No _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM R. STEVENSON,
PETITIONER,

Vs.

RANDY CORDOVA, ET AL,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS
CASE NO. 17-1053

PETITION FOR WRIST OF CERTIORARI AND REQUEST FOR SUMMARY REVERSAL

January, 2019

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QUESTIONS PRESENTED

I Whether the Court of Appeals erred in concluding the law was not clearly established as to the conduct of Defendants Espinoza and Williams and in concluding that Petitioner's case was not a case in which the constitutional violation was obvious?

II Whether the usual deliberate indifference standard of Farmer v. Brennon, 501 U.S. 825 (1994) applies to Eighth Amendment claims against prison officials who knew of but ignored a substantial risk of harm to a prisoner's health and safety, and whether the Tenth Circuit, like the Sixth Circuit in Wilson v. Seiter, 501 U.S. 294 (1991) applied the wrong legal standard to Petitioner's claims that Defendants Williams, Clinkinbeard and Espinoza acted with deliberate indifference to his health and safety?

III Whether the Court of Appeals misapprehended summary judgment and qualified immunity standards and failed to view evidence in the light most favorable to Petitioner as the non-moving party?

IV Whether the Court of Appeals erred in not conducting its own independant de novo review of the directed verdict issue, and does the transcript of Petitioner's cross-examination testimony demonstrates he presented sufficient evidence and sufficient disagreement requiring submission to the jury?

V Whether the Defendants obtained a jury verdict in their favor by the knowing use of contradictory and perjured testimony, and whether the District Court was biased towards Petitioner and improperly influenced the testimony, depriving Petitioner or neutrality and due process?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the United States District Court for the District of Colorado is as follows: Donald Nunez, Captain, Mark Holloway, Lieutenant, Kenneth Topliss, Lieutenant, Carl Williams, Lieutenant, Karen Clinkinbeard, Sergeant, Jason Espinoza, Sergeant, Gary Sullivan, Sergeant, Mark Benavidez, Sergeant, Jesica Hanson, Corrections Officer, Jody Bufmack, Nurse, Aubrey Bell, Case Manager - current and former employees of the Colorado Department of Corrections.

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The order and judgment on the merits of the Tenth Circuit Court of Appeals (COA) is unrepoerted. It is unofficially reported at **2018 U.S. App. WL 2171179 (10th Cir. 2018).** A copy is attached as **App. A.** The summary judgment memorandum and opinion of the United States District Court (DC) for the District of Colorado is unreported. It is unofficially reported at **2016 U.S. Dist. WL 5791243 (D. Colo. 2016).** A copy is attached as **App. B.** The order of the Tenth Circuit Court of Appeals denying rehearing is unreported. A copy is attached as **App. C.** The final judgment of the United States District Court for the District of Colorado is also unreported. A copy is attached as **App. D.**

JURISDICTION

The date on which the Tenth Circuit Court of Appeals entered its order and judgment was May 11, 2018. A copy is attached as **App. A.** A timely petition for rehearing was denied on August 7, 2018. A copy is attached as **App. C.** An extention of time to file this petition for writ of certiorari was granted by Justice Sotomayor to and including January 4, 2019. A copy of the application order is attached as **App. E.**

CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS INVOLVED

A. Federal Law

Eighth Amendment to the United States Constitution **(App. F 1)**

B. State Law

C.R.S. § 16-2.5-135
C.R.S. § 18-1-707
C.R.S. § 188-802
C.R.S. § 18-8-803
C.R.S. § 18-8-804

C. State Regulations

AR 1150-01
AR 300-16ED
AR 300-57RD

STATEMENT OF THE CASE

A. Introduction (Procedural History)

This matter involves a civil rights action filed on February 28, 2012, by Petitioner Stevenson, a prisoner of the Colorado Department of Corrections, under **42 U.S.C. § 1983** in the United States District Court for the District of Colorado. The Complaint alleged generally that Stevenson was subjected to cruel and unusual punishment (excessive force) in violation of the Eighth Amendment, and that prison officials conspired to cover it up, in violation of the Fourteenth Amendment. On March 31, 2014, Stevenson was authorized to proceed in forma pauperis. On February 10, 2015, an order was entered appointing pro bono counsel. On October 4, 2016 the DC entered summary judgment in favor of all defendants except three. Between January 9-12, 2017, trial was held against Benavidez, Cordova and Holloway. On January 11, 2017, the DC granted a directed verdict in favor of Benavidez. On January 12, 2017, the jury returned a verdict in favor of Cordova and Holloway, and judgment was entered that day.

On February 9, 2017, Stevenson filed timely motion for new trial, which was denied on May 22, 2017. On February 13, 2017, he filed timely notice of appeal. Counsel, who was a solo practitioner, after spending $10,000.00 of his own money, could not afford to prosecute the appeal, so Stevenson was left to do so, which he filed on August 1, 2017. On May 11, 2018 (without considering his reply brief) the Court of Appeals (COA) entered order and judgment affirming the DC. On July 28, 2018, timely petition for rehearing was filed, which was denied on August 7, 2018. This petition for writ of certiorari follows, after being granted an extension of time to and including January 4, 2019.

B. Basis for Federal Jurisdiction

This case raises questions under the Eighth Amendment to the United States Constitution. The United States District Court had jurisdiction under the general federal question jurisdiction conferred by **28 U.S.C. § 1331.**

C. Background Facts

Stevenson's rights were violated when [while dog-piled by three, then five officers], he was repeatedly tased five times back-to-back by Defendant Espinoza, causing unnecessary pain, while his hands and arms were trapped beneath him by the weight of the officers where he could not move or speak from weight and from being paralyzed by electricity. **App. F 2**, DOC 1, Verified Complaint, ¶51; **App. F 3**, Stevenson Depo, Pp 75-77; **App. F 4**, DOC 147, Summary Judgment Response, p 8 ¶2, 9 ¶2-3, 10 ¶3-4, 28 ¶1; When [while dog-piled], handcuffs (cuffs) were applied excessively tight and then needlessly "squeezed" even tighter, using "extra effort" by Espinoza, causing unnecessary pain and injury. DOC 1, ¶52; DOC 147, Pp 10-11, 19-20; When [while cuffed and shackled], all officers who were present ignored immediate and subsequent repeated complaints and requests to loosen the cuffs, prolonging unnecessary pain and discomfort and assuring injury, as cuffs remained on for 30 minutes, even after he informed them that he had carpal tunnel and nerve damage. DOC 1, ¶52, 53, 56, 57, 59; DOC 147, 11, 27, 30, 31, 32-34, 34-37; When [while cuffed and shackled], pressure points were needlessly applied to his mandibular angle by Holloway (as found during summary judgment by the Magistrate himself, **App. B**, 52), causing unnecessary pain and discomfort; When [while cuffed and shackled], he was dropped face first and his face was needlessly pressed hard into the concrete floor [for 40 seconds] by Sullivan, causing unnecessary pain and injury, while all those who were present stood by and watched. DOC 1, ¶54-55; DOC 147, 11; When [while cuffed, shackled and lying on the floor talking to Defendant Cordova], an officer who was misidentified as Soto, pulled arm hard at elbow cousing wrist to come in painful contact with cuffs, causing unnecessary fain and injury. DOC 1, ¶60; When [while cuffed, shackled and lying face down on the floor in the Upper Vestibule waiting for the backboard to arrive (not yet placed on the backboard, his left wrist was needlessly bent and then elbow

needlessly pulled hard against the steel cuffs by Benavidez, causing unnecessary pain and injury. **App. F** - DOC 1, ¶61-62; when [while cuffed, shackled, strapped face down to a backboard and then a gurney], all officers still ignored repeated complaints and requests to loosen the cuffs, causing unnecessary prolonged pain and exacerbation of pre-existing injury. **App. F** - DOC 1, ¶63-66; DOC 147, at 27, 30, 31, 32-34, 34-37; when [while still cuffed, shackled, strapped face down to backboard and gurney], his elbow was again needlessly pulled by Benavidez, causing his wrists to come in painful contact with the steel cuffs three additional times while in medical and on way to segregation, causing unnecessary pain and exacerbation of pre-existing injury. See **App. F** - DOC 147, at 16 - where Stevenson lists complaints on Body Camera between 16:30-16:39 minutes, that they are using the "handcuffs as punishment," and where he tells Benavidez, "Get you hand off my arm!" Stevenson can be heard on Body Camera complaining 20 times.

The incident happened because an officer wanted to confiscate as contrband a 9' x 13" manila envelope containing two grievances that belonged to Stevenson, which he plainly showed the officer; and another officer wanting to cuff him up and take him to segrgation for allegedly disrupting the facility - which he had not done; and Stevenson wanting to wait to speak with a shift commander because the officer was being unreasonable in accusing him of disrupting the facility and in wanting to take him to segregation. **App. F** - DOC 147, at 4-8; Stevenson Depo.

In his Complaint, Stevenson alleged he suffered physical and emotional injury, including, scaring to his back from taser, cuts, gashes [nicks], and swelling to his wrists; pain in both wrists; shooting pain in right hand; numbness and loss of feeling to his left thumb and fingers; feelings of electrical shock; decreased mobility in both wrists; lasting injury to hands and fingers due to nerve damage; two chipped front teeth, laceration to lip, and strained neck; and nightmares of being shot in the back. **App. F** - DOC 1, ¶21, 72, 79, 86, 96.

As relevant here, in his verified complaint and summary judgment response, Stevenson alleged some of the following claims:

He alleged and the evidence showed a "manner of cuffing" claim, or that there was no need for Espinoza to squeeze the cuffs even tighter ("extremely tight") using "extra effort" after they had already been slammed on" causing unnecessary pain and injury. DOC 1, ¶52; DOC 147, 10 ¶4, 35 ¶1, 37 ¶3.

