No. _____

In The
Supreme Court of the United States

JOE JEFFERSON, STATE TROOPER,

Petitioner,

v.

CLYDE ALLEN RIFE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A police officer found a motorcyclist disoriented and lethargic. After conducting five different field tests, the officer concluded that the man had no indication of an injury, was likely intoxicated, and had been involved in a minor accident. He noticed some dried blood on the man's nose but saw no other external abnormalities. Although the man briefly mentioned chest pain, he denied having been in an accident and never requested medical care. The officer arrested the man for public intoxication and drove him to jail. The man was later discovered to have suffered a lacerated spleen, and he sued. The district court granted summary judgment to the officer on the basis of qualified immunity. The Tenth Circuit reversed, holding that a reasonable jury could find that the officer inflicted unconstitutional punishment on the motorcyclist in violation of the Fourteenth Amendment's Due Process Clause by being deliberately indifferent to the man's serious medical needs. The Tenth Circuit then remanded to the district court to determine whether this constitutional violation was "clearly established."

1. This Court "has not yet addressed the precise nature of the obligations that the Due Process Clause places upon the police to seek medical care for pretrial detainees." *Canton v. Harris*, 489 U.S. 378, 397 (1989) (O'Connor, J., concurring in part and dissenting in part). Did the Tenth Circuit err when it held, in conflict

QUESTIONS PRESENTED – Continued

with similar cases decided by other Courts of Appeals, that this officer could be liable for inflicting unconstitutional punishment on the pretrial detainee in violation of the Due Process Clause?

2. Does an appellate court abuse its discretion in applying this Court's two-prong qualified immunity test when it holds that a police officer may have violated a constitutional right but declines to address whether the right was "clearly established," thereby violating this Court's requirement that qualified immunity cases be resolved at their "earliest possible stage in litigation," *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)?

PARTIES TO THE PROCEEDING

Petitioner Joe Jefferson, an Oklahoma State Trooper, is one of the appellees below. Respondent is Clyde A. Rife, who was the appellant in the court below. Three other appellees below were Chad Dale, Jonathon Willis, and the McCurtain County Jail Trust, who are filing a separate petition with this Court. The Oklahoma Department of Public Safety, another appellee, is not filing a petition with this Court.

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OPINIONS BELOW

The Tenth Circuit's decision (Pet. App. 1-38) is reported at 854 F.3d 637. This decision superseded the Tenth Circuit's decision reported at 846 F.3d 1119. The district court's opinion (Pet. App. 41-57) is unreported and can be found at 2016 WL 8650145.

JURISDICTION

The judgment of the Tenth Circuit was originally entered on January 23, 2017. A petition for rehearing was partially granted, and a superseding judgment entered, on April 12, 2017. On June 29, 2017, Justice Sotomayor granted a 45-day extension of time to file this petition for writ of certiorari until August 25, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

I. Factual Background

Early in the evening on Tuesday, May 14, 2013, a man was spotted slumped over a motorcycle by the roadside in McCurtain County, Oklahoma.[1] Soon thereafter, Oklahoma State Trooper Joe Jefferson was dispatched to conduct a welfare check on the individual.[2] When Jefferson arrived, he identified the man as Clyde Rife from Arkansas.[3] He asked Rife, who appeared disoriented and lethargic, if he was okay and if Jefferson could call anyone for him.[4] Rife declined the phone call and said he was fine.[5] Aside from a small spot of dried blood on Rife's nose, Jefferson could not see any abrasions, scratches, bruises, bleeding, swelling, deformities, irregular breathing, open wounds, or other maladies.[6] His eyes were not puffy, and there was no swelling around his face.[7] Nor did Jefferson observe any deformities to his head.[8] Rife was wearing a

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[1] Aplt. App. 186

[2] Aplt. App. 186. State policy requires that Oklahoma State Troopers like Jefferson assure that pretrial detainees "are provided the opportunity to receive medical treatment when it is apparent that such treatment is immediately needed." Aplt. App. 189 (citing Oklahoma Highway Patrol Policy Number 03.32.00).

[3] Aplt. App. 186.

[4] Aplt. App. 186-87.

[5] Aplt. App. 186-87.

[6] Aplt. App. 186.

[7] Aplt. App. 186.

[8] Aplt. App. 186.

short-sleeved shirt and yet had no scratches visible on his arms.[9]

Trooper Jefferson suspected that Rife was intoxicated in some way, so he activated his dashboard camera to document the evidence.[10] Rife was unable to answer a number of basic questions, including the time of day and day of the week.[11] Jefferson then conducted five separate field sobriety tests.[12] First, he conducted the horizontal gaze nystagmus test by asking Rife to track a pen with his eyes.[13] This test begins by ruling out possible injuries by checking for unequal tracking of the pupils, unequal pupil size, or resting nystagmus; because Rife exhibited none of these indications, Jefferson concluded Rife did not sustain any head injury.[14] The rest of the test looks for indications of intoxication; during this portion of the test, Rife exhibited six out of six clues for intoxication.[15] According to Jefferson's training, if an individual has at least four of the six clues, there is an 80% chance that the subject is under the influence of intoxicants.[16] Rife also failed to complete four additional intoxication tests – walk-and-turn, finger dexterity, balance, and alphabet tests

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[9] Aplt. App. 186.

[10] Aplt. App. 186-87. The two Dash Cam Videos can be found at Aplt. App. 191-92.

[11] Aplt. App. 187.

[12] Aplt. App. 187-89.

[13] Aplt. App. 187.

[14] Aplt. App. 187.

[15] Aplt. App. 187.

[16] Aplt. App. 187-88.

– losing his balance at one point and stating that he felt "floaty" at another.[17] Eventually, Jefferson asked Rife what medicine he was taking, and Rife told him that the medicine was in his coat pocket.[18] Jefferson, however, could not find any medication in the coat.[19] Regardless, Rife's symptoms were consistent with taking too much prescription pain medication.[20]

During his investigation, Trooper Jefferson spotted grass stains and residue on both Rife and his motorcycle.[21] Jefferson intuited that Rife had "turned the bike over" at some point that day.[22] When he asked Rife if he had been involved in an accident, however, Rife responded: "Not today, I know I didn't."[23] Rife continued to deny the incident, even when Jefferson pointed out the grass stains to him.[24] This did not eliminate Jefferson's suspicion; that said, Jefferson did not believe the accident had been high-impact or high-speed.[25] As far as Jefferson could tell, Rife's accident had not caused damage or injured anyone.[26] Indeed,

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[17] Aplt. App. 188-89.

[18] Aplt. App. 188.

[19] Aplt. App. 188.

[20] Aplt. App. 190, 1362-63, 1383.

[21] Aplt. App. 188; Second Dash Cam Video, Aplt. App. 192, at 38:20.

[22] Aplt. App. 188; Second Dash Cam Video, Aplt. App. 192, at 47:49 (Jefferson: "You don't remember where you turned your bike over?").

[23] Aplt. App. 188.

[24] Aplt. App. 188.

[25] Aplt. App. 188, 193-97.

[26] Aplt. App. 188, 193-97.

Rife was still able to bend down, get off his motorcycle, and walk around without any apparent pain or injury, and Jefferson did not believe the motorcycle had rolled, given the absence of any scratches on Rife's arms and the lack of damage to the motorcycle and its saddle bags.[27] Moreover, Jefferson could find no evidence that the accident had even occurred at that specific location.[28]

Based on all the facts and circumstances, including Rife's confusion and disorientation, the intoxication tests, and his training and experience, Trooper Jefferson concluded that he had probable cause to arrest Rife.[29] Although Jefferson believed he could arrest Rife for physically controlling a motor vehicle while under the influence of an intoxicating substance, he decided to arrest Rife for public intoxication only – a much less serious charge.[30] Jefferson advised the dispatcher that Rife was likely under the influence of prescription medication, and he asked her to call a tow truck to pick up Rife's motorcycle so it would not be stolen.[31] Jefferson then placed Rife in his patrol car and began driving him to the McCurtain County Jail.[32] In sum, Jefferson believed Rife was under the influence of prescription medication, should not be driving

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[27] Aplt. App. 188-89.

[28] Aplt. App. 188.

[29] Aplt. App. 188-90.

[30] Aplt. App. 187.

[31] Aplt. App. 189; *see also* Second Dash Cam Video, Aplt. App. 192, at 43:17.

[32] Aplt. App. 189.

a motorcycle, and needed time to get the medication out of his system.[33]

The drive to the McCurtain County Jail took around 30 minutes or so; Trooper Jefferson and Rife chatted off and on during the trip.[34] Among other things, Rife repeatedly asked Jefferson where they were going and what he had done wrong.[35] He also continued to insist that he had not been drinking and said he was cold.[36] Jefferson calmly responded to these inquiries, explaining that Rife was arrested for apparent medication intoxication (and not for drinking), that Rife would be going to jail for a couple hours until the effect wore off, and that Jefferson would turn down the vehicle's air conditioner.[37] At one point, Rife mumbled that his chest hurt.[38] Rife was booked into the McCurtain County Jail around nine o'clock that evening, and Jefferson had no further contact with him.[39] Later, Rife admitted he remembered nothing from his encounter with Jefferson.[40]

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[33] Aplt. App. 186-90.

[34] *See* Second Dash Cam Video, Aplt. App. 192, at 43:00 to 1:17:19.

[35] *Id.*

[36] *Id*.

[37] *Id.*

[38] *Id.*

[39] Aplt. App. 189-92, 216.

[40] Aplt. App. 1620.

During the booking process, prison employees conducted a medical screening of Rife and observed no physical deformities and no visible signs of trauma, illness, pain, or bleeding.[41] Rife did not tell prison personnel when he was booked that he was injured and in need of medical attention.[42] After Rife was released from jail, it was discovered, however, that Rife had a lacerated spleen and was experiencing some internal bleeding.[43] But because Rife was walking, talking, and able to maintain conversation, the doctor that examined him observed that typical first-aid providers (like Trooper Jefferson) would not have had the capacity to diagnose this injury.[44] Also, according to the doctor, the delay in Rife's diagnosis did not cause Rife to incur any additional medical treatment, and it is possible that Rife's condition could have improved on its own, without any treatment at all.[45]

As described in more detail below, the Tenth Circuit held that these facts could lead a reasonable jury

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[41] Aplt. App. 218.

[42] Aplt. App. 218-20.

[43] Aplt. App. 1366. Although the Tenth Circuit's opinion states that Rife "suffered a head injury in a motorcycle accident," Pet. App. 4, the record reflects that Rife's CT scan at the time was negative. Aplt. App. 1365. Regardless, "[i]t is undisputed Plaintiff had no bumps, bruises or scratches on his body," Pet. App. 53, and the emergency room doctor who reviewed Rife testified that "[t]here was no obvious head injury at the time." Aplt. App. 1365.

[44] Aplt. App. 1379.

[45] Aplt. App. 1366, 1369.

to conclude that Trooper Jefferson intentionally inflicted unconstitutional punishment on Rife in violation of the Fourteenth Amendment.

II. Procedural History

Rife brought an action under 42 U.S.C. § 1983 in the U.S. District Court for the Eastern District of Oklahoma against Trooper Jefferson, as well as the McCurtain County Jail and jail officials.[46] He alleged two constitutional violations: (1) wrongful arrest; and (2) deliberate indifference to his serious medical needs.[47] He also brought a state-law tort claim against the Oklahoma Department of Public Safety, under the Oklahoma Governmental Tort Claims Act (OGTCA), based on alleged negligence.[48]

The district court granted summary judgment to Trooper Jefferson, as well as the other defendants.[49] As to wrongful arrest, the court found that "it was reasonable for Defendant Jefferson to believe Plaintiff was impaired to the point of not being able to properly operate his motorcycle and that this impairment was caused by some intoxicating substance."[50]

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[46] Pet. App. 3-6.

[47] Pet. App. 5-6.

[48] Pet. App. 6.

[49] Pet. App. 7.

[50] Pet. App. 50.

As to deliberate indifference, the court noted that "an official cannot be liable 'unless the official knows of and disregards an excessive risk to inmate health and safety.' "[51] The court observed that "Jefferson spent some time assessing the Plaintiff," that he "administered a series of tests to Plaintiff to try to ascertain what was causing Plaintiff's condition," and that he "believed that Plaintiff had been in an accident . . . but that it was not a high impact accident."[52] In particular, the court noted that "[i]t is undisputed Plaintiff had no bumps, bruises or scratches on his body and that his bike had minimal damage."[53] Finally, the court emphasized that Plaintiff "was able to speak and did not mention being in pain," that he "never asked for medical assistance," and that "[t]he emergency room doctor who treat [sic] Plaintiff also testified that when he arrived at the emergency room he looked fine."[54] The court concluded that "[t]he facts reveal Jefferson was not aware of Plaintiff's serious medical condition and there simply were no facts that Jefferson could have even inferred a serious medical injury."[55] As a result, "[t]he subjective component of cruel and unusual punishment is not met where an official is merely exercising his medical judgment."[56]

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[51] Pet. App. 52 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

[52] Pet. App. 53.

[53] Pet. App. 53.

[54] Pet. App. 53.

[55] Pet. App. 53.

[56] Pet. App. 54.

On appeal, the Tenth Circuit affirmed the district court's holding that Trooper Jefferson had probable cause to arrest Rife, but reversed the court's holding that he was entitled to qualified immunity on the deliberate indifference claim.[57] As to wrongful arrest, the court held that Jefferson had reasonable suspicion to make the arrest, because "an officer could reasonably conclude that Mr. Rife was intoxicated from medication."[58] In so holding, the court expressly rejected Rife's argument that Jefferson's arrest was unreasonable since Jefferson knew Rife "had been in a motorcycle accident and that certain medical conditions could mimic the symptoms of intoxication."[59]

As to the deliberate indifference claim, the court began by noting that "[t]he Fourteenth Amendment's Due Process Clause entitles pretrial detainees to the same standard of medical care owed to convicted inmates under the Eighth Amendment."[60] That standard "is violated if state officials are deliberately indifferent to a pretrial detainee's serious medical needs."[61]

Next, the court stated this Court's "two-pronged test for deliberate indifference claims," under which "a

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[57] Pet. App. 8.

