers or other staff might retaliate against her.

Id. at 000743. The district court acknowledged that there was some "evidence suggestive of consent," but ultimately held that a reasonable jury could believe Works's version of events, and thus there was a genuine issue of material fact on consent. *Id.* at 000744.

Viewing the evidence in the light most favorable to Works, then, the court concluded that Byers had engaged in nonconsensual sex with Works, which the court held violated her Eighth Amendment rights. *Id.* at 000744–000745. The district court explained that "[s]uch violations are not limited to the use of physical force, and a court may properly consider the inherently coercive nature of imprisonment." *Id.* at 000745. Finally, the court held that it is clearly established in the Tenth Circuit that "nonconsensual, coerced sex between a jailer and an inmate violates

the Constitution." *Id.* (quoting *Brown v. Flowers*, 974 F.3d 1178, 1187 (10th Cir. 2020)). Therefore, the district court held that Byers was not entitled to summary judgment on qualified immunity grounds. *Id.*

Byers timely appealed the denial of qualified immunity. App. Vol. VI at 000757.

SUMMARY OF ARGUMENT

The district court properly denied Byers qualified immunity. It thoroughly reviewed the evidence in this case, including Works's testimony and the surveillance video, and concluded that a reasonable jury could find the sexual contact was nonconsensual. In reaching its conclusion, the district court found evidence of coercion, including Byers's insistent verbal demands, his physical blocking of Works's way out of the room, and Works's fear.

Consent and coercion are issues of fact, *see Brown v. Flowers*, 974 F.3d 1178, 1182 (10th Cir. 2020), and this Court lacks jurisdiction to disturb those factual findings on interlocutory appeal. That makes this an easy case. This Court has said that "nonconsensual, coerced sex between a jailer and an inmate violates the Constitution," and also that this has been clearly established at least since 2016. *Brown*, 974 F.3d at

1186. Viewing the facts in the light most favorable to Works, Byers violated this clearly established law.

Byers's arguments to the contrary are unavailing. This is not the rare case where the record evidence "blatantly contradicts" the district court's factual findings. Byers identifies no evidence the district court overlooked, only evidence the court acknowledged and grappled with in reaching its conclusion that a reasonable jury could find consent lacking.

The district court also made no burden-shifting error: it properly recognized that Works bore the burden of persuasion after Byers asserted qualified immunity, and it also properly found that she met that burden.

Additionally, the district court's mere mention of the possible adverse inference from Byers's choice to invoke his right to remain silent at his deposition does not constitute legal error. A review of the opinion in fact shows that the district court did not actually *draw* an adverse inference. Rather, it found the question unnecessary to resolve since the other evidence in the record was sufficient to decide the summary judgment motion.

Finally, the district court correctly determined that the constitutional right in this case is clearly established. In light of caselaw

establishing that sexual abuse perpetrated through either physical or nonphysical coercion violates the Eighth Amendment, no reasonable officer could have thought Byers's conduct constitutional. This Court should affirm.

STANDARD OF REVIEW

At summary judgment, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Tolan v. Cotton*, 572 U.S. 650, 651, 656 (2014). And on interlocutory appeals such as this one, this Court's review is even more circumscribed. "[W]hen reviewing the denial of a summary judgment motion asserting qualified immunity," this Court "lack[s] jurisdiction to review the district court's conclusions as to what facts the plaintiffs may be able to prove at trial." *Simpson v. Little*, 16 F.4th 1353, 1357 (10th Cir. 2021). That is, this Court has no interlocutory jurisdiction to review "whether or not the pretrial record sets forth a genuine issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 320 (1995). Instead, this Court may review only: "(1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, and (2) whether that law was clearly established at the time of the alleged violation." *Duda v. Elder*, 7

F.4th 899, 910 (10th Cir. 2021). This review is *de novo*. *Simpson*, 16 F.4th at 1360.

In reviewing these legal questions in an interlocutory posture, the Court "rel[ies] on the district court's description of the facts, taken in the light most favorable to Plaintiff" and "[may] not reevaluate the district court's conclusion that the record is sufficient to prove these facts." *Perea v. Baca*, 817 F.3d 1198, 1200–01 (10th Cir. 2016) (quoting *Al-Turki v. Robinson*, 762 F.3d 1188, 1191 (10th Cir. 2014)). The Court "must scrupulously avoid second-guessing the district court's determinations regarding whether the appellee has presented *evidence* sufficient to survive summary judgment." *Simpson*, 16 F.4th at 1360. A defendant seeking interlocutory review must "be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal." *Farmer v. Perrill*, 288 F.3d 1254, 1258 n.4 (10th Cir. 2002) (quoting *Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir. 1998)).

ARGUMENT

I. The District Court Properly Concluded That a Reasonable Jury Could Find Byers Violated Works's Eighth Amendment Rights.

