No.

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN HAMMONDS,

Petitioner,

v.

ROBERT THEAKSTON, M.D. and MATTHEW MARTIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Daniel Patrick Evans
G. Daniel Evans
The Evans Law Firm, P.C.
1736 Oxmoor Road, Suite 101
Birmingham, Alabama 35209
Telephone: (205) 870-1970
Fax: (205) 870-7763
E-Mail: dpevans@evanslawpc.com
E-Mail: gdevans@evanslawpc.com
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Respondents are jail officials who deliberately left Petitioner Stephen Hammonds, a Type-1 diabetic pre-trial detainee, in solitary confinement for days without providing him the care and insulin needed for his insulin-dependent diabetes. Respondents knew Hammonds suffered from Type I diabetes and were well aware of the life threatening risk associated in depriving Hammonds sufficient insulin to treat his Type-I diabetes. Due to inadequate care for this condition over the course of seventeen (17) days, Hammonds declined into Diabetic Ketoacidosis ("DKA"), suffered severe pain, organ failure, and was finally hospitalized in critical condition. Following his release, Hammonds was diagnosed for the first time with peripheral neuropathy (permanent nerve damage) resulting from insulin deprivation.

Petitioner brought suit under 42 U.S.C. § 1983. The trial court granted summary judgment to the Respondents awarding them qualified immunity without ever reviewing the constitutional deprivation for which the immunity was granted. The Eleventh Circuit affirmed and found it was not necessary to address the Constitutional deprivation before awarding qualified immunity. Instead, the Eleventh Circuit concluded that Hammonds' claim for deliberate indifference failed because his constitutional rights were not clearly established by reference to appellate decisions under these precise circumstances. The Eleventh Circuit's limitation of deliberate indifference claims directly conflicts with the holdings of the Supreme Court, and other circuits.

Three questions are presented:

1. When the unconstitutionality of an officials' conduct is reasonably obvious, does that suffice to render the violation of those constitutional rights clearly established, as the Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits have recognized in similar cases, or must there also be binding precedent under the same specific facts, as the Eleventh Circuit held below?

2. Are government officials entitled to qualified immunity so long as there is no prior appellate precedent recognizing the unconstitutionality of an identical fact pattern, as the Eleventh Circuit held below, or can prior precedent establish a clearly established constitutional right despite some factual variation, as this Court, as well as the Third, Fourth, Seventh, Ninth, Tenth, and Tenth Circuits have held?

3. Did the Eleventh Circuit and District Court err in summarily granting qualified immunity to Respondents without considering substantial factual issues of deliberate indifference in the officer's actions?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are Petitioner Stephen Hammonds and Respondents Robert Theakston, M.D. and Matthew Martin.

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly held companies in this case.

RELATED PROCEEDINGS

Hammonds v. Theakston, et.al., Appeal No.19-14123-G (11TH Cir.) (Judgment Entered, January 5, 2021)

Hammonds v. Theakston, et.al., Appeal No.19-14123-G (11TH Cir.) (Petition for Rehearing, November 24, 2020)

Hammonds v. Theakston, et.al., Appeal No.19-14123-G (11TH Cir.) (Judgment Entered, November 3, 2020)

Hammonds v. Theakston, et.al. 16-CV-01558 (N.D. Ala.)(Final Judgment entered on all claims on September 20, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

OPINIONS AND ORDERS BELOW

The Court of Appeals' opinion is reported at 833 Fed. Appx. 295 (11th Cir. 2020) and is reproduced at Pet. App. A. The district court's order and opinion granting summary judgment on all claims is not officially reported but may be found at 2019 WL 4572877 and is reproduced at Pet. App. B.

JURISDICTION

The Eleventh Circuit entered its decision on November 3, 2020. Pet. App. A. A Petition for Rehearing was timely filed on November 24, 2020. Pet. App. C. A Petition for Panel Rehearing was denied on January 5, 2021. Pet. App. D. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution Section One, provides:

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

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other per-son within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

STATEMENT OF THE CASE[1]

Hammonds was diagnosed as a Type-I diabetic in 1994 at 11 years old. Electronic Record on Appeal (R.O.A.) 92-2. Type I diabetics produce no insulin. Unlike a Type II diabetic whose body produces some insulin, Type I persons require frequent monitoring and regular insulin injections usually by a combination of long-acting "basal" and short-acting "R" insulin. R.O.A. 82-43, p. 15 at depo pp. 48-50; 91-12. If the insulin is not adequate, the person is at risk of impaired bodily functions and life-threatening Diabetic Ketoacidosis ("DKA"). In DKA, the body begins to cannibalize its own tissue since it cannot process the glucose without insulin. R.O.A. 82-43, at depo pp. 51-53; 91-2, pp. 2-4; R.O.A. 91-12, pp. 3-4. The byproducts of breaking down fatty acids are ketone bodies, which render the blood acidic. R.O.A. 82-33, at depo p. 118; 82-43, at depo pp. 51-53; 91-2, pp. 2-4; 91-12, pp. 3-4. That condition leads to nerve damage, blindness, systemic organ failure and death if not remedied. The warning signs of approaching DKA include vomiting, dehydration, shortness of breath, mental confusion, inability to eat or retain food, and unconsciousness. R.O.A. 82-33, at depo p. 115; R.O.A. 91-12. Hammonds suffered the classic symptoms and then DKA as a pretrial detainee after five days under the custody and control of Dr. Theakston and Chief Martin. He now suffers from peripheral neuropathy which all experts below acknowledged. R.O.A. 82-33, p. 39 at depo pp. 143-44; R.O.A. 82-43, p. 28 at depo p. 99; R.O.A. 91-12, pp. 2-4. Respondents admitted they knew Hammonds as a Type I

[1]These facts are drawn primarily from the decisions below. Because this case was resolved at summary judgment, the facts and inferences are viewed in the light most favorable to Hammonds. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam).

diabetic had a serious medical condition and that the risks included DKA and death if the condition was not properly treated. R.O.A. 91-1, p. 26 at depo p. 103, 104; 82-6, p. 24 at depo p. 89. The court below acknowledges that this is a "serious medical need." R.O.A. 96, p. 9.