He alleged and the evidence showed the officers refused to respect his right to be free from the tight cuffs and as a result he refused to stand and walk and told the officers to carry him, and that after being lifted, he was dropped by Sullivan and his face was pressed hard into the concrete floor, without cause, causing unnecessary pain and injury. DOC 1, ¶53-55; DOC 147, 11¶2-5.

He alleged and the evidence showed deliberate indifference to his health and safety and federally protected rights [specifically] against Holloway, Williams and Cordova, for their failure as supervisors to intervene to loosen the cuffs, and to prevent Sullivan and Benavidez from using excessive force. DOC 1, ¶52-53, 55-57, 59, 61-63, 80-82, 86-89, 95-99; DOC 147, 27, 30, 32-34, 34-37.

As to all others who were "deliberately indifferent" and had an affirmative duty to intervene, in his summary judgment response [after establishing that each defendant who was present either "actively participated" or "failed to intervene"], he showed that "no officer" intervened to check of loosen the cuffs; or to stop Sullivan or Benavidez from using excessive force. He argued that not only did Cordova, Holloway and Wiliams fail to intervene, but the "others" did as well, and that their "collective failure constituted a conctitutional violation." DOC 147, 22 ¶3, 32-34. He arged that failure to intervene could be the basis for liability; that officials can be liable for exposing prisoner to excessive force at hands of other officials under same standard as Farmer employs for officials who fail to protect from other inmates; and show officials knew of risk. DOC 147, 33.

The District Court's Summary Judgment Review:

The DC reviewed the Complaint, and by summary judgment opinion dated October 4, 2016, divided it into two parts - the force used "before" Stevenson was restrained, and the force used "after" he was restrained. In doing so, the DC did not "individually" analyze the excessive force used by those who used force before Stevenson was restrained. Instead, it improperly: 1) dismissed all of the defendants who applied force before restraints were applied - regardless of whether Stevenson posed no reasonable threat and/or was already subdued; whether the officers exceeded the need for the application of force; or whether they balanced the need for force against the risk of injury; 2) made absolutely no findings as to whether Sullivan violated Stevenson's rights when he used force after he was restrained; and 3) although concluding: "[o]n this record, the court cannot presume that Defendant Holloway's use of force was necessary if Plaintiff was in hand and leg restraints and was being assisted to his feet by other officers, [DOC 162, at 52], it did not allow the claim against him to proceed to trial for his gratuitous infliction of pain.

The DC only allowed claims against subordinate-defendant Benavidez (who used force and was deliberately indifferent); against supervisor-defendant Holloway (who also used force and was deliberately indifferent); and against supervisor-defendant Cordova (who was deliberately indifferent). And although Williams was no less a supervisor than Cordova and Holloway and knew that Stevenson was being subjected to an unnecessary and substantial risk of harm, the DC made absolutely no findings as to whether he violated Stevenson's rights. Nor did it do so as to any of the "other" defendants who were present but took no action. DOC 147, 34.

A finding of deliberate indifference would necessarily preclude a finding of qualified immunity, as officials who deliberately ignore a substantial risk of harm cannot claims that it was not apparent that such action violated the law.

Regarding "clearly established law" the DC stated in relevant part:

> [T]he Supreme Court has long recognized that the necessary infliction of pain on an inmate by a correctional officer violates the Eighth Amendment. Cf. Escobar v. Reid, 688 F. Supp. 2d 1260, 1295 (D. Colo. 2009)(finding that Supreme Court and Tenth Circuit case law "clearly established that "prison officials' malicious application of force, which is more than de minimis, and that prison officials' failure to prevent such harm when there is an opportunity to do so, violates the Eighth Amendment); Green v. Johnson, No 12-cv-03158-DDC-KGS, 2015 WL 1440721, at 5 (D. Kan. Mar 30, 2015)(noting that "the Supreme Court recognize[s] that "[t]he unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment" and concluded "as a matter of law" that "given this clearly established right, no prison official reasonably could believe that the unnecessary infliction of pain upon an inmate ... constitutes permissible conduct." App. B - Summary Judgment Opinion, at 28-29. [1]

Regarding Stevenson's failure-to-loosen claim, the DC concluded:

> There is some evidence from which a reasonable juror could conclude that Mr. Stevenson's requests [that his handcuffs be loosened] fell on deaf ears, not because of any **legitimate security concern**, but rather because he would not be compliant and insisted that the officers carry him. If believed by a jury, Mr. Stevenson's testimony might suggest that the handcuffs were not loosened in a good faith effort to maintain or restore discipline, **but rather maliciously for the purpose of causing pain.** [Emphasis added]. App. B, at 49. [2]

Trial in the District Court:

Trial proceeded on the sole issues of whether Benavidez, Cordova and Holloway violated Stevenson's Eighth Amendment rights under the United States Constitution to be free from cruel and unusual punishment by subjecting him to excessive force.

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1 As will be argued, this is significant because the COA disagreed with the DC's finding of clearly established law at such a "high level of gernerality" because, as it claimed, Stevenson's case was not one "in which the constitutional violation was so obvious that [his] rights were clearly established in the absence of a materially similar prior case" [App. A, at 9 and n 6], so that a "general standard" would apply, when in fact, due to the varied uses of excessive force, his case is such a case, and a "general standard could and did give fair warning. Therefore, the COA's ruling in contrary to this Court's precedent. See Brosseau v. Haugen, 543 U.S. 194, 198 (2004)("[i]n an obvious case, [general] standards can "clearly establish" [a right] ... even without a body of relevant case law."); Hope v. Pelzer, 536 U.S. 730, 739 (2002)(oficials can be on notice that their conduct violates clearly established law even in novel factual circumstances; courts need not have held that "fundamentally similar" conduct was unlawful to defeat qualified immunity).

During trial, Stevenson put on sufficient evidence to hold Benavidez liable for the force he used in the Upper Vestibule of Cellhouse 1 while waiting for the board to arrive (**App. F 5** Trl. Trans 432:11-15) and the force used down in medical and on way to segregation. (Stevenson was deprived of transcripts by the COA to prove his claims, so he does not have his direct examination, but even with the transcripts of his cross-examination the defendants provided, it is clear to see that even his cross-examination testimony was sufficient to establish liablity by Benavidez).

Stevenson testified on cross, inter alia, that he identified Benavidez as the person who intentionally bent his wrist and pulled his elbow hard against the steel cuffs causing sever pain while handcuffed, shackled and surrounded by ten officers; that it was while he was on the floor waiting for the backboard to be brought up; that when he yelled and looked back to see who it was, he stopped bending but began pulling on elbow to continue to cause pain; that he did not "pull" on the wrist but "bent," was "bending it against the cuffs, and then "pulled" on the "elbow"; that even though he stopped, there was no reason for it to be done; that it was done to cause pain; that it was painful when bending it against the cuffs and painful when pulling on elbow; that whatever the rate [more than ten?] it was painful; that maybe he exaggerated about the "nine" but off the scale when [a person's] "bending your wrist against the steel and [their] pulling on a person's elbow, that's painful; that he "thought it was reasonable in asking them to loosen the cuffs;" that bones in back of hand could have been injured by bending hand

2 Despite this ruling, When Stevenson requested an inference instruction, which informed the jury that it could "infere" malicious and sadistic intent where there was no legitimate penological purpose for the officers' refusal to loosen the cuffs, the DC denied the request. **App.F 5** Trial Trans., at 680-81. See Giron v. Corrections Corp of Am., 191 F.3d 1281, 1290 (10th Cir. 1999); Serna v. Colorado Dept. of Corrections, 455 F.3d 1146, 1152 (10th Cir. 2006)(malicious and sadistic intent can be infered from the absence of a legitimate penological purpose). Without this Stevenson was prejudiced. Not only did he have to prove that Cordova and Holloway refused to loosen the cuffs when he was subdued, he also had to prove they did so maliciusly and sadistically. In other words, he was forced to reach the additional hurdle of proving that their refusal involved malicious and sadistic intent, when they were only deliberately indifferent.

against the hard steel; that he didn't say it was "touching" his arm, but that "they [Benavidez] purposely put pressure on his wrists, my hands to bend them back hard against the steel, and surely that can cause some damage, fractures, whatever;" that during the incident he told the officers he had pre-existing carpal tunnel and nerve damage; that "everyone was crowded around so all those ... present heard me;" and that his carpal tunnel syndrome intensified and worsened to the point he "needed surgery." Id Trl. 431-436; 449-452.

Stevenson testified on direct that while in medical and on way to segregation, Benavidez "intentionally" put pressure on his left elbow three different times causing his wrists to come in painful contact with the cuffs. This was no mere touch. Stevenson can be heard on Body Camera complaining once "Get you hand off my arm," and twice "You guys use these handcuffs as punishment." **App F 4,** DOC 147, 16 ¶3.

Benavidez testified that he was "holding" Stevenson's arm in medical because he was concerned with "balance problems" with the gurney; and "holding" his arm on way to segregation because there was no place to "hold" the handles (which was not true because he assisted in wheeling gurney from Cellhouse 1 (CH-1) to medical (across the yard) with no handle or balance problems).