[58] Pet. App. 17.

[59] Pet. App. 12-13.

[60] Pet. App. 19 (citing *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002)).

[61] Pet. App. 19 (citing *Martinez v. Beggs*, 563 F.3d 1082, 1088-91 (10th Cir. 2009)).

plaintiff must satisfy an objective prong and a subjective prong."[62] The court observed that "[t]his appeal focuses largely on the subjective prong."[63] The court further noted that "[t]he subjective prong is satisfied only if the defendant knew of an excessive risk to the plaintiff's health or safety and disregarded that risk."[64]

The court then drew a novel distinction between "specialized standards to deliberate indifference claims against medical professionals" and a different standard applicable to "laypersons such as police officers," including Officer Jefferson.[65]

The court next identified four pieces of evidence that it believed the district court improperly discounted:

1. Mr. Rife said that his chest and heart hurt and made groaning noises.

2. Mr. Rife stated that he felt sick.

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[62] Pet. App. 19 (citing *Farmer*, 511 U.S. 825 at 834, 837-40).

[63] Pet. App. 20.

[64] Pet. App. 20 (citing *Farmer*, 511 U.S. at 837).

[65] Pet. App. 20 (citing *Self v. Crum*, 439 F.3d 1227, 1231-33 (10th Cir. 2006)). *Self*, however, did not state that there were separate standards; that case merely acknowledged that some deliberate indifferent claims involve medical professionals failing to provide sufficient medical attention, while others involve actors who serve as gatekeepers to medical professionals, such as officers and jailers, who may be liable for not bringing individuals to the attention of medical experts.

3. Trooper Jefferson saw dried blood on Mr. Rife's nose.

4. An expert witness testified that someone on a motorcycle is more likely to be injured in an accident than someone in an automobile.[66]

The court next identified "ten evidentiary items" that supported Rife's argument "that his need for medical attention was obvious":[67]

1. Trooper Jefferson knew that Mr. Rife had been involved in a motorcycle accident.

2. According to an expert witness, injury is more likely in a motorcycle accident than in an automobile accident.

3. Trooper Jefferson saw grass stains on Mr. Rife's pants and on the back of his shirt. These stains indicated that Mr. Rife had been thrown from the motorcycle.

4. Mr. Rife did not know what day it was, what time it was, what his social security number was, or what he had done in Idabel.

5. There was dried blood on Mr. Rife's nose.

6. Mr. Rife had constricted pupils, lethargy, nystagmus, and dizziness.

7. Mr. Rife said that he felt "floaty."

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[66] Pet. App. 21.

[67] Pet. App. 22.

8. Mr. Rife stated that he felt sick.

9. Mr. Rife complained that his chest hurt and he made groaning noises, suggesting that he was in pain.

10. Shortly thereafter, Mr. Rife complained that his heart hurt and again groaned.[68]

The court ultimately held that "[t]hese facts could lead a reasonable factfinder to infer that Trooper Jefferson had recognized the need for medical attention."[69] The court next acknowledged that Jefferson in turn pointed to six countervailing facts:

1. Trooper Jefferson never saw Mr. Rife exhibit signs of pain or injury.

2. All of Mr. Rife's symptoms were consistent with intoxication from pain medication.

3. Mr. Rife denied being in an accident.

4. When Trooper Jefferson approached Mr. Rife and asked how he was doing, Mr. Rife replied that he was fine.

5. Upon examination, Mr. Rife did not exhibit signs of a head injury.

6. The damage to the motorcycle was relatively minor.[70]

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[68] Pet. App. 22-23.

[69] Pet. App. 23.

[70] Pet. App. 24.

The court nonetheless rejected the relevance of these considerations, emphasizing that "throughout the episode, Mr. Rife had dried blood on his nose" and that it was "at least debatable" whether Rife's symptoms were "consistent with intoxication."[71] The court concluded by stating that "[t]ogether, the evidence could reasonably support a finding that Trooper Jefferson knew of a substantial risk to Mr. Rife's health and consciously disregarded that risk."[72]

Although the court held that Trooper Jefferson was not entitled to qualified immunity under the doctrine's first prong (constitutional violation), it declined to address the second prong: whether this violation was "clearly established" at the time of the alleged violation.[73] The court instead remanded "to the district court for consideration of whether the underlying constitutional right was clearly established."[74]

Finally, the court addressed Rife's negligence claim against the Oklahoma Department of Public Safety under the OGTCA.[75] After reviewing the evidence again, the court found that the "alleged facts

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[71] Pet. App. 24. This holding, of course, is in tension with the Tenth Circuit's prior holding in its wrongful arrest analysis that Trooper Jefferson "could reasonably conclude that Mr. Rife was intoxicated from medication." Pet. App. 17.

[72] Pet. App. 25.

[73] Pet. App. 25-26.

[74] Pet. App. 25-26.

[75] Pet. App. 26-28.

do not preclude a finding of negligence"[76] based on Trooper Jefferson's conduct.

Petitioner filed for rehearing.[77] The States of Colorado and Utah filed an *amicus* brief in support of Petitioner's brief; *amici* argued that the panel's "choice to postpone a decision on whether the rights Defendants allegedly violated are 'clearly established' conflicts with precedent and creates confusion"[78] and that the panel's "holding on Rife's claims against Trooper Jefferson creates a new test for deliberate indifference to medical needs not supported by Supreme Court or Circuit law."[79] The Tenth Circuit partially granted Jefferson's petition for rehearing and published a substantially similar amended opinion on April 12, 2017.[80]

On June 16, 2017, the District Court issued an opinion on remand, holding that Rife's right to custodial medical attention was clearly established.[81] Specifically, the court found that "caselaw clearly establishes Mr. Rife's constitutional right to medical attention as a pretrial detainee for injuries sustained in

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[76] Pet. App. 28.

[77] Pet. App. 1-2.

[78] Amicus Curiae Brief filed by States of Utah and Colorado, at 1 (Feb. 21, 2017).

[79] Amicus Curiae Brief filed by States of Utah and Colorado, at 4 (Feb. 21, 2017).

[80] Pet. App. 1-40.

[81] *Rife v. Okla. Dep't of Pub. Safety*, No. 14-CV-333-GKF, 2017 WL 2623868 (E.D. Okla. June 16, 2017).

a vehicle accident."[82] According to the court, "the fact Mr. Rife was suspected of intoxication does not change the result."[83]

REASONS FOR GRANTING THE PETITION

QUESTION 1

I. Courts of Appeals have issued irreconcilable opinions on when police act unconstitutionally in deciding that intoxicated persons do not need immediate medical care after an accident.

This Court has held that a government official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment's prohibition on cruel and unusual punishment.[84] For pretrial detainees and arrestees like Rife, the same standard applies, but under the Fourteenth Amendment instead of the Eighth.[85] Given its origin in the Cruel and Unusual Punishments Clause, that standard is rigorous. Deliberate indifference is "more than

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[82] 2017 WL 2623868, at *3 (citing *Garcia v. Salt Lake Cty.*, 768 F.2d 303, 307-08 (10th Cir. 1985); *Barton v. Taber*, 820 F.3d 958, 965-67 (8th Cir. 2016); *Marquez v. Bd. of Cty. Comm'rs Eddy Cty.*, No. 11-CV-838 JAP/WDS, 2012 WL 12895017, at *7-8 (D.N.M. Dec. 3, 2012), *aff'd* 543 Fed. App'x 803 (10th Cir. 2013); *Kraft v. Laney*, No. CIV S-04-129 GGH, 2005 WL 2042310, at *20-23 (E.D. Cal. Aug. 24, 2005)).

[83] 2017 WL 2623868, at *3.

[84] *Farmer v. Brennan*, 511 U.S. 825, 828-29 (1994).

[85] *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979).

ordinary lack of due care for the prisoner's interests or safety."[86] Theories sounding in mere negligence, this Court has held, should generally be redressed by state tort law rather than the Due Process Clause.[87] Deliberate indifference does not apply to "an inadvertent failure to provide adequate medical care," but instead must "constitute 'an unnecessary and wanton infliction of pain'" that is "repugnant to the conscience of mankind."[88] As such, unlike negligence, deliberate indifference includes a knowledge element; the defendant official must be subjectively aware of the actual risk and consciously disregard it in order to inflict punishment on the detainee.[89]

This Court "has not yet addressed the precise nature of the obligations that the Due Process Clause places upon the police to seek medical care for pretrial detainees."[90] As a result, "[t]he law articulated by the

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[86] *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *see also Davidson v. Cannon*, 474 U.S. 344, 347 (1986) ("[T]he Due Process Clause . . . is not implicated by [a] lack of due care.").

[87] *Daniels v. Williams*, 474 U.S. 327, 332-33 (1986). For example, here, Respondent is pursuing recovery for Trooper Jefferson's alleged negligence under the Oklahoma Governmental Tort Claims Act, OKLA. STAT. tit. 51, §§ 151-171. Pet. App. 26-28.

[88] *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976) (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring)).

[89] *See Farmer*, 511 U.S. at 828-29, 835-37.

[90] *Canton v. Harris*, 489 U.S. 378, 397 (1989) (O'Connor, J., joined by Scalia, J., and Kennedy, J., concurring in part and dissenting in part); *see also* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PENN. L. REV. 1009, 1009 (2013) ("The Supreme Court has set forth in detail the standards that govern

lower courts is unclear and inconsistent."[91] So, what conduct does the Constitution forbid when police officers are faced – as they are every day – with symptoms that are textbook signs of intoxication, but could also be attributed to internal injuries from an automobile accident?[92] In the absence of specific guidance from this Court, lower courts have made varying and irreconcilable rulings on what constitutes deliberate indifference, especially when intoxication and vehicular accidents are involved.

As recounted above, the Tenth Circuit here held that Trooper Jefferson could potentially be found liable for unconstitutionally "punishing" Rife, despite the fact that Rife, *inter alia*: (1) claimed he was okay; (2) declined to have Jefferson call anyone on his behalf;

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convicted prisoners' Eighth Amendment claims concerning their conditions of confinement, but has left undefined the standards for comparable claims by pretrial detainees."); Leslie B. Elkins, *Analyzing a Pretrial Detainee's § 1983 Claims Under the Deliberate Indifference Standard Amounts to Punishment of the Detainee*, 4 SEVENTH CIRCUIT REV. 91, 100 (2008) ("The Court never conclusively established a test for pretrial detainees claiming a § 1983 action against prison officials for maltreatment.").

[91] Struve, *supra* n.90, at 1009; *see also* Elkins, *supra* n.90, at 100 ("[S]ince [*Bell*, 441 U.S. 520], courts have struggled to determine where pretrial detainees' constitutional protection falls.").

[92] *Cf. Grayson v. Peed*, 195 F.3d 692, 696 (4th Cir. 1999) ("His is unfortunately a typical case. His symptoms hardly distinguish him from the multitude of drug and alcohol abusers the police deal with everyday.").

(3) denied being in a motorcycle accident; (4) tested negative for a head injury; (5) tested positive for intoxication; and (6) displayed minimal outward signs of injury.

But other courts have come to markedly different conclusions about the requirements of the Constitution in this all-too-common circumstance. The Seventh Circuit, for example, was presented with a situation where a single vehicle had been driven into a parking meter and restaurant wall.[93] Afterward, police officers and paramedics examined the driver, who, like Rife, had "external signs of injury [that] were 'remarkably small.' "[94] Indeed, the only indications of injury were a small bruise over the man's sternum "and some scrapes on his knees."[95] Furthermore, the man's vital signs, skin color, and pupils were all normal, and he indicated he did not want to be taken to a hospital.[96] On the other hand, it was "obvious" that the man had been drinking alcohol.[97] The driver could only "stagger eight to ten feet" before "toppling over" and later vomited, but officers "attributed [this] behavior to intoxication."[98] Despite his vomiting, the officers took the man to jail, and he was able to walk there "under his own

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[93] *Salazar v. City of Chicago*, 940 F.2d 233, 234-35 (7th Cir. 1991).

[94] *Id.* at 235-37.

[95] *Id.* at 237.

[96] *Id.* at 235-37.

[97] *Id.* at 235.

[98] *Id.* at 235-36.

power."[99] Tragically, he died in his cell later that afternoon "from a traumatic laceration of the liver caused by the automobile accident."[100] The Seventh Circuit, however, did not believe that a reasonable jury could find that the police officers' conduct rose to the level of a constitutional violation, and as a result it affirmed a district court's decision to direct a verdict in favor of the officers.[101] "What the plaintiff is arguing for is mandatory transportation to a hospital for all intoxicated accident victims," the Seventh Circuit observed. "This is something the Constitution does not require."[102]

The Eleventh Circuit faced a similar scenario in 2009. Following a single-vehicle crash into a mailbox, the driver there was found "slumped over the wheel."[103] When an officer examined her, "her speech was very slurred, her eyes were bloodshot, and her hair was in disarray."[104] The officer believed she "was drunk or on drugs."[105] Although no one smelled alcohol, the officer "found a number of unidentifiable pills in her purse."[106] The officer then arrested her for driving under the

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[99] *Id.* at 236, 241.

[100] *Id.* at 236-37.

[101] *Id.* at 241-42.

[102] *Id.* at 242.

[103] *Walker v. Huntsville*, 310 Fed. App'x 335, 336 (11th Cir. 2009).