Hammonds was arrested on September 29, 2014 at 1:10 p.m. The arrest report stated: "Medical: severe Type I diabetic takes 2 shots daily." R.O.A. 82-14, p. 20. When arrested, Hammonds' long- and short-acting insulin, syringes, and glucometer were confiscated. R.O.A. 82-6, at depo pp. 58, 115; 82-14, p. 36. The short-acting "R" insulin counteracts spikes in glucose levels after eating while the "N" long-acting insulin provides healthy levels between meals. R.O.A. 96 p. 3. From September 29, 2014 through October 16, 2014, Hammonds remained a pretrial detainee at the DeKalb County Detention Center ("DeKalb") in Fort Payne, Alabama. Matthew Martin was the Chief Jail Administrator and Dr. Theakston was the jail doctor who worked under Martin during Hammonds' detainment. The written jail policies required Martin as the Chief Jail Administrator be "be knowledgeable and comfortable with diabetic emergencies." R.O.A. 82-6, p. 37 at depo pp. 141-42.

Mr. Hammonds weighed 180 lbs. during booking and he was placed in a holding cell.[2] R.O.A. 82-14, p. 21; 82-7, p. 83 at ¶ 8; 69, ¶ 48. Jail intake documents also noted Hammonds' Type I diabetes. R.O.A. 82-14, pp. 19-20; 36-37. Despite being arrested at 1:10 p.m., his glucose level was not measured until after 8:00 p.m. when it was already

[2]Hammonds suffered a weight loss of approximately thirty (30) pounds in his sixteen (16) days of "pretrial" detainment. R.O.A. 82-14, p. 21; 82-26, p. 17.

231 mg/dl. R.O.A. 82-44, p. 44.

Dr. Theakston saw Stephen Hammonds at the jail and determined the medication to be given to Stephen. R.O.A. 82-4, p. 14 at depo p. 51; 82-7, p. 85 at ¶ 16; 39, ¶55; 69, ¶ 55. As the trial court found, Dr. Theakston directed Hammonds' treatment. R.O.A. 96, p. 3. That treatment consisted of intermittent low dosages of only short-acting R insulin with sporadic monitoring as opposed to both short-and long-acting insulins. R.O.A. 91-6, Doc 96 p. 3. Over the next five days, Hammonds' condition deteriorated until he was finally hospitalized in serious condition suffering from Diabetic Ketoacidosis (DKA). R.O.A. 82-23, pp. 2-6. After three days' hospitalization, he was returned to the jail with specific medication instructions for a 70/30 mixture of short- and long-acting insulin and specific monitoring. Dr. Theakston also failed to follow these directions. R.O.A. 82-6, p. 35 at depo pp. 134-35; 82-20; 82-23, pp. 29-31; 91-6. When released on October 16, 2014, Hammonds collapsed in the jail lobby and was again hospitalized. He now suffers permanent peripheral neuropathy. R.O.A. 91-2, pp. 6-8; 91-11; 91-12.

All jail medical staff, including Nurse Jonathan Langley, worked under Dr. Theakston. R.O.A. 82-4, p. 14 at depo p. 49. Though not regularly scheduled, Dr. Theakston visited the jail approximately once a week. He was paid the same regardless of the services he rendered or the time he spent. R.O.A. 91-1, pp. 11-12, at depo pp. 41-42. Nurse Langley testified that Dr. Theakston was notified when a Type I diabetic like Hammonds came into the jail.

Dr. Theakston previously treated Stephen Hammonds' diabetes during two

earlier incarcerations at this same jail. On both of those, he provided Hammonds with both short(R)-and long-lasting(N) insulin without incident. Those jail medical records for a 2007 lengthy incarceration, (R.O.A. 82-4, pp. 44-70) and for only a day in 2013, (R.O.A. 82-4, pp. 71-73) were submitted to the trial court. Those records show that on both prior events, Hammonds was provided both R and N insulin. R.O.A. 82-4, pp. 66-70 for 2007; 82-4, p. 72 for 2013. When Hammonds was arrested and jailed in 2014, Dr. Theakston had access to his earlier medical records as well as current records, both at the jail and remotely by computer access. R.O.A. 82-4, p. 19 at depo p. 69. Dr. Theakston testified that it was his normal practice to review the prior jail medical records. R.O.A. 91-1 at depo p. 136.

As a nurse, Jonathan Langley was legally prohibited from diagnosing and from prescribing medication or a course of treatment which must be done by a doctor. As a result, Langley looked to Dr. Theakston for direction on administering prescribed medication. R.O.A. 82-4, p. 14 at depo p. 50; 91-1, p. 18, at depo p. 70. Dr. Theakston also confirmed Hammonds could not have received the medical regimen he did unless Theakston had ordered it. R.O.A. 91-1 p. 32, at depo p. 127. Nurse Langley believes he spoke with Dr. Theakston about Hammonds using both N and R insulin together instead of just the short acting R insulin. R.O.A. 82-4, p. 19 at depo p. 70. Both types were readily available at several local drug stores. The jail maintained at the jail "70/30" which is a premixed insulin ratio of both N and R insulins. R.O.A. 82-4, pp. 19, 20, 21 at depo p. 71,76, 78. Even that was not given to Hammonds until after he was hospitalized with DKA.

Rather than continuing both the short- and long-insulins Hammonds was prescribed and using when arrested -- and which Theakston had provided in his prior treatment history with Hammonds -- Dr. Theakston limited Hammonds' medication to only R insulin. R.O.A. 91-1, pp. 16, 24-25 at depo pp. 63-64, 96-97.