Following the close of evidence, the DC placed itself in the position of the jury by weighing evidence and credibility against Stevenson, and granting a directed verdict to Benavidez, ruling in part:

> I don't find any evidence in the record from which a reasonable juror, even when contruing the facts in the light most favorable to Mr. Stevenson, could find that Mr. Benavidez's contact was malicious and sadistic. Because even under your own witness's testimony, as soon as he said something, Mr. Benavidez stopped.
>
> Now, Mr. Stevenson can disagree with Mr. Benavidez's characterization but there is nothing in the record, in my opinion, nothing from which a reasonable jury could conclude ... by preponderance of the evidence that Mr. Benavidez's conduct that day, in his very limited conduct that day was either sadistic or malicious and certainly was not malicious and sadistic. **App. F 5,** Trl. P 511.

The DC did not credit Stevenson's testimony that the intentional bending and pulling that occurred in the "Upper Vestibule" occurred while lying on the floor waiting for the board to arrive (which was before he was strapped to it); [3] and did not credit his testimony [that although Benavidez "stopped" when he "yelled" out in pain], that there was "no reason for [the bending and pulling] to be done" to begin with (and especially three more times in medical after he knew what caused Stevenson pain). **App. F 5,** Trl. 431:23-432:5; 434:6-15. Further, the DC improperly applied Benavidez's testimony of his difficulty in using "hand-holds" to his conduct in the Upper Vestibule (when the boadr would have been on the "floor" with no need to use hand-holds), when he was clearly referring to such difficulty down in "medical" and on way to "segregation.

On appeal, Stevenson argued that the DC confused Benavidez's testimony and timing of events and erred in applying his testimony about the difficulty in using the hand-holds to his conduct in the Upper Vestibule. The COA did not address this specific claim, and did not conduct an "actual" de novo review of the directed verdict issue, but merely relied on the DC's order denying new trial - going down the order chronologically - and confirmed what the "DC" "reviewed," "noted," and "held," but did not independently review Stevenson and Benavidez's direct and cross-examination testimony and draw reasonable inferences itself. **App. A,** 15-16. The trial transcripts were not ordered until May 7, 2018, just days before the order and judgment were entered. They were ordered, it appears, only for "[t]he interest of "completing" the record on appeal." [Emphasis added]. **App.** F **6,** Order.

Regarding Cordova and Holloway, Stevenson testified that he made numerous complaints about the cuffs, that both were present to hear his complaints, but both ignored him and took no action to loosen cuffs and he recieved injury.

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3. Even if bending and pulling occurred while being strapped to baord and "some contact" was required (**App. F 5,** Trl. 510:24), that "contact" did not require intentional, forceful bending and pulling which caused sever pain. And since board would have been on "floor" while being strapped, there would have been no need to "use hand-holds." They were used with no problem in carrying him from 3rd floor to 1st, where he and board were then strapped to gurney with wheels, and no problem wheeling him from CH-1 to medical.

Cordova and Holloway testified that Stevenson was fully restrained, that they heard complaints and were aware cuffs were too tight; that they did not check or loosen the cuffs, or direct others to do so; and significantly, in support of Stevenson's claim, that they "could have" placed looser fitting cuffs over the tight ones and safely removed the tight ones at any time to prevent injury. This was sufficient evidence in and of itself for a jury to them liable for deliberate indifference to his health and safety.

When Stevenson requested an inference instruction that would allow the jury to "infer" malicious and sadistic intent for their refusal to loosen (when no penological purpose existed), the DC denied the request. **App. F** 5, Trl. 680:11-681:12. ((Need stenographer's transcripts, not audio tape for complete text).

On January 11, 2017, when defendants moved for a directed verdict, the DC improperly showed bias towards Stevenson and improperly advocated for defedants by warning them that their theory of the case that "[t]hey didn't loosen the cuffs because Mr. Stevenson was unpredictable], was weak, and that [as it stood], it could not "discount the possibility that the jury would say it would have been possible to loosen those cuffs..." and "reguired" them to continue to present evidence if they wanted, because there was a "better time and place to do it,[move for directed verdict], not now." **Id** 557:1-558:5.

On que, the next day, during their case-in-chief, both Cordova and Holloway changed their previous testimony and committed perjuty. Following trial, the jury returned a verdict (secured by means of the perjured testimony) in their favor.

On February 9, 2017, Stevenson filed a motion for new trial, challenging a prejudicial comment made in front of the jury, the failure to give an inference instruction, the granting of the directed verdict, and the allowing Defendants to re-hash and change their stories. **App. F 7**, DOC 213, 9-12. The DC denied the motion on May 22, 2017.

On Appeal, Stevenson argued, as relevant here, that the DC erred in dismissing Defendants Clinkinbeard, Espinoza and Williams, who were deliberately indifferent; erred in not making finding as to whether Sullivan violated his rights; and in granting directed verdict to Benavidez, as well as failing to give an inference jury instruction and other appropriate instructions.

Without appointing counsel to even the playing field, or providing transcripts so Stevenson could prove his claims by "specific reference" to the record, on May 11, 2018, the COA, without a true review, affirmed the DC on all grounds, including alternative grounds. In doing so, it erred in finding that Stevesnon failed to show constitutional violations with respect to Espinoza and Williams; erred in concluding that the law was not clearly established and that his case was not one in which the constitutional violation was obvious; erred in crediting defendant's evidence and versions of events over Stevenson's; erred in no adhering to summary judgment and qualified immunity standards; erred in not appropriately ruling on Sullivan issue; and erred in not conduction a true de novo review of the directed verdict issue or plain error review of jury instruction issue. On August 7, 2018, the COA denied rehearing without comment. **App. C.**

REASONS FOR GRANTING PETITION

The COA's decision conflicts with decisions of this Court and those of its own relating to clearly established law; the decision rests on an erroneous view of clearly established law; an erroneous view of the facts; the misapprehension of the summary judgment and qualified immunity standards; the application of the wrong legal standard; and raises important questions of law and matters of great public importance warranting this Court's summary review, if not plenary review. Matters of great public importance appears at end of petition.

I. WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THE LAW WAS NOT CLEARLY ESTABLISHED AS TO THE CONDUCT OF DEFENDANTS ESPINOZA AND WILLIAMS AND IN CONCLUDING THE PETITIONER'S CASE WAS NOT A CASE IN WHICH THE CONSTITUTIONAL VIOLATION WAS OBVIOUS?

The Tenth Circuit analysis of the qualified immunity issue was flat out wrong and inconsistent with the precedent of this Court and its own. Under the facts and circumstances of Stevenson's case, a general excessive force standard could and did apply to clearly establish his rights.

Due to the varied uses of excessive force employed by the defendants while Stevenson was subdued [amounting to the wanton and unnecessary infliction of pain], the DC applied the "general excessive force standard" of Hudson v. McMillian, 503 U.S. 1 (1992), to all of his excessive force claims. However, the COA disagreed that Stevenson's rights were clearly established "as to all of his claims," and affirmed summary judgment on this "alterative ground." **App.A**, at 9. It then concluded that his case was "not a case in which the constitutional violation was so obvious that [his] rights were clearly established in the absence of a materially similar prior case," and found error in the DC defining clearly established at such a "high level of generality." Id 9.

Because the factual circumstances of the defendants excessive force varied, and some were novel, in his summary judgment response, Stevenson cited this Court's precedent of Hope v. Pelzer, 536 U.S. 730, 741 (2002) for the proposition that "officials can still be on notice that their conduct violates clearly established law even in novel factual circumstances," and cited Brosseau v. Haugen, 543 U.S. 194, 199 (2004) for the proposition that "[i]n certain circumstances, law can be clearly established even without a body of relevant law." Regarding Tenth Circuit precedent, he cited the case of Estate of Booker v. Gomez, 745 F.3d 405, 411 (10th Cir. 2014) for the proposition that "[a] plaintiff is not required to show...that the very act in question was previously held unlawful...to establish the absence of qualified immunity." **App. F 4**, DOC 147, at 40-41.

Stevenson also cited the Tenth Circuit's taser decision of Casey v. City of Federal Heights, 509 F.3d 1287, 1285 (10th Cir. 2007), which he cited as a case clearly establishing the violative nature of Espinoza's conduct of tasing him

immediately and without warning, and without believing lesser force would exact compliance, Id 29; and cited the Tenth Circuit's decision of Vondrak v. City of Las Cruses, 535 F.3d 1198, 1206 (10th Cir. 2008), which he cited as a case clearly establishing the violative nature of all the defendants conduct of ignoring his timely and repeated complaints to loosen the tight cuffs, subjecting him to injury. Id 34, 41.

With respect to Stevenson's tasing precedent, the COA rejected Casey, because it addressed the "use of a taser in the Fourth Amendment context," and not in the Eighth, and concluded that Casey's holding did not provide Espinoza "with notice that tasing Stevenson under the circumstances presented...would violate his constitutional rights." Id 9-10. It stated that it had not found Supreme Court or Tenth Circuit decisions sufficiently on point, or decisions from other circuits that had addressed a "correctional officer's use of a taser in sufficiently analogous circumstances." Id 11. The COA concluded that Stevenson failed to show a constitutional violation or that his rights were clearly established, and affirmed summary judgment on that claim. Id 11.

With respect to Stevenson's handcuffing precedent, the COA rejected Vondrak, because it addressed the "use of force against an arrestee in circumstances governed by the Fourth Amendment rather than the Eighth Amendment." Id 13. It again stated that it had found no Eighth Amendment cases with sufficiently analogous facts "that would have put Williams on notice that his inaction amounted to cruel and unusual punishment." Id 14. It did not reach the question of whether the evidence showed a constitutional violation, because it concluded that Steveson "fails to show that his Eighth Amendment rights...were clearly established." Id 13.

In rejecting Stevenson's cases, the COA is essentially saying that because the excessive tasing and refusal-to-loosen occurred in prison by correctional officers, and that because there were no published decisions that held those specific acts violated a prisoner's Eighth Amendment rights, then the defendants are entitled

to qualified immunity, but had the same acts occurred on the street by a police officer, then the officer would be held liable for violating an arrestees Fourth Amendment rights.