After a defendant asserts the defense of qualified immunity in a summary judgment motion, the plaintiff bears the burden to "raise a genuine issue of material fact that . . . the defendant's actions violated his or her constitutional or statutory rights." *Paugh v. Uintah Cnty.*, 47 F.4th 1139, 1153 (10th Cir. 2022). Here, the district court properly found that Works cleared this hurdle.

The district court thoroughly reviewed the evidence in the record and held, crucially, that a reasonable jury could find that the sexual contact between Works and Byers was nonconsensual. App. Vol. VI at 000743. The court was then required to view the evidence in the light most favorable to Works. *See Est. of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) ("When the defendant has moved for summary judgment based on qualified immunity, we still view the facts in the light most favorable to the non-moving party and resolve all factual disputes and reasonable inferences in its favor."). It properly did so, and held that the evidence sufficed to show an Eighth Amendment violation under this

Court's longstanding precedent that "nonconsensual, coerced sex between a jailer and an inmate violates the Constitution." *See Brown v. Flowers*, 974 F.3d 1178, 1186–87 (10th Cir. 2020) (collecting cases); App. Vol. VI at 000744–000745.

Byers resists this straightforward analysis with a confusing detour into burdens of proof, but these arguments don't stand up to scrutiny. The district court followed the proper standard for reviewing a qualified immunity defense at summary judgment to a T, and there is no basis for reversal.

A. On Interlocutory Appeal, We Must Assume Works Did Not Consent to Sexual Contact with Byers.

1. The District Court Determined That a Reasonable Jury Could Find That Works Did Not Consent.

There is no dispute that Byers and Works had sexual contact. App. Vol. VI at 000725; App. Vol. II at 000084–000085. And the district court held a reasonable jury could find that it was against Works's will: the court stated that "a material issue of fact exists as to whether the sexual encounter between Byers and Works was consensual." App. Vol. VI at 000742. It went on to catalog the evidence supporting an inference that the encounter was not consensual: Works "described the contact as a 'rape.'" *Id.* at 000743. She testified that "she was unable to leave the room

because Byers was in the way, that his preemptory instruction to 'drop them,' indicating her pants, frightened her." *Id.* After Byers issued the order to drop her pants, Works said, "I don't think so," but he repeated the order, at which point she relented. *Id.* at 000724. She was "distraught by the time she returned to her cell," *Id.* at 000744; her cellmate reported she was shaking, and she "was upset and cried but went to sleep." *Id.* at 000726. The court also noted that Works testified, "whenever you're in jail where you don't know anybody, you know, they have all the power over you. They can do whatever they want to." *Id.* at 000743. She was concerned that Byers or other staff might retaliate against her. *Id.*

In addition to this testimonial evidence, the district court took into account, consistent with this Court's caselaw, the inherently coercive nature of imprisonment. *Id.* at 000745. And it observed that Byers offered very little to contest this evidence: He refused to testify himself, and rather rested solely on the surveillance video, arguing that it contradicted Works's allegations. App. Vol. VI at 000742.

In considering Byers's arguments, the court did acknowledge that there was some evidence suggestive of consent. *Id.* at 000744. Works testified that she did not recall if she told Byers she did not want to have

sex. *Id.* And the court agreed with Byers that on the video, after the assault, Works does not appear upset. *Id.* But after thoroughly considering this evidence and the arguments, the court concluded that a reasonable jury could decide this factual question of consent in Works's favor.

2. This Court Does Not Have Jurisdiction to Reconsider that Factual Finding.

Notably, the district court's determination that "a rational fact-finder could find Works did not consent" is binding for purposes of this appeal. App. Vol. VI at 000743. This Court on interlocutory review is generally "not at liberty to review a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference." *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008).

Brown v. Flowers arose in this same procedural posture and illustrates this limitation. There, in a similar case of sexual abuse by a guard, this Court held that consent and coercion are issues of fact. *Brown*, 974 F.3d at 1183–84. The district court had found that a reasonable jury could credit the plaintiff's allegations, and this Court held, therefore, that

"for purposes of this appeal, we must assume that the sex was coerced and nonconsensual." *Id.* at 1182. The same is true in this case.

Byers argues that a narrow exception to this rule applies: a court may review the factual record *de novo* where "the version of events the district court holds a reasonable jury could credit is *blatantly contradicted* by the record." *Simpson*, 16 F.4th at 1360 (emphasis added); *see* Appellant's Br. 22. This Court has repeatedly cautioned that the standard for blatant contradiction is "a very difficult one to satisfy," *Crowson v. Washington Cnty., Utah*, 983 F.3d 1166, 1177 (10th Cir. 2020), applying only where "the version of events is so utterly discredited by the record that no reasonable jury could have believed it, constituting visible fiction." *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1164 (10th Cir. 2021).

