APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-14112

D.C. Docket No. 3:14-cv-02127-HLA-MCR

MATTHEW REID HINSON,

Plaintiff-Appellee,

v.

R.A. BIAS, OFFICER #61580,
B.K. KREMLER, OFFICER #64398,
S.T. WILLIAMS, OFFICER #64402,
Z.M. ANDERSON, OFFICER #67377,
ROB SCHOONOVER, OFFICER #6434,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(June 14, 2019)

[PUBLISH]

Before JORDAN, ROSENBAUM, and DUBINA, Circuit Judges.

ROSENBAUM, Circuit Judge:

For no apparent reason, Plaintiff-Appellee Matthew Hinson stabbed a man he did not know in the neck during a chance encounter at a pub. As the man laid on the ground bleeding to death, Hinson calmly

walked to the parking garage, got into his truck, and began to leave. But at the garage's checkout booth, Defendants-Appellants Jacksonville Sheriff's Office Officers caught up with him.

In this 28 U.S.C. § 1983 action, Hinson alleges that the Officers violated his Fourth Amendment rights by employing excessive force in effecting his arrest. He also asserts that the Officers transgressed his Eighth Amendment rights by being deliberately indifferent to medical needs he purportedly experienced as a result of the force inflicted during the arrest.

In support of his claims, Hinson relies on surveillance footage of the parking area, as well as his father's sworn interpretation of that same surveillance recording. For their part, the Officers deny that they used excessive force, and they support their version of the facts with their sworn statements recounting what happened during the arrest. In an interesting twist, they also rely on the same video recording as Hinson, in addition to Hinson's medical records.

But what looked at first like a tale of two stories turns out to be but a single one, uncontradicted in any material way by any admissible evidence in this case. And under that single rendition of the facts, the Officers here did not use excessive force to effect Hinson's arrest. Nor were they deliberately indifferent to Hinson's medical needs. For these reasons, the Officers are entitled to qualified immunity, and we vacate the district court's contrary conclusion.

I. Facts

A. The Stabbing

Though the day ended tragically, October 6, 2012, started out usually enough for Plaintiff-Appellee Matthew Hinson. He completed his shift as a cook at the Hyatt Regency in downtown Jacksonville at around 6:00 or 7:00 p.m. Then he went home, where his wife was, and watched the end of a football game. After that, Hinson went for a few hours to his friend's house down the road, where he had several beers. While he was there, Hinson's wife, who had since gone to Fionn MacCool's Irish Pub and Restaurant at the Jacksonville Landing, started calling and texting him to pick her up.

Hinson eventually left his friend's home and went over to Fionn MacCool's. But when he arrived at the restaurant, his wife was not yet ready to leave. So Hinson took a seat at the bar and had another beer or two.

At some point, Hinson encountered Chris Pettry, a man he had never previously met, in the restaurant. The trigger, if any, for what occurred next is unclear: Hinson grabbed his pocket knife, stabbed Pettry in the neck, and inflicted a four-inch laceration wound on one side of Pettry's throat. Pettry died soon after, as a result of this wound.

B. The Arrest

After stabbing Pettry, Hinson left Fionn MacCool's and headed for the parking garage. At the garage, Hinson got into his truck and drove to the checkout booth, where officers arrested him. Hinson testified that he remembered nothing at all about his

arrest after he put his hands up in response to officers' commands. So the sources of evidence concerning what happened during the arrest consist solely of the participating officers' statements and video surveillance footage.[1] We review them below.

1. The Officers' Statements

Defendants-Appellants Jacksonville Sheriff's Office ("JSO") Detective Z.M. Anderson and Officer B.K. Kremler responded to the scene after learning of the life-threatening stabbing. At the time, they knew of the suspect's description and whereabouts from a witness. Anderson and Kremler caught up with the suspect, who turned out to be Hinson, at the parking garage around midnight, as Hinson sat in his truck and tried to pay for his parking. According to Anderson, when he and Kremler approached Hinson's truck with their guns drawn, the engine was still on. Anderson saw Hinson, sitting in the truck. And he noted that Hinson matched the description of the suspect the officers had received.

Anderson and Kremler attested that Kremler instructed Hinson to put his hands up where the officers could see them. But, the officers stated,

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[1] James Hinson, Hinson's father, also provided an affidavit concerning the events of the arrest. But his statement was based solely on his interpretation of the video surveillance footage. As this evidence constitutes inadmissible hearsay, and the video footage itself provides the best evidence of what is on the video footage, we do not consider James Hinson's affidavit. *See* Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

Hinson did not comply. So Kremler continued to tell Hinson to put his hands up. Eventually, Hinson raised his left hand, but Kremler was unable to see Hinson's other hand. Finally, the officers reported, Hinson put both hands up.

While this was occurring, two more JSO officers arrived on the scene in response to a radio dispatch about the life-threatening stabbing. Defendant-Appellant Officer S.T. Williams first went to Fionn MacCool's, where he saw the victim lying in a pool of his own blood, apparently dead. Then Williams learned that Anderson and Kremler had found Hinson. So he went to the parking garage to see if he could be of assistance.

There, Williams met up with Defendant-Appellant Officer R.A. Bias, who had arrived at the garage and had run to the driver's door of Hinson's truck. Bias, too, drew his gun and pointed it at Hinson. He then commanded Hinson to keep his hands up and get out of the truck, facing away from Bias (for officer safety). Hinson did not respond, so Bias continued instructing Hinson to leave the truck. At some point, Bias opened the truck's door, and after some time passed, Hinson finally put one leg on the ground. Bias took Hinson's hand and extracted him from the truck.

As Bias and Hinson left the confined area between the truck and the checkout booth, Bias told Hinson to turn around and face away from him, so Bias could handcuff Hinson. Instead, Hinson continued moving towards Bias. Again, Bias commanded Hinson to stop and turn around. But Hinson again did not comply.

Anderson, who could see this occurring, attested that he then became concerned for Bias's safety, since

Bias no longer had his weapon drawn, Bias was significantly smaller in stature than Hinson, and the officers had no way of knowing whether Hinson was armed. So Anderson grabbed Hinson's wrist and shoulder and performed a police maneuver known as a "straight arm bar takedown." As a result, Hinson was in a prone position on the ground, next to the checkout booth.

Once Hinson was down, Bias stated, Bias attempted to handcuff him. Towards this end, Bias repeatedly instructed Hinson, whose hands were under him, to release his hands. But according to the officers, Hinson would not cooperate. Instead, Hinson struggled to keep his hands underneath his body.

Bias started to become concerned that Hinson might be trying to reach a weapon while his hands were under his body. So to induce compliance with Bias's directive to Hinson to produce his hands for handcuffing, Bias made "five or six hammer strikes"[2] to Hinson's upper-mid back area. In addition, Anderson gave one "pain compliance strike to Hinson's face" to obtain Hinson's cooperation. Hinson then

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[2] According to Bias, a hammer strike is a JSO-sanctioned striking technique used "to distract, incapacitate, or gain control of a subject who is on the ground and physically resisting police efforts to secure his hands and/or refusing to comply with lawful police commands such as 'put your hands behind your back.'" Bias explained that JSO officers are trained to stop applying striking techniques once the subject is secured or ceases resisting. Bias further asserted that such striking techniques are "in line with generally-recognized and accepted police practice in the United States and the State of Florida."

released his hands from underneath his body, and Bias handcuffed him.

The officers who viewed the arrest stated that once Hinson was handcuffed, no officer used further force against him, and all the officers denied using or seeing any other officer use a flashlight to administer the strikes or otherwise to hit Hinson. Nevertheless, Anderson, Bias, and Williams conceded that Hinson sustained abrasions to the skin on his left cheek, eye, and forehead, from the pavement, as a result of the officers' arrest efforts.

After Hinson was handcuffed, JSO Sergeant William Janes arrived on the scene. Janes attempted to get Hinson to stand, so he could place Hinson in his patrol car. According to Janes, however, Hinson refused to comply. Instead, Hinson fell to the ground. So Janes picked up Hinson, and Hinson then walked to Janes's patrol car on his own. Kremler and Williams attested that they saw these events, and while they were occurring, Hinson never lost consciousness. Along with Anderson, Bias, and Janes, Kremler and Williams also insisted that Hinson never requested medical attention and that they never perceived him as requiring it.

After officers secured Hinson in the patrol car, they found a large knife wedged between the driver's seat and the console inside Hinson's truck. Another knife laid on the ground by the driver's door. JSO later determined that the knife found on the ground next to the truck was the knife used to cut Pettry's throat earlier that evening.

Janes drove Hinson to the Police Memorial Building, where Janes turned Hinson over to homicide

detectives. At no point during the arrest was Defendant-Appellant JSO Lieutenant Rob Schoonover present.

2. The Video Recordings

The surveillance video taken at the checkout booth does not include audio. But to the extent that its limited view allows,[3] the video is, for the most part, not inconsistent with the officers' description of what occurred during the arrest.

It shows that while Hinson was at the checkout booth, Officers approached his truck with guns drawn and pointed them at Hinson in his truck. Roughly seven seconds later—enough time for officers to repeatedly instruct Hinson to put his hands up—Hinson put his left hand up and outside his truck's window.

At that time, Hinson dropped out the window what later turned out to be a knife. None of the Officers reported seeing Hinson drop the knife out the window. Anderson, however, attested that he saw a knife fall from Hinson's lap to the ground, when Hinson left the truck. Since only one knife was

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[3] For purposes of viewing the extraction of Hinson from his truck, perhaps the most useful angle of the surveillance video captured a bird's eye view of a portion of the driver's side of Hinson's truck and the edge of the checkout booth. The angle shows the officers' drawn guns in the opening between the truck and the checkout booth, but the view inside the truck is extremely limited because the video was positioned over the top of the truck's roof, so only a few inches of space inside the vehicle are visible. Because the surveillance system was equipped with a motion sensor that regulated when video was recorded, the surveillance video is not continuous and uninterrupted from every angle throughout the arrest.

recovered from the ground, the knife Anderson purported to see fall from Hinson's lap must have been the knife that Hinson actually dropped out the window. This is the one inconsistency between the video footage and the Officers' testimony that our review of the evidence reveals. As we discuss later, though, it does not concern a matter that is material to the granting of summary judgment here.

After Hinson dropped the knife out the window of his truck, he held his left hand up for about twelve seconds before reaching that hand back into the truck and out of the Officers' views. A couple of seconds later, Hinson again put his left hand outside the driver's window of his truck. Seven seconds after that, Hinson put both hands up and outside the driver's window. Again, these intervals would have permitted sufficient time for the Officers to have repeatedly instructed Hinson to put his hands up.

Roughly another thirty seconds passed before an officer opened the truck's door. This period also was more than enough time for Officers to have repeatedly instructed Hinson to leave the truck. Then another eight seconds went by, and Hinson put one foot outside the truck. After seven more seconds, an officer took Hinson's arm and pulled him from the truck. During the next several seconds, Hinson moved back in the direction of the officer who had his arm.

Suddenly, another Officer moved close to Hinson and took him down to the ground.[4] Once Hinson was

[4] The camera angle designated "overall" offers the best angle of footage for the events after the Officers removed Hinson from his truck. That is wide-angle footage taken from about 47 feet away from where the incident occurred. Unfortunately, however, the

on the ground facedown, an Officer straddled Hinson's back and appeared to reach down by the side of Hinson's body in a manner that would be consistent with trying to find Hinson's arms so he could cuff Hinson.

About seven seconds later, the same Officer struck Hinson on the back. Two seconds after that, the Officer again struck Hinson on the back. Another second went by, and the Officer struck Hinson on the back a third time. Then, a second later, another Officer struck Hinson in an area consistent with where Hinson's head would have been, had the view not been obstructed. Finally, after another second, the first Officer hit Hinson on the back a fourth and fifth time.