Once jailed, Hammonds' glucose was measured sporadically and even the short-acting R insulin was only intermittently provided. R.O.A. 91-6. According to Dr. Theakston, he used a generic sliding scale for administering the R insulin with no distinction between Type I and Type II diabetics. R.O.A. 91-1 p. 25 at depo p. 97. All experts agreed such regimen did not meet any standard of care. R.O.A. 82-43, p. 21, 28 at depo pp. 71-72, 99-101; 82-31, p. 39 at depo pp. 144-45; 82-33, pp. 27-28 at depo pp. 95-101.

By his second jail day on September 30, 2014, Hammonds had hyperglycemic symptoms of hunger, thirst and dehydration, headache, nausea, fatigue, frequent urination. R.O.A. 91-2, p. 4. Hammonds pleaded for the doctor and knew he could be in jeopardy of diabetic ketoacidosis ("DKA"). R.O.A. 91-2, p. 4. Hammonds had never suffered DKA until this 2014 detainment. R.O.A. 82-23, -24, - 25, - 26, -27, -28, -29.

Respondents' expert, Dr. Trippe, testified that a glucose level over 100 mg/dl is high when fasting and that DKA can begin with glucose levels of 240 mg/dl. R.O.A. 82-33, p. 31 at depo p. 112. During his detainment from September 30, 2014 until October 3, 2014, Hammonds' glucose levels averaged 311 mg/dl. R.O.A. 91-6.[3]

[3]A chart showing the monitoring and insulin administered to Hammonds is R.O.A. 91-6 and is a typed version of the handwritten jail medical record. R.O.A. 91-1. p. 61.

By October 3 (jail day 5), Hammonds called his father, Bobby Hammonds, to tell him that he did not think he would not live through the night. R.O.A. 91-2, p. 2. In response, his mother Carla Hammonds and sister Sherry Hammonds called 911 to report Hammonds' medical emergency. R.O.A. 91-3, pp. 2-3 , 91-4, pp. 2-3. The 911 dispatch called Jail Administrator Martin, but Martin unilaterally cancelled the requested call without any investigation. R.O.A. 82-6, pp. 25, 27 at depo pp. 96, 101. Martin then called the Hammonds family and threatened them with arrest for calling 911 and for "interrupting his dinner." R.O.A. 82-46, pp. 9-10 at depo pp. 32-36; 91-3, pp. 2-3; 91-4, pp. 2-3. Carla Hammonds told Martin her concerns and asked if she could see her son and bring him his insulin medication, but Martin refused. R.O.A. 91-3, pp. 2-3. Martin testified that despite the call he did not talk with the jail medical staff and never looked at Hammonds' medical records either. R.O.A. 82-6, p. 28 at depo pp. 107-08; p. 36 at depo p. 139; 82-6, pp. 25, 27 at depo pp. 96, 101. After Martin's call with his family, Hammonds was taken to an empty medical ward and handed a phone with Martin on the line. R.O.A. 91-2, p. 4. Martin threatened Hammonds and ordered him to solitary confinement with "four walls to complain to" and stated if he received another call from 911, "things" would get worse for him. R.O.A. 91-2, p. 5.

Court records for October 3, 2014, show that the state circuit court granted Hammonds a pretrial release on an "OR" bond, but Theakston and Martin **never** informed him of this fact and instead kept him detained until October 16, 2014. R.O.A. 82-14, p. 12.

By October 4, 2014, Hammonds remained isolated and was given only intermittent doses of only R insulin and was not provided a diabetic diet. R.O.A 82-44 pp. 36-38; 82-43, p. 32 at depo pp. 115-16; 91-2. Hammonds' glucose was recorded 444mg/dl at 8:49 a.m. and the records show he was given 10 units of R insulin. There was no further measurement of his levels nor any insulin given until 8:00 p.m. that evening. By then, his level was measured at 543 mg/dl and he was unable to care for himself. R.O.A. 91-6. Martin was informed and by 5:40 a.m. on October 5, 2014, Hammonds' blood glucose was recorded at 534mg/dl. At 9:20 a.m. and again at 11:02 a.m. his glucose level was recorded as "high" which meant the reading exceeded the glucometer's capacity. R.O.A. 91-1, p. 28 at depo p. 109, R.O.A. 91-6. Dr. Theakston was informed, but did not speak with or examine Hammonds. R.O.A. 82-4, p. 29 at depo p. 109.

Throughout October 5, 2014, Hammonds remained in isolation with a glucose level above 534 mg/dl from at least 5:40 a.m. until at least 1:52 p.m. The scant medical records show notes from others at the jail surmising Hammonds condition as "DKA ?" *Id*.

Respondents' expert testified that Hammonds was indeed suffering from DKA which he described as a "state of pre-death." R.O.A. 82-33, pp. 32-33 at depo pp. 115, 117-119; R.O.A. 91-1, pp. 56-57; 82-4, p. 30 at depo p. 113, 116. DKA requires immediate hospitalization, often in the intensive care unit because every organ can be damaged and affected. R.O.A. 82-33, p. 35, at depo p. 120. This was the known risk of failing to properly care for this Type I diabetic. R.O.A. 91-1, p. 26 at depo p. 103, 104;

R.O.A. 82-6, p. 24 at depo p. 89. Despite this indication, Dr. Theakston never examined Hammonds and waited for hours before ordering him taken to the hospital. R.O.A. 91-1, p. 57, 63; 91-1 at depo p. 109. Petitioner's expert, Dr. Venters, stated that Theakston's act of sporadically giving Stephen only R insulin for this period of time "is no treatment for half the problem." R.O.A. 82-43, p. 28 at depo p. 101.