Nothing Byers points to meets the high bar of rendering the district court's findings "visible fiction." *See Vette*, 989 F.3d at 1162. He primarily rests his argument on the surveillance video. But the video – which the district court thoroughly considered and discussed at length, App. Vol. VI at 000742–000744 – simply does not blatantly contradict Works's testimony such that "no reasonable jury could have believed it," *Vette*,

989 F.3d at 1164. First, it does not come close to proving that her testimony that she didn't consent is *false* – that is, that she actually *consented*. Nor does it render any other part of her testimony clearly false.

For the most part, the camera's "limited view" of events doesn't shed any light on Works's allegations at all. App. Vol. VI at 000743. And though the district court thought she appeared "calm" at the end of the video, it also recognized that even this could be consistent with her allegations because "the trauma of the event may have taken a few minutes to manifest itself," App. Vol. VI at 000744. And other evidence in the record corroborates that understanding of the video: "The calm demeanor of Works on the video is counterbalanced by the testimony of Works and Whisenhunt that Works was distraught by the time she returned to her cell." *Id.*

Nor does the video discredit Works's testimony that she felt she couldn't leave the laundry room just because she can never be seen attempting to leave. *See* Appellant's Br. 27; App. Vol. VI at 000743. The video clearly shows that when Byers was in the room, he was standing between her and the doorway. This is fully consistent with her testimony

that when he demanded that she drop her pants, he was blocking the door of the small room they were in. App. Vol. III at 000139.

In any event, Byers raises nothing about the video that the district court overlooked; the court itself thought that there was some tension between the video and Works's testimony. But it grappled with that conflict and came to a reasonable conclusion: "The video may provide some fodder for Defendants' claim of consent, but it does not utterly discredit Works' testimony that she did not consent." App. Vol. VI at 000744.[5]

[5] Byers's other arguments come nowhere near satisfying the high standard for blatant contradiction. He takes issue with the district court's crediting of Works's testimony that she feared retaliation because she said this in the context of a question about why she didn't later report the assault. Appellant's Br. 27; App. Vol. III at 000151. But Works described a general fear of the guards, and a reasonable jury could easily infer that her fear of retaliation wasn't limited to reporting an assault, but also disobeying an order or resisting a sexual advance. Byers also argues that Works's use of the word "rape" does not support her claim because she may have been referring to the criminal offense under Oklahoma law, for which consent is immaterial. Appellant's Br. 27. Byers would be free to argue to a jury that when Works told her mother she had been "raped," *see id.* at 12, she did not mean "rape" in the colloquial sense, but was instead referring to the legal definition. Of course, positing an alternate possible meaning for her words falls far short of rendering Works's account visible fiction. Works also has additional facts and arguments to support her case, including her statement to investigators that she told Byers "I don't want to do this." App. Vol. III at 000234. But in this posture the district court findings govern.

Byers also argues that Works failed to present any evidence of coercion. Appellant's Br. 28–29. This argument falls far short of satisfying the blatant contradiction standard, for which he would have to point to "clear, conclusive evidence" that renders Works's account visible fiction. *See Hubbard v. Nestor*, 830 F. App'x 574, 581 (10th Cir. 2020). In any event, Byers's contention that Works has no evidence of coercion is simply belied by the record. Works testified that Byers physically blocked her in the laundry room, ordered her to pull her pants down, insisted after she refused, and frightened and intimidated her. App. Vol. VI at 000743. She feared retaliation and testified to feeling powerless relative to the guards while in jail. *Id.*; *see also supra* I.A.1. (quoting district court's findings of coercion). This all comprises evidence of coercion.

In a variation on this argument, Byers suggests that there is a legal requirement that "to establish a lack of consent, a plaintiff is required to prove either objective assertions or manifestations were made or establish that favors, privileges, or some other exchange was involved." Appellant's Br. 28. Even if that were the rule, Works *did* objectively manifest non-consent when she said "I don't think so" after Byers told her to pull down her pants. App. Vol. VI at 000724. But more importantly,

there is no such rule. The Tenth Circuit has never adopted this restrictive definition of what qualifies as coercion. To the contrary, it has recognized that it is "difficult to discern consent from coercion," *Graham v. Sheriff of Logan Cnty.*, 741 F.3d 1118, 1126 (10th Cir. 2013), and accordingly adopted a broad definition that incorporates both physical and nonphysical coercion. *See Brown*, 974 F.3d at 1185. And it has authorized courts to take account of the "inherently coercive nature of the prison setting," recognizing that coercion may be present even in the absence of obvious signs of resistance. *Id.* at 1181.[6] Byers misstates the law when he suggests Works must satisfy some categorical test. This Court should decline to disturb the district court's factual determinations on consent and coercion.