Even if Casey or Vondrak did not clearly establish Stevenson's rights, his case is a case in which the contours of his rights were sufficiently clear that every reasonable official would have understood what he was doing, violated those rights. Anderson v. Creighthon, 483 U.S. 635, 640 (1987).

This Court has found an Eighth Amendment violation on facts comparable to those in Stevenson's case. In Hudson v. McMillian, 503 U.S. at 4, after the prisoner was handcuffed and shackled, he was punched and kicked in the mouth, eyes, chest and stomach. As as result, his teeth were loosened, a dental plate cracked, and he suffered minor bruises and swelling of his face, mouth and lips. Although his injuries were considered minor, the Hudson Court reversed the Fifth Circuit and held that an Eighth Amendment violation had been proven. The Court stated: "Punishment...invol[ing] the unnecessary and wanton infliction of pain are repugnant to the Eighth Amendment," and that "[W]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated." Id 9.

In addition, in Hope v. Pelzer, 536 U.S. at 737, the prisoner had been handcuffed to a hitching post (after he had been subdued, handcuffed and palced in leg irons), long after any safety concern had abated. Because there was clear lack of emergency, the Court found that officials knowingly subjected him, inter alis, to a substantial risk of physical harm and unnecessary pain. The Court determined that the use of the hitching post in those circumstances violated the Eighth Amendment, and that not only had the defendants acted with deliberate indifference to his health and safety but, in light of the clear lack of emergency, their conduct amounted to the "gratuitous infliction of wanton and unnecessary pain." Id 738.

In Stevenson's case, regarding the defendant's deliberate indifference, he remained strapped face down in an awkward position on a backboard and gurney [prohibited by CDOC policy - App. F 8 Use of Force Review], with his hands cuffed dangerously and uncomfortably behind his back for 30 minutes, while 8-10 officers refused his repeated pleas to loosen the cuffs, when he posed absolutely no threat.

In Hope, first turning to the qualified immunity issue, the Court declared that the Eleventh Circuit's "materially similar" qualified immunity standard was a "rigid gloss" on qualified immunity that was not consistent with the Court's precedent. In particular, it was inconsistent with Lanier's (520 U.S. 259 (1997) standard of "fair warning" which required only that a prior decision give reasonable warning of the unconstitutionality of the conduct at issue. The Court explained:

> [G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances, a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very act in question had not been previously held unlawful.
>
> Our opinion in Lanier thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in Lanier, we expressly rejected a requirement that previous cases be fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of the cases with "materally similar" facts.

Thus, Hope, shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts towards the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional.

Next, the Court asked whether the defendants had fair warning in 1995 that their conduct violated the Eighth Amendment. After intimating that the Court's own precedent may well have established this by that time, the Court went on to find that the Fifth Circuit's 1994 case of Gates v. Collier, 501 F.2d 1291 (5th

Cir. 1974), had determined that handcuffing an inmate to a fence, and forcing him to remain in awkward positions for prolonged periods offended contemporary concepts of decency and human dignity, and thus violated the Eighth Amendment. In addition, the Court accepted the Eleventh Circuit's 1987 case of Ort v. White, 813 F.2d 318 (11th Cir. 1987), which stated strongly that physical abuse of a prisoner after he had terminated his resistance would constitute an Eighth Amendment violation. Thus, the two cases, the "obvious cruelty inherent in [the practice][4] an alabama Department of Corrections regulation, and a Department of Justice report, showed that defendants violated clearly settled law and were not entitled to qualified immunity.

Again, the Tenth Circuit's analysis of the qualified immunity issue is wrong with respect to the conduct of Espinoza and Williams.

First, contrary to the COA, it makes no difference, in certain circumstances, whether a prior decision was made in the Fourth or Eighth Amendment context. It is the "fact" of a prior "decision" holding unlawful the "conduct at issue" which provides fair warning to officials of the "violative nature" of their "conduct," not whether it was decided in the context of the Fourth or Eighth Amendment or whether the conduct was committed by a "police Officer" on the street or a "correctional officer" in prison. This amounts to an invalid distinction. Why should such violative conduct be limited to "one kind of government official" and not the other. It should make no difference "who" committed the conduct or "where" the conduct was committed.

The law of excessive force is that a prisoner cannot be subjected to gratuitous force that has no object but to inflict pain. Whitley v. Albers, 475 U.S. 312, 320 (1986). This is so whether the prisoner is in cuffs in the back of a police car, in a prison yard, in a jail or prison cell, or in any other custodial setting.

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4. Both Cordova and Clinkinbeard testified to a "cruel" practice/policy of not loosening cuffs, regardless of complaints, no mater how long it takes, until the fully restrained prisoner is "compliant" or until he reached his "final cell in segregation. Cordova Depo. 87:22-88:5; Clinkinbeard Depo. 36:1-39:4.

The use of force must stop once a prisoner is subdued or when the need for it to maintain or restore discipline no longer exists. In Stevenson's case, long before the defendants used force, the law clearly established that correctional officers could not not use force maliciously or sadistically for the very purpose of causing harm, and that they could not act with deliberate indifference to a prisonerS health and safety. Hudson, 503 U.S. at 7-8. Any reasonable official understood the contours of these rights, and would have prevented injury.

Second, the Tenth Circuit's decision is contrary to Supreme Court precedent, as a materially similar case is not required. The COA has overemphasized the degree of specificity required of prior cases to clearly establish the law. In Hope, the Supreme Court emphasized: "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id 739. Further, this Court has repeatedly stated that a case on point is not required, and that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Id. The Court has also made clear that "[i]n an obvious case, [general] standards can clearly establish [a right] even without a body of relevant case law." Brosseau, 543 U.S. at 198. "[T]he focus of qualified immunity" is on whether the official had fair notice that [his] conduct was unlawful. Id.

Third, the Tenth Circuit's decision is contrary to its own precedent. Tenth Circuit precedent makes clear that a prior case may not exist which addresses the "same circumstances" or "fact pattern." The COA said so in Casey, the very case cited by stevenson and rejected by the COA. There, the COA found: "[T]here will almost never be a published opinion involving the same circumstances, and then acknowledged: "We cannot find qualified immunity wherever we have a new fact pattern, citing Anderson v. Blake, 469 F.3d 910 (10th Cir 2006)(finding "[A] general rule can apply with obvious clarity to the specific conduct in question, even though [such conduct] has not previously been held unlawful"). In Morris v. Noe, 672 F.3d

1185, 1196 (10th Cir. 2012), the COA held: "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior law to clearly establish the violation. We do not always require a case law on point." In the case of Estate of Booker v. Gomez, 745 F.3d 405, 411 (10th CIr. 2014) the Tenth Circuit stated: "The plaintiff is not required to show...that the very act in question previously was held unlawful...to establish the absence of qualified immunity." and in the case of Redmond v. Crowther, 882 F.3d 927, 935 (10th Cir. 2018), the Circuit acknowledged: "General legal standards...rarely clearly establish rights.. [t]hey only do so in "an obvious case," clearly stating that an obvious case is one in which the "contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right," quoting Ashcroft and Hope.

Therefore, the Tenth Circuit's own precedent makes clear that a materially similar case was not required, and that there may be no preexisting cases where officials acted under the same or similar circumstances or fact pattern; that a general standard can apply to the specific conduct even though the very acts were not previously held unlawful; and that a general standard can clearly establish a right in "an obvious case."

Fourth, the decision is contrary to other Circuit precedent. The Eleventh Circuit alsk acknowledges that "pre-existing law tied to the precise fact, is not essential to establish clearly the law applying to the circumstances facing a public official so that a reasonable official would be put on fair and clear notice that specific conduct would be unlawful in the faced specified circumstances." Marsh v. Butler County, 268 F.3d 1014, 1033 (11th Cir. 2001); Skitch v. Thornton, 280 F.3d 1295, 1305 (11th Cir. 2002("Indeed, "some conduct is so obviously contrary to constitutional norms that even in the absence of case law, the defense of qualified immunity does not apply").

Fifth, common sense can clearly establish a right. The Ninth Circuit has found:

"Even if there is no analogous case law, a right can be established on the basis of common sense." Giebel v. Sylvester, 244 F.3d 1182, 1189 (9th Cir. 2002); Sepulevsa v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992)(official was not immune for conduct that ran contrary to "common sense, decency and state regulations.").

Sixth, in combination with Hudson's general standard, a state statute. a Colorado Department of Corrections (CDOC) administrative regulation (AR). a Department of Justice (DOJ) directive, and an SBA Standard for Criminal Justice for Treatment of Prisoners can support a "conclusion" that defendants knew their conduct was unlawful. See Hope, at 742-45.

In Colorado, pursuant to C.R.S. § 16-2.5-135 and AR 1150-01, a correctional officer is a "peace officer." App. F 1, Constitutional, Statutory and Regulatory provisions. As "peace officers," defendants were trained in the use of force [Espinoza the taser], as well as the "duty ot care," and therefore were charged with knowing the law. App. F 9 Training Record of Espinoza, Cordova and Clinkinbeard.

Pursuant to C.R.S. § 18-1-707 and 18-8-803, a peace officer is prohibited from using excessive force which exceeds what is "reasonable and appropriate" in (1) effecting an arrest; (2) preventing an escape; and (3) defending himself or a third party. They are also prohibited from continuing to use force once a person has been "rendered incapable of resisting." Id. That such statutes apply to correctional officers is the fact of CDOC's own "Use of Force Report" which lists the very three elements as "Reasons For the Use of Force. Cordova relied on the first and third. App. F 10 Use of Force Report, Sec II.