[104] *Id.*

[105] *Id.*

[106] *Id.* at 336-37.

influence.[107] Later on, "a CT scan revealed a bleeding aneurysm in her brain."[108] In affirming summary judgment in favor of the police, however, the Eleventh Circuit held that "even if it was negligent of the officers or the jailers not to provide Walker with more intensive medical care, mistakenly failing to identify a brain aneurysm is not *deliberate* indifference."[109] "The fact is that Walker's symptoms were easily confused with the effects of drugs or alcohol," the Eleventh Circuit wrote. "A lot of people made that mistake."[110]

One year later, the Sixth Circuit dealt with its own now-familiar fact pattern. There, a man crashed his vehicle "into a ditch and through a fence" and then fled the scene to a nearby residence.[111] Upon locating the man, a police officer "detected a strong odor of alcohol" and "then conducted a series of field sobriety tests."[112] The driver was "unable to recite the alphabet and declined to attempt the 'stork stance' and instead admitted that he was intoxicated."[113] Following his arrest, the driver recorded an extremely high blood-alcohol content (BAC) of 0.31 at the jail.[114] At his screening, the driver "understood the interview questions, had

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[107] *Id.* at 337.

[108] *Id.*

[109] *Id.* (emphasis in original).

[110] *Id.*

[111] *Meier v. Cty. of Presque Isle*, 376 Fed. App'x 524, 525 (6th Cir. 2010).

[112] *Id.*

[113] *Id.*

[114] *Id.*

bloodshot eyes, walked with a stagger, spoke with slurred speech, and emitted an odor of alcohol."[115] The next day, however, he was found in his cell "lying face down on the floor in a pool of blood."[116] He was rushed to the hospital where doctors "diagnosed him with acute respiratory failure as well as multiple lacerations on his face, mouth, and leg. They also determined that he had suffered a seizure and a head injury."[117] Despite the officer's violating an internal policy that required transportation to a medical facility for anyone with a BAC higher than 0.30, the Sixth Circuit held that the officer did not show deliberate indifference to the man's medical needs, and it affirmed the district court's grant of summary judgment.[118]

The rulings from these circuits stand in stark contrast to the Tenth Circuit's decision below, which held that the appearance of a small amount of dried blood, disorientation, and complaints of aches – with no evidence of a head injury or a serious accident and all other evidence pointing towards intoxication – somehow are sufficient evidence to meet this Court's rigorous deliberate indifference standard. Based on this scant evidence, the Tenth Circuit held that a reasonable jury could find that Trooper Jefferson must have known that Rife needed medical attention for a ruptured spleen, even though the Tenth Circuit

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[115] *Id.*

[116] *Id.* at 527.

[117] *Id.*

[118] *Id.* at 529.

acknowledged that no reasonable jury could find that Jefferson lacked probable cause to believe Rife was intoxicated.

The Tenth Circuit's decision below does not stand alone, however, as the Eighth Circuit recently applied a similarly lax standard.[119] In that case, a driver was also involved in a single-vehicle wreck.[120] When "officers arrived, [the driver] almost fell to the ground on multiple occasions," repeatedly "swayed," and, when searched, finally "fell to the ground."[121] Nor was he responsive to officers' commands.[122] His BAC was measured at 0.11.[123] As he was arrested and booked at the jail, he "was unable to answer questions . . . and when he did speak, his speech was slurred."[124] Later that evening, he was found dead in a holding room.[125] "An autopsy determined the cause of death to be a heart condition."[126] Writing for two judges, Judge Wollman held that the defendant officer was not entitled to qualified immunity, because the above facts indicated that

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[119] *Barton v. Taber*, 820 F.3d 958 (8th Cir. 2016).

[120] *Id.* at 962.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* at 963.

[125] *Id.*

[126] *Id.*

the officer "had direct knowledge of [the driver]'s obvious need for prompt medical attention and yet took no steps to secure such care."[127]

Judge Colloton dissented, writing that "[i]n my view, the court goes too far in exposing a state trooper to liability for a death caused by an undiagnosed heart condition of a drunk driver."[128] He noted that this "Court has emphasized, 'qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.'"[129] Quite simply, "[t]he Constitution does not require an arresting law enforcement officer to seek medical attention for every arrestee who appears to be intoxicated."[130]

Given this critical split in case law between the Circuits on such a common and recurring issue, review from this Court is needed. Under the Eighth and Tenth Circuits' approach, federal courts will pry ever more deeply into the quotidian judgment calls State officers make on a daily basis. In the prescient words of the Fourth Circuit in a similar (but non-vehicle accident) case, this approach "thrust[s] federal courts into the daily practice of local police departments."[131] In contrast, the rigorous approach of the Sixth, Seventh, and

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[127] *Id.* at 965.

[128] *Id.* at 968 (Colloton, J., dissenting).

[129] *Id.* (quoting *Mullenix v. Luna*, 1336 S. Ct. 305, 308 (2015)).

[130] *Id.* at 969 (citing *Burnette v. Taylor*, 533 F.3d 1325, 1333 (11th Cir. 2008); *Grayson*, 195 F.3d at 696; *Estate of Hocker v. Walsh*, 22 F.3d 995, 999-1000 (10th Cir. 1994); *Meier*, 376 Fed. App'x at 529).

[131] *Grayson*, 195 F.3d at 696.

Eleventh Circuits respects the discretion afforded to State agents that our federalism demands. This division among the Courts of Appeals is thus worthy of resolution.[132]

II. Because the fact pattern at issue in this case occurs frequently, review will decide an issue of national importance.

Decisions such as the one at bar, this Court has accurately observed, "are rulings that have a significant future effect on the conduct of public officials . . . and the government units to which they belong."[133] Indeed, "they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of [qualified] immunity in later cases."[134] And the scenario of a police officer inspecting a potentially intoxicated driver (or passenger) for medical injuries is "a problem beyond the academic or episodic."[135] Rather, it is a frequently recurring one, certainly affecting thousands of interactions annually. In the Tenth Circuit States alone, there are thousands of people involved in alcohol- and drug-related vehicle crashes each year, and these States record tens of

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[132] *See* Sup. Ct. Rule 10.

[133] *Camreta v. Greene*, 563 U.S. 692, 704 (2011).

[134] *Id.* at 704-05.

[135] *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955).

thousands of arrests for DUIs annually.[136] To say the least, this case is far from unique.

The logic of the decision below does not stop with intoxicated vehicle accidents, either. It may "mandate as a matter of constitutional law that officers take all criminal suspects under the influence of drugs or alcohol to hospital emergency rooms rather than detention centers"[137] – car accident or not. "Drunks do odd things," as the Seventh Circuit pithily observed,[138] and what sane officer will want to risk facing a lawsuit when an intoxicated person does something strange

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[136] Utah, the Tenth Circuit's third-most populous state, recorded 2,448 alcohol- and drug-related vehicular crashes in 2014. *See Thirteenth Annual DUI Report to the Utah Legislature*, Utah Commission on Criminal and Juvenile Justice: 2015, at 13 (alcohol), 15 (drugs), *available at* http://le.utah.gov/interim/2015/pdf/00004528.pdf. That same year, Utah arrested 10,901 people for driving under the influence (DUI). *See id.* at 1, 10. These numbers are comparable to those found in the rest of the Tenth Circuit. *See, e.g.*, *Oklahoma 2015 Crash Facts*, Department of Public Safety, Highway Safety Office (recording 4,542 alcohol- and drug-related crashes in 2015) *available at* https://ok.gov/ohso/Data/Crash_Data_and_Statistics/Crash_Facts_2015.html; *New Mexico Traffic Crash Annual Report*: *2015*, New Mexico Dep't of Transportation, at 9 (recording 2,365 alcohol- and drug-related crashes in 2015) *available at* https://tru.unm.edu/Crash-Reports/Annual-Reports/annual-report-2015.pdf; *Alcohol and Impaired Driving*, Colorado Dep't of Public Transportation ("Each year, more than 26,000 people [in Colorado] are arrested for DUI. . . ."), *available at* https://www.codot.gov/safety/alcohol-and-impaired-driving.

[137] *Grayson* 195 F.3d at 696.

[138] *Salazar*, 940 F.2d at 241.

that could even remotely be tied to a potential internal injury?

On a daily basis, police face these types of questions. Are an arrestee's physical symptoms due to drugs and alcohol or to internal physical ailments? Should the officer provide medical assistance to an arrestee who denies the need for help out of fear of admitting guilt?[139] Do an apparently intoxicated arrestee's generic complaints about aches and pains trigger a *constitutional* duty to provide medical attention?[140]

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[139] *See, e.g.*, *Weaver v. Shadoan*, 340 F.3d 398 (6th Cir. 2003) (holding that officers were not deliberately indifferent to arrestee who died in police custody after voluntarily ingesting a lethal dose of cocaine and then repeatedly denying his ingestion of the drugs and refusing medical treatment, despite exhibiting "seizure-like symptoms"); *Watkins v. City of Battle Creek*, 273 F.3d 682 (8th Cir. 2001) (holding that officers were not deliberately indifferent to arrestee who died in police custody after refusing medical treatment when police inferred that he ingested drugs to hide them); *Sanchez v. Young Cty.*, 2017 WL 3224981 (5th Cir. 2017) (holding that officers were not deliberately indifferent to arrestee who claimed she was okay but later committed suicide, despite seeing a pill bottle on the passenger floorboard and over protest of her husband's demand that she be taken to the hospital).

[140] *See, e.g.*, *Taylor v. Adams*, 221 F.3d 1254 (11th Cir. 2000) (granting qualified immunity where bystander warned of arrestee's history of seizures and pointed out saliva and foaming at his mouth, and arrestee was "sweaty and heavy-breathing," indicated to firemedics that he was not okay, complained of stomach pains, was discovered unconscious while being transported to jail, and ultimately died en route to hospital where police took him "without lights or sirens"); *Wagner v. Bay City*, 227 F.3d 316 (5th Cir. 2000) (granting qualified immunity where arrestee died after being pepper sprayed, pushed with his face to the ground,

The result of decisions like that of the Eighth and Tenth Circuits is to unduly constrict the "breathing room" State officials need to govern and act,[141] which this Court has recognized "can be peculiarly disruptive of effective government,"[142] and only superimposes constitutional tort-law requirements "upon whatever systems may already be administered by the States" to address such policy questions.[143] Although this case involves a single officer's attempt to perform his duties, its application to the thousands of similar situations officers regularly encounter makes it a matter of pressing and national importance.

The frequency with which courts face and disagree on such recurring fact patterns calls for more particular guidance from this Court.[144] As the Tenth Circuit's

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and hauled unconscious by police to jail while groaning and grunting during the trip); *Jones v. Minn. Dep't of Corr.*, 512 F.3d 478 (8th Cir. 2008) (granting qualified immunity where arrestee "was unable to stand or walk under her own power, was 'google-eyed' and unresponsive, was rolling on the ground while grunting and groaning, was bleeding from the mouth, smelled as if she had urinated on herself, and was breathing at a very rapid rate" and ultimately died from pulmonary edema); *Watkins*, 273 F.3d 682 (granting qualified immunity where arrestee was seen consuming crack cocaine, complained of an upset stomach, appeared to be drunk or high, and ultimately died in prison).

[141] *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

[142] *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

[143] *Paul v. Davis*, 424 U.S. 693, 701 (1976).

[144] *Cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (granting certiorari "to illuminate the character of the standard that will identify unconstitutionally excessive awards of punitive damages") (internal marks omitted).

opinion below raises these commonly asked questions, it presents the Court with an ideal vehicle to address the contours of the Fourteenth Amendment in a world where rising drug and alcohol use will only make this issue all the more frequent.[145]

QUESTION 2

I. This Court has repeatedly admonished that a critical purpose of qualified immunity is to resolve cases against state officers at the "earliest possible stage in litigation."

"Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[146] As to the latter interest, this Court has emphasized over and again that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences."[147] Furthermore, the Court has explained, these "consequences" are not

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[145] *See, e.g.*, Jane C. Maxwell, *The prescription drug epidemic in the United States: A perfect storm*, 30(3) DRUG & ALCOHOL REV. 264 (2011).

[146] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

[147] *Mitchell*, 472 U.S. 511 (internal marks omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967))).

restricted "to liability for money damages; they also include 'the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and the deterrence of able people from public service.' "[148] Indeed, the Court has broadly interpreted this "entitlement not to stand trial or face other burdens of litigation"[149] to include "even such pretrial matters as discovery,"[150] because such inquiries "can be peculiarly disruptive of effective government."[151]

Perhaps most crucially, this Court has held that qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."[152] As Justice O'Connor once wrote,

> This entitlement is analogous to the right to avoid trial protected by absolute immunity or

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[148] *Id.* at 526 (quoting *Harlow*, 457 U.S. at 816).

[149] *Id.*

[150] *Id.*

[151] *Id.* (quoting *Harlow*, 457 U.S. at 817).

[152] *Id.* (emphasis in original); *see also Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.").

> by the Double Jeopardy Clause. Where the district court rejects claims that official immunity or double jeopardy preclude trial, the special nature of the asserted right *justifies immediate review*. The very purpose of such immunities is to protect the defendant from the burdens of trial, and the right will be irretrievably lost if its denial is not *immediately* [resolved].[153]

Accordingly, the Court has "made clear that the driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials will be resolved prior to discovery"[154] and has "repeatedly . . . stressed the importance of resolving immunity questions *at the earliest possible stage in litigation*."[155]

This Court has taken a number of strong steps to enforce this "earliest possible" command. For example, in *Harlow* the Court recognized that under Federal Rule of Civil Procedure 56 plaintiffs could merely allege malice and expect "an official's subjective good faith . . . to be a question of fact . . . regarded as

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[153] *Mitchell*, 472 U.S. at 537 (O'Connor, J., with whom Burger, C.J., joins, concurring in part) (emphases added) (citing *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979); *Abney v. United States*, 431 U.S. 651, 660-62 (1977)).