B. Byers's Conduct Violates the Eighth Amendment.

Byers spends most of his brief disputing the district court's factual findings of coercion, which are set in stone for purposes of this appeal.

[6] Other circuits have similarly recognized the many forms coercion can take. *See Wood v. Beauclair*, 692 F.3d 1041, 1049 (9th Cir. 2012) (declining to "attempt to exhaustively describe every factor which could be fairly characterized as coercive"); *Hale v. Boyle County*, 18 F.4th 845 (6th Cir. 2021) ("Coercion factors include, *but are not limited to*, explicit assertions or manifestations of non-consent, as well as favors, privileges, or any type of exchange for sex." (emphasis added)).

See, e.g., Appellant's Br. 28, 36; *see also Vette*, 989 F.3d at 1162. Notably, what he doesn't do is argue that those factual findings wouldn't establish a constitutional violation. *See* Appellant's Br. 2.

The district court properly concluded that they do. Viewing the evidence and reasonable inferences in the light most favorable to Works, Byers coerced Works into a nonconsensual sexual encounter. The court correctly concluded that this conduct violates the Eighth Amendment. App. Vol. VI at 000744–000745. This follows from a straightforward application of this Court's precedent.

This Court has held that "sexual abuse of those in jail or prison violates the Constitution." *Brown*, 974 F.3d at 1184. To show an Eighth Amendment violation, "the prisoner need prove only that the guard forced sex." *Graham*, 741 F.3d at 1123. Such a claim requires "at least some form of coercion" – but that may be either physical or nonphysical coercion. *Id.* at 1126. When considering such a claim, the court must take account of "the power dynamics between prisoners and guards that make it difficult to discern consent from coercion." *Id.*

In *Brown*, a recent and factually similar case, this court found sufficient evidence of a constitutional violation to survive summary

judgment. 974 F.3d at 1183.[7] There, the defendant jailer ordered the plaintiff to come see him in the control tower and then, when she got there, told her to expose her breasts, lifted her shirt up, and began having sex with her. *Id.* at 1180–81. The plaintiff "explained that she did not physically resist because [defendant] was a guard and she was an inmate and so if she used physical force to resist [defendant], that resistance could result in charges against her." *Id.* After the encounter, the jailer gave the plaintiff cigarettes. *Id.* at 1181. The court held that this sufficed to establish a violation of the plaintiff's constitutional rights. *Id.* at 1183.

So too in this case. The district court's factual findings demonstrate both physical and nonphysical coercion. App. Vol. VI at 000743. Byers cornered Works in a small room and demanded that she remove her pants. *Id.* When she refused, he insisted. *Id.* at 000724. Works was frightened and felt unable to get away from him, so she relented and took off her pants, at which point Byers proceeded to have sex with her. *Id.*; *see also id.* at 000743. She was visibly distraught when she returned to

[7] The *Brown* Court's merits and clearly established analysis relied on Eighth Amendment cases, even though the plaintiff was a pretrial detainee protected by the Fourteenth Amendment. *See* 974 F.3d at 1183 n.2, 1186–87.

her cell and later told her mother that she had been raped. *Id.* Like the plaintiff in *Brown*, Works understood the extreme power imbalance between her and Byers, saying that he had "all the power over [her]." *Id.* at 000743. She feared retaliation. *Id.* The district court also properly included in its consideration the inherently coercive nature of imprisonment. *Id.* at 000745. In light of this evidence, the district court correctly found that Works's allegations of nonconsensual, coerced sex sufficed to make out a constitutional violation.

C. Byers's Attempts to Obfuscate This Straightforward Analysis Are Unavailing.

Bound by the district court's factual findings, Byers has very limited grounds to dispute the district court's thoroughly reasoned determination that the factual allegations here make out a constitutional violation. He attempts to cast doubt on the district court's analysis by arguing that the district court applied the wrong burdens of proof. Appellant's Br. 17. This argument has no merit. Byers is correct that Works bears the ultimate burden of persuasion to overcome the defense of qualified immunity. Appellant's Br. 18–19. But the district court did not overlook that. Rather, it correctly stated that once a defendant has asserted qualified immunity, the burden shifts to the plaintiff. App. Vol.

VI at 000735. And to overcome the qualified immunity defense at summary judgment, the plaintiff must (1) raise a genuine issue of material fact that the officer violated a federal constitutional or statutory right, and (2) show that the right was clearly established at the time of the unlawful conduct. *Id.*; *see also Simpson v. Little*, 16 F.4th 1353, 1359 (10th Cir. 2021).

The district court properly held Works to this burden. As explained above, it determined that Works raised a genuine issue of material fact that Byers violated her Eighth Amendment rights. It also held that the right was clearly established. App. Vol. VI at 000744–000745.