In the next second, that Officer began to sit up and to work with his hands behind Hinson's back. For the next about twenty seconds, the Officer engaged in activity consistent with cuffing Hinson, though the video is of such poor quality that even after reviewing it frame by frame, we cannot confirm with certainty precisely what the officer was doing. Nevertheless, the recording reflects nothing inconsistent with the Officers' statements concerning Hinson's takedown and cuffing, and it does not show that any Officer used a flashlight to hit Hinson.

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events after Hinson was taken to the ground occurred in large part behind what appears to be a two-to-three-foot sign resting on the ground. In addition, because the camera filmed only when triggered by the motion sensor, the video is interrupted by periods where no filming occurred. As a result of these circumstances, it is difficult to discern much detail from the video footage.

A little while after Hinson was cuffed, another Officer arrived and stood Hinson up. Hinson then fell down. While Hinson was on the ground, the Officer who had stood Hinson up used his foot to apparently tap Hinson's back. About nine seconds after Hinson fell to the ground, two Officers stood Hinson up again and placed him in the patrol car.

3. Hinson's Lack of Memory

As we have noted, Hinson repeatedly insisted at his deposition that he remembered absolutely nothing about his arrest, from the time that he put his hands up while sitting in his truck until he was in the back of the patrol car. In particular, Hinson denied having any memory concerning (1) the Officers' alleged instructions to him to open his door and leave the truck; (2) how he got out of the truck; (3) how handcuffs were put on him; (4) being struck in any way by any officer; (5) whether he resisted arrest in any way after he put his hands in the air; (6) what he did once he was prone on the ground after the takedown; (7) whether he offered his hands for handcuffing; and (8) walking to the patrol car. He further testified that even before he put his hands up, he could not understand what the Officers were saying to him. Finally, he explained that his "entire case rests on" the arrest video.

C. The Officers' Interview of Hinson

At the Police Memorial Building, JSO Detectives James Childers and Kevin Munger interviewed

Hinson. The evidence from the Officers' interviews[5] of Hinson comes from their sworn declarations, the sworn declaration of Schoonover, and a video recording of the interview. In addition, we recount what Hinson testified to concerning how his wounds felt during the interviews.

1. The Officers' Statements

We begin with the Officers' statements. Both Munger and Childers attested that though they observed abrasions to the left side of Hinson's face, Hinson did not appear to them at any time to be in distress or in need of immediate medical treatment. As Childers described the abrasions, they were "road[] rash," and they were not bleeding when he saw Hinson. Childers also asserted that Hinson never requested medical attention or claimed he was in pain during Childers's contacts with Hinson.

Schoonover, who supervised Childers and Munger, stated that he saw Hinson in the interview room where Munger and Childers were interviewing him. After noticing "minor abrasions" on Hinson's face, Schoonover asked the sergeant who was present about them. The sergeant advised Schoonover that Hinson was asked about his facial wounds and had responded that he was "okay." Schoonover explained that he then watched portions of Hinson's interview, and Hinson neither appeared to be in pain nor requested medical attention during the parts Schoonover saw.

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[5] The Officers interviewed Hinson twice. After Hinson's first interview had ended, Hinson asked to speak further with the Officers, so a second interview occurred.

2. The Video Recording of the Interviews

During the interviews, Hinson and the detectives discussed the abrasions on Hinson's face, though Hinson never complained that he was in pain or asked for medical attention. Childers also asked Hinson whether he was "all right," and Hinson responded that he was.

At some point, Hinson's wife was permitted to visit with him. During that time, the two discussed, among other things, the abrasions on Hinson's face. Hinson's wife repeatedly asked Hinson whether he was "okay." Despite these topics, Hinson never said he was not physically alright, never asked his wife for medical assistance, and never complained that he was in pain.

Our review of the video recordings confirmed that Hinson suffered abrasions to the left side of his face, though the wounds did not appear to be actively bleeding during the interviews. Nor did Hinson seem to be in physical pain or discomfort at any point in the interviews. Hinson also responded calmly and coherently to questions Childers and Munger asked him. At various times during the interview, Hinson rubbed and picked at the abrasions on his face without grimacing or displaying any pain. At other times, Hinson put his head in his hands or on the table—his abrasions making contact with both—and showed no signs of discomfort. Even when Hinson's wife met him in the interview room and wiped the abrasions on his face, Hinson did not react as if he were in pain or required medical attention.

3. Hinson's Testimony Concerning His Wounds

In contrast to his statements and conduct during his interviews, at his deposition, Hinson testified that during the interviews, he experienced "[a]ll types of pain" to his face and head. More specifically, Hinson claimed that he suffered "throbbing pain," "sharp pain," and "dull pain" and that his face and head were "sore to the touch." He characterized his pain as a 6 or 7 on a scale of 1 to 10. But he expressly denied feeling pain to any other parts of his body while he was in the interview room.

D. Hinson's Booking

When Hinson's interviews concluded, Munger and Childers took Hinson to the jail, where he was admitted. According to Childers, admission to the jail meant that the jail's medical staff determined that Hinson had no serious medical need. Had the medical staff reached the contrary conclusion, Childers explained, he would have been required to transport Hinson to the hospital.

Jacqulyne Phillips, a Certified Medical Assistant employed by the City of Jacksonville, was on duty at the jail when Hinson arrived for his medical screening on October 7, 2012. She created medical records of her evaluation. These records indicate, "No trauma identified." They further describe "[w]ound[s] observed" as follows: "[Hinson] has abrasions to his face, they are minor and not bleeding at this time. [Hinson] instructed to keep clean with soap and water." According to Phillips, Hinson denied having any pain when she asked him. Phillips also attested that Hinson did not appear to be in any pain. Overall, Phillips determined that Hinson was "not in need of

urgent medical attention," so she medically cleared him for admission to the jail. Hinson's jail medical records do not indicate that he complained of or was found to have suffered a concussion or any other type of traumatic head or brain injury on October 7, 2012.

E. Other Evidence

After October 7, 2012, Hinson's medical records reflect that his next medical visit occurred eleven days later, on October 18, when Hinson was given a "multiphasic screening exam." The record of that visit shows that medical staff identified no significant physical findings, including, among other things, specifically with respect to "[i]nspection[s]" of Hinson's abdomen and musculoskeletal system and for skin lesions.[6] Nor do Hinson's jail medical records indicate that he ever complained of any physical ailments that could have been related to the events of his arrest.[7] And though Hinson did report on January 28, 2013, that he was "HAVING SEVERE MANIC EPISODES OF DEPRESSION/ANXIETY LEADING TO LOSS OF APPETITE/SLEEP FOR 5-6 DAYS A WEEK," Hinson claimed in a February 5, 2013, medical visit to address that condition that he suffered from post-traumatic stress disorder, which he attributed to his prior Naval service.[8]

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[6] The examining professional did describe Hinson's mood and affect as "[a]bnormal ([p]oor eye contact)."

[7] Hinson did report a clearly unrelated physical ailment: on April 3, 2013, and after that, he was treated for a break to bones in his right hand, following a fight at the jail.

[8] The records from that medical visit state that Hinson reported "symptoms of mood[] swings and sleep disturbance since his service time in the Navy" and that he advised the health

In addition to Hinson's jail medical records, the Officers also submitted a sworn declaration from Valerie Rao, M.D. Dr. Rao, a medical doctor and board-certified forensic pathologist, licensed by the State of Florida, attested that, among other items, she reviewed photographs of Hinson's injuries taken immediately after his arrest, Hinson's booking photographs, the video recording of Hinson's JSO interview, and Hinson's jail medical records. Based on her review, Dr. Rao opined that "the injuries sustained by Hinson during the course of his arrest on 10/7/2012 (minor abrasions to the left side of his face) were merely superficial and non-life threatening," and they "did not require medical attention." She further asserted that "[t]he abrasions [were] not consistent with being punched, kicked, or beaten with a flashlight or [with] knee strikes."

Finally, we turn to Hinson's deposition. During his deposition, Hinson discussed his sense of hearing. He explained that the Veterans Administration had diagnosed him with hearing loss. According to Hinson, he experienced hearing loss in both ears as a result of his Naval service. Hinson noted that he had slept over the torpedo tube, where "it was very loud, . . . one of the loudest things that [he had] experienced constantly." In addition, Hinson complained of ringing in his ears. And while Hinson was not willing to rule

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professional at the jail that he was a "disabled veteran" and "fe[lt] like people [were] plotting on [him] all the . . . time." He explained that he had witnessed "dramatic events and casualties, death, suicides" during his time in the Navy. The records do not indicate that he mentioned his October 7, 2012, arrest experience when he discussed his mental-health concerns.

out other contributors to his hearing problems, he did not identify any possible reasons for it other than his Naval service.

II. Procedural History

Hinson filed a *pro se* action under 42 U.S.C. § 1983 against Bias, Anderson, Kremler, Williams, and Schoonover (collectively, the "Officers"). In a verified complaint, he alleged that the Officers each violated his Fourth Amendment right against the use of excessive force and his Eighth Amendment right to be free from deliberate indifference to medical needs.

In support of his Fourth Amendment claim, as relevant to Hinson's appeal, Hinson alleged that Bias removed him from his truck and "SLAMMED HIM ON THE GROUND." Compl. at 6. He further contended that after the Officers handcuffed him, Bias and Anderson "ASSAULT[ed] [him] FOR NO JUST CAUSE." *Id.* In particular, Hinson averred that they "REPEATEDLY BEAT[] [him] WITH FLASHLIGHTS AND KICKED [him] . . . WHILE [he was] IN HANDCUFF[]S AND LAYING ON HIS STOMACH." *Id.* at 7. In addition, Hinson complained that Kremler and Williams, who were present at the scene but not participating in the alleged beating, failed to intervene to stop it. *Id.* at 5. Despite these allegations, Hinson conceded in the complaint that he "[did] NOT REMEMBER THE MAJORITY OF THE DEFENDANTS[‘] ASSAULT," though he asserted that circumstance was attributable to having been "KNOCKED UNCON[S]CIOUS FROM THE DEFENDANTS[‘] EXCESSIVE USE OF FORCE." *Id.* at 7.

As a result of this alleged violation, Hinson averred, he "SUFFERED MULTIPLE LACERATIONS, BRUISES AND SWELLING ON THE SIDE OF HIS FACE AND UPPER PARTS OF HIS BODY. [He] ALSO SUFFERED INJURIES TO HIS EAR AND NOW HAS CHRONIC MIGRAINES . . . ." *Id.*

As for Hinson's Eighth Amendment claim, Hinson asserted that he "WAS BLEEDING FROM THE SIDE OF HIS FACE AND NEED[ed] MEDICAL ATTENTION." *Id.* According to the complaint, Hinson "NEED[ed] OBVIOUS MEDICAL CARE." *Id.* And because he did not receive it, Hinson contended, he "SUFFERED FURTHER INJURY AND PHYSICAL, EMOTIONAL AND P[]SYCHOLOGICAL PAIN AND INJURY." *Id.*

As relief for these alleged violations, Hinson sought, among other remedies, "A SUM TOTAL NO LESS THAN 4.5 MILLION DOLLARS." *Id.* at 9.

Following discovery, the Officers filed summary-judgment motions, invoking qualified immunity. After Hinson responded, the district court granted Schoonover's motion as it concerned Hinson's Fourth Amendment claim, since Schoonover was not present for the arrest and therefore could not have intervened. But the district court denied the Officers' summary-judgment motions in all other respects, concluding that material issues of fact existed, so the Officers were not entitled to qualified immunity.

The Officers now appeal.

III. Standard of Review

We review *de novo* district-court orders on summary judgment, taking the facts in the best light to the nonmoving party and drawing all reasonable inferences in that party's favor. *Glasscox v. City of Argo*, 903 F.3d 1207, 1212 (11th Cir. 2018). But while all reasonable inferences must be drawn in favor of the nonmoving party, "an inference based on speculation and conjecture is not reasonable." *Hammett v. Paulding Cty.*, 875 F.3d 1036, 1049 (11th Cir. 2017) (citation and internal quotation marks omitted).