[154] *Pearson*, 555 U.S. at 231-32 (internal marks omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)).

[155] *Id.* at 232 (emphasis added) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

inherently requiring resolution by a jury."[156] The Court viewed this as "frequently" leading to situations "incompatible with our admonition . . . that insubstantial claims should not proceed to trial."[157] The Court therefore created an objective requirement in qualified immunity claims, since "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."[158] Otherwise, there would be "no clear end to the relevant evidence."[159]

Likewise, in *Mitchell* this Court held "that a district court's denial of a claim of qualified immunity . . . is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."[160] This allows officers to avoid suit at the earliest possible instance. More recently, the Court held in *Pearson* that judges need not address whether facts alleged by a plaintiff make out a violation of a constitutional right if they can dismiss the suit more quickly by ruling on the "clearly established" prong first.[161] In so holding, the Court overruled its prior requirement that courts address the constitutional right prong first, because that rule " disserves the purpose of qualified immunity when it forces the parties

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[156] *Harlow*, 457 U.S. at 815-16.

[157] *Id.*

[158] *Id.* at 817-18.

[159] *Id.* at 817.

[160] *Mitchell*, 472 U.S. at 530.

[161] *Pearson*, 555 U.S. at 236.

to endure additional burdens of suit – such as the costs of litigating constitutional questions and delays attributable to resolving them – when the suit otherwise could be disposed of more readily."[162] Finally, in *Camreta*, this Court expanded the "special" treatment afforded qualified immunity by permitting government officials to appeal decisions granting them qualified immunity, because the further elaboration of the law would ultimately resolve similar qualified immunity suits earlier in litigation.[163]

The importance of shielding officers from unnecessary litigation is evidenced by this Court's frequent summary reversals of in qualified immunity cases. As the Court observed several months ago, "[in] the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases."[164] By Judge Kavanaugh's count, "the Supreme Court has issued 11 decisions reversing federal courts

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[162] *Id.* at 237 (internal marks and citations omitted).

[163] 563 U.S. at 697-98.

[164] *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (citation omitted); *see, e.g.*, *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017); *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015); *Mullenix*, 136 S. Ct. 305; *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam); *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam); *Wood v. Moss*, 134 S. Ct. 2056 (2014); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Stanton v. Sims*, 134 S. Ct. 3 (2013) (per curiam); *Reichle v. Howards*, 566 U.S. 658 (2012); *Ryburn v. Huff*, 565 U.S. 469 (2012); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Ashcroft*, 563 U.S. 731. *Cf. District of Columbia v. Wesby*, 137 S. Ct. 826 (2017) (granting writ of certiorari).

of appeals in qualified immunity cases [during that time], including five strongly worded summary reversals."[165] By Petitioner's count, the tally has since grown to 14.[166] More particularly, this Court "ha[s] not hesitated to summarily reverse courts for wrongly *denying officers* the protection of qualified immunity."[167] This heightened vigilance has been necessary because "qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.'"[168] Accordingly, this "Court often corrects lower courts when they wrongly subject individual officers to liability,"[169] as the Tenth Circuit did below.

Thus, this Court has been clear and unequivocal: The doctrine of qualified immunity demands that courts protect officers from litigation by resolving disputes about immunity at the earliest possible moments.

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[165] *Wesby v. District of Columbia*, 816 F.3d 96, 102 (2016) (Kavanaugh, J., joined by Henderson, Brown, and Griffith, JJ., dissenting from denial of rehearing *en banc*) (citations omitted).

[166] *See supra* n.164.

[167] *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1282 (2017) (Alito, J., joined by Thomas, J., dissenting from the denial of certiorari) (emphasis added) (citations omitted).

[168] *Pearson*, 555 U.S. at 231.

[169] *Sheehan*, 135 S. Ct. at 1774 n.3 (citations omitted).

II. Allowing appellate courts to remand on the second prong of qualified immunity exposes officers to needlessly prolonged litigation and unjustifiably wasted resources.

The logical implication of this Court's exhortation to resolve qualified immunity cases "at their earliest possible stage in litigation" is simple: Although an appellate court may address either prong first in order to dismiss the suit at the earliest possible instance, if a court rules that the facts are sufficient to demonstrate an officer violated constitutional law, the court must also decide the question of whether that law was clearly established. At that point, remand should not be an option, for the same reason that taking the prongs out of order when granting qualified immunity *is* an option: Speed is vital, whereas unduly prolonged litigation defeats the entire purpose of qualified immunity.

Requiring appellate courts to analyze the second qualified immunity prong, instead of remand, is especially apropos because deciding whether a law is "clearly established" is a pure question of law. "An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim."[170] Rather, it need only consult case law to determine "whether the legal norms allegedly violated by the defendant were clearly established at the time of

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[170] *Mitchell*, 472 U.S. at 528.

the challenged actions."[171] For this reason, this Court has not hesitated to rule on the second prong, even where the court below did not address the issue.[172]

Allowing courts to remand the "clearly established" issue unjustifiably wastes judicial resources and subjects officers to protracted litigation. The parties must re-litigate the question at the district court level and face the almost-certain prospect of a second interlocutory appeal. Resolution of the question is delayed months – at best. And there is no identifiable benefit to requiring two further rounds of briefing, when the dispute over the second prong was fully presented before the Court of Appeals.

Indeed, if a court has already determined that the facts may establish a constitutional violation, it is hard to imagine that the court has not already identified the relevant legal materials to determine whether that violation was clearly established by existing case law. It is strange to think that an appellate court would need further briefing and a district court opinion to help it answer this question, especially when it will review the question *de novo* anyway. Yet the Tenth Circuit has chosen this circuitous course, in this and other cases.[173]

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[171] *Id.*

[172] *Id.* at 529 (citing *Nixon v. Fitzgerald*, 457 U.S. at 743 n.23).

[173] *See Ferguson v. Brian Webster, P.A.*, 493 Fed. App'x 982 (10th Cir. 2012); *Harris v. Morales*, 231 Fed. App'x 773, 776-77 (10th Cir. 2007); *Lowe v. Town of Fairland*, 143 F.3d 1378, 1381 (10th Cir. 1998); *Workman v. Jordan,* 958 F.2d 332, 336-37 (10th Cir. 1992).

Not surprisingly, other Circuits have taken the opposite tack, holding that "because the application of qualified immunity is a matter of law which we review de novo . . . we need not remand to obtain the district court's decision on qualified immunity."[174]

In the end, such prolonged litigation strips officers of their constitutional protections, distracts them from their important duties, and wastes judges', attorneys', and litigants' resources.

Because no legitimate countervailing interest justifies delayed litigation in this context, this Court should consider whether courts abuse their discretion in refusing to decide whether the second prong of the qualified immunity test has been met after deciding in the plaintiff's favor on the first prong.

[174] *Howell v. Evans*, 922 F.2d 712, 716 (11th Cir. 1991), *vacated pursuant to settlement* 931 F.2d 711 (11th Cir. 1991), *and opinion reinstated sub nom. Howell v. Burden*, 12 F.3d 190 (11th Cir. 1994).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CLYDE ALLEN RIFE, Plaintiff-Appellant, v. OKLAHOMA DEPARTMENT OF PUBLIC SAFETY; JOE JEFFERSON, State Trooper; CHAD DALE; JONATHON WILLIS; MCCURTAIN COUNTY JAIL TRUST, Defendants-Appellees.	No. 16-7019 (D.C. No. 6:14-CV-00333-FHS) (E.D. Okla.)

ORDER

(Filed Apr. 12, 2017)

Before **LUCERO**, **McKAY**, and **BACHARACH**, Circuit Judges.

This matter is before the court on appellees McCurtain County Jail Trust, Chad Dale and Jonathon Willis's *Petition for Rehearing En Banc*, as well as the separate *Petition for Rehearing and Petition for*

Rehearing En Banc filed by appellee Joe Jefferson. We also have the appellant's response to those petitions.

Upon consideration, panel rehearing is granted in part and only to the extent of the changes made to the amended opinion attached to this order. In all other respects panel rehearing is denied by the original panel members.

The petitions, the response, as well as the amended opinion were also circulated to all the judges of the court who are in regular active service. As no judge on the original panel or the en banc court requested that a poll be called, the requests for en banc consideration are denied.

The Clerk is directed to file the attached amended opinion effective the date of this order.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CLYDE ALLEN RIFE, Plaintiff-Appellant, v. OKLAHOMA DEPARTMENT OF PUBLIC SAFETY; JOE JEFFERSON, State Trooper; CHAD DALE; JONATHON WILLIS; MCCURTAIN COUNTY JAIL TRUST, Defendants-Appellees.	No. 16-7019

Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 6:14-CV-00333-FHS)

(Filed Apr. 12, 2017)

Daniel E. Smolen (Robert M. Blakemore, with him on the briefs), Smolen, Smolen & Roytman, PLLC, Tulsa, Oklahoma, for Plaintiff-Appellant.

Stephen L. Geries (Ammon J. Brisolara, with him on the brief), Collins Zorn & Wagner, Oklahoma City, Oklahoma, for McCurtain County Jail Trust, Chad Dale, and Jonathon Willis, Defendants-Appellees.

Devan A. Pederson, Assistant Attorney General, Oklahoma Attorney General's Office, Oklahoma City, Oklahoma, for Oklahoma Department of Public Safety, and Joe Jefferson, Defendants-Appellees.

Before **LUCERO**, **McKAY**, and **BACHARACH**, Circuit Judges.

BACHARACH, Circuit Judge.

This case began with the plaintiff, Mr. Clyde Rife, sitting on a motorcycle next to a road, unable to recall the date, the time, or even what he had been doing in a town he had just visited. When approached by a state trooper, Mr. Rife said that he was fine. Nonetheless, the trooper questioned Mr. Rife and concluded that he was intoxicated on pain medication and had been in a motorcycle accident. These conclusions led the trooper to arrest Mr. Rife for public intoxication. Authorities later learned that Mr. Rife had not been intoxicated; he had suffered a head injury in a motorcycle accident.

Mr. Rife ultimately sued the trooper and the Oklahoma Department of Public Safety, alleging in part that he had been wrongfully arrested. For this allegation, we ask: Did probable cause exist to arrest Mr. Rife? The district court said "yes," and we agree.

The rest of the case involves what happened after the arrest. After the arrest, the trooper drove Mr. Rife

to jail. Along the way, Mr. Rife groaned and complained of pain in his heart and chest. Upon arriving at the jail, Mr. Rife was put in a holding cell. The scene was observed by a cellmate, who said that Mr. Rife had repeatedly complained about pain. Nonetheless, Mr. Rife was not provided medical attention.

The lack of medical care led Mr. Rife to sue (1) the trooper, two jail officials, and the entity operating the jail for deliberate indifference to serious medical needs and (2) the Oklahoma Department of Public Safety for negligent failure to provide medical care. On these claims, we ask: Did the failure to provide medical attention constitute (1) deliberate indifference to Mr. Rife's serious medical needs or (2) negligence? The district court thought no one could reasonably infer either deliberate indifference or negligence. We disagree, concluding that both could be reasonably inferred from the evidence.

These conclusions lead us to affirm in part, to reverse in part, and to remand for further proceedings.

I. Mr. Rife's Claims

Mr. Rife sued the trooper (Joe Jefferson), the two jail officials (Jonathon Willis and Chad Dale), the entity operating the jail (McCurtain County Jail Trust), and the Oklahoma Department of Public Safety.[1] With regard to the arrest, Mr. Rife makes two claims:

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[1] The Oklahoma Department of Public Safety is a state agency. *See* Okla. Stat. tit. 47, § 2-101. Trooper Jefferson worked

1. Trooper Jefferson is liable under § 1983 for arresting Mr. Rife without probable cause.

2. The Oklahoma Department of Public Safety incurs vicarious liability for the wrongful arrest under the Oklahoma Governmental Tort Claims Act.[2]

For the lack of medical attention after the arrest, Mr. Rife makes three claims:

1. Trooper Jefferson, Mr. Willis, and Mr. Dale are liable under 42 U.S.C. § 1983 for deliberate indifference to serious medical needs.

2. The jail trust is liable under § 1983 for the deliberate indifference of jail employees.

3. The Oklahoma Department of Public Safety is vicariously liable under the Oklahoma Governmental Tort Claims Act for Trooper Jefferson's negligent failure to obtain medical attention.[3]

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for the Oklahoma Highway Patrol, which is a division of the Oklahoma Department of Public Safety.

[2] The Oklahoma Governmental Tort Claims Act is codified at Okla. Stat. tit. 51, § 151 et seq. This law provides the exclusive tort remedy in Oklahoma for injured plaintiffs to recover against state entities. *Tuffy's, Inc. v. City of Okla. City*, 212 P.3d 1158, 1163 (Okla. 2009). Under this law, state entities can generally incur liability for torts. *Id.* This liability may be based on the acts of state employees. *Id.*

[3] Mr. Rife also sued under the Oklahoma Constitution, but those claims are not involved in this appeal.

During the lawsuit, Mr. Rife discovered that the jail trust had destroyed a videotape that showed him in the jail's booking area. According to Mr. Rife, the destruction of the videotape warranted spoliation sanctions consisting of denial of the summary judgment motions brought by Mr. Willis, Mr. Dale, and the jail trust.

II. The District Court's Rulings

The defendants moved for summary judgment, and the district court granted summary judgment to each defendant.

On the wrongful arrest claims, the district court granted summary judgment to Trooper Jefferson and the Oklahoma Department of Public Safety, concluding that probable cause existed for Mr. Rife's arrest.

On the claims involving a failure to provide medical attention, the court granted summary judgment to all defendants, reasoning that the lack of medical attention had not resulted from deliberate indifference or negligence.

In addition, the district court declined to sanction the jail trust, Mr. Willis, and Mr. Dale for destruction of the videotape, reasoning that Mr. Rife had failed to follow the proper procedure for requesting a spoliation sanction.