Byers argues that the court "expressed some reservations concerning Works's consent," and "[o]nly by shifting the burden of proof to Byers did it resolve these doubts in her favor." Appellant's Br. 19. This is incorrect. The district court didn't resolve its doubts at all. It acknowledged that there was conflicting evidence on the issue of consent, and held only that *a reasonable jury* could resolve the doubts in Works's favor (or, of course, in Byers's). Nor did the district court improperly shift the burden when it moved to the next step of the analysis. In analyzing whether a constitutional violation occurred, the district court properly

assumed that the sexual contact was nonconsensual because it was required to view the facts and inferences in the light most favorable to Works. *See Est. of Booker*, 745 F.3d at 411. There was no error; but only faithful adherence to the procedure for evaluating qualified immunity at summary judgment.[8]

Byers also argues that the court improperly required him to prove consent by "overwhelming evidence." Appellant's Br. 20. It did no such thing. Rather, it discussed – and ultimately distinguished – a previous Tenth Circuit case that Byers invoked in summary judgment briefing in which there had been "overwhelming evidence" of consent. App. Vol. VI at 000744; App. Vol. II at 000096–000098; *see Graham*, 741 F.3d at 1124. In *Graham*, this Court affirmed a grant of summary judgment, noting that, "[a]lthough we recognize a need to examine consent carefully in the prison context, this case does not present a factual issue with regard to Ms. Graham's consent." *Id.* at 1120. The district court in this case

[8] Nor did the district court improperly adopt a presumption of non-consent. *See* Appellant's Br. 21. The court never stated it was adopting any presumption. Nor did it apply one in its analysis: it acknowledged that the evidence was in dispute, and then properly viewed that evidence in Works's favor when assessing whether a constitutional violation occurred. App. Vol. VI at 000743. That is not an improper presumption, that is the letter of the law.

distinguished *Graham* because, as it had already found, Works had satisfied her evidentiary burden to raise a genuine issue of material fact on consent. App. Vol. VI at 000743, 000744 (explaining that the evidence in this case is "a far cry from the 'overwhelming evidence of consent' which would entitle Defendants to summary judgment on the issue"). The court didn't look to *Graham* for the governing standard of review; it was merely responding to one of Byers's summary judgment arguments, *see* App. Vol. II at 000096–000098.

In the same vein, Byers argues that the court required him to prove consent "beyond a reasonable doubt." Appellant's Br. 18, 22. Again, this is false. To be sure, the court used this phrase in its order: "[b]ecause the Court is unable to determine, beyond a reasonable doubt, that the sexual contact between Byers and Works was consensual, it finds that Defendant Byers is not entitled to summary judgment based on qualified immunity." App. Vol. VI at 000745. Read in context, the phrase is merely an alternate way of saying that Byers failed to show there was no genuine dispute on consent and that he thus failed to show he was entitled to judgment as a matter of law. The rest of the court's opinion confirms that it applied the proper standard of review: it properly stated the standard

at the outset, App. Vol. VI at 000734 (the nonmovant must "bring forth specific facts showing a genuine issue for trial"), and in multiple places used language confirming that it was applying this standard, App. Vol. VI at 000742 (concluding "a material issue of fact exists" on consent); App. Vol. VI at 000743 (holding that there is "evidence that a rational fact-finder could find" no consent).

II. The District Court Did Not Draw an Adverse Inference Against Byers; Though the Law Fully Permits One.

Byers next argues that the district court erroneously drew an adverse inference from his decision to invoke his Fifth Amendment privilege during deposition, and treated his silence as evidence that he coerced Works to have sex. Appellant's Br. 29. It is important to note at the outset that an adverse inference from Byers's refusal to testify would have been fully permissible and within the district court's discretion in a civil case like this one. Both the Supreme Court and this Court have recognized that the Fifth Amendment does not prohibit adverse inferences in civil cases. *See MacKay v. Drug Enf't Admin.*, 664 F.3d 808, 820 (10th Cir. 2011) ("The Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."); *see also Baxter v.*

Palmigiano, 425 U.S. 308, 318 (1976) (same). Indeed, in every case cited by Byers, the court actually *endorsed* the application of an adverse inference.[9] So the district court would have been within its broad discretion to draw an adverse inference here.[10]

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[9] *See U.S. S.E.C. v. Suman*, 684 F. Supp. 2d 378, 386–87 (S.D.N.Y. 2010), aff'd, 421 F. App'x 86 (2d Cir. 2011) (applying "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify" and drawing an adverse inference against defendants); *S.E.C. v. Pittsford Cap. Income Partners, L.L.C.*, No. 06 Civ 6353 T(P), 2007 WL 2455124 at *15 (W.D.N.Y. Aug. 23, 2007) (same); *S.E.C. v. Invest Better 2001*, No. 01 CIV. 11427 (BSJ), 2005 WL 2385452 (S.D.N.Y. May 4, 2005) (same); *Brink's Inc. v. City of New York*, 717 F.2d 700, 710 (2d Cir. 1983) (affirming district court's drawing of adverse inference); *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997) (holding adverse inferences from a non-party's invocation of privilege are not prohibited).