Summary judgment should be granted only if the evidence of record yields no genuine dispute of material fact, and the moving party is entitled on the undisputed material facts to judgment as a matter of law. Fed. R. Civ. P. 56(a). Yet a "mere scintilla of evidence" cannot suffice to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Rather, the nonmoving party must present enough evidence to allow a jury to reasonably find in its favor. *Id.*

When a party properly supports a motion for summary judgment, the nonmoving party must come forward with "concrete evidence from which a reasonable juror could return a verdict in his favor." *Id.* at 256. It is not enough for the nonmoving party to "merely assert[] that the jury might, and legally could, disbelieve" the moving party's evidence. *Id.* Instead, the nonmoving party must present "affirmative evidence" that would allow a reasonable jury to rule for him. *Id.* at 257.

IV. Discussion

As we have noted, Hinson lodged a claim for excessive force under the Fourth Amendment and a claim for deliberate indifference to medical needs under the Eighth Amendment against Defendant Officers. In their motions for summary judgment, Defendant Officers invoked qualified immunity.

The qualified-immunity doctrine seeks to balance "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." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). To resolve this balance, the doctrine protects government officials engaged in discretionary functions and sued in their individual capacities unless they violate "clearly established federal statutory or constitutional rights of which a reasonable person would have known." *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010) (quotation marks and brackets omitted).

We have explained that qualified immunity shields from liability "all but the plainly incompetent or one who is knowingly violating the federal law." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (citation omitted). Nevertheless, the doctrine's protections do not cover an officer who "knew or reasonably should have known" that his actions taken under color of law would violate the plaintiff's constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (internal quotation marks and alteration omitted).

To invoke qualified immunity, a public official must first demonstrate that he was acting within the scope of his or her discretionary authority. *Maddox v. Stephens*, 727 F.3d 1109, 1120 (11th Cir. 2013). The term "discretionary authority" covers "all actions of a governmental official that (1) were undertaken pursuant to the performance of his duties, and (2) were within the scope of his authority." *Jordan v. Doe*, 38 F.3d 1559, 1566 (11th Cir. 1994) (internal quotation marks omitted). Here, Defendant Officers readily satisfied this requirement, as they undertook all the challenged actions while on duty as police officers conducting arrest and investigative functions.

Because Defendant Officers have established that they were acting within the scope of their discretionary authority, the burden shifts to Hinson to demonstrate that qualified immunity is inappropriate. *See id.* To do that, Hinson must show that, when viewed in the light most favorable to him, the facts demonstrate (1) that Defendant Officers violated Hinson's constitutional right and (2) that that right was "clearly established . . . in light of the specific context of the case, not as a broad general proposition[,]" at the time of Defendant Officers' actions. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part on other grounds by Pearson*, 555 U.S. 223. We may decide these issues in either order, but to survive a qualified-immunity defense, Hinson must satisfy both showings. *Maddox*, 727 F.3d at 1120-21 (citation omitted).

A. Defendant Officers are entitled to qualified immunity on Hinson's Fourth Amendment excessive-force claim

We begin by considering whether the Officers violated Hinson's Fourth Amendment right to be free from the use of excessive force. As relevant here, the Fourth Amendment protects against "unreasonable . . . seizures." U.S. Const. amend. IV. The use of excessive force in executing an arrest is a species of unreasonable seizure, so the Fourth Amendment prohibits it. *See Lee*, 284 F.3d at 1197.

Here, Hinson has challenged the actions of both the Officers who participated in taking him to the ground and striking him and the Officers who were present but did not participate in the use of force. If the participating Officers violated Hinson's rights and the non-participating Officers were in a position to take reasonable steps to protect Hinson but did not, the non-participating Officers are equally liable as the participating ones, based on their nonfeasance. *Crenshaw v. Lister*, 556 F.3d 1283m 1293-94 (11th Cir. 2009) (per curiam).

The Fourth Amendment's "objective reasonableness" standard governs our inquiry. *Crenshaw*, 556 F.3d at 1290 (citation omitted). Under this standard, we must consider "whether the officer's conduct is objectively reasonable in light of the facts confronting the officer." *Id.* (quoting *Vinyard v. Wilson*, 311 F.3d 1340, 1347 (11th Cir. 2002)) (internal quotation marks omitted). When we conduct our analysis, we must do so "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *id.* (quoting *Graham v.*

Connor, 490 U.S. 386, 396 (1989)) (internal quotation marks omitted), and we acknowledge that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396 (citation omitted).

In applying this standard, we carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Crenshaw*, 556 F.3d at 1290 (quoting *Graham*, 490 U.S. at 396) (internal quotation marks omitted). We have explained that "the amount of force used by an officer in seizing and arresting a suspect must be reasonably proportionate to the need for that force." *Stephens v. DeGiovanni*, 852 F.3d 1298, 1324 (11th Cir. 2017) (cleaned up). Factors we account for in making this assessment include (1) the severity of the crime; (2) whether the individual "poses an immediate threat to the safety of the officers or others," *Crenshaw*, 556 F.3d at 1290 (quoting *Graham*, 490 U.S.at 396)(quotation marks omitted);(3) whether the individual actively resists or tries to evade arrest by flight, *id.*; (4) the need for force to be applied; (5) the amount of force applied in light of the nature of the need; and (6) the severity of the injury.[9]

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[9] At times in our caselaw, we have identified another factor: whether officers applied force "in good faith or [rather did so] maliciously and sadistically." *Hadley v. Gutierrez*, 526 F.3d 1324,1329 (11th Cir. 2008)). As we explained in *Mobley v. Palm Beach County Sheriff Department*, 783 F.3d 1347, 1354 (11th Cir. 2015), however, that caselaw is not correct. Because the test we apply asks whether an officer's actions in using force were

We have further elaborated on some of these factors. For example, "[t]he nature and extent of physical injuries sustained by a plaintiff" can be relevant in evaluating "whether the amount and type of force used by the arresting officer were excessive." *Stephens*, 852 F.3d at 1325 (emphasis omitted). Nevertheless, we have cautioned that "[w]hen more force is required to effect an arrest without endangering officer safety, the suspect will likely suffer more severe injury, but that alone does not make the use of that amount of force unreasonable." *Mobley v. Palm Beach Cty. Sheriff Dep't*, 783 F.3d 1347, 1356 (11th Cir. 2015) (per curiam).

1. The Applicable Facts

We now consider these principles in light of the facts before us. But before we can analyze whether the force used here was excessive under the Fourth Amendment, we must first identify the facts to which we apply our analysis. Here, Hinson himself remembers nothing about the arrest,[10] and no witnesses other than the Officers have filed statements concerning the arrest.

Hinson complains that the Officers employed excessive force in three ways: they "SLAMMED HIM TO THE GROUND"; they "REPEATEDLY BEAT[] [him] WITH FLASHLIGHTS"; and they kicked him "WHILE [he was] IN HANDCUFF[]S AND LAYING

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objectively reasonable, the test is not a subjective one. *Id.* So we do not consider an officer's subjective intent in applying force. *Id.*

[10] According to Hinson's recorded post-arrest interview statements, he also remembers nothing about the murder earlier that evening.

ON HIS STOMACH." Hinson also alleges in his complaint that he cannot recall what the Officers did during the arrest because he was "KNOCKED UNCONSCIOUS FROM THE DEFENDANTS[']EXCESSIVE USE OF FORCE."

As we have noted, we view all facts and draw all reasonable inferences in favor of the non-moving party when reviewing a summary-judgment ruling. *Glasscox*, 903 F.3d at 1212. This means that we normally take as true the testimony of the non-moving party and adopt his version of the facts in a qualified-immunity case. *See Beshers v. Harrison*, 495 F.3d 1260, 1262 n.1 (11th Cir. 2007) (citing *Scott v. Harris*, 550 U.S. 372 (2007)).

But here, we cannot do that since Hinson admits that he has no memory of any events after he placed his hands up while sitting inside his truck. Of course, we would not want to reward an officer for unlawfully engaging in actions that rendered the arrestee unable to rebut the officer's version of events. So, that Hinson cannot personally rebut the Officers' story does not mean that we must necessarily accept the Officers' version of events. *Flythe v. District of Columbia*, 791 F.3d 13, 19 (D.C. Cir. 2015). Rather, we must "carefully examine all the evidence in the record . . . to determine whether the officer's story is internally consistent and consistent with other known facts." *Id.* (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)) (quotation marks omitted). Where circumstantial or other evidence, if believed, "would tend to discredit the police officer's story," or where such evidence "could convince a rational factfinder that the officer acted unreasonably," we do not simply

accept the officer's account. *Id.* (quoting *Henrich*, 39 F.3d at 915) (quotation marks omitted). Instead, where the circumstantial evidence supports a dispute of material fact, we must conclude that summary judgment is inappropriate and allow the case to proceed to trial. *See id.* (collecting cases).

Here, the other evidence consists of the video footage, Hinson's medical records, and Hinson's deposition testimony. So if sufficient evidence exists for Hinson to withstand summary judgment on the Fourth Amendment qualified-immunity inquiry, it must come from those sources or inconsistencies in the Officers' testimony. *See Fennell v. Gilstrap*, 559 F.3d 1212, 1214 & n.1 (11th Cir. 2009) (where plaintiff did not remember what occurred during his arrest or while at police station, the court looked to statements of police officers and relevant surveillance video).

We begin with the video recording. It reflects that Anderson did indeed take Hinson to the ground. But it does not show that Bias or Anderson beat Hinson with a flashlight or that they kicked him. Indisputably, Bias struck Hinson five times, and Anderson struck him once. But each Officer used his fist to inflict the strikes. And one Officer did inexplicably touch the front of his shoe to Hinson's back while Hinson was on the ground, but the recording does not, by any measure, show a kick. Nor does the medical evidence provide any indication that an Officer beat Hinson with a flashlight or kicked Hinson in the back. Indeed, the record contains no evidence that Hinson suffered a cracked skull, cracked or broken bones, or even bruises in the areas where he was allegedly beaten with a flashlight and kicked in

the back. It is difficult to conceive of how strikes to the body and head with a flashlight or a kick to the back would not leave a mark.

Since the record lacks evidence of flashlight strikes or kicks, the allegedly excessive acts we must evaluate consist of Anderson's takedown of Hinson, Bias's five fist strikes of Hinson, and Anderson's single fist strike of Hinson. Significantly, though, in evaluating the Officers' actions, we must accept as true all evidence the Officers have submitted that Hinson does not contest and that Hinson's evidence—the video recording and medical records—does not contradict. *See Beshers*, 495 F.3d at 1262 n.1 (citing *Scott*, 550 U.S. at 372). We also do not accept Hinson's version of events where the video recordings flatly contradict them. *See Id.* ("[T]o the extent [a party's] version of the facts is clearly contradicted by [video recordings], such that no reasonable jury could believe it, we do not adopt [that party's] factual allegations.")).

So here, these rules mean we must credit the Officers' statements that Hinson repeatedly ignored their instructions to put his hands up, to keep his hands up, to leave his truck, to stop moving towards the officer behind him after he got out of his truck, and to release his hands from underneath him so an officer could restrain them in handcuffs. As we have noted, though the surveillance video lacks audio, the time stamp on the video shows that more than ample time passed between the Officers' alleged commands to Hinson and either Hinson's eventual responses or the Officers' resulting actions for Officers to have repeatedly given Hinson the instructions to which they all attested, in the interlude. Plus, Hinson does

not assert that the Officers did not so instruct him or that he cooperated. And we likewise have found nothing in the record to suggest that the Officers did not direct Hinson in the manner they claim or that Hinson did not fail to comply. So based on the uncontroverted video evidence and Officers' statements, we must assume that the Officers did so instruct Hinson and that Hinson did not initially comply.

As for whether the Officers knocked Hinson unconscious in the course of the force they applied, we cannot tell either way from looking at the video. Nevertheless, the Officers did not attest that they did not knock him unconscious. So since we are reviewing Hinson's case on the Officers' motion for summary judgment, we will assume without deciding that they did.

2. Application of the Fourth Amendment Factors

Having identified the universe of facts on summary judgment, we must apply the six Fourth Amendment excessive-force factors. Here, the crime was extremely serious: a man had just been knifed to death, apparently without provocation. The Officers also observed blood on Hinson's hands and shirt, which tended to corroborate the idea that Hinson was the one who had stabbed the victim. In addition, Hinson matched the physical description of the suspect that a witness had provided.