III. Our Conclusions

We affirm the district court's orders in part, reverse in part, and remand for further proceedings.

On the wrongful arrest claims against Trooper Jefferson and the Oklahoma Department of Public Safety, we affirm, agreeing with the district court that probable cause existed for the arrest.

On the deliberate indifference claims, we reverse: A reasonable factfinder could find facts supporting the deliberate indifference claims against Trooper Jefferson, Mr. Willis, Mr. Dale, and the jail trust. Thus, we reverse and remand for the district court to determine (1) whether Mr. Rife's rights were clearly established and (2) whether a reasonable factfinder could find a causal link between the jail trust's policies or customs and a constitutional violation.

On the negligence claim against the Oklahoma Department of Public Safety, we reverse, concluding that a genuine dispute of material fact exists on the reasonableness of Trooper Jefferson's failure to obtain medical attention.

In addition, we affirm the district court's denial of spoliation sanctions, concluding that Mr. Rife forfeited his present argument and has failed to identify evidence of bad faith.

IV. Standard of Review

The district court concluded that the defendants were entitled to summary judgment. We review these conclusions de novo. *Koch v. City of Del City*, 660 F.3d 1228, 1237-38 (10th Cir. 2011). In applying de novo review, we consider the evidence in the light most favorable to Mr. Rife, resolving all factual disputes and drawing all reasonable inferences in his favor. *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014).

We apply not only this standard of review but also the substantive burdens on the underlying issues. One such issue is qualified immunity, which is raised by Trooper Jefferson, Mr. Willis, and Mr. Dale. The threshold burden falls on the plaintiff, who must demonstrate that a reasonable factfinder could find facts supporting the violation of a constitutional right that had been clearly established at the time of the violation.[4] *Id*. If this burden is met, the defendant must show that (1) there are no genuine issues of material fact and (2) the defendant is entitled to judgment as a matter of law. *Koch*, 660 F.3d at 1238.

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[4] The defendants state that the plaintiff must show a violation of a clearly established constitutional right, not that a reasonable factfinder could find facts supporting such a violation. The difference in framing would not affect our analysis.

V. The Wrongful Arrest Claim Against Trooper Jefferson

Invoking § 1983, Mr. Rife argues that Trooper Jefferson lacked probable cause, rendering the arrest a violation of the Fourth and Fourteenth Amendments. According to Mr. Rife, the district court disregarded evidence supporting this claim. Trooper Jefferson counters that

- he had probable cause,
- any possible factual mistake would have been objectively reasonable, and
- the underlying right was not clearly established.

The district court granted summary judgment to Trooper Jefferson, holding that he had probable cause to arrest Mr. Rife for public intoxication. We agree.

A. The Interaction Between Mr. Rife and Trooper Jefferson

Trooper Jefferson's police car had a dashcam, which captured almost the entire interaction between Mr. Rife and Trooper Jefferson.

The dashcam begins with Trooper Jefferson checking on Mr. Rife, who was sitting on a motorcycle next to a road. Mr. Rife was confused with dried blood on his nose, and there were grass and grass stains on the motorcycle. Mr. Rife also had grass stains on his pants and

shirt, indicating that he had been thrown from the motorcycle.

Trooper Jefferson asked if Mr. Rife was okay, and Mr. Rife replied that he was fine. But Mr. Rife could not identify the day, approximate the time of day, or remember his social security number. He knew that he had been in Idabel, Oklahoma, earlier that day but could not remember what he had been doing there. His speech was slurred.

The trooper suspected intoxication. Because the symptoms of head injuries and intoxication are similar, the trooper looked for signs of a head injury: unequal tracking of the pupils, unequal pupil size, and resting nystagmus. Mr. Rife did not exhibit these signs.

Trooper Jefferson then performed a horizontal gaze nystagmus test, which could reveal up to 6 clues of impairment. Trooper Jefferson's training stated that if a person exhibits 4 out of the 6 clues, there is an 80 percent chance of intoxication. Mr. Rife exhibited all 6 clues.

To determine whether Mr. Rife was intoxicated, Trooper Jefferson conducted four additional tests. Mr. Rife failed these tests or was unable to complete them. Before one of the tests, Mr. Rife stated that he felt "floaty"; during another test, Mr. Rife lost his balance.

These tests and observations led Trooper Jefferson to arrest Mr. Rife for public intoxication. Trooper Jefferson knew that Mr. Rife was not drunk but believed that he had taken too much pain medication. Many of

Mr. Rife's symptoms were consistent with intoxication from pain medication, including constricted pupils, lethargy, nystagmus, dizziness, and feeling "floaty."

At the time of arrest, Trooper Jefferson also knew that Mr. Rife had been in a motorcycle accident. Mr. Rife had repeatedly denied being in a motorcycle accident, but Trooper Jefferson said that Mr. Rife had obviously been in an accident.

Though Trooper Jefferson knew that an accident had taken place, he did not believe that it had involved high speed or high impact. Trooper Jefferson reasoned that Mr. Rife did not have the type of visible injuries that would likely result from a high-speed or high-impact accident. For instance, Mr. Rife had no marks or scratches on his arms. Trooper Jefferson also noted that there was little damage to the motorcycle or saddlebags.

Trooper Jefferson drove Mr. Rife to jail. During the drive, Mr. Rife said that his chest hurt and groaned in pain. A few minutes later, Mr. Rife stated that his heart hurt and again groaned.

Trooper Jefferson acknowledges that at some point, Mr. Rife complained that he felt sick.

B. The District Court's Alleged Discounting of Supporting Evidence

Mr. Rife argues that the district court improperly discounted four evidentiary items:

1. Trooper Jefferson reported that the arrest had been for public intoxication under Okla. Stat. tit. 37, § 537, but this statute involves intoxication from alcohol rather than medication.

2. Trooper Jefferson knew that Mr. Rife was not under the influence of alcohol.

3. Trooper Jefferson knew that Mr. Rife had been in a motorcycle accident and that certain medical conditions could mimic the symptoms of intoxication. Although Trooper Jefferson ruled out a head injury, he did not rule out shock or other medical conditions.

4. Mr. Rife said that the only medication he had taken was for blood pressure.

None of this evidence precludes the existence of probable cause.

The first two evidentiary items are immaterial because probable cause need not be based on the statute mistakenly invoked by Trooper Jefferson. *See* Part V(D), below. Under Oklahoma law, Mr. Rife could be guilty of a crime if he had been publicly intoxicated on pain medication rather than alcohol. *See* Parts V(C)-(D), below.

The third evidentiary item is immaterial because probable cause does not require police officers to rule out all innocent explanations for a suspect's behavior. *See, e.g.*, *Lingo v. City of Salem*, 832 F.3d 953, 961 (9th Cir. 2016) ("It is decidedly not the officers' burden to

'rule out the possibility of innocent behavior' in order to establish probable cause." (quoting *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009)); *United States v. Reed*, 220 F.3d 476, 478 (6th Cir. 2000) ("Officers are not required to rule out every possible explanation other than a suspect's illegal conduct before making an arrest."); *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985) ("The fact that an innocent explanation may be consistent with the facts alleged . . . does not negate probable cause.")).

The fourth evidentiary item is also immaterial. Though Mr. Rife stated that the only medication he had taken was for his blood pressure, Trooper Jefferson could rationally have thought that Mr. Rife had forgotten what medication he had taken or had been lying. After all, Mr. Rife had denied being in a motorcycle accident, but obviously had been in an accident and was unable to remember many common things such as what day it was or what he had been doing in Idabel.

In these circumstances, we reject Mr. Rife's argument that the district court improperly discounted the four evidentiary items.

C. The Existence of Probable Cause

Notwithstanding these evidentiary items, probable cause existed to arrest Mr. Rife for public intoxication.

A warrantless arrest is permissible only if an officer has probable cause to believe that the arrestee

committed a crime. *Cortez v. McCauley*, 478 F.3d 1108, 1115 (10th Cir. 2007) (en banc). "Probable cause to arrest exists only when the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id.* at 1116 (quoting *United States v. Valenzuela*, 365 F.3d 892, 896 (10th Cir. 2004)). The officer's belief does not need to be certain or more likely true than false. *United States v. Padilla*, 819 F.2d 952, 962 (10th Cir. 1987).

In Oklahoma, the crime of public intoxication involves being intoxicated in a public place. Okla. Stat. tit. 37, §§ 8, 537(A)(8). Mr. Rife does not question whether he was in a public place. Instead, he denies any plausible reason to think he was intoxicated.

The "outward manifestations" of intoxication are "impaired mental judgment and physical responses." *Findlay v. City of Tulsa*, 561 P.2d 980, 984 (Okla. Crim. App. 1977). But these symptoms of intoxication "may also be symptomatic of other physical impairments." *Id.* That was the case here, for Mr. Rife's symptoms could reasonably suggest intoxication, a head injury, or other medical conditions.

The Seventh Circuit Court of Appeals addressed a similar situation in *Hirsch v. Burke*, where a diabetic individual experiencing insulin shock was arrested for public intoxication. 40 F.3d 900, 901 (7th Cir. 1994). Before the arrest, the individual had trouble balancing

himself, seemed incoherent, smelled of alcohol, had bloodshot eyes, and was unable to state his name or date of birth. *Id.* at 903. Unbeknownst to the officer, the individual was experiencing diabetic symptoms that mimicked intoxication. *Id.* Based on these facts, the Seventh Circuit upheld the district court's finding of probable cause. *Id.* at 903-04.

Similarly, in *Qian v. Kautz*, an individual with a pre-existing head injury was arrested for public intoxication. 168 F.3d 949, 951-52, 954 (7th Cir. 1999). The arresting police officer was unaware of the head injury, but was aware of five facts:

1. The individual had lost control of a car and crashed.
2. The individual was hunched over and having difficulty walking.
3. There were no signs that the individual had hit anything in the car's interior during the accident.
4. The individual denied being injured and showed no physical signs of injury.
5. The individual's speech seemed slurred.

Id. at 954. The Seventh Circuit held that these facts were sufficient to create probable cause, noting that "the overall setting easily support[ed] [the officer's] decision to arrest [the individual]." *Id.*

Some of the factors supporting probable cause in *Hirsch* are present here. Like the arrestee in *Hirsch*,

Mr. Rife had trouble balancing himself and was unable to provide the police with basic information (such as the day or time).

There are also parallels between the facts in our case and those in *Qian*. Like the arrestee in *Qian*, Mr. Rife had been in an accident, was hunched over, denied being injured, and had slurred speech.

Additional evidence supports probable cause here that was not present in *Hirsch* or *Qian*. As explained above, Trooper Jefferson examined Mr. Rife to determine whether he had a head injury, checking for unequal tracking of the pupils, unequal pupil size, and resting nystagmus. Mr. Rife did not show any of these signs. After ruling out a head injury, Trooper Jefferson conducted other tests that suggested intoxication.

In these circumstances, an officer could reasonably conclude that Mr. Rife was intoxicated from medication.

D. Trooper Jefferson's Reason for Making the Arrest

Mr. Rife suggests that probable cause did not exist because Trooper Jefferson had relied on the wrong statute. In a report, Trooper Jefferson stated that the arrest had been based on Okla. Stat. tit. 37, § 537. This law deals with intoxication from alcohol, not medication.

But Trooper Jefferson's mistake does not foreclose probable cause because an arresting officer's "subjective reason for making [an] arrest need not be the criminal offense as to which the known facts provide probable cause." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004).

Probable cause existed for violation of a separate statute: Okla. Stat. tit. 37, § 8. Under this statute, a crime is committed when the intoxication is caused by either alcohol or another intoxicating substance. *Findlay v. City of Tulsa*, 561 P.2d 980, 984-85 (Okla. Crim. App. 1977). Thus, probable cause existed even though Trooper Jefferson relied on the wrong statute.

VI. The Wrongful Arrest Claim Against the Oklahoma Department of Public Safety

Mr. Rife invokes the Oklahoma Governmental Tort Claims Act, claiming that the Oklahoma Department of Public Safety is vicariously liable for the wrongful arrest. On this claim, the district court granted summary judgment to the Oklahoma Department of Public Safety, holding that the existence of probable cause vitiated tort liability. We agree with the district court. Because the arrest was supported by probable cause, the Oklahoma Department of Public Safety could not incur liability for a wrongful arrest.

VII. The Deliberate Indifference Claim Against Trooper Jefferson

Mr. Rife brought a § 1983 claim against Trooper Jefferson, alleging deliberate indifference to serious medical needs. The district court granted summary judgment to Trooper Jefferson, concluding that he enjoyed qualified immunity because there was no evidence of a constitutional violation. This conclusion was erroneous, for Mr. Rife presented evidence that would reasonably allow factual findings supporting liability for deliberate indifference.

A. The Legal Framework for Deliberate Indifference Claims by Pretrial Detainees

The Fourteenth Amendment's Due Process Clause entitles pretrial detainees to the same standard of medical care owed to convicted inmates under the Eighth Amendment. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002). Thus, the Fourteenth Amendment is violated if state officials are deliberately indifferent to a pretrial detainee's serious medical needs. *See, e.g.*, *Martinez v. Beggs*, 563 F.3d 1082, 1088-91 (10th Cir. 2009) (analyzing whether police officers were deliberately indifferent to the serious medical needs of a pretrial detainee).

The Supreme Court has established a two-pronged test for deliberate indifference claims. Under this test, a plaintiff must satisfy an objective prong and a subjective prong. *Farmer v. Brennan*, 511 U.S. 825, 834, 837-40 (1994). The objective prong concerns the

severity of a plaintiff's need for medical care; the subjective prong concerns the defendant's state of mind. *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000). This appeal focuses largely on the subjective prong.