Regarding CDOC's taser policy: AR 300-16RD prohibits the extended, repeated and prolonged application of the taser," and warns: "The effect that a taser has on a person's heart is not zero." Id. As well, DOJ directive prohibits the tasing of prisoners to "gain compliance," those lying in a "prone position," and those "not resisting with physical force." Therefore, such supports the "conclusion" that Espinoza knew his conduct was unlawful.

Regarding CDOC's handcuffing policy: AR 300-57RD prohibits the application of restraints "in a manner that injures." Id. And SBA Standard for Criminal Justice, requires correctional officers to "take care to prevent injury to a restrained prisoner," and prohibits "restrain[ing] a prisoner in a manner that causes unnecessary physical pain or extreme discomfort." Id. Therefore, such supports the "conclusion" that both Espinoza and Williams knew their conduct was unlawful.

A reasonable officer in Espinozas' position would have known that his taser was having no effect on Stevenson because his arms were trapped by the various officers body weight, and known (at least by the second tasing) not to continue to electrocute him three additional times (as shown by photos and second, more accurate anatomical showing "ten" healing marks from taser, not six.- App. F 11 Photos and anatomicals), causing unnecessary pain and possible heart attach. He would have also known not to squeeze the cuffs even tighter, using "extra effort" after they had already been "slammed on" extremely tight. And a reasonable officer in Espinozas' and Wiiliams' position (after hearing repeated complaints) would have known that they had to balance the need to maintain order and restore discipline against the risk of harm, and would have known that if they did not intervene to use the pinky rule to check the cuffs or to loosen them that they would be subjecting Stevenson to an unnecessary and substantial risk of harm.

Seventh, The COA erred in concluding Stevenson's case was not one in which the constitutional violation was obvious. Williams' refusal to loosen and the resulting injury was an obvious violation. It was clearly established by 2012 that prison officials had an affirmative duty to take steps to protect inmates from harm, and that subjecting them to an unnecessary and substantial risk of harm violated the eighth Amendment. Farmer v. Brennan, 511 U.S. 825, 844-37 (1994).

To establish an Eighth Amendment violation, Stevenson had to saitisfy two requirements. First, he had to show that defendants conduct was objectively serious or caused an objectively serious injury, which he did. Id at 834. Second, he has to show that

prison officials acted with a "sufficiently culpable state of mind" or with deliberate indifference to or reckless disregard for his health and safety, which he also did. Id 837.

The second element of the deliberate indifference standard is an objective element. To satisfy that element, a prison official must act "with deliberate indifference to a substantial risk of harm to an inmate." Id 834 (quoting Wilson v. Seiter, 501 U.S. 294, 297 (1991). The second element is contextual and responsive to contemporary standards of decency. In the excessive force context, society's expectations are different, "when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated. Hudson, 503 U.S. at 9.

In Stevenson's case, his Complaint showed [after his numerous complaints were ignored], that he specifically identified by name those present who heard his pleas but did "not reply," "respond," or "loosen the cuffs." App. F 1, DOC 1, ¶58, 52-53, 56-59, 61, 63, 66. His claims against supervisor-defendants Cordova, Holloway and Williams specifically alleged injury and claims of "failure to intervene" and "deliberate indifference" to his health and safety. Id ¶79-82, 85-89, 95-99. And in his summary judgment response, after establishing that all the defendant's either "actively participated" in the excessive force or "failed to intervene," [DOC 147, 22, 30, 31], he argued that all had an affirmative duty to intervene; that "Cordova and the "others" do not intervene whatsoever," and that their "collective failure" constituted a constitutional violation. Id 32-34. The body camera showed he complained no less than 18 times after he had been strapped to board and gurney. It also showed that he remained [strapped face down on his stomach with his hands cuffed dagerously tight behind his back] in this awkward position for 30 minutes.

It was clear that Stevenson "repeatedly" complained the cuffs were too tight App. F12 Espinoza Depo. 48:6-13, 50:24-51:5; Bufmack Depo. 26:13-18. 28:18-21; clear that no one bothered to check or loosen the cuffs, clear that he was "comletely

immoblized" and "fully restrained" by cuffs and shackles and then by being strapped to a board and gurney and "could not harm anyone." Id. Espinoza Depo. 52:23-53:3; Cordova Depo. 79:4-12, 76:24-77:14, 82:17-23; and clear that each defendant had an opportunity within the 30 minutes to intervene.

In this case, viewing the facts in Light most favorable to Stevenson, there was no legitimate penological purpose that would justify the multiple refusals to loosen his cuffs cuffs. In the unusual situational context of this case, the typical concern for safety was simply not at play here, particularly after he was cuffed and shackled, and even less so after he was strapped to board and gurney.

The constitutional violation here is obvious. Any security concern had long abated by the time Stevenson was cuffed, shackled and strapped. Despite this clear lack of emergency, the defendants knowingly subjected him to an unnecessary and substantial risk of harm. Their refusal to loosen the cuffs under these circumstances violated the basic concepts of decency underlying the Eighth Amendment. This treatment was punitive (DOC 147, 37) and amounted to the gratuitous infliction of wanton and unnecessary pain prohibited by this Court's precedent. Even Hope made it obvious to every reasonable prison official that leaving a prisoner handcuffed when no penological purpose existed, would violate the Eighth Amendment.

Here, it was not dispositive that there may have been no "Eighth Amendment" cases dealing expressly with "refusal-to-loosen handcuffs," because it was clearly established by Farmer, that subjecting an inmate to an unnecessary risk of harm would violate his rights. In this case, the numerous refusals without penological justification violated clearly settled law "even without a body of relevant case law." Farmer, put the defendants on "fair notice" because it set out the contours of the right with sufficient clarity to guide a reasonable officer. The evidence showed that Clinkinbeard, Espinoza and Cordova were "aware" that improperly applied cuffs had the potential to injure. App. F 12 Clinkinbeard Depo. 40:13-41:11; Espinoza Depo. 52: 3-11; Cordova Depo. 69:9-70:7.

Even if the DC was not allowed to define clearly established law at such a "high level of generality," in the context of this case, which provided every opportunity to defendants to respond to Stevenson's pleas, a reasonable officer would have known that maliciously choosing to ignore his complaints for no legitimate penological purpose, would offend common notions of decency and would violate his Eighth Amendment rights. Prison officials who deliberately ignore a substantial risk of harm cannot claim that it was not apparent to a reasonable person that such action violated the law. Contrary to the COA, the Constitutional violation "was" obvious, and Hudson's general excessive force statndard did apply.

A reasonable juror could have concluded that "all" present violated Stevenson's rights, because: (1) the failure to loosen was not done in a good faith effort to maintain discipline, but rather (as the DC concluded - DOC 162, at 49), "maliciously for the purpose of causing pain;" and (2) the force resulted in injury, that in the context of this case, offended notions of decency.

II WHETHER THE USUAL DELIBERATE INDIFFERENCE STANDARD OF FARMER V. BRENNON, 511 U.S. 824 (1994) APPLIES TO EIGHTH AMENDMENT CLAIMS AGAINST PRISON OFFICIALS WHO KNEW OF BUT IGNORED A SUBSTANTIAL RISK OF HARM TO A PRISONER'S HEALTH AND SAFETY, AND WHETHER THE TENTH CIRCUIT, LIKE THE SIXTH CIRCUIT IN WILLSON V. SEITER, 501 U.S. 294 (1991) APPLIED THE WRONG LEGAL STANDARD TO PERTITTIONER'S CLAIMS THAT DEFENDANTS WILLIAMS, CLINKINBEARD AND ESPINOZA ACTED WITH DELIBERATE INDIFFERENCE TO HIS HEALTH AND SAFETY?

The deliberate indifference standard of Farmer v. Brennon, clearly established in 1994 that prison officials could not subject a prisoner to a substantial risk of serious harm, and that deliberate indifference to a substantial risk would violate the Eighth Amendment.

As shown above, Stevenson's claims against Williams and "all" others were based on their "failure to intervene" and "deliberate indifference" to his health and safety. He argued on appeal that the DC erred in granting Williams, Clinkinbeard and Espinoza summary judgment; that they had an affirmative duty to intervene; and that they acted with deliberate indifference to his health and safety.

This Court held in Farmer that prison officials could be liable in damages for their deliberate indifference in failing to protect prisoners from harm. The Court defined deliberate indifference in a subjective manner as meaning the failure to act when prison officials knew of a "substantial risk of serious harm." The Court went on to say that an "inference from circumstantial evidence" could be sufficient to show that officials had the requisite knowledge. Id. Justice Blackman commented that the Court's opinion "sends a clear message to prison officials that their affirmative duty is not to be taken lightly." Id.

Thus, in the context of prison cases, this Court in Hope, 536 U.S. at 739 stated:

> The unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendmnt. Whitley v. Albers, 475 U.S. 312, 320 (1986). Among "unnecessary and wanton infliction of pain' are those that are totally without penological justification." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). In making this determination, in the context of prison conditions, we must ascertain whether officials involved acted with deliberate indifference to an inmates health and safety." Hudson v. McMillian, 503 U.S. 1, 8 (1992). WE may infer the existance of this subjective state of mind from the fact the risk of harm is obvious. Farmer, 511 U.S. at 842.

Thus, Stevenson asserts that the deliberate indifference standard of Farmer applied to his claims that Williams, Clinkinbeard and Espinoza knew of but ignored a substantial risk of harm to his health and safety when they failed their duty to intervene or take any steps to check or loosen his cuffs.