And when Officers encountered Hinson, they had every reason to believe he was still armed. Even if the Officers saw or heard Hinson drop a knife out his front window, they had no way of knowing whether he had

other weapons inside the truck with him.[11] (As it turned out, Hinson did have another knife inside the truck, tucked between his seat and the center console.). Hinson was also in a functioning vehicle. Particularly in light of his erratic behavior at Fionn MacCool's, the Officers reasonably believed that Hinson posed a substantial and immediate threat to their safety and that of others. Notably, Hinson had also repeatedly failed to comply with nearly all of the Officers' simple instructions, making him seem even more unpredictable to a reasonable officer. On these facts, a reasonable officer could feel a compelling need to apply force to obtain control of Hinson and ensure he did not hurt himself, the Officers, or others.

As for the proportionality of the force to the need for it, we first consider Anderson's takedown of Hinson. As we have noted, immediately before Anderson took Hinson to the ground, Hinson failed to comply with the Officers' instructions to stop moving back towards Bias. And he did this after repeatedly ignoring the Officers' prior instructions to put his hands up, to keep them up, and to exit the truck. So

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[11] The fact that Anderson attested that the knife dropped from Hinson's lap when, in reality, Hinson dropped the knife out his window could perhaps, on a different record, allow a reasonable jury to conclude that Anderson had lied, and if he had lied about that, that he had lied about other things. But here, there is nothing to support Hinson's version of the facts concerning his arrest, and whether the knife was dropped out the window or dropped from Hinson's lap makes no difference to the reasonableness of the Officers' decisions during the course of Hinson's arrest. Therefore, this one inconsistency between the Officers' statements and the video recording of the arrest cannot save Hinson from summary judgment.

the Officers were faced with a man who had just apparently slashed the victim in the throat without provocation; they had no way of knowing whether he remained armed; they had just seen him fail repeatedly to comply with their instructions; and in violation of the Officers' instructions, he was moving towards an unarmed Officer who was already in close proximity to him. Under these circumstances, a reasonable officer could conclude that the amount of force Anderson applied in taking Hinson to the ground was appropriate, in light of the need to prevent what reasonably could have appeared to be imminent harm to Bias, since Hinson continued to move towards him.

We now turn to the strikes the Officers inflicted on Hinson while he was on the ground. According to the Officers' uncontradicted attestations, Bias was straddling Hinson, trying to handcuff him. Bias repeatedly instructed Hinson to give Bias his hands, and Hinson once again failed to comply. So, Bias explained, he became concerned that Hinson was trying to get a weapon while his hands were under his body. To avert that from possibility, Bias inflicted hammer strikes to Hinson's body, along with interceding repeated instructions to Hinson to make his hands available to Bias for cuffing. After the third such strike, when Hinson was continuing to ignore Bias's instructions, Anderson used a "pain-compliance" hand strike to Hinson's head in an effort to obtain compliance. As soon as Hinson gave his hands to Bias, no further blows occurred.

Once again, in the situation confronting the Officers, the Officers knew that for no apparent reason, Hinson had just stabbed the victim in the

throat; they had no way to be sure he was not still armed at the time; he had repeatedly failed to comply with their instructions; and it seemed like he may have been trying to get his hands on a weapon while Bias was trying to cuff him. Under these circumstances, we cannot say that the fist blows the Officers used to get Hinson to follow the instructions to produce his hands for cuffing inflicted an unreasonable amount of force in light of the need to maintain the safety of Officers and others.

And this is particularly true when we consider the last Fourth Amendment excessive-force factor: the severity of the injuries. Here, photographic evidence shows abrasions around Hinson's left eye and forehead, as well as a small bruise on the part of Hinson's right knee that abutted the ground while Bias tried to handcuff him. Hinson's medical records from his admission to the jail reflect nothing further and describe Hinson's abrasions as "minor and not bleeding" at that time. And Dr. Rao opined that Hinson's only injuries were "merely superficial and non-life threatening" and "not consistent with being punched, kicked, or beaten with a flashlight . . . ." Hinson's jail medical records also show that Hinson's injuries healed soon after his admission to the jail.

When we account for all of the Fourth Amendment excessive-force factors, then, we must conclude that the Officers' conduct in taking Hinson to the ground and fist-striking him were objectively reasonable uses of force on this record. As a result, the Officers did not violate Hinson's Fourth Amendment right to be free from the use of excessive force in securing his arrest. Since Hinson cannot show a

violation of his Fourth Amendment right, the Officers are entitled to qualified immunity on Hinson's Fourth Amendment claim.

And since no Fourth Amendment violation was established, the Officers who allegedly failed to intervene to stop the use of force in Hinson's arrest are also entitled to qualified immunity.

B. Defendant Officers are entitled to qualified immunity on Hinson's Eighth Amendment claim of deliberate indifference to medical need.

In evaluating whether the Officers are entitled to qualified immunity on Hinson's Eighth Amendment claim of deliberate indifference to medical needs, we again begin our analysis by determining whether Hinson established that the Officers committed an Eighth Amendment violation.

Among other functions, the Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. amend VIII. Deliberate indifference of a medical need violates the Eighth Amendment because it amounts to "the unnecessary and wanton infliction of pain. . . ." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (cleaned up). To set out a claim for deliberate indifference to medical need, Hinson must make three showings: (1) he had a serious medical need; (2) the Officers were deliberately indifferent to that need; and (3) the Officers' deliberate indifference and Hinson's injury were causally related. *Taylor v. Hughes*, 920 F.3d 729, 733 (11th Cir. 2019).

We have explained that a "serious medical need" is an injury or condition that a physician has diagnosed as requiring treatment or that "is so obvious that even a lay person would easily recognize the

necessity for a doctor's attention." *Id.* (cleaned up). To qualify as a "serious medical need," an injury or condition, if not treated, must create a "substantial risk of serious harm." *Id.* (cleaned up). For example, we have concluded that a freely bleeding cut that created a pool of blood on the ground and required stitches presented a serious medical need. *See Aldridge v. Montgomery*, 753 F.2d 970, 972-73 (11th Cir. 1985) (per curiam). We have also found broken bones to constitute a serious medical need. *Brown v. Hughes*, 894 F.2d 1533, 1538-39 (11th Cir. 1990) (per curiam). And depending on the circumstances, severe pain that is not promptly or adequately treated can present a serious medical need. *McElligott v. Foley*, 182 F.3d 1248, 1255-59 (11th Cir. 1999).

Here, Hinson's claim fails at the first step. Hinson has not identified evidence establishing a serious medical need constitutionally requiring more prompt treatment than Hinson received. As we have noted, Hinson unfortunately experienced skin abrasions on his face and a bruise on his knee. But Childers attested that when he interviewed Hinson at the police station following Hinson's arrest, Hinson was not actively bleeding. The video recording of Hinson's interview appears to corroborate Childers's assessment. And when Childers asked Hinson whether he was "alright," Hinson responded that he was.

Similarly, when Hinson's wife visited, although the two discussed his abrasions, Hinson never said he was not physically alright, never asked for medical assistance, and never complained he was in pain. Nor does the video recording of Hinson's interaction with

his wife suggest in any way that Hinson was in pain or even uncomfortable. Rather, the video shows Hinson's wife wiping at the abrasions without any complaint by Hinson. Other video footage shows Hinson repeatedly touching and picking at his wounds without any indication of pain.

Hinson's jail medical records also do not reflect he presented with a serious medical need. The health professional who screened Hinson when he was admitted to the jail indicated "[n]o trauma identified" and described Hinson's wounds as "minor and not bleeding at this time." As treatment, she directed only that he keep the wounds clean, using soap and water. And she reported that Hinson denied having any pain when she asked him.

Finally, as we have noted, after reviewing Hinson's records and the video recording of Hinson's interview, Dr. Rao concluded that Hinson's wounds "were merely superficial and non-life threatening" and that they "did not require medical attention."

To be sure, Hinson testified during his deposition that he suffered "throbbing pain," "sharp pain," and "dull pain" and that his face and head were "sore to the touch." But Hinson never did anything during the interview to convey those feelings to the Officers who questioned him or to anyone else. On the contrary, when asked specifically if he was "alright" and "okay" and if he had any pain, he never indicated he was in pain or distress in any way. For this reason, and because Hinson did not exhibit an injury or condition that was "so obvious that even a lay person would easily recognize the necessity for a doctor's attention,"

he has not established that he had a serious need that required medical attention.

And even if Hinson could somehow get past the serious-medical-need element, he has not shown that any failure to treat or delay in treatment of any injuries he experienced during his arrest caused further injury or worsened his condition. True, Hinson asserted in his Complaint that he "SUFFERED INJURIES TO HIS EAR AND NOW HAS CHRONIC MIGRAINES" and that, because he did not receive necessary and timely treatment for the injuries inflicted during his arrest, he "SUFFERED FURTHER INJURY AND PHYSICAL, EMOTIONAL P[]SYCHOLOGICAL PAIN AND INJURY."

But during his deposition, Hinson identified only his prior Naval service as a cause of his hearing condition, chalking up the ringing in his ears and his hearing loss to having slept over the torpedo tube on the submarine where he served. Nor did Hinson present any medical evidence suggesting a link between the delay of treatment for any injuries he experienced during his arrest, on the one hand, and his ear-related problems, on the other.

Similarly, Hinson's jail medical records reflect that Hinson claimed in a February 5, 2013, mental-health-related medical visit that he suffered from post-traumatic stress disorder, which he attributed to his prior Naval service. As with the hearing issues, Hinson presented no evidence suggesting that any delay of treatment for any injuries he suffered during his arrest affected his mental health.

So Hinson's deliberate-indifference claim fails independently for the reason that he did not satisfy

the causation requirement. Because the record does not support the conclusion that Hinson suffered a violation of his Eighth Amendment right to be free from deliberate indifference to a medical need, the Officers are entitled to qualified immunity on this claim.

V. Conclusion

At the end of the day, the proof is in the video recordings in this case. Or more accurately, the proof of Hinson's case is not in the video recordings here. Those video recordings simply do not, in any material way, contradict the Officers' version of what occurred during and after Hinson's arrest. Based on those facts, we cannot conclude that the Officers violated either Hinson's Fourth Amendment right to be free from the use of excessive force in effecting an arrest or his Eighth Amendment right to be free from deliberate indifference to medical needs. For these reasons, the Officers are entitled to qualified immunity, and the order of the district court must be vacated.

VACATED AND REMANDED.

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 3:14-cv-1217-J-25MCR

MATTHEW REID HINSON,

Plaintiff,

v.

R.A. BIAS, ETC.; ET AL.,

Defendants.

May 24, 2016

ORDER

I. Status

Plaintiff, proceeding on a civil rights Complaint (Doc. 1),[1] asserts that his rights under the Fourth and Eighth Amendments were violated. Complaint at 5. He states police officers used excessive force against him on October 7, 2012, during an arrest. *Id.* at 5-6. He alleges that Officers Bias, Kremler, Williams, and Anderson were involved in the arrest, however, Plaintiff is unsure of which officers were involved in the actual takedown and handcuffing procedure. *Id.* at 6. Plaintiff states that according to the arrest report, Officers Bias, Kremler, Williams, and Anderson took

[1] With respect to the Complaint, the Court references the page numbers assigned by the electronic filing system.

part in the arrest, and Defendant Schoonover was the lead supervisor at the scene of the arrest.[2] *Id.*

Plaintiff alleges that one of the officers took him out of his truck, slammed him to the ground, and placed handcuffs on him while he lay face-first on the ground. *Id.* Plaintiff further alleges that once he was handcuffed, officers assaulted him without provocation or just cause. *Id.* He contends that he was repeatedly beaten with flashlights and kicked, in violation of the Fourth Amendment. *Id.* at 7. He also states that some officers failed to intervene. *Id.* at 5. Plaintiff states that as a result of this alleged beating, he suffered multiple lacerations, bruises, and swelling on the side of his face and upper parts of his body. *Id.* at 7. He also states that he suffered injuries to his ear and now suffers from chronic migraines. *Id.* Plaintiff believes that he was knocked unconscious and does not remember the assault upon him. *Id.* He alleges that Defendant Schoonover, "the apparent supervisor at the scene," failed to take any action to stop the violation. *Id.*

Plaintiff contends that all of the Defendants were deliberately indifferent to his medical needs as he was bleeding from the side of his face and needed medical attention. *Id.* Plaintiff states that he was deprived of any medical treatment despite his obvious need for medical care. *Id.* Plaintiff asserts that the Defendants' failures in this regard resulted in Plaintiff suffering further injury and physical and emotional pain. *Id.*

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[2] The Clerk of the Court shall correct Defendant Rob Schnoover's surname to Schoonover.