The subjective prong is satisfied only if the defendant knew of an excessive risk to the plaintiff's health or safety and disregarded that risk. *Farmer*, 511 U.S. at 837. In deciding whether this prong is satisfied, the factfinder may consider circumstantial evidence. *Gonzales v. Martinez*, 403 F.3d 1179, 1183 (10th Cir. 2005). For example, the existence of an obvious risk to health or safety may indicate awareness of the risk. *See Farmer*, 511 U.S. at 842 ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."). But "the obviousness of a risk is not conclusive and a prison official may show that the obvious escaped him." *Id.* at 843 n.8.

B. Application of Standards Involving Medical Professionals

Our court applies specialized standards to deliberate indifference claims against medical professionals. *See Self v. Crum*, 439 F.3d 1227, 1231-33 (10th Cir. 2006) (discussing these standards). We have not applied these standards to deliberate indifference claims against laypersons such as police officers. Nonetheless, the district court analyzed whether Trooper Jefferson was deliberately indifferent under the standards for

medical professionals. Mr. Rife takes a different approach, urging liability of Trooper Jefferson based on cases involving laypersons. This approach is correct because Trooper Jefferson was not a medical professional.

C. The District Court's Discounting of Supporting Evidence

Mr. Rife contends that the district court improperly discounted four evidentiary items:

1. Mr. Rife said that his chest and heart hurt and made groaning noises.
2. Mr. Rife stated that he felt sick.
3. Trooper Jefferson saw dried blood on Mr. Rife's nose.
4. An expert witness testified that someone on a motorcycle is more likely to be injured in an accident than someone in an automobile.

Trooper Jefferson denies any evidence that Mr. Rife complained of heart or chest pain or groaned in pain. We disagree. The dashcam recorded Mr. Rife's complaints and groans. The district court should have considered this evidence, along with the complaint of feeling sick, the presence of dried blood on Mr. Rife's nose, and the expert testimony that personal injury is

more likely in motorcycle accidents than in automobile accidents.[5]

D. Trooper Jefferson's Conscious Disregard of a Substantial Health Risk

Trooper Jefferson argues that Mr. Rife failed to present sufficient evidence of a conscious disregard of a substantial health risk. We disagree.

Mr. Rife argues that his need for medical attention was obvious. This argument is supported by ten evidentiary items:

1. Trooper Jefferson knew that Mr. Rife had been involved in a motorcycle accident.
2. According to an expert witness, injury is more likely in a motorcycle accident than in an automobile accident.
3. Trooper Jefferson saw grass stains on Mr. Rife's pants and on the back of his shirt. These stains indicated that Mr. Rife had been thrown from the motorcycle.

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[5] Trooper Jefferson seems to acknowledge that the district court discounted the testimony that personal injury is more likely in motorcycle accidents than in automobile accidents. But he argues that "this abstract proposition is immaterial given the other evidence suggesting that Rife was not injured." Response Br. of the Oklahoma Department of Public Safety and Trooper Jefferson at 18. This argument fails. To the extent that there is conflicting evidence on the obviousness of the injury, we must view the evidence favorably to Mr. Rife. *See* Part IV, above.

4. Mr. Rife did not know what day it was, what time it was, what his social security number was, or what he had done in Idabel.

5. There was dried blood on Mr. Rife's nose.

6. Mr. Rife had constricted pupils, lethargy, nystagmus, and dizziness.

7. Mr. Rife said that he felt "floaty."

8. Mr. Rife stated that he felt sick.

9. Mr. Rife complained that his chest hurt and he made groaning noises, suggesting that he was in pain.

10. Shortly thereafter, Mr. Rife complained that his heart hurt and again groaned.[6]

These facts could lead a reasonable factfinder to infer that Trooper Jefferson had recognized the need for medical attention. Nonetheless, Trooper Jefferson admittedly did not obtain medical attention for Mr. Rife.

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[6] Trooper Jefferson argues that "even assuming, *arguendo*, that Rife did, almost inaudibly, say that his chest or heart hurt, this would not be enough, given the totality of the other circumstances of this case, to show that Jefferson acted with deliberate indifference." Response Br. of the Oklahoma Department of Public Safety and Trooper Jefferson at 33. This argument is flawed in two respects. First, Mr. Rife did not whisper these statements; a factfinder could reasonably infer that the statements were loud enough for Trooper Jefferson to hear. Second, other evidentiary items indicated a need for immediate medical attention. For both reasons, this argument fails.

Trooper Jefferson denies that a court could find deliberate indifference, pointing to six alleged facts:

1. Trooper Jefferson never saw Mr. Rife exhibit signs of pain or injury.
2. All of Mr. Rife's symptoms were consistent with intoxication from pain medication.
3. Mr. Rife denied being in an accident.
4. When Trooper Jefferson approached Mr. Rife and asked how he was doing, Mr. Rife replied that he was fine.
5. Upon examination, Mr. Rife did not exhibit signs of a head injury.
6. The damage to the motorcycle was relatively minor.

The first alleged fact is inaccurate. For instance, the videotape shows Mr. Rife groaning and complaining that his heart and chest hurt. In addition, Trooper Jefferson acknowledges that Mr. Rife complained of feeling sick. And throughout the episode, Mr. Rife had dried blood on his nose.

The second alleged fact is at least debatable, for the summary judgment record does not contain evidence of an inconsistency between Mr. Rife's symptoms (such as pain in the chest or heart) and intoxication from pain medication. And even if the symptoms had been consistent with intoxication, the symptoms could also have suggested serious injury from the apparent motorcycle accident.

The other four alleged facts are insufficient to avoid a genuine dispute of material fact. Mr. Rife denied being in a motorcycle accident, but the trooper repeatedly stated that he knew that Mr. Rife had been in a motorcycle accident. Similarly, Mr. Rife may have initially claimed that he was fine, but he later complained of chest pain and heart pain, said that he felt sick, and remarked that he felt "floaty." These statements, when combined with Mr. Rife's other evidence, could adequately support liability for deliberate indifference even if Mr. Rife had not exhibited signs of a head injury or incurred major damage to his motorcycle.

Together, the evidence could reasonably support a finding that Trooper Jefferson knew of a substantial risk to Mr. Rife's health and consciously disregarded that risk.

E. Whether the Underlying Right Was Clearly Established

In district court, Trooper Jefferson argued that Mr. Rife's right to medical care had not been clearly established, but the district court did not rule on this argument. In this situation, "[t]he better practice . . . is to leave the matter to the district court in the first instance." *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272, 1290 (10th Cir. 2011) (quoting *Apartment Inv. & Mgmt. Co. v. Nutmeg Ins. Co.*, 593 F.3d 1188, 1198 (10th Cir. 2010)). Thus, we remand to

the district court for consideration of whether the underlying constitutional right was clearly established.

VIII. The Negligence Claim Against the Oklahoma Department of Public Safety

Mr. Rife again invokes the Oklahoma Governmental Tort Claims Act, alleging that the Oklahoma Department of Public Safety is vicariously liable for Trooper Jefferson's negligent failure to obtain medical attention. The district court granted the Oklahoma Department of Public Safety's motion for summary judgment, reasoning that Trooper Jefferson's actions were reasonable as a matter of law.

On appeal, Mr. Rife argues that the district court improperly discounted evidence supporting the negligence claim. We agree and reverse the order granting summary judgment to the Oklahoma Department of Public Safety.

A. The District Court's Discounting of Supporting Evidence

Mr. Rife contends that the district court improperly discounted evidence supporting the negligence claim, pointing to the same evidence that the district court improperly discounted for the deliberate indifference claim against Trooper Jefferson. *See* Part VII(C), above. We agree that the district court improperly discounted evidence supporting the negligence claim. This discounting of evidence constituted error because

the district court had to view the evidence favorably to Mr. Rife. *See* Part IV, above.

B. The Reasonableness of Trooper Jefferson's Failure to Obtain Medical Attention

The Oklahoma Department of Public Safety argues that Trooper Jefferson acted reasonably, relying on five of the alleged facts that Trooper Jefferson uses to defend against the deliberate indifference claim:

1. Mr. Rife had no visible injuries.
2. Mr. Rife did not complain of any injuries.
3. All of Mr. Rife's symptoms were consistent with intoxication from pain medication.
4. Mr. Rife denied being in an accident.
5. Trooper Jefferson ruled out a head injury.

This argument fails. The first two alleged facts are inconsistent with some of the evidence. For example, the first is inaccurate because Mr. Rife had dried blood on his nose. The second is inaccurate because Mr. Rife complained of chest pain and heart pain and said that he felt sick.

The third alleged fact is questionable and immaterial. It is questionable because there is no summary judgment evidence stating that some of Mr. Rife's symptoms (such as pain in one's chest or heart) are consistent with intoxication from pain medication.

This alleged fact is also immaterial: Regardless of whether Mr. Rife had been intoxicated, a factfinder could reasonably find that Trooper Jefferson had recognized a substantial risk to Mr. Rife's health and consciously disregarded that risk.

The fourth and fifth alleged facts are also immaterial. Though Mr. Rife denied being in an accident and Trooper Jefferson ruled out a head injury, the trooper repeatedly said that he knew an accident had taken place.

In our view, the five alleged facts do not preclude a finding of negligence.

IX. The Deliberate Indifference Claim Against Mr. Willis and Mr. Dale

Mr. Rife alleges that Mr. Willis and Mr. Dale are liable under § 1983 for deliberate indifference to serious medical needs. Mr. Willis and Mr. Dale counter that they did not violate a constitutional right and that the underlying right was not clearly established.

The district court granted summary judgment to Mr. Willis and Mr. Dale based on qualified immunity, reasoning that there was no evidence of a constitutional violation. We disagree, concluding that the district court erred by (1) treating Mr. Willis and Mr. Dale like medical professionals and (2) misunderstanding a key piece of evidence – the declaration by Mr. Rife's cellmate.

A. The Use of Standards Applicable to Medical Professionals

The district court analyzed whether Mr. Willis and Mr. Dale were deliberately indifferent under the standards for medical professionals. These standards do not apply because Mr. Willis and Mr. Dale were not medical professionals. *See* Part VII(B), above.

B. Mr. Rife's Interaction with Mr. Willis and Mr. Dale

When Mr. Rife and Trooper Jefferson arrived at the jail, Trooper Jefferson told Mr. Willis and Mr. Dale that Mr. Rife had been arrested for public intoxication. But no one mentioned the motorcycle accident or said that Mr. Rife might have been injured.

Mr. Willis and Mr. Dale booked Mr. Rife into the jail. During the book-in, Mr. Rife was dazed, slurring his words and showing confusion about where he was or what he was doing.

As part of the book-in, Mr. Dale completed a medical questionnaire for Mr. Rife. According to this questionnaire, Mr. Rife did not show signs of trauma or illness that required immediate medical attention. Mr. Willis and Mr. Dale suspected that Mr. Rife was drunk, though Mr. Willis was not sure what substance Mr. Rife was on. Mr. Willis and Mr. Dale could not smell alcohol on Mr. Rife's breath.

Suspecting intoxication, Mr. Willis decided to place Mr. Rife on medical observation, fearing that he might

throw up in his sleep. This placement required jail personnel to check on Mr. Rife every fifteen minutes.

Mr. Willis and Mr. Dale moved Mr. Rife to the holding cell. Mr. Rife's entry into the cell was observed by his new cellmate, Mr. Timothy May, who submitted a declaration recounting what he saw and heard: Mr. Rife moaned loudly, showed obvious pain, and repeatedly complained of stomach pain.

C. Mr. Rife's Release and Collapse

The following morning, Mr. Rife was released. Upon release, Mr. Rife walked about 100 feet to a bail bondsman's office. During the walk, Mr. Rife stated that he did not feel well.

When Mr. Rife reached the office, he sat in a chair. When he later tried to stand up, he passed out.

D. The District Court's Consideration of the Cellmate's Declaration

Mr. Rife contends that the district court improperly discounted the declaration of Mr. May. In Mr. Rife's view, the declaration supports the existence of serious pain and the obvious need for medical attention upon entry into the holding cell.

The district court stated that Mr. May's declaration is unclear about whether Mr. Rife had been in obvious pain when entering the holding cell. We disagree with this characterization, for Mr. May's declaration

states: "I woke up when Mr. Rife entered the holding cell because he was making loud moaning and groaning noises. He was obviously in pain. He kept saying that his stomach hurt and continued to make loud moaning and groaning noises." Appellant's App'x at 1650. This account unambiguously indicates that Mr. Rife was obviously in pain when he entered the holding cell. In our view, the district court misunderstood Mr. May's declaration.[7]

E. Conscious Disregard of a Substantial Risk to Mr. Rife's Health

Mr. Willis and Mr. Dale argue that they did not consciously disregard a substantial risk to Mr. Rife's health or safety. But a reasonable factfinder could reach a different conclusion.

According to Mr. May, Mr. Rife was repeatedly moaning in pain and complaining of stomach pain when entering the holding cell. This evidence could lead a reasonable factfinder to infer (1) an obvious need for medical attention and (2) Mr. Willis and Mr. Dale's awareness of a substantial risk to Mr. Rife's health.[8]

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[7] If the declaration had been ambiguous, the district court should have resolved the ambiguity in Mr. Rife's favor. *See* Part IV, above.

[8] Mr. Willis and Mr. Dale argue that at most, Mr. May's declaration indicates awareness of a stomach ache. But a factfinder could reasonably infer that Mr. Willis and Mr. Dale knew that Mr.

Mr. Willis and Mr. Dale did not obtain medical attention for Mr. Rife. Thus, the factfinder could reasonably infer that Mr. Willis and Mr. Dale had disregarded the obvious risk to Mr. Rife.

According to Mr. Willis and Mr. Dale, Mr. Rife never complained of pain. But Mr. May states under oath that Mr. Rife entered the holding cell while making loud moaning and groaning noises, "obviously" suffering from pain, and repeatedly complaining of stomach pain. *Id*. Mr. Willis and Mr. Dale were present at the time.