Hammonds was taken from the jail and admitted to the hospital at 3:10 p.m. on October 5, 2014. R.O.A. 91-1, p. 97, 91-6. His glucose level was measured there at 689 mg/dl with admitting diagnoses included anemia, dehydration, Diabetic Ketoacidosis, nausea, vomiting, abdominal cramps, fatigue, malaise, Type 1 Diabetes Mellitus, Leukocytosis, acute renal/kidney failure, tachycardia, acute hypokalemia. R.O.A. 82-23, pp. 2 - 6. He was listed in "serious" condition with critical levels (R.O.A. 82-23, pp. 6, 36) and admitted to the intensive care unit. R.O.A. 82-23, pp. 2-6. The hospital treatment provided a combination of both short(R)- and long-acting(N) insulins as he had successfully used before his detention.

On October 8, 2014, Hammonds was discharged and returned to the jail isolation cell, despite hospital discharge orders. R.O.A. 82-20, p. 2; 82-23, pp. 2 - 6; 91-1, p. 63; 91-2, pp. 5-6; 91-6. At discharge, the treating physician provided a specific written order to continue using the insulin combination. R.O.A. 91-1, p. 63.

The Eleventh Circuit below acknowledged Hammonds' blood sugar remained abnormally high after he returned and Dr. Theakston admitted that there was not a single day that the discharge orders were correctly followed. Pet. App. A - ECF Doc. 105-1, p. 3; *see also*, R.O.A. 91-1, pp. 29-33 at depo pp. 119-129; 91-6. Dr. Theakston

offered no reason for this failure or for his lack of attention to Hammonds' serious medical issue. R.O.A. 91-1, pp. 29-33 at depo pp. 119-129. After returning from the hospital, a 70/30 insulin mix was provided for the first time, albeit not as required. R.O.A. 82-4, p. 26 at depo pp. 99-100.

In isolation, Hammonds' food was entirely controlled by the jail and his cell monitored by video, but Respondents testified that the video footage and dietary records for Hammonds' 2014 detainment were lost and/or destroyed. R.O.A. 82-4, p. 20 at depo p. 75; 82-6, p. 30 at depo p. 114.

Hammonds remained in confinement until October 16, 2014 when his glucose was measured at 481 mg/dl at 11:07 a.m., with no insulin provided. (R.O.A. 91-6). Jail Administrator Martin testified Hammonds had become a "problem" and that he arranged for his release. R.O.A. 82-6, p. 22 at depo p. 84. On his release, Hammonds was directed to the pay phone in the jail lobby where he called for an ambulance and then collapsed. R.O.A. 91-2, p. 6, 91-6. Martin saw Hammonds shortly after his collapse and testified that Hammonds' mouth was drawn as if he had suffered a stroke. R.O.A. 82-6, p. 34 at depo p. 132; 91-2, pp. 6-8; 91-6. Hammonds was again taken to the hospital and again diagnosed with numbness, bilateral facial paresthesis, and a weight loss of approximately thirty (30) pounds in his sixteen (16) days of "pretrial" detainment. R.O.A. 82-14, p. 21; 82-24, pp. 3, 14, 15; 82-26, p. 17. Hammonds returned home from the hospital but did not improve. R.O.A. 91-2, p. 6, 8.

Hammonds' expert, Dr. Homer Venters, testified that Type I individuals, unlike Type II diabetics, cannot be adequately treated with only short-acting R insulin other

than perhaps in a hospital "intensive care setting where there is constant medical monitoring." R.O.A. 82-43, p. 23 at depo p. 78. Only in a hospital setting with IV administration and constant monitoring or an insulin pump can R insulin alone be used for a Type I diabetic. R.O.A. 82-43, at depo. pp. 42. For these obvious reasons, Type I diabetics must have a combination of short- and long-acting insulins which is adjusted in response to routine monitoring. R.O.A. 82-43, p. 15 at depo p. 49.

Respondents' expert also confirmed that using R insulin does not adequately treat a Type-I diabetic because "It [R insulin] doesn't work quick enough and it didn't last long enough . . . I call it R irregular." R.O.A. 82-33, p. 17 at depo p. 57.

Dr. Theakston, however, testified that for insulin administration, he treated Type I and Type II diabetics the same. R.O.A. 91-1, p. 25 at depo p. 98. Hammonds' expert, Dr. Venters, testified that Dr. Theakston's treatment of Hammonds and his lack of response constituted a "gross deviation from any standard of care, not simply a matter of the wrong medicine or the wrong treatment." R.O.A. 82-43, p. 21, 28 at depo pp. 71-72, 99-101. As Dr. Venters' explained in his declaration, the care given Stephen Hammonds while under Theakston and Martin was:

> . . .grossly inadequate in that **not only did it fail to meet any applicable medical standard of care, but that it involved gross neglect** of Mr. Hammonds' medical needs. . . **[t] here are obvious incidences where Dr. Theakston simply failed to exercise any professional judgment or to make any response to urgent medical needs of Mr. Hammonds. He failed to provide any basal insulin for Mr. Hammonds, failed to monitor even the medication that was given Hammonds, and failed to respond** to Mr. Hammonds' continually deteriorating condition up until shortly before Mr. Hammonds was hospitalized, suffering diabetic ketoacidosis, a life-threatening condition. . . **Dr. Theakston failed to abide by the**

> **discharge directions. These are not merely professional errors or alternative choices, but instead show egregious lapses of involvement of the medical care for Mr. Hammonds, far exceeding negligence, or even gross negligence.**

(R.O.A. 91-12) (emphasis added)

Shortly after his release from jail on October 16, 2014, Hammonds was diagnosed for the first time with peripheral neuropathy which was confirmed by a nerve conduction study. R.O.A. 82-25, pp. 22-23; 82-33, p. 39 at depo p.143; 91-11. Dr. Venters explained that the DKA contributed to and exacerbated previously dormant nerve damage that was asymptomatic before the DKA. R.O.A. 82-44 at p. 38-39; 82-43, p. 32 at depo pp. 115-17.