Plaintiff seeks declaratory relief finding the Defendants violated his Fourth and Eighth Amendment rights when they used excessive force and failed to provide him with medical care.[4] *Id.* at 9. He also seeks compensatory and punitive damages against each Defendant. *Id.*

This cause is before the Court on a Motion by Defendants, Anderson and Bias, for Final Summary Judgment (Doc. 41) and a Motion by Defendants Kremler, Williams, and Schoonover for Final Summary Judgment (Doc. 42).[5] Jointly, Defendants filed a Notice of Filing Exhibits in Support of Their Respective Motions for Summary Judgment (Doc. 39), a Supplemental Notice of Filing Documents and Exhibits in Support of Their Respective Motions for Summary Judgment (Doc. 40), a Notice of Filing Corrected Exhibit [Docket No. 39-9) [Exhibit 9,

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[4] Plaintiff raises two claims in his Statement of Claim:

> 1) United States Constitution Amendment Four excessive use of force, deprivation of good name, police brutality, failure to intervene[;]
>
> 2) United States Constitution Amendment Eight cruel and unusual punishment through deliberate indifference to medical needs after police brutality[.]

Complaint at 5.

[5] The Court advised Plaintiff of the provisions of Fed. R. Civ. P. 56, notified him that the granting of a motion to dismiss or a motion for summary judgment would represent a final adjudication of this case which may foreclose subsequent litigation on the matter, and gave him an opportunity to respond (Doc. 14).

Declaration of Janice G. Lowe, signed] (Doc. 50), and a Notice of Supplemental Authority (Doc. 52).[6]

On November 30, 2015, Plaintiff filed his Response to Defendants Anderson's and Bias' Motion for Summary Judgment (Doc. 54) and his Response to Defendants Kremler's, Williams', and Schoonover's Motion for Summary Judgment (Doc. 55). He also filed Plaintiff's Notice of Filing Exhibits in Support of his Respective Response to Defendants' Motions for Summary Judgment (Doc. 56).[7] In addition, Plaintiff submitted a Response to Defendants' Notice of Supplemental Authority (Doc. 62).

Defendants were granted leave to file a reply, and they filed a Reply to Plaintiff's Response to Defendants' Motion for Final Summary Judgment (Doc. 66). The Court also granted Plaintiff leave to file a traverse, and he filed his Traverse to Defendants' Reply (Doc. 68).

The Court has thoroughly reviewed all of the submitted exhibits and viewed the video footage provided to the Court by the parties.[5] Based on the record before the Court, the Court is not convinced that all of the Defendants have met their burden under the summary judgment standard on all of the claims raised in the Complaint.

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[6] The Court hereinafter refers to Defendants' Exhibits as "Defendants' Exhibit."

[7] The Court hereinafter refers to Plaintiff's Exhibits as "Plaintiff's Exhibit."

[5] The Court also reviewed the video referenced by Plaintiff in his Response (Doc. 55) at 5. *See* http://www.news4jax.com/HinsonDefense-looking-into-evidence/l9277332.

II. Summary Judgment Standard

"Summary judgment is appropriate only if 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Moton v. Cowart*, 631 F.3d 1337, 1341 (11th Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). "If the moving party meets this burden, 'the nonmoving party must present evidence beyond the pleadings showing that a reasonable jury could find in its favor.'" *Ekokotu v. Federal Exp. Corp.*, 408 F. App'x 331, 333 (11th Cir.) (per curiam) (quoting *Fickling v. United States*, 507 F.3d 1302, 1304 (11th Cir. 2007)), cert. denied, 132 S.Ct. 420 (2011).

III. Excessive Force

Plaintiff references the Fourth Amendment in his Complaint, and "[p]roperly analyzed, the basis for his § 1983 claim of excessive force comes under the rubric of the Fourth Amendment . . . ." *Jones v.* Marcum, 197 F.Supp.2d 991, 998 (S.D. Ohio 2002). The Court must employ the Fourth Amendment's "reasonableness" standard. *Id.* (citation omitted). Further, it must be recognized that some degree of force is constitutionally acceptable when a police officer is effecting an arrest. *Id.* (citation omitted).

The Eleventh Circuit addressed the parameters of the excessive force inquiry in *Crosby v. Monroe County*, 394 F.3d 1328, 1333-34 (11th Cir. 2004):

> The Fourth Amendment encompasses the right to be free from the use of excessive force during an arrest. *See Vinyard v. Wilson*, 311 F.3d 1340, 1347 (11th Cir. 2002). As we have recently said, "[t]he 'reasonableness' inquiry in an excessive force case is an objective one: the

> question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation." *Kesinger ex rel. Estate of Kesinger v. Herrington*, 381 F.3d 1243, 1248 (11th Cir. 2004).
>
> In making an excessive force inquiry, we are not to view the matter as judges from the comfort and safety of our chambers, fearful of nothing more threatening than the occasional paper cut as we read a cold record accounting of what turned out to be the facts. We must see the situation through the eyes of the officer on the scene who is hampered by incomplete information and forced to make a split-second decision between action and inaction in circumstances where inaction could prove fatal. *See Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989); *Kesinger*, 381 F.3d at 1248-50; *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1279 (11th Cir. 2004).

The Eleventh Circuit described the relevant evaluation process for an excessive force claim:

> To balance the necessity of the use of force used against the arrestee's constitutional rights, a court must evaluate several factors, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 4 90 U.S. at 396, 109 S.Ct. 1865; *see also Lee*, 284 F.3d at 1197-98 (citing *Leslie v. Ingram*, 786 F.2d 1533, 1536 (11th Cir. 1986) and

> stating that "in determining if force was reasonable, courts must examine (1) the need for the application of force, (2) the relationship between the need and amount of force used, and (3) the extent of the injury inflicted") (footnote omitted). As this Court also recently explained in *Lee*, "Graham dictates unambiguously that the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight." 284 F.3d at 1198.

Vinyard v. Wilson, 311 F.3d 1340, 1347 (11th Cir. 2002).

"It is also well-settled that the right to make an arrest 'necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'" *Schultz v. Hall*, 365 F.Supp.2d 1218, 1225 (N.O. Fla. 2005) (citations omitted). The Eleventh Circuit, providing guidance in how to analyze these types of Fourth Amendment arrest cases, states: "[i]n analyzing whether excessive force was used, courts must look at the totality of the circumstances: not just a small slice of the acts that happened at the tail of the story." *Garrett v. Athens-Clarke County, Ga.*, 37 8 F. 3d 127 4, 1280 (11th Cir. 2004) (per curiam).

With regard to the question of the extent of the injury, in *Lloyd v. Tassell*, No. 07-11205, 2009 WL 179622, at *2 (11th Cir. Jan. 27, 2009) (not selected for publication in the Federal Reporter), the Eleventh Circuit reiterated that the extent of the injury is not determinative, but the focus is rather on whether the force was objectively unreasonable:

> The extent of injury is not determinative, because reasonable force does not become excessive merely because it aggravates a pre-existing condition of which the officer was unaware. *Lee*, 284 F.3d at 1200. Conversely, objectively unreasonable force does not become reasonable or de minimis merely because the plaintiff only suffered minimal harm. *Id.* In addition, we have noted that force is more likely to be unlawful if it occurred after a suspect was already secured, the arrest effected, and danger vitiated, as opposed to force that occurred while the officer was still securing a suspect. *Id.* at 1199-1200.

Additionally, Plaintiff has made a claim that some of the Defendants failed to intervene, including the "apparent supervisor" at the scene, Defendant Schoonover. The Eleventh Circuit has recognized that there is an enforceable claim for failure to intervene:

> We have previously said that an officer can be liable for failing to intervene when another officer uses excessive force. *See Ensley v. Soper*, 142 F.3d 1402, 1407-08 (11th Cir. 1998) ("[I]f a police officer, whether supervisory or not, fails or refuses to intervene when a constitutional violation such as an unprovoked beating takes place in his presence, the officer is directly liable[.]"); *see also Riley v. Newton*, 94 F. 3d 632, 635 (11th Cir. 1996); *Byrd v. Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986); *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1441-42 (11th Cir. 1985). This liability, however, only arises when the officer is in a position to intervene and fails to do so. *See Ensley*,

> 142 F.3d at 1407 ("[F]or an officer to be liable for failing to stop police brutality, the officer must be in a position to intervene[.]").

Priester v. City of Riviera Beach, Fla., 208 F.3d 919, 924-25 (11th Cir. 2000). *See also Skrtich v. Thornton*, 280 F.3d 1295, 1301 (11th Cir. 2002) (noting that an allegation that an officer was present at the scene and failed to take reasonable steps to protect a victim from another officer's use of excessive force states a claim for relief) (citation and quotation omitted).

IV. Medical Care

With regard to the claim that the officers failed to insure that Plaintiff received medical care for his injuries, the law under 42 U.S.C. § 1983 provides:

> A § 1983 claim is predicated on an alleged violation of an underlying constitutional right. In the case of a pretrial detainee like [Plaintiff], "the Eighth Amendment prohibitions against cruel and unusual punishment do not apply." *Belcher v. City of Foley*, 30 F.3d 1390, 1396 (11th Cir. 1994) (quoting *Tittle*, 10 F.3d at 1539 n.3). Nevertheless, "in regard to providing pretrial detainees with such basic necessities as . . . medical care[,] the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons." *Id.* (quoting *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985)). Thus, pretrial detainees like [Plaintiff] plainly have a Fourteenth Amendment due process right "to receive medical treatment for illness and injuries . . . ."

Cook ex rel. Tessier v. Sheriff of Monroe County, Fla., 402 F.3d 1092, 1115 (11th Cir. 2005).

The deprivation of medical care claim raised against these defendants is governed by the standards found in the Fourteenth Amendment since Plaintiff was a person arrested but not yet convicted. In other words, as a pretrial detainee at the time of the incident, Plaintiff's claim of deprivation of medical care sounds properly in the Fourteenth Amendment right to due process of law rather than the Eighth Amendment. The standards, however, are the same.

As such, Plaintiff must "shoulder three burdens," (1) he must satisfy the objective component by showing that he had a serious medical need; (2) he must satisfy the subjective component by showing that the official acted with deliberate indifference to his serious medical need; and (3) he must show that the injury was caused by the Defendant's wrongful conduct. *Goebert v. Lee County*, 510 F.3d 1312, 1326 (11th Cir. 2007). *See Harper v. Lawrence Co., Ala.*, 592 F. 3d 1227, 1234 (11th Cir. 2010) (to show deliberate indifference, it requires a demonstration that the defendant had subjective knowledge of a risk of serious harm, that he disregarded that risk, that he acted with more than gross negligence, and that his conduct caused the injury) (citation omitted). In short, Plaintiff must have had an objectively serious need, an objectively insufficient response to that need, subjective awareness of facts signaling the need and an actual inference of required action from the facts presented. *Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir. 2000), *cert. denied*, 531 U.S. 1077 (2001).