Like th Sixth Circuit in Wilson v. Seiter, 501 U.S.294 (1991), the Tenth Circuit in Stevenson's case applied the wrong legal standard to his claims that Williams, Clinkinbeard and Espinoza acted with deliberate indifference by subjecting him to a substantial risk of harm.

During its de novo review, instead of addressing the claim that the DC erred in granting the defendants summary judgment and correcting the error, the COA itself erred by deferring to the fact that the DC "construed Stevenson's failure-to-loosen claim as brought against Cordova and Holloway (the very error raised - because based on the facts presented the DC had no business 'construing" such) App. A, at 12, when Stevenson's complaint and summary judgment responses put forth

sufficient facts of deliberate indifference to hold William, Clinkinbeard and Espinoza [and all others] liable for failing their affirmative duty to prevent injury. On Appeal, he argued that his complaint and summary judgment responses were "sufficient" to establish constitutional violations and "adequate" to carry his burden to set fourth facts demonstrating genuine issues of material fact. The COA did not resolve the issue with respect to Clinkinbeard and Espinoza.

With respect to Williams, the COA agreed with Stevenson that the DC's "reasoning" in granting him summary judgment "failed to address [his] claims based on Williams inaction," but nonetheless, passed on determining whether the evidence showed that Williams committed a constitutional violation, and instead, improperly found that "Stevenson failed to show his Eighth Amendment rights were clearly established. Id 13.

Instead of addressing the claim under the deliberate indifference standard, as it was raised, the COA improperly treated Stevenson's claim as if "williams" himself had actually "used force" against him, by applying the malicious and sadistic standards. This is evident by its statement: "Our cases involving the use of force against a prisoner who was restrained involved significantly greater force than the refusal to loosen handcuffs." Id 14. But of course, Williams did not "use force" he simply subjected Stevenson to a substantial risk if harm. The two excessive force cases relied on by the COA [Mitchell v. Maynard, 80 F.3d 1433 (10th Cir. 1996) and Miller v. Glanz, 948 F.2d 1562 (10th Cir. 1991)], addressed the use of force under the "malicious and sadistic" and the unnecessary and wanton infliction of pain" standards of (Hudson and Whitley, respectively) against those who "actually" used force. In Mitchell, the court itself acknowledged such, stating that Mitchell's claim "[fell] in the category of malicious and sadistic," Id 1441, and that he "fail[ed] to allege "any' deliberate indifference." Id 1444. [Emphasis added]. And in Miller, his claim of "deliberate indifference" related only to a "medical needs claim, not a "use of force calim." Id 1566, 1569.

Here, the COA's application of the wrong legal standard is similar to what occurred in the Eighth Amendment case of Wilson v. Seiter, 501 U.S. 294 (1991), where the Sixth Circuit did not apply the deliberate indifference standard, but instead applied a standard of "behavior marked by persistent malicious cruelty." Id 294, 305. The Wilson Court stated: "It appears...from the opinion that the court believed that the criterion for liability was whether respondent acted maliciously and sadistically for the purpose of causing harm." Id 305. The Court vacated and remanded for consideration under the appropriate standard, concluding: "Conceivably...the court would have reached a different disposition under the correct standard." Id 295. Stevenson asserts the same finding and remand should occur here, because a 'different disposition would have been reached' had the COA applied the correct standard or "criterion for liability" to his claims.

III WHETHER THE COURT OF APPEALS MISAPPREHENDED SUMMARY JUDGMENT AND QUALIFIED STANDARDS AND FAILED TO VIEW EVIDENCE IN THE LIGHT MOST FAVORABLE TO PETITIONER AS THE NON-MOVING PARTY?

In this case, the COA failed to view the evidence at summary judgment in the light most favorable to Stevenson with regard to several key facts of his case. In summary judgment appellate-cases, the evidence is to be ruled on in the light most favorable to the non-moving party. In setting out the factual context in this case, the COA did not follow the maxim that when ruling on a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986). For this reason too, the Court should accept review.

Here, the COA credited the defendants version of events by failing to credit Stevenson's evidence that contradicted some of its key factual conclusions. The COA improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the defendants, as the moving party, and wrongly affirmed the DC's grant of summary judgment. The COA's role was 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. Courts have discretion to decide the order in which to engage the qualified immunity prong, but under either prong, they may not resolve genuine disputes of fact in favor of the party seeking summary judgment. Brosseau, 543 U.S. at 195, n 2; Hope, 536 U.S. at 733, n 1. Summary judgment is only appropriate if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. **FRCP 56(a).**

As relevant here, it was disputed whether Stevenson wrestled with two female officers. DOC 147, 8 ¶3; whether he was tased instantly and without warning upon contact. Id 9 ¶2, Stevenson Depo. 75:18-20; whether he was tased five times or three. DOC 1, ¶51, 70, 104, 106, 113-14, 117-19; DOC 147, 9 ¶2, 17 ¶5; whether his behavior could be characterized as physically resistive. Id 7 ¶3; whether Espinoza had to use strength techniques to cuff him or whether his right hand was cuffed when freed from weight weight of officers. DOC 1, 52, Stevenson Depo. 81:6-18; whether Clinkinbeard heard his numerous complaints about cuffs. DOC 147, 27 ¶1; and whether Williams was present. Id 10 ¶2, 32 ¶1, n 11; DOC 1, ¶58.

There was no dispute however that he was tased while dog-piled with his arms trapped beneath him by weight of officers and that he could not move or free them, or speak from being paralyzed by the taser. DOC 147, 8 ¶2, 9 ¶2-3, 10 ¶3-4, 28 ¶1, Stevenson Depo 75:9-76:5; no dispute that he moved involuntarily from the multiple, simultaneous uses of force. DOC 147, 9 ¶3; no dispute that when he could not breath, he yelled for officers to get off him and that his right arm was freed and cuffed and that cuffs were initially "slammed on" and then "squeezed" "extremely tight" using "extra effort." DOC 1, ¶52, DOC 147, 10 ¶4; no disputs that no one bothered to check the cuffs after his immediate subsequent repeated complaints to loosen the cuffs; no dispute that no one bothered to use the "pinky rule" to check. DOC

1, ¶56, 59, 63, 80, 97; DOC 147, 19-20, 27, 30, 34-35; and no dispute he remained in cuffs for 30 minutes, contributing to injury, **App. F 12**, Cordova Depo. 86:17-89:25. [approx 10 minutes in Upper Vestibule].

The COA concluded the Vestibule Video did not show that Espinoza began tasing Stevenson immediately and without warning, **App. A**, 8; that there were factual disputes whether he was tased five times or three; that it was undisputed that the tasings were not effective in getting him to comply with being cuffed; that Espinoza arrived to find two female officers wrestling with him; that given the circumstances he encountered, whether he tased him five or three times did not alter its analysis Id 8; that defendants presented uncontested evidence that the [pinky rule] applied when the inmate is being compliant and not resisting the application of handcuffs Id 11; and that it was undisputed that at the time Espinoza applied the cuffs, Stevenson was resisting the efforts of multiple officers to physically force him to submit Id 12.

The COA affirmed the grant of summary judgment to Espinoza and Williams. It declined to decide whether Espinozas' tasing of Stevenson five times violated his right, and declined to decide whether Williams' refusal to loosen did so. Instead, in both cases, it improperly found that Stevenson's rights were not clearly established. Id 8, 11, 13, 14.

As for the COA's conclusion that Espinoza arrived to find Clinkinbeard and another female officer wrestling with Stevenson on the floor, it appears the COA credited Espinoza and Cordova's version of events, but there was never any evidence of wrestling or that Stevenson touched, or put hands on anyone (it takes two to wrestle and it also takes hands). In their initial Incident Reports, there were false claims of wrestling (as well as staff assault by Cordova [5]), and in their

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5. Evidence showed that Cordova falsely charged Stevenson with staff assault, which was later reversed and expunged. It also shows that he testified falsely when he stated that he did not know "what [disciplinary] charges followed [Stevenson]," when it was Cordova himself who initiated the Incident Report and signed the Notice Charges. App. F 12, Cordova Depo. 54:11-14; **App. F 13**, Notice of Charges.

motion for summary judgment, they made it appear as if "Stevenson" was wrestling, see, DOC 147, 8 ¶3, n 6. However, during deposition testimony, Espinoza admitted he did not see Stevenson "put hands on," "grab," or "strike" the female officers. **App. F 12**, Espinoza Depo. 42:17-43:4. Clinkinbeard testified that Stevenson did not "strike" or "assault" her. Clinkinbeard Depo. 25:15-18, 38:11-13. Stevenson's evidence showed that he "laid in a prone position face down on the floor with [his] arms beneath [him] and waited for someone with authority to arrive," DOC 1, ¶50, and that he laid on the floor so he would not "touch anyone" or be "accused of assault." Stevenson Depo. 78:8-23. Here, the COA did not credit Stevenson's evidence that he did not touch anyone and appears to rely on defendant's charaterization of the females wrestling. There was no evidence of wrestling. The evidence showed that the females were applying painful pressure techniques, needlessly, as Stevenson laid prone, asking to wait until the shift commander arrived.

As for the COA's conclusion that the video did not clearly show that Espinoza began tasing Stevenson "immediately and without warning," the COA did not credit Stevenson's contradictory evidence that he was tased "instantly" and without any "warning" [after he was immediately dog-pilled], DOC 1, ¶51; Stevenson Depo. 75: 18-20; DOC 147, 9, 28. Further, the Vestibule Video is "silent" and would not depict if warning was given.