[10] There is also no requirement, contrary to Byers's assertion, that a plaintiff seeking an adverse inference must show that she was precluded from obtaining evidence. Such a requirement would make no sense: the act of refusing to testify alone precludes the other party from obtaining evidence – one's own recollection of events. *See Suman*, 684 F. Supp. 2d at 386 (explaining that invoking Fifth Amendment privilege "keep[s] [the opposing parties] from obtaining information they could otherwise get"). But, more importantly, the requirement finds no support in any legal authority. The sole case that Byers cites in support for this purported threshold requirement, *see* Appellant's Br. 30 n. 13 (citing *Pittsford Cap.*, 2007 WL 2455124), is entirely inapposite. As Byers's quoted language from *Pittsford Capital* makes plain, that case was about whether the party that had invoked the Fifth Amendment could first "hid[e] behind the protection of the Fifth Amendment" and then later change course when it benefitted him. *Id.* at *14–15. It has no bearing whatsoever on

But, it did not do so. A review of what an adverse inference actually is makes this clear. A court makes an adverse inference when it infers that withheld testimony would have been unfavorable to the party choosing to remain silent. In other words, it is "an inference that what you refuse to produce isn't favorable to your cause." *Feinberg v. Comm'r*, 808 F.3d 813, 815 (10th Cir. 2015).

For example, courts have said that the failure to contest an accusation may be considered evidence of acquiescence. *See, e.g.*, *Baxter*, 425 U.S. at 319. A district court in this Circuit applied that logic after a defendant charged with fraud asserted his Fifth Amendment privilege during deposition. *S.E.C. v. Smart*, No. CIV. 2:09CV00224 DAK, 2011 WL 2297659, at *18–*19 (D. Utah June 8, 2011), aff'd, 678 F.3d 850 (10th Cir. 2012). The court construed the defendant's silence as "evidence of his acquiescence to" the fraud charges. *Id.* Drawing an adverse inference therefore means that a court assumes that the reason testimony is being withheld is because it is detrimental to the party's case, and treats the silence as affirmative evidence of the other party's position.

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whether the district court can draw an adverse inference in Works's favor from the invocation itself.

The district court did not do that here. To be sure, the district court acknowledged that the parties disputed the propriety of an adverse inference in this case, App. Vol. VI at 000742, but it concluded that it need not resolve that dispute in order to decide the summary judgment motion. *Id.* Rather, it held that other evidence in the case, unrelated to Byers's choice to remain silent, was sufficient to raise a genuine issue of material fact on coercion. App. Vol. VI at 000742–000743.

With respect to Byers's silence, the court merely noted that "by remaining silent, Byers offers no positive proof that Works consented to having sex." App. Vol. VI at 000742. The court therefore attached no evidentiary significance to Byers's silence; it treated it as a nullity. It did not infer that Works did *not* consent from Byers's refusal to answer questions. Nor did it infer that Byers acquiesced to the accusations against him in general. It did not treat the silence as affirmative evidence of *any* fact. Rather, it merely noted the uncontroverted fact that Byers hadn't offered any testimony in support of his own case. This is, of course, a recognized risk with choosing to remain silent: "In some cases if a party claims the privilege and does not give his or her own evidence there will be nothing to support his or her view of the case." 8 Fed. Prac. & Proc.

Civ. § 2018 (3d ed. 2022). Ultimately, the court relied on the other evidence in the record – including testimony of Works, witnesses, and surveillance video – not any inference about Byers's refusal to testify.[11] Byers's argument that the district drew an improper adverse inference is therefore meritless.[12]

III. The District Court Properly Determined the Law Was Clearly Established that Nonconsensual, Coerced Sex Between a Prisoner and Guard Violates the Constitution.

A. The Constitutional Violation in This Case Is Clearly Established.

As the district court held, and Byers concedes, it is clearly established in this Circuit that "nonconsensual, coerced sex between a

[11] The district court's reliance on this array of evidence also makes any suggestion that the district court based its ruling on an adverse inference alone insupportable. *See* Appellant's Br. at 29. It is true that a court may not rely on an adverse inference alone to grant summary judgment. *See Suman*, 684 F. Supp. 2d at 386. But the district court explicitly recognized this limitation, *see* App. Vol. VI at 000742 n.38 (citing *Suman*, 684 F. Supp. 2d at 378), and followed this rule. First, it didn't grant summary judgment at all – it denied it – and second, it relied on testimony and video evidence unrelated to any inference from Byers's silence.