Hammonds sued Respondents under 42 U.S.C. § 1983, alleging they violated the Fourteenth Amendment by acting with deliberate indifference toward his serious medical needs. R.O.A. 39, pp. 1, 3, 61-82. The district court denied Respondents' motion to dismiss these claims as insufficiently pleaded. R.O.A. 60; 62; and 63. However, the district court granted summary judgment to Respondents Theakston and Martin on qualified immunity grounds without addressing the constitutional claims of deliberate indifference towards Hammonds' medical needs or the questions presented there. Pet. App. B. ECF 96, pp. 1, 6-7, 19, 20-21. The district held "the jail deviated from the hospital discharge instructions" and it "expressed concern with the quality of care Mr. Hammonds received at the jail." Pet. App. B. ECF 96, pp. 18-19. Nonetheless, the district court held Hammonds failed to rebut Respondents' assertion of qualified immunity concerning the medical care he received while confined as a pretrial

detainee. Pet. App. B. ECF 96, pp. 1, 6-7, 18-21. The district court's holding was based on its claim that Hammonds did not provide an appellate case directly on point factually which showed it was not possible to treat a Type-I diabetic in jail using only regular insulin offered at irregular intervals. Pet. App. B. ECF 96, pp. 15-19. The facts cited in the district court's opinion noted Martin actively interfered with Hammonds' attempt to receive adequate care while he was suffering from DKA and it highlighted how Martin delayed care for Hammonds while threatening Hammonds' family for seeking the same. Pet. App. B. ECF 96, pp. 4-5. Nonetheless, the district court granted summary judgment and qualified immunity for Martin by holding no genuine issue exists of a causal connection between Mr. Martin's supervisory actions or policies and a constitutional violation. Pet. App. B. ECF 96, pp. 20-21.

The Eleventh Circuit panel acknowledged Hammonds suffered from a severe medical condition and that the treatment he received caused his abnormally high blood sugar during detainment. Pet. App. A, ECF 105-1, pp. 10. The Eleventh Circuit nonetheless affirmed the lower court and found it unnecessary to address the allegations of constitutional violations before granting qualified immunity. Pet. App. A, ECF 105-1, pp. 6-7.

While acknowledging deliberate indifference to serious medical needs of pretrial detainees to be a constitutional violation as a "general matter," the Eleventh Circuit opinion found that *Estelle v. Gamble* "does not obviously apply to the specific circumstances of this case – treatment of Type I diabetes with only short acting insulin." Pet. App. A, ECF 105-1, p. 8. The opinion recognized the concept of deliberate

indifference to be highly fact specific. *Id*. But the Eleventh Circuit limited the claim's availability to only those fact settings already sustained in appellate decisions. Pet. App. A, ECF 105-1, pp. 10-11. Therefore, under this decision, without specific references to the same factual setting in existing appellate decisions - (treatment of Type I diabetes with only short acting insulin) - the Plaintiff's claim is never viable because it never overcomes the defense of qualified immunity. Pet. App. A, ECF 105-1, pp.11-12. This approach results in a closed universe of possible deliberate indifferent scenarios. Without fitting perfectly in one of those existing appellate factual settings, the Plaintiff is never deemed to overcome qualified immunity. Thus, under the Eleventh Circuit's opinion, regardless of other or slightly different egregious facts from which a jury would conclude deliberate indifference, that conclusion is never allowed and the constitutional violation recognized by *Estelle* and *Harlow* is not addressed. Pet. App. A, ECF 105-1, pp. 5,8; see *Estelle v. Gamble*, 429 U.S. 97, 104,(1976) and *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That approach also ignores the principle that there is no such immunity for constitutional violations and allows the defense of qualified immunity to pretermit any consideration of the claim itself. *Id*. The Eleventh Circuit affirmed the district court's decision to grant Respondents' qualified immunity ***without*** addressing whether or not Respondents violated Hammonds' constitutional rights. Pet. App. A, ECF 105-1, p. 5.

The court observed that while"[d]eliberate indifference may be established by a showing of grossly inadequate care as well as by a decision to take an easier but less efficacious course of treatment," it had not previously held that the Respondents'

failure to give more insulin and/or long-acting insulin to a Type I diabetic over 17 days violated the Constitution. Pet. App. A, ECF 105-1, pp. 10. Therefore, ignoring the obviously egregious facts and gross breach of medical standards attested to by medical experts, the Court nonetheless concluded Respondents lacked fair warning that their specific acts were unconstitutional. Pet. App. A, ECF 105-1, pp. 10-15. Hammonds timely filed a petition for panel rehearing with respect to his deliberate indifference claim. Pet. App. C. The Eleventh Circuit's panel denied the petition on January 5, 2021. Pet. App. D. This petition followed.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Decision Below Conflicts With This Court's Precedent That "Obvious" Constitutional Violations Are Clearly Established Even Absent Factually Similar Precedent And Conflicts with Decisions of Other Circuits Denying Qualified Immunity In Similarly Analogous Circumstances.

The substantial risk of serious harm to Hammonds was "especially obvious here," from his known illness, coupled with inadequate insulin, solitary confinement, lack of monitoring, and a non-diabetic diet which were imposed by Respondents. The Eleventh Circuit should have followed this Court's guidance that the unconstitutionality of such obviously egregious conduct may be clearly established without prior case law approving the same specific facts.

The Eleventh Circuit's decision below is contrary to the following decisions of this Court and consideration by the Supreme Court is necessary to secure and maintain uniformity of decisions in this Court: *Estelle v. Gamble*, 429 U.S. 97 (1976); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Harlow v. Fitzgerald*, 457 U.S. 800, 818

(1982); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 150 (2000); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849–50, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); *Tolan v. Cotton*, 572 U.S. 650 (2014); and most recently *Taylor v. Riojas*, 141 S.Ct. 52, 53-54 (2020)(Per Curiam) and *McCoy v. Alamu,* 2021 WL 666347 *1 (In *McCoy* on February 22, 2021, this Court granted a writ of certiorari concerning qualified immunity and vacated the judgment and remanded the case to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Taylor v. Riojas*,141 S.Ct. 52, (2020)(Per Curiam).