As for the COA's conclusion that it was indisputed that the tasings were not effective, again, the COA did not credit Stevenson's evidence that he was dog-piled and his arms trapped by the weight of the officers and that he could not move or speak from being paralyzed by the taser. Stevenson Depo. 75:9-76:5; DOC 1, 51-52; DOC 147, 8, 9. 10, 28. Here, the COA relied on its mistaken view the tasings were not effective. Stevenson asserts that the tasings were effective, that they were effective in administering "pain."

As for the COA's conclusion that it was undisputed at the time Espinoza applied the handcuffs that Stevenson was resisting efforts of multiple officers to physically

force him to submit, the COA did not credit Stevenson's evidence that once he yelled for the officer to get off him that his right arm was freed and cuffed and then his left. DOC 1, ¶52; DOC 147, 10 ¶4; Stevenson Depo. 81:6-14. There was no evidence Stevenson was resisting application of the cuffs at the time Espinoza applied the cuffs. The video does not show "when" the cuffs were applied. The COA appear to have relied on its own mistaken view, or appears to have credited the defendant's account that at the time of cuffing, Stevenson was resisting.

As for the defendants not applying the "pinky rule," the COA relied on "Cordova's testimony construing a "passive" handcuffing to when officers are struggling to get the handcuffs on an inamte," and "Clinkinbeard's testimony that "[i]n a tactical situation, where the offender is not compliant [leaving space between the handcuff and wrist] doesn't always happen." **App. A,** 11-12. But this ignores and does not credit Stevesnon's evidence that no one bothered to check or loosen the cuffs "after" they were applied and he bagan complaining. The COA ignores that the "pinky rule" could have been used at "any time" (not just upon application) to determine whether the cuffs had been applied too tightly, as Cordova testified he was taught to do, as a way of seeing if the cuffs were too tight. Cordova Depo. 71:2-9.

In reviewing the grant of summary judgment, the COA was required to examine the factual record and believe Stevenson's evidence and draw all justifiable inferences in his favor as the non-moving party. It failed to do so. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986); Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir. 2000). The Court should vacate the COA's order and judgment and remand to proerly credit and draw all reasonable inferences from the evidence in favor of Stevenson.

IV WHETHER THE COURT OF APPEALS ERRED IN NOT CONDUCTING ITS OWN INDEPENDANT DE NOVO REVIEW OF THE DIRECTED VERDICT ISSUE, AND DOES THE TRANSCRIPT OF PETITIONER'S CROSS-EXAMINATION TESTIMONY DEMONSTRATE HE PRESENTED SUFFICIENT EVIDENCE AND SUFFICIENT DISAGREEMENT REQUIRING SUBMITION TO THE JURY?

Stevenson's direct and cross-examination testimony presented sufficient evidence and evidence of disagreement to require submission of his claims against Banavidez to the jury.

It appears the COA affirmed the DC's directed verdict in favor of Benavidez without conducting its own independent de novo review. This is evidenced by from a "close" review of the COA's ruling (App. **A**, 15) and a review of the DC's order denying new trial **(App. F 14**, DOC 245, Order, at 15-19). It is apparent the COA simnply went down the order and merely noted what the DC "reviewed," "credited," noted" and "held," (in that order), but did not independently review the competing testimony of Stevenson and Benavidez to determine what it actually showed. Had it done so, it would have reached a different conclusion.

On direct examination, Stevenson testified that Benavidez intentionally and forcefully bent his left wrist hard against the steel cuffs causing sever pain at time he was cuffed and shackled on the floor of the Upper Vestibule; that the bending and pulling was not accidental; and that when he yelled out in pain, moments later, he intentionally and forcefully pulled on his elbow causing the cuffs to put pressure on his wrists causing additional sever pain. He also testified that he intentionally put pressure on his left elbow three additional times, once in medical and twice on the was to segregation.

On cross-examination, Stevenson testified, as relevant here, that he identified Benavidez as the person who intentionally bent his wrist and pulled his elbow hard against the steel cuffs causing pain while he was shackled, handcuffed behind back and surreounded by ten officers; that it occurred (not while being strapped to board), but while on floor [in Upper Vestibule] waiting for the backboard to be brought up; that when he yelled and looked back, he stopped bending and pulling; that even though he stopped, **there was no reason for [the bending and pulling] to be done;** that it was done to cause pain; that it was painful and worsened carpal tunnel (CT) to the point of needing surgery; that it was not heard on audio because they did

not have body camera on [out of five wearing Body Cameras, only one was activated, and it was activated at the "very end" of the Vestibule incident]; and that it was not on, but should have been turned on. **App F 5,** Trl 431-436, 449-452.

In granting directed verdict, the DC ruled:

> The testimony presented to this jury...shows that for much of the time in the upper vestibule when he can actually be identified in the videotape, he's either laying accross your client's legs... [or] Mr. Benavidez is simply simply standing on the sidelines observing. At some point the entire group goes down the hall [carrying Steevenson to top of stair-well] and becomes almost impossible to distinguish one person from another. Id 509:17-510:2.

Even if the video showed him in one portion standing on the sidelines, does not mean he remained there. Indeed, the DC noted that the "entire group [including Benavidez] moved down the hall [out of camera range], but this does not mean that Benavidez did not bend and pull his wrist. Stevenson's testimony established he did. The jury could have belived his testimony. Further, Benavidez's own counsel admits that he admitted to holding Stevenson's left arm (Id 505:7), which was the wrist that received the most injury. Stevenson is right handed, and previously had bi-lateral CT, but now his left is more damaged. See EMG results, **App. F 15.**

> The DC ruled: There is testimony from Mr. Stevenson...Once he is on the ground and they are putting him on the body board, Mr. Stevenson testified toady that at some point he felt someone touch and bend his wrist, then he looked up...and shouted or said something, and he looked up and saw Mr. Benavidez. And if I credit his teatimony, Mr. Benavidez let go of his wrsit and then touched his arm. Id 510:9-19.

This This is contrary to the evidence. Stevenson's testimony showed he was not yet strapped to board at time Benavidez bent wrist and pulled elbow, but was on the floor waiting for the backbaord. Id 432:8-15. His testimony further shwed that Benavidez did not "touch" his wrist, but "bent it" and "pulled" his elbow. Id 431:16, 432:24, 343:8, 433:19-22; that it was done to cause pain. Id 432:6-10, 433:21-22, 432:17, 21-23, 435:8-10; and that there was nc reason for it to be done. ID 432:8-15.

The jury could have found that he did not simply "touch" Stevenson's wrist and elbow, but intentionally and maliciously bent and pulled to cause pain.

> The DC ruled: Mr. Benavidez testified, and it's unrefuted, that there are litereally no - given the size of Mr. Stevenson, it was very difficult to use the hand-holds. To the extent he had to be strapped to the board, that was going to require some contact. Id 510:21-21.

Benavidez's testimony showed that he was referring to when he was down in medical and on the way to segregation, not in the Upper Vestibule, because, there, the board would have been placed on the "floor" while Stevenson was being strapped, and there would have been no neeed to "use hand-holds." And even if "some contact" would have been 'required', that contact would not have required the intentional and forceful bending and pulling employed by Benavidez. Additionally, there was no testimony or evidence that he had "hand-hold" problems when carrying the board from the third floor to the first in CH-1, or guiding the gurney across the yard from CH-1 to medical. The jury could have found that he did not have "hand-hold" problems and that he intentionally and maliciously used force in Upper Vestibule, down in medical and on way to segregation to cause pain.

> The DC ruled: I don't find any evidence in the record from which a reasonable juror, even when construing the facts in the light most favorable to Mr. Stevenson, could find that Mr. Benavidez's contact was malicious and sadistic. Because even under your own witness's testimony, as soon as he said something, Mr. Benavidez stopped. Id 511:1-7.

The jury certainly could have "reasonably" found that even though he "stopped" when Stevenson "said something," that he had no business bending and pulling to begin with, or, in support of Stevenson's testimony, that "there was no reason for it to be done." Id 434:10-15. The jury could have found that had he not been using excessive force, there would have been no reason to "stop," and concluded that his actions in all three locations was malicious and sadistic.

> The DC ruled: The only other contact is the incident down in clinic and there, you're right, there is testimony that at that time Mr. Benavidez put hands on Mr. Stevenson. Mr. Benavidez testified that he did that because the gurney was only 2 feet wide and it's elevated and Mr. Stevenson was turning and Mr. Benavidez was concerned that there might be a blance problem with the gurney. Id 511:8-14.

The video evidence and Stevenson's testimony showed that Benavidez grabbed and put pressure on his elbow on three additional occasions, where he can be heard

yelling, "you guys are using these hancuffs as punishment," "Get your hand off my arm," and "you guys are using these handcuffs as punishment." [DOC 147, 16 - from Body Camera]. Whether this conduct was malicious and sadistic was for the jury to decide. After reviewing the video, the jury could have found that it did not believe Benavidez; that there were no balance problems and that he made that up; and that repeatedly putting pressure on Stevenson's arm three additional times was intentional, malicious and sadistic.

> The DC ruled: Now Mr. Stevenson can disagree with Mr. Benavidez's characterization, but there is nothing in the record, **in my opinion, nothing from** which a reasonable juror could conclude...that Mr. Benavidez's conduct that day, in his very limited conduct that day was either malicious or sadistic and certainly not sadistic and malicious...what you have established today is that Mr. Benavidez had **some physical contact...** And Mr. Stevenson dis agrees with why that contact occurred and the extent of the contact, but it's Mr. Stevenon's burden of proof, and I don't find he has presented sufficient evidence from which a reasonable jury could find in your client's favor... Id 511:15-512:4.