Viewing Mr. May's sworn account favorably to Mr. Rife, as we must,[9] we consider the inferences that could reasonably be drawn. Mr. May stated that Mr. Rife was moaning loudly and kept complaining of stomach pain. Because Mr. Willis and Mr. Dale were present, the factfinder would reasonably infer that they heard the moaning and pain complaints. And if the need for medical attention appeared obvious to Mr. May, the factfinder could reasonably infer that the need for medical attention would also have been obvious to Mr. Willis and Mr. Dale. *See Farmer v. Brennan*, 511 U.S. 842 (1994) ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.") After all, Mr. Willis and Mr. Dale had already decided to require "medical observation" of Mr. Rife even before he entered the holding cell.

Rife was in considerable pain, for Mr. May stated that Mr. Rife had moaned and had repeatedly complained of stomach pain.

[9] *See* Part IV, above.

See Blackmore v. Kalamazoo County, 390 F.3d 890, 899 (6th Cir. 2004) (stating that the jailers' placement of an inmate in an observation cell supported an inference of deliberate indifference to the inmate's complaints of severe stomach pain).

Mr. Willis and Mr. Dale argue that at book-in, they did not see any injuries to Mr. Rife. But a factfinder could reasonably downplay the lack of visible injuries in light of Mr. Rife's disorientation and moaning of pain when entering the holding cell.

Mr. Willis and Mr. Dale also note that (1) Mr. Rife did not ask for medical attention and (2) neither Mr. Rife nor Trooper Jefferson mentioned a motorcycle accident. Nevertheless, other evidence would allow a reasonable factfinder to infer that Mr. Willis and Mr. Dale had been aware of a substantial risk to Mr. Rife's health.

Mr. Rife did not seek medical attention immediately after his release. Pointing to this fact, Mr. Willis and Mr. Dale contend that it would be unreasonable to expect them to recognize the need for medical attention when Mr. Rife did not recognize that need. For two reasons, we conclude that a factfinder could justifiably infer that Mr. Willis and Mr. Dale had recognized the need for medical attention even if Mr. Rife had not. First, Mr. Willis and Mr. Dale state that Mr. Rife was confused and apparently intoxicated when arriving at the jail. Second, even after Mr. Rife was released, he remained disoriented from a traumatic brain injury. Thus, a factfinder could reasonably infer that Mr.

Willis and Mr. Dale had recognized the need for medical attention regardless of what Mr. Rife had thought.[10]

F. Whether the Underlying Right Was Clearly Established

In district court, Mr. Rife argued that the underlying right was clearly established for purposes of qualified immunity. The district court did not reach this issue.

As noted above, "[t]he better practice on issues raised [below] but not ruled on by the district court is to leave the matter to the district court in the first instance." *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272, 1290 (10th Cir. 2011) (quoting *Apartment Inv. & Mgmt. Co. v. Nutmeg Ins. Co.*, 593 F.3d 1188, 1198 (10th Cir. 2010)); *see also* Part VII(E), above. As a result, we remand to the district court to determine in the first instance whether the underlying right was clearly established.

X. The Deliberate Indifference Claim Against the Jail Trust

Mr. Rife brings a § 1983 municipal liability claim against the jail trust. According to Mr. Rife, the jail trust's policies and customs led the jail officials to act

[10] Mr. Rife contends that he was mistreated throughout the night. We need not address whether this contention could affect the claims against Mr. Willis or Mr. Dale.

with deliberate indifference. The jail trust moved for summary judgment, making two arguments:

1. There was no underlying violation of Mr. Rife's constitutional rights that could support a § 1983 claim against the jail trust.

2. Even if a jail employee had committed a constitutional violation, it had not resulted from the jail trust's policy or custom.[11]

The district court granted the jail trust's motion for summary judgment, reasoning that there had not been an underlying constitutional violation.

We have already held that a reasonable factfinder could infer facts supporting a constitutional violation by Mr. Willis and Mr. Dale, who were employees of the jail trust acting in the course of employment. Thus, Mr. Rife has defeated the sole basis for the district court's award of summary judgment to the jail trust.

Nonetheless, the jail trust urges affirmance based on an alternate ground: the absence of substantial

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[11] Municipal liability under § 1983 cannot be based on respondeat superior or vicarious liability. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Rather, a plaintiff must establish that (1) a policy or custom of the municipality exists and (2) the policy or custom caused the constitutional violation. *See Kramer v. Wasatch Cty. Sheriff's Office*, 743 F.3d 726, 758 (10th Cir. 2014) ("As to institutional liability under § 1983, the County can only be liable for the actions of Sergeant Benson if it had a custom, practice, or policy that encouraged or condoned the unconstitutional behavior[ ]. . . .").

harm from the delay in medical attention. *See Sealock v. Colorado*, 218 F.3d 1205, 1210 (10th Cir. 2000). To support this argument, the jail trust points to medical testimony that the delay did not affect Mr. Rife's medical care. But Mr. Rife rebutted that testimony with evidence of substantial pain while he waited for medical attention. *Id.* Thus, we cannot affirm based on the jail trust's argument.

But the jail trust raises two other alternate grounds for affirmance: (1) the absence of causation and (2) the absence of a clearly established constitutional right. The district court did not rule on these arguments, and we remand for the district court to address these issues in the first instance.[12] *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272, 1290 (10th Cir. 2011); *see* Part VII(E), above; *see also Kramer v. Wasatch Cty. Sheriff's Office*, 743 F.3d 726, 758 (10th Cir. 2014) (stating that the county could incur liability under § 1983 for a sergeant's actions only if the county "had a custom, practice, or policy that encouraged or condoned the unconstitutional behavior").

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[12] The district court concluded that Mr. Rife's interactions with two unidentified jail officials could not create liability on the part of the jail trust. The district court seemed to hold that the jail trust could incur liability only if the jail officials could be identified. We need not determine whether this holding was correct because constitutional violations by Mr. Willis and Mr. Dale could support liability of the jail trust. Thus, we need not decide whether the jail trust could incur liability based on the misconduct of unidentified jail officials.

XI. The District Court's Denial of Sanctions

Mr. Rife argues that there was a videotape of him in the booking area of the jail and that the jail trust intentionally destroyed the videotape.[13] According to Mr. Rife, destruction of the videotape constitutes unlawful spoliation of evidence, justifying sanctions in the form of an adverse inference against the jail trust, Mr. Willis, and Mr. Dale.

In district court, Mr. Rife did not ask for an adverse inference. Thus, Mr. Rife has forfeited this argument. *See Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1238 (10th Cir. 2016). On appeal, we may consider forfeited arguments under the plain-error standard. *Id.* at 1239. But Mr. Rife has not asked us to apply this standard. Thus, we cannot reverse based on this argument. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130-31 (10th Cir. 2011) (stating that a failure to argue plain error on appeal "marks the end of the road for an argument for reversal" newly presented on appeal).

Even if Mr. Rife had not forfeited this argument, we could not grant the sanction he is seeking. For an adverse inference sanction, the aggrieved party must show bad faith. *See Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009) ("[I]f the aggrieved

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[13] The jail trust, Mr. Willis, and Mr. Dale contend that the videotape did not show the booking process. Instead, they state that the videotape "showed Rife walk[ing] into the booking area and call[ing] the [bail] bondsman the next morning." Response Br. of the Jail Trust, Mr. Willis, and Mr. Dale at 37.

party seeks an adverse inference to remedy the spoliation, it must also prove bad faith."); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("[An] adverse inference must be predicated on the bad faith of the party destroying the records."). But both here and in district court, Mr. Rife failed to identify any evidence of bad faith.

For these reasons, we uphold the district court's denial of sanctions.

XII. Disposition

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CLYDE ALLEN RIFE, Plaintiff-Appellant, v. OKLAHOMA DEPARTMENT OF PUBLIC SAFETY; JOE JEFFERSON, State Trooper; CHAD DALE; JONATHON WILLIS; MCCURTAIN COUNTY JAIL TRUST, Defendants-Appellees.	No. 16-7019 (D.C. No. 6:14-CV-00333-FHS) (E.D. Okla.)

JUDGMENT

(Filed Apr. 12, 2017)

Before **LUCERO**, **McKAY**, and **BACHARACH**, Circuit Judges.

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

The judgment of that court is affirmed in part and reversed in part. The case is remanded to the United

States District Court for the Eastern District of Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court

/s/ Elisabeth A. Schumaker
ELISABETH A. SHUMAKER, Clerk

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

CLYDE ALLEN RIFE, Plaintiff, vs. OKLAHOMA DEPARTMENT OF PUBLIC SAFETY; STATE TROOPER JOE JEFFERSON, et al., Defendants.	)	CIV-14-333-FHS

ORDER

(Filed Jan. 7, 2016)

Before the court for its consideration is the Motion for Summary Judgment of Joe Jefferson and the Department of Public Safety (Doc. 41).[1] Both Defendants seek summary judgment on Plaintiff's claims. Defendant Jefferson also asserts qualified immunity.

Plaintiff has alleged that Defendant Joe Jefferson (Jefferson) arrested him without probable cause and inflicted cruel and unusual punishment upon him in violation of both the State and Federal Constitutions. In addition, Plaintiff alleges the Department of Public

[1] Defendant's Motion for Summary Judgment was filed on August 24, 2015. Plaintiff filed an Amended Complaint on September 17, 2015. The court notes that the Amended Complaint raises the exact same allegations and causes of action against these Defendants as the original Complaint. As a result, the court will rule on this Motion for Summary Judgment as filed.

Safety (DPS) is liable for Jefferson's alleged wrongful arrest of Rife and for Jefferson's alleged failure to provide medical assistance to Plaintiff under the Oklahoma Governmental Tort Claims Act (OGTCA). The court now turns to the merits of the Defendants' motion.

STANDARDS FOR SUMMARY JUDGMENT

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c); See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of demonstrating the absence of a genuine issue of fact. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). If this initial burden is satisfied, the nonmoving party then has the burden of coming forward with specific facts showing there is a genuine issue for trial as to elements essential to the nonmoving party's case. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party cannot rest on the mere allegations of the pleadings, but must go beyond the pleadings and "set forth specific facts showing there was a genuine issue for trial as to those dispositive matters for which [it] carries the burden of proof." *Applied Genetics v. First Affiliated Securities*, 912 F.2d 1238, 1241 (10th Cir. 1990).

"A fact is 'material' only if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Thomas v. IBM*, 48 F.3d 478, 486 (10th Cir. 1995) (quoting *Anderson*, 477 U.S. 242, 248 (1986)). In this regard, the court examines the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Deepwater Invs. Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991). This 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*, 477 U.S. at 249.

When a Defendant has asserted qualified immunity, the summary judgment standard differs from that applicable to other summary judgment decisions. *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995). Once the Defendant asserts his right to qualified immunity, the burden shifts to the Plaintiff to show that (1) the Defendant's actions violated a constitutional or statutory right and (2) the constitutional or statutory rights the Defendant allegedly violated were clearly established at the time of the conduct at issue. *Id*. If the Plaintiff fails to carry either part of this two part burden, Defendant is entitled to qualified immunity. *Id*. If, and only if, the Plaintiff meets this two-part test does a Defendant then bear the traditional burden of the movant for summary judgment and must show that there are no genuine issues of material fact and

that he or she is entitled to judgment as a matter of law. *Albright* at 1535.

With these standards in mind, the court turns to the merits of the Defendants' motion.

FINDINGS OF FACT

The court finds the facts as follows. On Tuesday, May 14, 2013, Trooper Joe Jefferson received a call from headquarters requesting a welfare check on a subject who was off of the roadway and leaning over his motorcycle. Jefferson made contact with the individual at the scene and identified him as the Plaintiff, Clyde Rife (Rife). Jefferson asked Rife if he was okay and he replied that he was. Jefferson then asked him where he had been but Rife could not remember. Jefferson noted that he did not appear to be injured but was lethargic. Jefferson noted that he did not see any scratches, abrasions, bruises or bleeding on Plaintiff. Rife's eyes were not puffy, nor was there any swelling around his face. Jefferson noted that there were not any deformities to his head, black eyes, irregular breathing, or open wounds. Jefferson was wearing a short sleeve shirt and he did not see any scratches or bruises on his arms. Rife did complain of a stomach ache several times. Jefferson asked Rife what his social security number was and Rife could not recite it. Jefferson asked Rife for his driver's license. Rife produced his license and Jefferson determined Rife was from Arkansas.

Jefferson then ran a check of Rife's drivers license with the dispatcher. Jefferson was advised the license was valid with no history and no flags. Thus, there was no indication that Rife was a high risk driver. The motorcycle license was also returned as valid. Jefferson got out of his car, returned to Rife and returned his license to him. Jefferson asked Plaintiff if there was anyone he could call for him. Rife replied there was not. Jefferson then asked Rife if he knew what day of the week it was. Rife was unable to correctly identify the day of the week. Rife was also unable to correctly estimate the time of day. Rife was able to tell Jefferson that he had been in Idabel that day, but Rife was unable to tell him what he had been doing there.

After asking these questions, Jefferson began to perform the horizontal gaze nystagmus test on Rife by asking him to track his pen with his eyes. This test is performed to rule out medical issues, including head injuries. This is done by noting whether there is unequal tracking of the pupils size or resting nystagmus. Rife had none of those indications.

After completing the test to rule out medical issues Jefferson began to test for impairment. During these test, Jefferson observed that Rife had 6 out of the 6 clues for impairment: (1) lack of smooth pursuit left eye, (2) lack of smooth pursuit right eye, (3) distinct and sustained nystagmus at maximum deviation left eye, (4) distinct and sustained nystagmus at maximum deviation right eye, (5) onset of nystagmus prior to 45 degrees left eye, (6) onset of nystagmus prior to 45 degrees right eye. Based on Jefferson's training, four out

of the six of these clues for impairment means that there is an 80% chance that the subject is under the influence of intoxicants. In this case, Rife showed all six clues.