The Eleventh Circuit's holding that Respondents are entitled to qualified immunity without review of the obvious underlying constitutional violation conflicts not only this Court's precedent, but also with decisions of the Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits involving similarly analogous fact patterns.

A. The Eleventh Circuit's Holding That Respondents Are Entitled to Qualified Immunity Despite the Obvious Unconstitutionality of Their Conduct Conflicts with this Court's Precedent.

The focus of underlying modern qualified immunity jurisprudence is that officers must be "on notice their conduct is unlawful" before being subjected to suit for damages. *Saucier v. Katz*, 533 U.S. 194, 206 (2001). That is, officers must have "fair warning that their conduct violated the Constitution." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Often, this fair warning is provided by prior cases establishing the unlawfulness of the conduct. But an official's conduct may also be so "obvious[ly]" illegal that no "body of relevant case law" is necessary. *Brosseau v. Haugen*, 543 U.S.

194, 199 (2004) (per curiam) (citing *Hope*, 536 U.S. at 738); see also *Hope*, 536 U.S. at 753 (Thomas, J., dissenting) ("Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address 'materially similar' conduct."); *United States v. Lanier*, 520 U.S. 259, 270-71 (1997) (particularly egregious conduct may be clearly unconstitutional even if "the very action in question has [not] previously been held unlawful"). Recent decisions of this Court have reaffirmed that obviously illegal conduct can defeat qualified immunity. *See Taylor v. Riojas*, 141 S.Ct. 52, 53-54 (2020)(Per Curiam); *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019) (per curiam); *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam).[4]

The "obvious" principle follows directly from the fair warning requirement: For conduct that is "obviously" illegal, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. The principle is also essential to ensure that the most egregiously violative conduct gives rise to liability. Obviously unconstitutional conduct is by its nature less likely to lead to the development of precedent to serve as clearly established law: Because it is obviously unconstitutional, officials are - or should be - less likely to do it. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009) ("[O]utrageous conduct obviously will be unconstitutional, this being the reason … that the easiest cases don't even arise." (internal quotation marks and brackets omitted).

[4]The Eleventh Circuit's opinion below stated the rules set forth by this court in *Estelle* are not applicable to Hammonds and would not be followed. (R.O.A. 105-1, p. 8).

The Eleventh Circuit acknowledged that Hammonds is an insulin dependent Type-I diabetic who suffers with a known serious medical condition. (R.O.A. 105-1, pp. 2-16, 8). Though aware of this, Dr. Theakston ignored Hammonds' prior course of treatment, deprived him of adequate insulin and then failed to respond to his declining condition. R.O.A. 91-1, pp. 16, 24-25 at depo pp. 63-64, 96-97. Martin actively participated in delaying and denying Hammonds' the medical care required to prevent his permanent injury and organ failure. Pet. App. B. ECF 96, pp. 4-5. Due to insulin deprivation, Hammonds was left to decline into DKA. (R.O.A. 82-33, at depo p. 118; 82-43, at depo pp. 51-53; 82-43, at depo pp. 51-53; 91-2, pp. 2-4; R.O.A. 91-12, pp. 3-4. After suffering for days in isolation, he was finally taken to the hospital with a glucose level of 689 mg/dl. R.O.A. 82-23, pp. 2 - 6.

In *Estelle* this Court wrote:

> We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, supra, at 173, 96 S.Ct. at 2925 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under s 1983.

Estelle v. Gamble, 429 U.S. 97, 104,(1976). The Eleventh Circuit panel, however, refused to follow *Estelle* stating "Estelle's general rule does not obviously apply to the specific circumstances of this [Hammonds'] case-treatment of Type 1 diabetes with only short- acting insulin. App. A, ECF 105-1, p.8.

This Court also warned that a prison official may "not escape liability if the

evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk he strongly suspected to exist." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Furthermore, "[w]hether a prison official has the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inferences from circumstantial evidence." *Id*. at 842. In this matter however, the Eleventh Circuit decided *Estelle* should not apply and that the factual issues showing obvious deliberate indifference need not be addressed by a jury before awarding qualified immunity to the defendants.

"Fair warning" of deliberate indifference to serious medical needs of a pretrial detainee like Hammonds, is established when, as here, the Respondents admit their knowledge of the obvious serious medical need and the risk of improper treatment. *Brosseau v. Haugen*, 543 U.S. 194, 198, 199 (2004) (per curiam) (*citing Hope*, 536 U.S. at 738). Expert medical testimony added further support for the egregious indifference of the medical defendant here. R.O.A. 91-12. The Eleventh Circuit's limitation of these concepts is in conflict with this Court and other circuits. As a result, it summarily approved the respondents' inaction here which knowingly allowed a Type I diabetic to suffer for days in an isolated cell.

The Eleventh Circuit opinion ignored clearly applicable precedent, and incorrectly held that this case is only about difference in treatment types such that qualified immunity was proper without further inquiry to the facts of the claim itself. Pet. App. A, ECF 105-1, pp. 11-13. In actuality, expert testimony found the treatment provided was so grossly inadequate that it failed to meet ***any*** standard of care and that

Dr. Theakston "simply failed to exercise any professional judgment or to make any response to urgent medical needs of Mr. Hammonds." R.O.A. 91-2. This obvious indifference caused allowed glucose readings, with resulting organ failure, hospitalization, and permanent nerve damage. R.O.A. 82-23, pp. 2 - 6; Pet. D, ECF 105-1, pp. 2-3. Such acts constitute cruel and unusual punishment. *Estelle* at 104.