V. Conclusion

Based on the record before the Court, the following matters are in dispute: (1) whether Plaintiff disobeyed the officers' orders or resisted arrest, including being handcuffed; (2) whether Plaintiff fully submitted to the officers commands and threw the knife out the truck window or dropped the knife as he exited the vehicle; (3) whether an officer threw Plaintiff to the ground after Plaintiff raised his hands and complied with the officers' commands, and whether officers proceeded to repeatedly strike Plaintiff after he was taken to the ground, then beat him (punched and kicked Plaintiff and struck Plaintiff with an instrument, perhaps a flashlight); (4) whether, after Plaintiff was handcuffed, an officer repeatedly struck Plaintiff on his back, and whether another officer struck Plaintiff with an instrument, possibly a flashlight; (5) whether officers standing by failed to act and stop the alleged beating and kicking by other officers; and, (6) whether the Defendants were deliberately indifferent to Plaintiff's alleged serious medical needs by denying and or delaying medical care.

The Court recognizes that the arrest clearly involved a serious crime and a potentially dangerous situation for the officers. Making an arrest is a part of a officer's duties; however, the question remains whether the application of force was objectively unreasonable if Plaintiff can show he had already submitted to the officers' commands, he did not resist

and the actions of the officers caused Plaintiff to suffer injuries.[6]

The Court notes that the Fourth Amendment prohibits the beating of a restrained, non-resisting suspect. *Reese v. Herbert*, 527 F.3d 1253, 1274 (11th Cir. 2008). Plaintiff alleges that after he was

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[6] Police were dispatched to Fioon MacCool's Irish Restaurant at 0029 (12:29 a.m.). Defendants' Exhibit 4, Arrest and Booking Report. As Plaintiff was attempting to leave the parking lot of the Jacksonville Landing in his truck, he was apprehended by police. Although Plaintiff was placed in a police interview room after his arrest, he was not interviewed until 5:25 a.m. Defendants' Motion (Doc. 41) at 11; Defendants' Exhibit 4, Childers' Declaration, at 2. When Plaintiff arrived at the Police Memorial Building to be interviewed by the police, he had visible injuries. Both the photographs and videos taken during the course of the police interviews depict abrasions/contusions on Plaintiff's forehead, face and legs. A trail of blood is visible on Plaintiff's leg and there is blood visible on his clothes and hands, although it is not entirely clear whether this blood was his or that of the victim. During an interview, Plaintiff told the detectives that he may have lost consciousness and he may have been drugged. During the course of the interview, Plaintiff said he thought he had been in an altercation with the victim. He also advised the officers that he could not remember much that transpired. The record further shows that after the use of force and after Plaintiff was lifted from the pavement, he fell or dropped to the ground and had to be lifted up by an officer. Finally, the record reflects that he was not seen by a certified medical assistant at the pretrial detention facility until sometime between 9:40 a.m. and 10:00 a.m. Defendants' Exhibit 12, Phillips' Declaration, at 1-2. He was cleared for admission to the pretrial detention facility by 10:10 a.m. Defendants' Exhibit 5 (Doc. 39-5 at 9). The certified medical assistant found Plaintiff had abrasions to his face that were minor and not bleeding at that time. *Id.* She recorded that Plaintiff appeared depressed, angry and anxious. *Id.* at 11.

handcuffed and lying on the ground, officers beat him, kicked him and struck him with flashlights.[7]

In the photographs and the videos filed with the Court, Plaintiff has visible contusions/abrasions to his forehead, face, and legs. During the police interviews, Plaintiff admits that he had been drinking, suggests that he may have been involuntarily drugged, and repeatedly touches his forehead and face and rubs his eyes.[8] He also mentions that he cannot remember a good portion of the events and he thought he had been attacked by the victim or others in the restaurant. Also, after being handcuffed and lifted up from the ground, Plaintiff fell or dropped to the ground.

As far as the arrest scenario, after Plaintiff lifted both hands up and exited the truck, the question remains as to whether Plaintiff posed an immediate threat to the safety of the officers or others and whether Plaintiff was actively resisting arrest.

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[7] In his Complaint, Plaintiff admits that he does not remember the alleged beating, but relies on the videos of his arrest to support his claims.

[8] In Plaintiff's Exhibit C, the Response to Resistance Report (primarily written by Defendant Anderson), it states that Plaintiff's "Physical Force Body Impact Locations" are the head-face, head-forehead (left), and head-eye (left). (Doc. 56-3 at 3). The Report states that Plaintiff was injured; he was injured when there was officer contact; he was not treated by officers or a rescue unit, and he sustained visible injuries. *Id.* at 4. The injuries are described as abrasions. *Id.* Anderson describes the physical force type as "takedown techniques." *Id.* at 3. A straight arm bar takedown is mentioned, and the cause of the injuries is listed as the takedown. *Id.* at 4-5. No mention is made in the report of the use of pain compliance strikes by the two officers. *Id.* The conclusion in the report is the injuries were from the takedown. *Id.*

Material facts are disputed with respect to the excessive force claim, the failure to protect claim, and the medical claim. The evidence, including affidavits, pictures, videos, medical records, and Plaintiff's deposition create factual issues regarding the circumstances that led to Plaintiff's injuries, the extent of the injuries, and the need for prompt medical care to relieve pain or to treat the injuries.

The Supreme Court has cautioned that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). In *Scott*, the Supreme Court had the benefit of reviewing a videotape of the incident at issue, *id.* at 378-80, and as such, found that the Court of Appeals "should have viewed the facts in the light depicted by the videotape." *Id.* at 381; *see Mathis v. Adams*, No. 14-10605, 2014 WL 4067751, at *2 (11th Cir. Aug. 19, 2014) (per curiam) (citation omitted) ("In light of the uncontroverted video evidence, the district court was required to view the facts in the light depicted by the video even if [plaintiff's] allegations contradicted its depiction.")

Here, the parties have submitted videos that show much of the incident in question, and Plaintiff agrees that the video footage accurately reflects the arrest event, to the extent that it is included in the video, as it transpired. Accordingly, in ruling on summary judgment, the Court views the facts and all reasonable inferences in the light most favorable to Plaintiff except "to the extent [Plaintiff's] version of the facts is

clearly contradicted by the [video], such that no reasonable jury could believe it." *Beshers v. Harrison*, 495 F.3d 1260, 1262 n.1 (11th Cir. 2007) (alterations added); *see Mathis*, 2014 WL 4067751, at *2 (stating "the district court could not credit [plaintiff's] allegation that the defendants beat him for thirty minutes, as that allegation was 'blatantly contradicted by the record [(video)], so that no reasonabl[e] jury could believe it[]'"). Therefore, the Court relies on the videos submitted by the parties. *See Bodden v. Bodden*, 510 F. App'x 850, 852 n.2 (11th Cir. 2013) (per curiam) ("We need not adopt the non-moving party's version of the facts to the extent it is clearly contradicted by a videotape such that no reasonable jury could believe it."); *Sims v. Quilliams*, 378 F. App'x 945, 946 (11th Cir. 2010) (per curiam) ("Because the district court relied on the facts as it observed them in the tapes, it did not err by relying on these facts rather than on [the plaintiff's] contradictory assertions."); *White v. Georgia*, 380 F. App'x 796, 797 (11th Cir. 2010) (per curiam) ("It is settled law that where the record tells two different stories, one blatantly contradicted by the evidence, the court is not required to adopt that version of the facts when ruling on summary judgment.").

In this instance, Plaintiff's description of the use of force is supported by the video evidence, which shows Plaintiff putting both hands up, exiting the truck, being taken to the ground, and two officers striking Plaintiff while two other officers are in near proximity. The video shows one officer employing at least five strikes, and a second officer employing at least one strike, and the video footage raises the

question as to whether the strike by the second officer is done with an instrument or his hand.[9]

Defendant Bias, in his sworn Declaration, Defendants' Exhibit 3 at 2, attests that he saw a knife on the ground when Plaintiff got out of the vehicle. He said he believed Plaintiff could still be armed and dangerous. *Id.* at 3. He noted that Defendant Anderson took Plaintiff to the ground to a prone position using a straight arm takedown. *Id.* Defendant Bias said he tried to quickly grab Plaintiff's hands, but Plaintiff had his hands underneath his body. *Id.* Fearing that Plaintiff may reach for another weapon, Defendant Bias said he struggled to get Plaintiff's hands free from underneath him. *Id.* Defendant Bias reported that Plaintiff refused to put his hands behind his back. *Id.* Bias attests that "in order to distract Hinson from resisting me, I gave Hinson five or six hammer strikes to his upper-mid back area as pain compliance." *Id.* He observed that Plaintiff sustained minor abrasions to the left side of his face (cheek, eye and forehead). *Id.* at 5.

Defendant Kremler, in his sworn Declaration, Defendants' Exhibit 8 at 2, identifies himself as one of the plain clothes officers who approached Plaintiff's truck with his weapon drawn. He states that after several commands Plaintiff put his hands up. *Id.* at 3. He saw Officers Bias and Williams arrive on the scene. *Id.* He observed Plaintiff being taken towards the

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[9] The Sheriff's Office Response to Resistance policy states that "officers will not intentionally strike anyone with an intermediate weapon [described as batons and flashlights] on the head, neck, and clavicle unless the circumstance justifies the use of deadly force." Defendants' Exhibit 2 at 9 (Doc. 39-2 at 18).

ground, but then disappear from his view. *Id.* Kremler noted that he ran around the truck and saw Bias on the ground with the Plaintiff. *Id.* At this point, Kremler attests that he turned off the ignition of the truck and saw the knife on the ground. *Id.* He observed Officer Bias struggling with Plaintiff and then use two or three strikes to Plaintiff's back to get him to release his hands from under his body. *Id.* Kremler states that he did not use force during the apprehension of Plaintiff. *Id.* at 3. He did not observe any other use of force other than the two or three strikes he saw applied by Officer Bias. *Id.* He did see Plaintiff fall to the ground after an officer stood him up. *Id.* He observed minor abrasions to the left side of Plaintiff's face from "being on the pavement." *Id.* at 4.

Defendant Officer Z. M. Anderson, in his sworn Declaration, Defendants' Exhibit 2 at 1, arrived at the scene in an unmarked covert vehicle wearing plain clothes. He approached Plaintiff's vehicle with his weapon drawn. *Id.* at 2. He observed blood on Plaintiff's shirt, pants and right hand. *Id.* He stated that Plaintiff did not immediately comply with Officer Kremler's commands for Plaintiff to keep his hands where they could see them. *Id.* He notes that after several loud verbal commands, Plaintiff put both hands up where they could be seen. *Id.* at 3. Anderson describes the incident in great detail as follows:

> Officer R. A. Bias and S. T. Williams then arrived on scene to assist in apprehending the Plaintiff. Officer Bias, Officer Williams, and I were standing by the driver's side of the Plaintiff's truck. Officer Kremler had moved to take his position by the passenger door of the truck.

Because the truck was between two concrete pillars and the toll booth, extracting the Plaintiff from the truck was very difficult. Officer Bias told the Plaintiff to get out of the vehicle with his hands in the air. The Plaintiff did not respond. Officer Bias told him again to step out of the truck. When Plaintiff did not respond, Officer Bias extracted him from the vehicle. At that point, I saw a small black knife fall from his lap and land on the ground next to the truck. . . . Once out of the truck, Officer Bias told the Plaintiff to stop and turn around away from Officer Bias. Plaintiff did not stop and turn around as commanded but started to walk towards Officer Bias. Officer Bias gave the Plaintiff the command again to stop and turn around. Plaintiff did not comply. Because Officer Bias did not have his weapon drawn at this time, and being much smaller than the Plaintiff who stood well over 6 feet as compared to Officer Bias's short stature, I was concerned for Officer Bias's safety. Plaintiff was dangerously close (arm length) to Officer Bias in a confined space, especially when having been armed with a knife and could have been armed with other weapons. . . . I then grabbed Plaintiff's left wrist with my left hand and grabbed his left shoulder area with my right hand and performed a police technique called a "straight arm bar takedown." I took the Plaintiff to the ground by the toll booth to apprehend him.