After completing the horizontal gaze nystagmus test, Jefferson asked Rife about the medications that he was taking. Rife advised Jefferson that he was taking blood pressure medicine. After a few more questions regarding any possible medical treatment the Plaintiff might have undergone, Jefferson asked Plaintiff to stand up and get off of his motorcycle. When Plaintiff got off the motorcycle, Jefferson looked at it. Jefferson notice that it did have traces of grass on the front below the windshield. Jefferson actually pointed out to Rife that it looked like he may have been in an accident. Rife had no memory of being in an accident. Jefferson pointed out the grass stains on the bike and asked "Are you sure?". Rife again denied he had been involved in an accident. Jefferson also noted grass stains on Plaintiff's clothing. Plaintiff never asked for medical assistance.

Jefferson determined by looking at Plaintiff's bike that he had been in an accident. However, he determined that it was not a high impact accident. Jefferson determined that based on the damage to the bike and the lack of injuries to Plaintiff that no high impact collision occurred.

Jefferson then attempted to do the walk and turn test with Rife, but Rife started to walk before Jefferson told him to start. Rife lost his balance. When Jefferson

asked him to start over, he declined to continue the test. Rife repeated to Jefferson that he had not been drinking. Jefferson asked him what medicine he had been taking. Rife told him that his medication was in his coat pocket, but Jefferson didn't find any medication.

Jefferson than began looking around the area where the bike was parked to determine if an accident had occurred there. Jefferson did not see any evidence of an accident that had occurred in that location either. Jefferson then attempted to do the finger dexterity test with Rife. Rife was unable to complete that test. Jefferson then told him to count to four and then back down from four, but instead he counted up to ten twice. After he failed those test, Jefferson attempted the alphabet test. Jefferson asked him to start with the letter G and go through the alphabet up to the letter V. Rife only mumbled and then ended with "W, X, Y, Z". He again denied that he had been drinking.

Jefferson then conducted the Rhomberg balance test with Rife. Jefferson asked him to close his eyes, tilt his head back, count to 30, and then say "stop" when he was done counting. Before starting that test, Plaintiff said that he felt floaty and Jefferson noticed a visible sway to Plaintiff. Rife asked to stop after 15 seconds. He said he needed to stop because he felt unsteady and needed to sit back down on his motorcycle. Rife then sat back down on his motorcycle. Jefferson again told Plaintiff that he thought Rife had some sort of accident with his bike because he had grass on his

motorcycle. Plaintiff continued to deny being in any type of accident.

At that time based on all the fact and circumstances, appearance and speech, the tests that Jefferson had performed and based on his training and experience, Jefferson arrested Rife for public intoxication.

In his training, Jefferson did learn that there are a number of medical conditions which "mimic" drug impairment including head trauma, shock and stroke.

Jefferson then advised the dispatcher that Rife was under the influence of something – likely prescription medication. Jefferson asked her to send a wrecker to pick up Rife's motorcycle. When the wrecker arrived, Jefferson place [sic] Rife under arrest and transported him to the McCurtain County Jail.

The next morning the woman who bailed him out of jail also did not notice anything unusual about Plaintiff. She testified that he walked half a block with her back to the Bail Bonds office.

The emergency room physician who treated Plaintiff also stated that from visual appearances Rife looked fine when he arrived at the emergency room.

I. Unlawful Arrest

Plaintiff has alleged a cause of action against Defendant Jefferson for wrongful arrest in violation of the Fourth and Fourteenth Amendments. He alleges that

Jefferson had no probable cause to arrest him and the wrongful arrest caused a prolonged imprisonment which exacerbated physical injuries, emotional distress, and pain and suffering. "In the context of a warrantless arrest in a Sec. 1983 action, the court must grant a police officer qualified immunity 'if a reasonable officer could have believed that probable cause existed to arrest the plaintiff.'" *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1312 (10th Cir. 2002) (citing *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995)). "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." *Olsen* at 1312 (quoting *Jones v. City & County of Denver*, 854 F.2d 1206, 1210 (10th Cir. 1988)). "The primary concern is whether a reasonable officer would have believed that probable cause existed to arrest the defendant based on the information possessed by the arresting officer." *Olsen* at 1312. "Probable cause is based on the totality of the circumstance . . . " *Cortez v. McCauley*, 478 F.3d 1108, 1116 (10th Cir. 2007) (internal citations omitted). Probable cause for a warrantless arrest is determined in terms of the circumstances confronting the arresting officer at the time of the arrest. *United States v. Hansen*, 652 F.2d 1374, 1388 (10th Cir. 1981). The validity of such an arrest is not undermined by subsequent events in the suspect's criminal prosecution, such as dismissal of charges. *Warren v. Byne*, 699 F.2d 95, 98 (2d Cir. 1983). An essential element of this claim is lack of probable cause.

Jefferson made his decision to arrest Rife on the following: Rife had 6 out of 6 clues for impairment on the horizontal gaze nystagmus test. Four out of six of these clues for impairment means that there is an 80% chance that the subject is under the influence of intoxicants. Rife failed the finger dexterity test, the alphabet test and the balance test. Rife had no physical injuries indicating he had been in an accident and Rife appeared to be somewhat unsteady on his feet. Rife could not tell the officer the proper time of day or what he had been doing that day. Rife could not repeat his social security number and had great difficulty trying to locate his license in his wallet. Further, Rife had no memory of the events which lead him to be stopped on the side of the road with grass stains on his clothes and a patch of grass in his motorcycle. Based on these facts and circumstances, it was reasonable for Defendant Jefferson to believe Plaintiff was impaired to the point of not being able to properly operate his motorcycle and that this impairment was caused by some intoxicating substance. Jefferson had sufficient facts to believe that Rife was a danger to himself and the public. Even though public intoxication may have not been the proper crime committed because there was no evidence of alcohol, Jefferson knew Plaintiff was impaired. Jefferson had probable cause to believe an offense had been committed. "Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest." *Devenpeck v. Alford*, 543 U.S. 146, 155 (2004). The court finds that Defendant Jefferson had sufficient facts based on the circumstances he had

observed to establish probable cause to arrest Rife. Accordingly, the court grants the Defendant's motion for summary judgment on the false arrest claim.

II. Cruel and Unusual Punishment

Plaintiff has also alleged a cause of action under the Eighth and Fourteenth Amendments to the Constitution for Cruel and Unusual Punishment. Plaintiff alleges that Jefferson knew there was a strong likelihood that Plaintiff was in danger of serious harm and injury based on his obvious impairment and symptoms. In his Amended Complaint, Plaintiff alleges Jefferson "disregarded the known, obvious, and substantial risks to Plaintiff's health and safety by failing to provide Plaintiff with any physical assessment or evaluation, and failing to provide timely or adequate treatment, despite his obvious and emergent needs." In the Amended Complaint, Plaintiff states:

> The acts and/or omissions of indifference as alleged herein, include but are not limited to: the failure to treat Plaintiff's serious medical condition properly; failure to conduct appropriate medical assessments; failure to create and implement appropriate medical treatment plans; failure to promptly assess and evaluate Plaintiff's physical health; failure to properly monitor Plaintiff's physical health; failure to provide access to medical personnel capable of evaluating and treating his serious health needs; and a failure to take precautions to prevent further injury to Plaintiff.

Plaintiff's cruel and unusual punishment claim is based on Jefferson's failure to realize Rife was seriously injured and treat what Plaintiff describes as Rife's "obvious emergent medical needs". To prevail on this claim, Rife must prove that Jefferson acted with deliberate indifference to his serious medical needs. *Self v. Crumb*, 439 F.3d 1227, 1230 (10th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). To show deliberate indifference, Plaintiff must prove that Jefferson both knew of and disregarded an excessive risk to Plaintiff's health or safety. *Id*. at 1231 and *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005). In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Court set forth a two-pronged inquiry, comprised of an objective and subjective component. Under the objective inquiry, the alleged deprivation must be "sufficiently serious" to constitute a deprivation of constitutional dimension. *Id*. at 834. Under the subjective inquiry, the official must have a "sufficiently culpable state of mind." *Id*. In describing the subjective component, the Court made clear an official cannot be liable "unless the official knows of and disregards an excessive risk to inmate health and 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 837. Jefferson must have been aware of facts from which the inference could be made that a substantial risk of serious harm existed and he deliberately disregarded that risk. *Id*.

After reviewing all the facts in the light most favorable to Plaintiff, the court finds that the Plaintiff's

deliberate indifference claim must fail. Viewing the dash camera video, it is apparent that Jefferson spent some time assessing the Plaintiff. He asked him questions and observed him on his motorcycle. Defendant Jefferson also testified that he administered a series of tests to Plaintiff to try to ascertain what was causing Plaintiff's condition. Defendant Jefferson does acknowledge that he believed that Plaintiff had been in an accident on his motorcycle but that it was not a high impact accident. It is undisputed Plaintiff had no bumps, bruises or scratches on his body and that his bike had minimal damage. He was able to speak and did not mention being in pain. He did mention a stomach ache but said nothing about being in pain. Plaintiff never asked for medical assistance. The emergency room doctor who treat [sic] Plaintiff also testified that when he arrived at the emergency room he looked fine.

The facts reveal Jefferson was not aware of Plaintiff's serious medical condition and there simply were no facts that Jefferson could have even inferred a serious medical injury. The evidence shows that Defendant Jefferson's assessment was reasonable and he acted accordingly. While Jefferson did have training that certain medical conditions such as head trauma can mimic drug impairments, there simply was not enough evidence to even infer a serious medical injury. There were no physical signs and no evidence Plaintiff was in pain. It is undisputed that Jefferson is not a medical professional. He made the best decision he could regarding Plaintiff's condition with the facts he had. Jefferson believed Plaintiff had ingested some form of a

medication that had caused him to be slow and deliberate and confused about what had happened. The United States Supreme Court has recently stated "to be reasonable is not to be perfect." *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). The subjective component of cruel and unusual punishment is not met where an official is merely exercising his medical judgment such as whether to consult a specialist or conduct additional testing. *Self* at 1232. A claim is actionable only where the need for treatment is obvious. *Id*. As long as the treatment is consistent with the symptoms present [sic] by the inmate there is no actionable claim. *Self* at 1232-1233.

It is obvious now in hindsight that Jefferson did not correctly assess the cause of Plaintiff's condition, however the United States Supreme Court has recently stated that the Constitution "allows for some mistakes on the part of governmental officials." *Hein* at 536. See also *Self* at 1234 (holding that a misdiagnosis even if rising to the level of medical malpractice, is insufficient to satisfy the subjective component of a deliberate indifference claim.); *Sealock v. Colorado*, 218 F. 3d 1205, 1211 (10th Cir. 2000) (holding that defendant Huber was entitled to summary judgment because "at worst she misdiagnosed appellant and failed to pass on information . . . about appellant's chest pain"); and *Mata v. Saiz*, 427 F. 3d 745, 760-61 (10th Cir. 2005) (holding that defendant's misdiagnosis of chest pain as something other than a heart attack, did not show deliberate indifference). There is no evidence Jefferson was aware of Plaintiff's serious medical needs or deliberately indifferent to Plaintiff's medical

needs. There is absolutely no evidence that Plaintiff's serious medical condition was obvious to Jefferson. There was no physical manifestations of a serious injury. The court finds that Defendant Jefferson's conduct was reasonable in light of the facts and information he had. Plaintiff is unable to establish the subjective component of his cruel and unusual punishment claim. *Farmer* at 834. As a result, Plaintiff cannot establish that Jefferson violated a constitutional right of the Plaintiff. As such, the court finds Jefferson is entitled to qualified immunity.[2]

III. State Claims under OGTCA

First, Jefferson has sought summary judgment on Plaintiff's Tort Claims under the OGTCA and Plaintiff's claims pursuant to the Oklahoma Constitution. In his response, Plaintiff stated that he "never intended to bring State law tort claims against Jefferson." Accordingly, the court finds the issue of a tort claim against Defendant Jefferson pursuant to the OGTCA is moot since there is no such claim. Also, Plaintiff concedes that his Oklahoma Constitutional

[2] In the Motion for Summary Judgment, Defendant Jefferson argues that Plaintiff had no clear constitutional right to medical care since at the time Defendant approached him he was just a member of the public. The court makes no finding about whether Defendant Jefferson had a constitutional duty to provide Plaintiff with medical care when he was just a member of the public. The court does not need to make this finding since it has found the Defendant's conduct was reasonable in light of the information he had.

Claim against the DPS is barred under *Perry v. City of Norman*, 341 P.3d 689 (Okla. 2014).

As to Plaintiff's claim against the Defendant DPS under the OGTCA the court finds that this claim must also fail. The OGTCA is the exclusive remedy for an injured Plaintiff to recover against a governmental entity in tort. *Tuffy's Inc. v. City of Oklahoma City*, 212 P.3d 1158, 1163 (Okla. 2009). The doctrine of respondent [sic] superior is applicable under the OGTCA. *Id*. at 1163. Thus, DPS is vicariously liable for the actions of Defendant Jefferson.

The court has previously found that Defendant Jefferson's actions were reasonable and he was not deliberately indifferent to Plaintiff's medical needs. Accordingly, the court grants summary judgment to the Defendant DPS for any and all tort claims for negligent failure to provide medical assistance. Further, the court grants summary judgment to the Defendant DPS on Plaintiff's tort claim for wrongful arrest since this court has previously found the Defendant Jefferson had probable cause to arrest Plaintiff.

Accordingly, the court grants the Motion for Summary Judgment of Joe Jefferson and the Department of Public Safety (Doc. #41).

IT IS SO ORDERED this 7th day of January, 2016.

/s/ Frank H. Seay
Frank H. Seay
United States District Judge
Eastern District of Oklahoma