[12] So too his argument that the district court erred by failing to evaluate the inference for admissibility under Federal Rule of Evidence 403. Appellant's Br. 31–33. The district court wasn't required to undertake any Rule 403 balancing because it didn't apply an adverse inference.

jailer and an inmate violates the Constitution." *See* Appellant's Br. 34; App. Vol. VI at 000745; *Brown v. Flowers*, 974 F.3d 1178, 1186 (10th Cir. 2020). In *Brown v. Flowers*, this court thoroughly analyzed the scope of clearly established law in this context.[13] 974 F.3d at 1184–87. It noted that this Circuit has "long held that nonconsensual, coerced sex between a jailer and an inmate" is unconstitutional. *Id.* at 1186. It relied on a body of caselaw holding that similar types of abuse violate the Constitution, tracing back to this Court's holding in *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998), that "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards," including sexual assault. *Id.* at 1310; *see also, e.g.*, *Giron v. Corrections Corp. of America*, 191 F.3d 1281, 1290 (10th Cir. 1999) (finding sexual abuse of a prisoner by a corrections officer "has no legitimate penological purpose, and is simply not part of the penalty that criminal offenders pay for their offenses against society"); *Castillo v. Day*, 790 F.3d 1013 (10th Cir. 2015)

[13] Although the *decision* in *Brown* postdates the underlying events in this case, the underlying events in *Brown* occurred in 2016, prior to Byers's 2017 assault of Works, 974 F.3d at 1180, 1184–87. So *Brown*'s discussion of the clarity of the law applies here. *See Soza v. Demsich*, 13 F.4th 1094, 1100 n.3 (10th Cir. 2021).

(sexual abuse by guard violates the Eighth Amendment); *Smith v. Cochran*, 339 F.3d 1205, 1212–13 (10th Cir. 2003) (same).

Moreover, the Court in *Brown* recognized that these cases "do not delineate between sexual abuse carried out through physical and nonphysical coercion." 974 F.3d at 1185. Indeed, this Court has said that these claims require "at least some form of coercion (*not necessarily physical*)," *Graham*, 741 F.3d at 1126 (emphasis added), and has found that sexual abuse involving only nonphysical coercion can violate the Eighth Amendment, *see Barney*, 143 F.3d at 1310 (verbal threats).[14]

This case falls squarely in that clearly established law. *See Brown*, 974 F.3d at 1184 ("The precedent must be *clear enough* that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." (citation omitted)). Taking the facts as we must construe them, Byers engaged in nonconsensual, coerced sexual contact with Works. He coerced her in both physical and nonphysical ways: he

[14] The *Brown* court also noted that when a prison guard has sex with a prisoner, the "use of force [is] in no way related to his duties as a jailer" and that therefore "a case involving the same type of coercion and evidence of lack of consent is unnecessary to place the unconstitutionality of [defendant's] conduct beyond debate." *Id.* at 1187 (quoting *Mullenix v. Luna*, 577 U.S. 7, 18 (2015)).

ordered Works to go to the laundry room, and once there, he physically blocked her in that room and issued a "peremptory instruction" to pull down her pants. App. Vol. VI at 000723–000724, 000743. After she said "I don't think so," he repeated the command. App. Vol. VI at 000724. Additionally, Works presented evidence of the power dynamics in prison that this court has recognized may contribute to coercion, testifying that "whenever you're in jail where you don't know anybody, you know, they have all the power over you." App. Vol. VI at 000743. Exploiting this power imbalance and sexually abusing Works against her will is clearly unlawful under existing caselaw.

Moreover, additional sources reinforce that "it would be clear to a reasonable officer that his conduct was unlawful under the circumstances." *See Fogarty v. Gallegos*, 523 F.3d 1147, 1155 (10th Cir. 2008). As the district court recognized, both Oklahoma law and jail policy prohibit *any* sexual contact between a jailer and a detainee, and Byers had training on this very issue. App. Vol. VI at 000727, 000730; *see also* 21 OK Stat. § 21-1111(A)(7); App. Vol. V at 000519. Statutes and administrative provisions can bolster the clarity of the law for qualified immunity purposes. *See, e.g.*, *Irish v. Maine*, 849 F.3d 521, 523–24 (1st

Cir. 2017) (explaining that policies, training, and standard police practices are relevant to the qualified immunity inquiry); *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 546 (4th Cir. 2017) (explaining that clearly established finding was "'buttressed by' the South Carolina Department of Correction's internal policies"); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 531, 533–34 (8th Cir. 2009) (en banc) (observing that "[p]rison regulations governing the conduct of correctional officers are [] relevant in determining whether an inmate's right was clearly established," and relying on Arkansas Department of Corrections administrative regulations to deny qualified immunity). This Court's caselaw, in combination with Oklahoma law and jail policy and training, made it abundantly clear that Byers's conduct – coercing Works into sexual contact she did not consent to – was unlawful.