Once on the ground, Officer Bias attempted to handcuff the Plaintiff. Officer Bias repeatedly asked Plaintiff to release his hands. The Plaintiff had his hands underneath his body in a prone

> position and resisted being handcuffed by Officer Bias. Plaintiff struggled with Officer Bias's attempts to handcuff him. **I gave Plaintiff one compliance strike to his face, which caused Plaintiff to release his hands in order for Officer Bias to handcuff him.**
>
> Once Plaintiff was handcuffed, I did not use any other force on him. I did not strike Plaintiff with a flashlight as he alleges in his complaint. I *did* not even have a flashlight with me that night. I did not kick or beat Plaintiff before or after he was handcuffed.

Id. at 3-4 (paragraph enumeration omitted and emphasis added).

Anderson further stated:

> I used the pain compliance strike technique and the straight arm bar takedown technique because of the circumstances at the time. The Plaintiff had just stabbed another person, and he had a knife when he confronted him. I did not know if he had another weapon or weapons. Thus, I was concerned for officer safety (including mine). He was non-compliant with lawful commands. Consequently, it was vital to gain control of him and the situation rapidly and get him handcuffed before someone else got hurt.
>
> I did not see any other officers use force on Plaintiff after he was handcuffed. I did not see any other officer kick or beat Plaintiff with or without a flashlight before or after he was handcuffed. I was not carrying a flashlight with me that night.

> Plaintiff never complained to me of any pain or asked for medical assistance. After the Plaintiff was restrained, I observed that he had sustained minor abrasions to the left side of his face (cheek, eye and forehead) from being taken to the ground. I observed no other injuries to the Plaintiff's person related to this incident or otherwise.
>
> At no time during my contact with the Plaintiff, or during my observation of the Plaintiff, did I perceive him as having any injury that required medical attention.

Id. at 5-6 (paragraph enumeration omitted).

Detective Kevin D. Munger, one of the detectives that interviewed Plaintiff, states in his sworn Declaration that he observed minor abrasions to the left side of Plaintiff's face. Defendants' Exhibit 10 at 2. He also states that Plaintiff did not request medical attention or appear to need medical attention. *Id.* Jacqulyne Phillips, the certified medical assistant at the pretrial detention facility, attests that Plaintiff has some minor abrasions to his face, and most of the blood had dried. Defendants' Exhibit 12 at 2. She instructed Plaintiff to keep the wounds clean with soap and water. *Id.* She reports that Plaintiff did not complain of any pain, nor did he appear to be in any pain. *Id.*

Valerie Rao, M. D., a non-treating physician who reviewed Plaintiff's medical records, opines that Plaintiff suffered minor abrasions to the left side of his face, and these abrasions were superficial and non-life threatening. Defendants' Exhibit 13 at 2. She further opines that these abrasions likely occurred when Plaintiff's face came into contact with the paved

parking lot. *Id.* She also opines that the appearance of these abrasions is not consistent with being punched, kicked, or beaten with a flashlight or knee strikes.[10] *Id.*

Defendant Lieutenant Robert Schoonover, in his sworn Declaration, Defendants' Exhibit 14 at 2, states that he arrived at the Landing after Plaintiff was in police custody. He further attests that he was not present at the Landing when Plaintiff was apprehended or handcuffed, and he did not play any role in apprehending Plaintiff and was not in a position to intervene during the arrest. *Id.* He states that he did observe minor abrasions on Plaintiff's face when he walked by the interview room and asked the sergeant about Plaintiff's facial injuries. *Id.* He states that the sergeant told him that Plaintiff had said that he was okay. *Id.* Finally, Schoonover relates that he gave a press conference the following day and said that there was no clear motive for the killing except that the victim had spoken to Plaintiff's wife at the bar and it was believed that Plaintiff may have been jealous and became enraged when he approached the victim. *Id.* at 3.

Defendant Williams, in his sworn Declaration, states that he was behind Officer Bias. Defendants' Exhibit 15 at 2. Williams explains that he heard

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[10] Of significance, Defendant Anderson admits in his Declaration that he struck Plaintiff in the face with one compliance strike. Dr. Rao' s opinion, to the extent she is suggesting there was no strike to the face, is inconsistent with the facts as admitted. The video evidence supports Plaintiff's allegation that he was struck as well.

Officer Bias direct Plaintiff to get out of the truck with his hands up and to turn away from him. *Id.*

Williams states that Officer Bias opened the truck door, which was close to the pay booth. *Id.* Williams then describes the use of force:

> Once Hinson put one leg on the ground, I observed Officer Bias take his hand and pull Hinson out of the truck. At this point, I heard Officer Bias tell Hinson to turn around, but Hinson did not obey. I observed Officer Anderson grab Hinson and take him to the ground in a **prone position next to the booth.**[11] I observed Officer Bias immediately try to get Hinson's hands from underneath him. Hinson was not cooperating. I saw Officer Bias struggling to get Hinson' s hands from underneath him, and then **give him [sic] several pain compliance strikes to Hinson' s back.**

Id. (emphasis added)

Defendant Williams make no mention of Defendant's Anderson's strike to Plaintiff's face. In fact, Williams states that he did not observe "Officer Anderson or Officer Kremler strike, punch or beat Hinson before or after he was handcuffed." *Id.*

Generally, Defendants contend the following: Plaintiff had just used a knife to slit the throat of a customer at the restaurant and the customer was bleeding to death or was in critical condition; Plaintiff was attempting to drive away from the scene; when approached, Plaintiff, inside of his truck, was not

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[11] Prone means lying flat, face downward.

entirely responsive to police commands; a knife was found on the ground next to Plaintiff's truck (and was either thrown out of the truck by Plaintiff or dropped to the ground when he exited the vehicle); one of the officers took Plaintiff to the ground claiming Plaintiff failed to follow commands upon exiting the vehicle; once on the ground, the officers assert that Plaintiff's hands were underneath his body, preventing the officers from observing his hands and handcuffing him; the officers claim they struck Plaintiff with their hands in order to get Plaintiff to release his hands from under his body; a second knife was found in the truck; the officers claim they did not strike Plaintiff with instruments or kick Plaintiff; they claim Plaintiff's injuries occurred when he came in contact with the paved parking lot during the process of restraint; they note that Plaintiff, after being returned to his feet, fell or dropped to the pavement, but did not strike his face on the ground during that fall; and Plaintiff never complained of any injuries and never requested medical attention.

The parties agree that a use of force did occur; however, Plaintiff contends that the use of force was not applied in a good-faith effort to arrest and secure him. The Court notes that Plaintiff was apparently not charged with resisting arrest. Although the use of force incident recorded on the videotape is brief, the Court is not convinced that the record shows "no more than a *de minimis* use of force*," Smith v. Sec'y, Dep't of Corr.*, 524 F. App'x 511, 513 (11th Cir. 2013) (per curiam). Indeed, the video shows Plaintiff being taken abruptly down to the ground after he put his hands up and exited the truck in an apparent attempt to surrender. Once on the ground, the video shows that

one officer uses his hand to strike Plaintiff five times. During the course of those strikes, the video shows a second officer strike Plaintiff with perhaps an instrument in his hand (Plaintiff suggests a flashlight was used to beat him) or perhaps, just his hand.[12] Of further import, due to camera angles; motion sensor cameras starting and stopping; and a rather large sign in close proximity to the take down, the entire incident is not fully captured on videotape.

This type of force is not similar to a simple push or a shove. *Id.* 525 F. App'x at 514 (stating that the type of force allegedly used by defendant (twisting plaintiff's arm and pressing him against the wall) was "not of a sort repugnant to the conscience of mankind," but instead was similar to the push or shove described in *Wilkins*,[13] which "almost certainly fails to state a valid excessive force claim[]") (citations and quotations marks omitted). Additionally, there is no evidence that efforts were made to temper the effect of the use of force at the scene. *See Ledlow v. Givens*, 500 F.App'x 910, 913 (11th Cir. 2012) (per curiam), *cert. denied*, 133 S.Ct. 2802 (2013); *Fennell v. Gilstrap*, 559 F.3d 1212, 1220 (11th Cir. 2009) (per curiam) ("The immediate offer of medical assistance demonstrates an effort to temper the severity of the response."). Of import, an offer of immediate medical care is the type of response that "makes it less likely that [officers were] acting sadistically instead of in good faith [,]"

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[12] Of course, this would be a jury determination. It is difficult to discern whether it *is* just a hand striking the Plaintiff or an instrument like a baton or flashlight in an officer's hand striking the Plaintiff.

[13] *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010).

Cockrell v. Sparks, 510 F.3d 1307, 1310 (11th Cir. 2007) (per curiam), and in this instance, Defendants do not contend, and the submitted evidence does not show, that the officers at the scene made any efforts to mitigate the effects of the force that was applied.

In the Complaint, Plaintiff alleges several officers failed to intervene, including the supervisor, Defendant Schoonover. It is clear, "'[i]f a police officer, whether supervisory or not, fails or refuses to intervene when a constitutional violation such as an unprovoked beating takes place in his presence, the officer is directly liable under Section 1983. "'*Dukes v. Miami-Dade Cnty.*, 232 F. App'x 907, 913 (11th Cir. 2007) (per curiam) (quoting *Ensley v. Soper*, 142 F.3d 1402, 1407 (11th Cir. 1998) (internal citation and quotation omitted)). However, "[t]his liability only applies when the defendant officer was **in a position to intervene.**" *Id.* (emphasis added). Indeed, "[a] police officer with the ability to do so must intervene to stop another police officer's use of excessive force." *Grimes v. Yoes*, 298 F. App'x 916, 921 (11th Cir. 2008) (per curiam) (citing *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 924-25 (11th Cir. 2000)). But, a civil rights plaintiff must include facts showing the "real opportunity" for the officers to intervene in the alleged unlawful conduct. *See Keating v. City of Miami*, 598 F.3d 753, 764 (11th Cir. 2010) (citation omitted). Also, the plaintiff "has the burden to demonstrate that the defendant was in a position to intervene but failed to do so." *Ledlow v. Givens*, 500 F. App'x at 914.

Of importance, "[t]he Fourth Amendment guarantees '[t]he right of the people to be secure in

their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .' U.S. Const. amend. IV." *Walters v. Freeman*, 572 F. App'x 723, 727 (11th Cir. July 16, 2014) (per curiam). In order to demonstrate a Fourth Amendment violation against Defendants Kremler, Williams, and Schoonover, Plaintiff must show that each one had a real opportunity to intervene, the ability to intervene, and was in a position to actually intervene, but failed to do so.

Defendant Schoonover asserts that Plaintiff has failed to establish that he was in a position to intervene. Based on the record before the Court, Defendant Schoonover was not present when Plaintiff was arrested and taken into custody. He arrived after Plaintiff was taken into custody, he did not have any contact with Plaintiff or the officers at the scene, and he did not hear or see any of the officers' actions constituting the alleged use of excessive force.

Based on Defendant Schoonover's Declaration, he has discharged his initial burden of showing that there are no genuine issues of material fact with respect to the failure to protect claim. Plaintiff is obligated to go beyond the pleadings to designate specific facts showing that there remains a genuine issue for trial, and based on the record before the Court, Defendant Schoonover is not entitled to summary judgment on this claim. Simply, Plaintiff must show that the supervisor had the ability to intervene but failed to do so.

In the Complaint, Plaintiff says "Defendant Schnoover [sic] was the apparent supervisor at the scene and failed to act[.]" In his Response to

Schoonover's Motion for Summary Judgment (Doc. 55), Plaintiff does not attempt to challenge Schoonover's assertion that he was not at the scene and he had no opportunity or position to intervene. Upon review, there is no evidence or support for the claim that Defendant Schoonover observed an excessive use of force or had the opportunity or position to be able to intervene to prevent abuse. Schoonover did not arrive at the scene until after Plaintiff was in custody. Therefore, Plaintiff has failed to meet his burden and Defendant Schoonover is entitled to summary judgment on this claim.