The appellate court below acknowledged that Hammonds satisfied the objective component of the deliberate indifference because his serious medical condition was admittedly known to the Respondents who also knew the risks of inadequate treatment. Pet. D, ECF 105-1, pp. 2-3, 8. However, the appellate court then imposed a new and higher subjective evidentiary burden on Hammonds in order to overcome qualified immunity. Pet. D, ECF 105-1, pp. 11-12, 14-15. That holding is in conflict with *Farmer* and *Estelle.* This Court's precedent contains no support for that new additional burden. Such additional limitation is especially unwarranted when Respondents' action and inaction "produce physical 'torture or a lingering death.'" See *Estelle* at 103 (1976)(citing, *In re Kemmler*, 136 U.S. 436, 447(1890). In *Farmer,* this Court held, "deliberate indifference" amounts to a constitutional violation which falls somewhere in the middle of the culpability spectrum. *Farmer*, 511 U.S. at 835–36; *see also Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849–50, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). "[D]eliberate indifference describes a state of mind more blameworthy than negligence," but it also involves something less than acting or failing to act "for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835. (emphasis added). Deliberate indifference exists when a jail doctor

and/or administrator denied an inmate humane conditions of confinement when "the official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837. These decisions describe the essence of deliberate indifference recognizing it could be presented in a myriad of settings. Yet, the Eleventh Circuit opinion found the issue of qualified immunity could be granted without reviewing the underlying factual claim of deliberate indifference. Pet. A. pp. 5-6, Ped. D. ECF 105-1, pp. 5-6. Such an approach views the claim as a response to the defense rather than the opposite and finds the claim viable only if existing appellate cases with specific facts therein align perfectly. Though acknowledging the risk of serious bodily harm to Hammonds from the inadequate insulin, the Eleventh Circuit panel claimed it was not "conscience-shocking" even though all experts agreed Hammonds was in a state of pre-death due to the gross deviation from any standard of care. Pet. App. A, ECF 105-1, pp. 3-4, 9-10, 11-12; R.O.A. 82-33, pp. 32-33 at depo pp. 115, 117-119; 82-43, p. 21, 28 at depo pp. 71-72, 99-101. In reaching its conclusions while denying consideration by a jury, the panel misstated pertinent facts. For instance, the court held Dr. Theakston should not be held liable for his acts in 2014 because it incorrectly concluded he had previously treated Hammonds' diabetes with only R-Regular insulin during his one-day detainment in 2013 stating: "As a matter of common sense, it would be an odd result for us to deny Dr. Theakston qualified immunity because, after successfully managing Hammonds's diabetes with only short-acting insulin in 2013." App. A, ECF 105-1, p.13. This was incorrect. The factual record is unequivocal that Hammonds was treated with BOTH R-Regular and N-Novolin insulin during his twelve (12) hour 2013 detainment.

R.O.A. 82-4, pp. 71-73; Pet. A, ECF 105-1, p. 13. Similarly, the Eleventh Circuit also ignored all reasonable inferences in Hammonds' favor concerning the inadequate diabetic treatment Hammonds received during his sixteen days detainment in 2014. R.O.A. 91-6, p. 2 and 91-12, pp. 3-5. The Opinion's conclusion that it is therefore "common sense" to award immunity to Theakston because he used this same treatment in 2013, is erroneous. Such a vague approach to avoiding or summarily deciding factual matters conflicts with this Court's discussion in *Brosseau v. Haugen, supra,* and other precedent and closes the door for litigants with obvious, but not yet previously reported claims of deliberate indifference.

Using this approach, the panel below affirmed the district court's decision to summarily grant immunity though it never even reached the constitutional deprivation question. Pet. App. A, ECF 105-1, pp. 3-4, 9-10, 11-12. That approach perverts Rule 56 and ignores direction from this Court in *County of Sacramento v. Lewis,* 523 U.S. 833, 841(1998) and the cases cited therein. In fact, the Eleventh Circuit opinion boldly addresses that ruling of this Court as only a "suggested approach." Pet. App. A., pp. 6, fn. 4; D, ECF 105-1, p. 6 fn.4. Tellingly, the Eleventh Circuit here also ignored the cases cited in *Sacramento['s]* footnote five (5) which stated that unconstitutional behavior must be addressed before granting qualified immunity:

> **As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated. *See Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1870–1871, 104 L.Ed.2d 443 (1989).** The District Court granted summary judgment to Smith on the basis of qualified immunity, assuming without deciding that a substantive due process violation took place but holding that the law was not clearly established in 1990 so as to justify imposition of §

> 1983 liability. We do not analyze this case in a similar fashion because, as we have held, **the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.** Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question. *See Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991) ("**A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all," and courts should not "assum[e], without deciding, this preliminary issue**").

County of Sacramento v. Lewis, 523 U.S. 833, 841, n.5 (1998)(emphasis added). By avoiding even that ruling as only a "suggestion," an illogical result occurs where a court grants qualified immunity without addressing factual issues of deliberate indifference first. S*ee also, Tolan v. Cotton*, 572 U.S. 650, 657 (2014)[5].

This Court first articulated the principle that obviously illegal conduct defeats qualified immunity in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Hope, an incarcerated plaintiff, brought an Eighth Amendment claim after prison officials handcuffed him to a "hitching post" as punishment for "a wrestling match with a guard." 536 U.S. at 734.[6]

---

[5]"In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to *Tolan* with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party." (citing, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986)).

[6]The Eleventh Circuit also erred in holding Hammonds' claims were brought pursuant to the Eighth Amendment, when in fact Hammonds' claims were brought pursuant to the Fourteenth Amendment. Pet. App. A, ECF 105-1, pp. 4, 13; R.O.A. 39, pp. 1, 3, 81. The analysis of deliberate indifference regarding a pretrial detainee's medical needs is governed by the Fourteenth Amendment's Due Process Clause, not the Eighth Amendment's Cruel and Unusual Punishment Clause. *See Melton v. Abston*, 841 F. 3d 12071220 (11th Cir. Nov. 18, 2016); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (*citing Bell v. Wolfish*, 441 U.S. 520, 535 & n. 16, 99 (1979)). The Eighth Amendment specifically protects a person against with the "unnecessary and wonton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 327 (1986). In cases where pretrial detainees allege claims under the Eighth and Fourteenth Amendment(s), this Court, however, held that the Due Process Clause could serve as an alternative basis for affirmance. *Id.* at 327.