B. Byers's Counterarguments Fail.

Byers argues that this Court's caselaw does not make it clear that sexual contact violates the Eighth Amendment where the plaintiff only harbors "unmanifested subjective fear." Appellant's Br. 34–37. The biggest problem with this argument is that it misrepresents the district court's factual findings, in violation of the limitation on this court's

jurisdiction in this interlocutory posture. *See Fogarty*, 523 F.3d at 1154 ("Those facts explicitly found by the district court, combined with the those that it likely assumed, then form the universe of facts upon which we base our legal review of whether defendants are entitled to qualified immunity."). Byers minimizes Works's evidence by characterizing it as no more than "unmanifested subjective fear," but in fact Works proffered ample evidence – which the district court credited – of coercion. Byers completely ignores Works's *direct* evidence of coercion: that Byers, the only jailer working at the time, commanded her to go to a small, isolated room after lights out, and then physically blocked her from leaving while he began to make insistent sexual demands – all despite his training that any sexual contact with a detainee was prohibited. App. Vol. VI at 000723–000724, 000732, 000743. This far exceeds evidence of "unmanifested subjective fear."

To be sure, some of Works's evidence of coercion was evidence of her own mental state and reactions. But that evidence – that she was frightened, feared retaliation, was deeply shaken by the incident, cried when she returned to her cell, and later stated she had been "rape[d]," App. Vol. VI at 000724 – all supports an inference about Byers's conduct:

that he was doing something to make Works feel she had no choice but to comply, despite not actually consenting. *See Vette*, 989 F.3d at 1162 (court may not look beyond the "facts found *and inferences drawn* by the district court" (emphasis added)). This too, therefore, is evidence of coercion.

Indeed, much of this is the same type of evidence that the Court in *Brown* held supported the finding of coercion: there, the plaintiff "testified the sex was not consensual" and later told her family she had been "raped." 974 F.3d at 1185. She also said she went to the room where the rape occurred because "she was in jail and had to do what she was told." *Id.* And there, like here, the court took account of the inherently coercive nature of prisons and the particular power dynamic between the guard and the prisoner. *Id.* Works has presented highly similar evidence of coercion.

Byers's legal argument – that a plaintiff can only show coercion through "an objective verbal or physical manifestation of resistance or evidence of a *quid pro quo* exchange," Appellant's Br. 36–37 – is also wrong. As has already been discussed, this Court has recognized the many different forms coercion can take in the prison setting and has recognized that power dynamics between prisoners and guards make it

difficult to recognize coercion. *See Graham*, 741 F.3d at 1126. Those power imbalances might make a prisoner feel that they *cannot* resist, as this Court has already recognized. *See Brown*, 974 F.3d at 1185. There is no requirement that a plaintiff show overt resistance or a quid pro quo exchange in order to show a constitutional violation.

Byers concedes that the power dynamics between prisoners and guards are a relevant consideration in evaluating coercion, but argues that a plaintiff must point to a "specific power dynamic" in order to rely on that factor. Appellant's Br. 36. This is an incorrect statement of the law: this Court has described coercion as an *inherent* characteristic of imprisonment. *See Brown*, 974 F.3d, at 1187; *see also Graham* 741 F.3d, at 1126. But in any event, there was substantial evidence of specific power dynamics in this case. Works testified that she personally felt the guards had "all the power over [her]" and "[could] do whatever they want to." App. Vol. VI at 000743. The night of the assault, Byers was the only officer on duty. She was in the laundry room because Byers had ordered her – after lights out – to go there and find something for him, at which point his demands crossed the line into sexual demands.

Ultimately, this Court need not look beyond the district court's straightforward and cogent analysis. Indeed, it *may not* second-guess the district court's determination that a reasonable jury could find Byers coerced Works into sexual contact against her will. And this Court has been very clear that that violates the Eighth Amendment.

CONCLUSION

For these reasons, this Court should affirm the district court's order denying qualified immunity and remand for further proceedings.

Dated: February 21, 2023

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Ms. Works, through *pro bono* counsel, respectfully states that the issues raised on appeal were authoritatively and correctly decided by the district court and may be expeditiously affirmed by this court without the need for oral argument.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This Brief complies with type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because, according to the word count function of Microsoft Word 2019, the Brief contains 8,475 words excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook font for the main text and 14-point Century Schoolbook font for footnotes.

Dated: February 21, 2023

/s/ Meghan Palmer
Meghan Palmer

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2023, I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

Dated: February 21, 2023

/s/ Meghan Palmer
Meghan Palmer

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Endpoint Advanced 10.8.11.4, last updated on Tuesday, February 21, 2023, and according to the program are free of viruses.

Dated: February 21, 2023

/s/ Meghan Palmer
Meghan Palmer