Stevenson's direct and cross-examination testimony clearly established far more than "some physical contact," it established that Benavidez intentionally and forcefully used unnecessary and wanton force against a restrained prisoner, causing pain and injury, when he presented no harm to anyone. There was sufficient evidence in the record from which a jury could conclude his conduct was malicious and sadistic. And Stevenson certainly knows the "extent" of the contact, and surmises that it was done to punish him for making them carry him when they refused to loosen the cuffs. And it was certainly "not" within the providence of the DC to weigh the evidence or determine there was "nothing" in the record **"in [its] opinion"** for the jury to conclude his conduct was "malicious and sadistic."

If reasonable minds could differ as to the import of the evidence, a verdict should not be directed. Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949). Stevenson presented sufficient evidence and evidence of disagreement for submission to the jury. The COA erred in affirming the DC's grant of directed verdict to Benavidez, and in not conducting its own review of the competing testimony of Stevenson and Benavidez. For these reasons too, this Court should accept review.

V WHETHER THE DEFENDANTS OBTAINED A JURY VERDICT IN THEIR FAVOR BY THE KNOWING USE OF CONTRADICTORY AND PERJURED TESTIMONY AND WHETHER THE DISTRICT COURT WAS BIASED TOWARDS PETITIONER AND IMPROPERLY INFLUENCED THE TESTIMONY, DEPRIVING PETITIONER OF NEUTRALITY AND DUE PROCESS?

The jury verdict was obtained by Cordova and Holloway by the presentation of both contradictory and perjured testimony, which was known by defendants and their counsel to be contradictory and perjured at the time it was offered. Stevenson also alleges that the testimony was influenced by the biased and unfair conduct of the DC in warning defendants that their case was week and that the jury could find in Stevenson's favor.

At trial, both initially testified that Stevenson was fully restrained; that they were aware that his cuffs were too tight; that they did not check or loosen the cuffs or direct others to do so; and most significantly, in support of Stevenson's claim, that they could have placed looser fitting cuffs over the tight ones and safely removed the tight ones at any time while he remained cuffed and no threat to anyone, but did not do so.

When defendants moved for directed verdict and it appeared to DC that that their theory of the case was damaging to them and that the jury could find in Stevenson's favor, the DC improperly involved itself and showed bias in favor of defendants by warning them that their theory of the case was weak, and as it stood, "I can't discount the possibility that the jury would say it would have been possible to loosen those cuffs, at least while he was strapped to the board in transit." and "The jury may or may not find that persuasive" [that the situation was so absolutely impractical, that there was no consideration to loosen the cuffs]," and then told them "I'm going to at least require you to to continue to present evidence if you want to." It then improperly stated: "I've got some reservations. I don't want to suggest otherwise. I got some reservations. But if you're renewing your motion now, one, I think it's probably premature and, two, there's a better time

and place to do it, not now." App. F 5, Trl, 557:1-558:5. On que, the very next day during their case-in-chief, both defendants tailored their testimony and came up with all manner of security reasons why they did not "unlock" and "loosen" the cuffs, and testified in many instances to the opposite of what they did the previous day. They made it appear that even though Stevenson was cuffed, shackled, strapped to boad, stapped to gurney and surrounded by 8-10 officers, that he was so dangerous and upredictable that he was subject to break free and harm someone. They made it appear they did not hear Stevenson's complaints in the Upper Vestibule; that they did not recall exactly when they heard them. Cordova changed his testimony to state he could not say when he first heard, but recalled that he heard it in medical (Stevenson does not have his testimony on hand). Holloway changed his testimony to state that he first realized it was an "issue" was "in transit between cell house 1 and infirmary," and that there could have been a "possible risk" if he were to "unlock and loosen" them in the courtyard. Id 596:10-597:11. Of course, this did not negate his earlier testimony that he could have placed looser fitting cuffs on Stevenson's wrist while he remained cuffed and safely removed the tight ones at any time - which would not have required him to "unlock and loosen" the cuffs).

Holloway's testimony shows that he committed perjury when he testified he checked the cuffs, stating, "I **did initially check** to make sure that the tightness, that factored into my decision, because if they are too tight, you want to give somebody relief." Id 593:17-21. But this statement is materially false and total contradicts his iterrogatory testimony where he stated at No. 13 (in response to question: "Did you check to see if the cuffs were actually too tight?") "No. I didn't because I was not going to adjust the restraints due to his action/non-compliant behavior..." App. F 16 Benavidez Interrogatories. That he was "aware" the cuffs were too tight in the "Upper Vestibule," note how he evades the question" "After Mr. Stevenson was strapped to the back board, posing no threat to the safety of anyone, did you intervene <u>then</u> to loosen the cuffs or <u>see</u> if there were too tight? See No. 14. And note at No. 9, where he states he was "aware" of complaints, but that he "observed" the offenders

"non compliant actions," which he had to "observe" prior to Stevenson being cuffed, shackled and strapped to board. Yet note that when questioned about his changed testimony on cross, he perjured himself again, stating: "I don't know exactly when I knew his cuffs were too tight, I knew that I knew in that yard in transit. I'm not saying that I knew up at the top in the vestibule." Id 604:1. Frustrated by his changed and perjured testimony, counsel finally asked him if he stood on his testimony from the previous day, to which he stated: "Yes, sir." Id 604:3-5. A close look at the testimony shows that it appears rehearsed and leading. Id 602:11-13.

In his motion for new trial, counsel addressed the DC for allowing Defendants to "re-hash" and "change their stories." App. F 7, Motion for New Trial, DOC 213, 9-11. No doubt the jury was confused by the contradictory and perjured testimony. For the DC to act in the manner that it did and warn the defendants that their theory was weak, that the jury could find in Stevenson's favor, and require them to continue to put on evidence, deprived Stevenson of neutrality, due process and a verdict in his favor.

It was said by this Court in Marshall v. Jerrico, Inc., 466 U.S. 238, 242 (1980) that:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concers of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process.
>
> The requirement of neutrality helps to guarantee that life, liberty or proerty will not be taken away on the basis of erroneous or distorted concepts of the facts or law. (citations omitted) At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done, by ensuring that no person will be deprived of his interest in the absence of a proceeding in which he may present his case with assurance that the arbitrator is not predisposed to find against him. The requirment of neutrality has been jealously guarded by this Court.

It strongly appears that it was the DC, not the presentation of Stevenson's case, that caused him to receive an adverse judgment. Had the DC not altered defendants, it is highly likely a verdict would have issued in his favor.

MATTERS OF GREAT PUBLIC IMPORTANCE

This is a matter of great public importance and exceptional circumstances exist that warrant this Court's discretion. Stevenson understands that the Court does not correct "every" lower court error, such as erroneous factual findings or failures to apply proper legal standards, but this case involves those matters and much more, and deserves this Court's review, as it did in Tolan v. Cotton, 134 S. Ct. 1861 (2014), where it agreed that summary judgment should not have been granted. As there, Stevenson too, requests the Court to intervene in his case because the opinion of the COA reflects a clear misapprehension of summary judgment and qualified immunity standards in light of this Court's precedent, and requires the Court's supervision.

If the Court does not grant review to guide the COA, it will mean that the Tenth Circuit and Circuits nationwide can misapprehend the summary judgment and qualified immunity standards and fail to credit the evidence of prisoners appearing pro se, but credit the evidence of correctional officers and grant summary judgment where such would not otherwise be granted. As found by Justice Sotomayor in Salazar-Limon v. City of Huston, Tx, 137 S. Ct 1277, 1282 (2017), the Court has not hesitated to summarily reverse court for wrongly denying "police officers the protection of qualified immunity in excessive force cases." (citations ommited). The Court should likewise not hesitate to do so in Stevenson's case, because again, if review is not granted, it will mean that lower courts will continue to discredit the evidence of pro se prisoners but credit the evidence of correctional officers. The failure to correct this error leaves in place a judgment that accepts the words of one party over the words of another.

Aside from these errors, the COA's decision conflicts with decisions of this Court and its own precedent relating to clearly established law, and rests on an erroneous view of clearly established law, on erroneous factual findings, the application of the wrong legal standard, the failure to conduct de novo review, and the knowing use of perjured testimony, all effecting due process and basic fairness.

Without guidance from this Court, the COA's decision is sending the wrong message (though unpublished, it can still be cited by courts and correctional officials alike, as persuasive authority), that correctional officers of the State of Colorado and elsewhere in the nation can use excessive force on a restrained prisoner and escape liability; that they can fabricate reports and minimize and hide injury; that they can stand by and watch other officers use excessive force and not intervene; that they can witness obvious risks of harm and neglect their affirmative constitutional duty to protect from harm; and that they can secure a jury verdict by means of perjury and get away with it.

This matter is also of great public importance because prisoners nationwide need to know that they can have trust and confidence in the institution of the federal courts to know that those who use unnecessary and wanton force on a restrained prisoner will be held accountable; that courts will not pass on finding whether a correctional officer used excessive force, as the DC did with Sullivan; and will not pass on finding whether officers were deliberately indifferent, as the DC did with Clinkinbeard, Espinoza and Williams.

As mentioned above, although the COA's decision is unpublished, it it nonetheless unofficially reported at **2016 U.S. Dis. WL 5701243 (D. Colo. 2016) and 2018 U.S. App. WL 2171179 (10th Cir. 2018)**, and avialable: (1) for correctional officers of this and other states to review and rely on in making use of force decisions relating to tasings, handcuffing and intervention; and (2) for citing as persuasive authority by courts, and by correctional officers in support of their claim, which may later arise dealing with the same or similar facts.

CONCLUSION

Stevenson requests the Court to grant his petition for certiorari and his motion for leave to proceed in forma pauperis and summarily reverse the judgment of the COA (or, if necessary, grant plenary review) and remand his case for further summary judgment proceedings and a new trial.

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