Although not a model of clarity, Plaintiff makes some mention of "deprivation of his good name" as part of his Fourth Amendment claim. Complaint at 5. Plaintiff is apparently making some attempt to allege that Defendant Schoonover, by reporting to media outlets concerning the status of the murder investigation and responding to questions from the media on behalf of the Jacksonville Sheriff's Office, made remarks which damaged Plaintiff's reputation. This assertion does not constitute a constitutional claim under the Fourth Amendment, or even the Fourteenth Amendment.[14] Thus, Defendant Schoonover' s Motion for Summary Judgment with

[14] A defamation claim, a state tort claim, does not give rise a constitutional due process claim under the Fourteenth Amendment, "unless there is an additional constitutional injury alleged." *Rehberg v. Paulk*, 611 F.3d 828, 851 (11th Cir. 2010) (citation omitted). Here, Plaintiff has not alleged additional constitutional injury in this regard. Injury to reputation is simply not enough to constitute a Fourteenth Amendment violation of deprivation of liberty or property interests. *Id.* (citations omitted).

respect to this claim for the alleged deprivation of Plaintiff's good name is due to be granted.

Plaintiff submitted a verified Complaint, and both parties submitted various documents and supporting evidence, including affidavits and/or declarations, videos, and records to support their respective positions. Defendants Kremler and Williams' Motion for Summary Judgment will be denied with respect to Plaintiff claim of failure to intervene and protect him from the excessive use of force of the other officers. The video footage supports Plaintiff's contention that Kremler and Williams were both in close proximity to the event, were fully aware of the takedown, and observed much, if not all of the arrest incident. There remain genuine issues of material fact that prevent the entry of summary judgment on their behalf.

With regard to the issue of deprivation of medical care, "delay in medical treatment must be interpreted in the context of the seriousness of the medical need, deciding whether the delay worsened the medical condition, and considering the reason for delay." *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1189 (11th Cir. 1994), *abrogated on other grounds by Hope v. Pelzer*, 536 U.S. 730 (2002). "Delayed treatment for injuries that are of a lesser degree of immediacy than broken bones and bleeding cuts, but that are obvious serious medical needs, may also give rise to constitutional claims." *Harris v. Coweta County*, 21 F.3d 388, 394 (11th Cir. 1994).

Plaintiff did not see a certified medical assistant until approximately nine hours after he was injured. There is no reasonable explanation provided for this extraordinary delay in providing Plaintiff with some

medical attention.[15] The medical assessment at the pretrial detention facility apparently included the taking of some oral history, making a visual assessment of Plaintiff's injuries, and taking Plaintiff's vital signs. It is not stated in the record whether Plaintiff removed his clothing for the examination. The Court also notes that a certified medical assistant did the examination, not a nurse, physician's assistant, or doctor.

A genuine issue of fact has been raised whether this delay amounted to deliberate indifference to a serious medical need. During the post-arrest interviews, Plaintiff told the officers he could not remember much of the incident, and did not remember being taken down by the police. In fact, he stated that he thought he may have been in an altercation in the restaurant. He also told the police he had been drinking and thought that he may have been drugged. He mentioned that he suffered previous black outs

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[15] The Office of the Sheriff's Response to Resistance Policy submitted to the Court by Defendants states "[o]fficers and supervisors will be required to obtain medical evaluations Jacksonville Fire and Rescue Department (JFRD), nurse at the Pretrial Detention Facility (PDF), etc.) [sic] as soon as possible or practical, for individuals: 1. Who show signs of **any injury as a result of any use of force being applied**[.]" Defendants' Exhibit 2 at 2-3 (Doc. 39-2 at 11-12) (emphasis added). Additionally, it requires a medical evaluation if the individual becomes "**unconscious either during or following the application of any force** [.]" Defendants' Exhibit 2 at 3 (Doc. 39-2 at 12) (emphasis added). Plaintiff told the officers in the interview room he believed he was rendered unconscious, and he advised them he could not remember the officers taking him down and restraining him. Also of note, Plaintiff fell or dropped to the ground after the use of force.

from excessive intoxication in the distant past. He also believed that he had been rendered unconscious at some point. In Plaintiff's verified Complaint, he states he suffered injuries including some lacerations and bruises and swelling on the side of his face and upper parts of his body.[16] He also relates that he suffered injuries to his ear and developed chronic migraines as a result of the beating.[15] *Id.*

Plaintiff had visible injuries after force was used during the arrest. No medical care was provided at the scene, even after Plaintiff fell to the ground after an officer stood him up. *See* Defendants' Exhibit 8, Kremler's Declaration, at 3. Defendant Schoonover admits in his Declaration that he saw Plaintiff in the interview room and inquired about Plaintiff's visible facial injuries. Instead of seeking medical attention for Plaintiff or requiring that he be immediately seen and

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[16] *See Stallworth v. Tyson*, 578 F. App'x 948, 950 (11th Cir. 2014) (per curiam) (citations omitted) ("The factual assertions that [Plaintiff] made in his amended complaint should have been given the same weight as an affidavit, because [Plaintiff] verified his complaint with an unsworn written declaration, made under penalty of perjury, and his complaint meets Rule 56's requirements for affidavits and sworn declarations.").

[15] In his deposition, Plaintiff states that he was suffering from pain in his face in the interview room. Defendants' Exhibit 17 at 104. The next day he said he had pain in his shoulder and his body ached. *Id.* at 104-105. He did not recall asking for medical attention in the interview room. *Id.* at 105. Plaintiff explained that it was obvious that he needed medical attention because "the side of my face was swollen and bleeding." *Id.* at 107. At one point in the interview room, Plaintiff's wife enters the room, has a conversation with her husband, and then says "[d]on't bleed on me." Defendants' Exhibit 19 at 30. Plaintiff's wife also dabs his face with a tissue or cloth, as displayed on the videotape.

examined, Schoonover simply asked the sergeant about the injuries, and the sergeant responded that Plaintiff had said he was okay. Defendants' Exhibit 14 at 2. Of course the officers in the interview room had been told that Plaintiff believed that he had been rendered unconscious and he could not remember anything after he put his hands up when he was first confronted by the police in his truck.

The Court recognizes that the arrest involved a very serious crime and a potentially dangerous situation for the police officers. The question remains whether the application of force was objectively unreasonable if Plaintiff can show he had already submitted to the officers' commands, he did not resist, and the actions of the Defendants caused Plaintiff to suffer injuries. In this instance, the photographs and videos filed with the Court reflect that Plaintiff has visible contusions/abrasions to his face and scrapes on his legs. Plaintiff admitted that he had been drinking (approximately eight beers). He could not remember being taken down to the ground by the police or the details of his arrest. He told the officers he thought that he had been rendered unconscious during the arrest. Indeed, he fell to the ground after he was lifted up off of the ground by a police officer. His wife, when she visited him in the interview room, asked him not to bleed on her and dabbed his facial injuries.

The question remains as to whether Plaintiff posed an immediate threat to the safety of the officers or others and whether Plaintiff was actively resisting arrest. Material facts are disputed with respect to the excessive force claim (against Defendants Anderson and Bias), the failure to protect claim (against

Defendants Kremler and Williams), and the deprivation of medical care claim (against Anderson, Bias, Kremler, Williams, and Schoonover). However, the Court concludes that Defendant Schoonover's Motion for Summary Judgment will be granted with respect to Plaintiff's Fourth Amendment failure to protect claim against him and the deprivation of good name claim against him, but it is denied with respect to the deprivation of medical care claim against him as there are disputed material facts.

VI. Qualified Immunity

The Defendants assert that they are entitled to qualified immunity from monetary damages in their individual capacities with regard to the excessive force, failure to protect, and deprivation of medical care claims. Defendants' Motion (Doc. 41) at 22-25; Defendants' Motion (Doc. 42) at 15-19. It is undisputed that the Defendants were engaged in discretionary functions during the events at issue. Given the conclusion that summary judgment should be denied as to the Fourth Amendment claim against Defendants Anderson and Bias for the excessive use of force, as to the Fourth Amendment claim against Defendants Kremler and Williams for failure to protect, and as to the deliberate indifference claim against Defendants Anderson, Bias, Kremler, Williams, and Schoonover, and based on the state of the law on qualified immunity in the Eleventh Circuit, qualified immunity should be denied as to Defendants Anderson, Bias, Kremler, Williams, and Schoonover, except with respect to the Fourth Amendment claim of failure to protect against Defendant Schoonover.

To defeat qualified immunity with respect to Defendant Schoonover, Plaintiff must show both that a constitutional violation occurred and that the constitutional right violated was clearly established. *Fennell v. Gilstrap*, 559 F.3d 1212, 1216 (11th Cir. 2009) (per curiam). Since Defendant Schoonover was acting within the scope of his discretionary authority when the alleged failure to intervene occurred, the burden is on Plaintiff to show that the Defendant is not entitled to qualified immunity. *Skop v. City of Atlanta*, 485 F.3d 1130, 1136-37 (11th Cir.), *reh'g and reh'g en bane denied*, 254 F. App'x 803 (11th Cir. 2007). Here, a reasonable jury could not find that the Defendant Schoonover violated Plaintiff's Fourth Amendment rights by failing to intervene; therefore, Defendant Schoonover is entitled to qualified immunity.

Because Defendant Schoonover did not commit a Fourth Amendment violation, he is entitled to qualified immunity with respect to that claim. *See Hadley v. Gutierrez*, 526 F.3d 1324, 1331 (11th Cir. 2008) (citing *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 924 (11th Cir. 2000) (finding the plaintiff failed to present evidence from which a reasonable jury could find that the defendant could have stopped the use of force); *Ensley v. Soper*, 142 F.3d 1402, 1408 (11th Cir. 1998) (concluding that no reasonable juror could find that the defendant was in a position to intervene and finding "no evidence that might lead a reasonable juror to conclude that [the defendant] violated any clearly established right of [the plaintiff] to intervention."). Plaintiff did not meet his burden to demonstrate that Schoonover had a real opportunity to intervene/protect and was in a position to

intervene/protect, but failed to do so. Thus, Defendant Schoonover is entitled to qualified immunity with respect to the Fourth Amendment claim of failure to protect.

Accordingly, it is now

DONE AND ORDERED:

1. Defendant Schoonover's Motion for Final Summary Judgment (Doc. 42) is GRANTED with respect to Plaintiff's Fourth Amendment failure to protect claim and to Plaintiff's deprivation of good name claim and DENIED in all other respects.

2. Defendants Kremler and Williams' Motion for Final Summary Judgment (Doc. 42) is DENIED.

3. Defendants Anderson and Bias' Final Motion for Summary Judgment (Doc. 41) is DENIED.

4. The Court finds that Plaintiff is entitled to the appointment of counsel. Previously, the Court denied Plaintiff's motion for appointment of counsel without prejudice, noting that the Court would be willing to consider the request for counsel at a later date. Order (Doc. 70). This Court has broad discretion in determining whether the appointment of counsel is appropriate. Under these circumstances and at this point in the proceedings, the Court finds that Plaintiff is entitled to the assistance of a trained practitioner. Plaintiff needs the assistance of counsel for a settlement conference and he needs assistance in preparing for a jury trial, if the case proceeds to trial, and in selecting a jury and presenting the case to a jury. Therefore, **this case is referred to the Jacksonville Division Civil Pro Bono Appointment Program** so that the designated

deputy clerk of the Court may seek counsel to represent Plaintiff.

5. Since the search for an attorney for Plaintiff may be a lengthy process, this case is STAYED until counsel is appointed. Upon counsel's filing a Notice of Appearance, the stay will be lifted, and the case will be reopened.

6. The Clerk shall administratively close this case.

DONE AND ORDERED at Jacksonville, Florida, this 24th day of May, 2016.

s/
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-14112-GG

MATTHEW REID HINSON,

Plaintiff-Appellee,

v.

R.A. BIAS, OFFICER #61580,
B.K. KREMLER, OFFICER #64398,
S.T. WILLIAMS, OFFICER #64402,
Z.M. ANDERSON, OFFICER #67377,
ROB SCHOONOVER, LT. #6434,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

August 14, 2019

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, ROSENBAUM, and DUBINA, Circuit Judges.

PER CURIAM:

The Petiton(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/_____

UNITED STATES CIRCUIT JUDGE