Hope was left shirtless in the sun and cuffed to the post for seven hours, given water only once or twice, and provided no bathroom breaks. *Id*. at 734-35. A guard taunted Hope by giving water to some nearby dogs instead of to him. *Id*. at 735.

This Court readily concluded that these conditions were actionable. *Id*. at 738. It further held that the unconstitutionality of the prison officials' actions was clearly established. *Id*. at 744. After noting that circuit precedent established the unconstitutionality of the defendants' actions, the Court found a second, independent basis for denying qualified immunity:

> The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity-he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.

Id. at 745.

Hope's holding and applicability to the qualified immunity analysis in this Court's recent *Taylor v. Rojas* decision is supportive to Hammonds' case. 141 St. Ct. at 53-54, 55 (2020), where this Court reversed the Fifth Circuit's grant of summary judgment for not applying this Court's qualified immunity test outlined by *Hope* to the facts in *Taylor. v. Riojas*, 141 St. Ct. 52, 55 (2020).

The degradation, humiliation, and bodily harm which resulted from insulin deprivation while jailed in isolation as in Hammonds' treatment is evocative of *Hope* as those were inflicted and created "a risk of life-threatening conditions, painful

discomfort, and humiliation," *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). Hammonds was deprived appropriate insulin, even though Respondents had it on site and/or they could have easily ordered it at any time. R.O.A. 82-4, pp. 17, 19, 20, 21, at depo pp. 61, 69, 76, 78. As he declined, he was ignored. Dr. Venters' declaration attests to the indifference in treatment given Hammonds: "not only did it fail to meet any applicable medical standard of care, but that it involved gross neglect of Mr. Hammonds' medical needs. . . [t]here are obvious incidences where Dr. Theakston simply failed to exercise any professional judgment or to make any response to urgent medical needs of Mr. Hammonds." R.O.A. 91-12 p. 2.

Hope, Estelle, and Taylor all hold support that the "especially obvious" risk of harm such as that to Hammonds clearly establishes a constitutional violation which should preclude summarily granting Respondents qualified immunity.

II. The Court's Review Is Necessary To Resolve An Inter-Circuit Conflict Created By The Eleventh Circuit's Holding.

The Eleventh Circuit's holding also directly conflicts with decisions of the Third, Fourth, Sixth, Seventh, Ninth and Tenth Circuits which hold that qualified immunity should be denied when the constitutional violation was so obvious as to be clearly established even absent a "body of relevant case law." *See e.g., Brosseau*, 543 U.S. 194, 199 (2004).

A. The Eleventh Circuit's Holding Conflicts with Decisions of the Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits.

The Third Circuit holds even "in the absence of expert testimony, a reasonable jury could conclude that prison officials who knew the inmate was diabetic and needed

insulin regularly were deliberately indifferent in denying sufficient insulin or insulin for non-medical reasons." *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 582-83 (3d Cir. 2003). *See also*, *Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) ("[W]e do not require a case directly mirroring the facts at hand, so long as there are sufficiently analogous cases that should have placed a reasonable official on notice that his actions were unlawful." (internal quotation marks and brackets omitted)).

The Fourth Circuit holds that summary judgment was precluded where a doctor's act of providing an inmate insulin types and dosages contrary to his diagnoses and known prescription created a genuine issue of material fact. *Scinto v. Stansberry*, 841 F.3d. 219, 228 (4th Cir. 2016). The circuit held that the doctor's failure to supplement a dose of insulin when plaintiff's blood sugar was 200 mg/dl (more than three times LESS than when Hammonds was finally placed in the ICU) may be sufficient alone to meet the object test set forth in *Farmer*. *Id*. at 228. The court concluded expert testimony was not necessary to establish that an insulin dependent diabetic's inability to receive and take insulin regularly suffers a sufficiently serious risk of harm. *Id*. at 230. *See also*, *Thompson v. Virginia,* 878 F.3d 89, 98 (4th Cir. 2017) ("In the absence of directly on-point, binding authority, courts may also consider whether the right was clearly established based on general constitutional principles or a consensus of persuasive authority." (internal quotation marks omitted)).

The Sixth Circuit holds that a prison official was on "fair warning" that it violated an inmate's rights noting "that certain misconduct is "obvious[ly]" unconstitutional." *Berkshire v. Beauvais*, 928 F.3d 520, 537-38 (6th Cir. 2019); cf.

Barker v. Goodrich, 649 F.3d 428, 435, 437 (6th Cir. 2011) (noting that the "obvious cruelty" inherent in restraining an inmate in an uncomfortable position, denying access to water, and denying "even the basic dignity of relieving himself" warned defendants "that they were violating the prohibition against cruel and unusual punishment"). The Sixth Circuit reversed summary judgment where the district court granted qualified immunity to defendants concerning alleged deliberate indifference to plaintiff diabetic's needs because the district court's opinion lacked analysis on why a constitutional violation did not occur. *Derfiny v. Pontiac Osteopathic Hospital*, 106 Fed.Appx. 929, 934-937 (6th Cir. 2004). The Sixth Circuit also remanded the district court's decision involving a doctor who reduced an inmate's insulin dosage and thereafter failed to increase it despite his suffering adverse effects. *Briggs v. Westcomb*, 801 Fed.Appx. 956, 958 (2020). See *Lemarbe v. Wisneski*, 266 F.3d 429, 439 (6th Cir. 2001).

The Seventh Circuit holds a jury could find that a physician's decision to prescribe low insulin doses insufficient to treat the inmate's diabetes to be "such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment," *Jackson v. Kotter*, 541 F.3d 688, 697 (7th Cir.2008). The Court held further denying sufficient insulin to a Type-I diabetic constitutes a serious risk of harm leading to the constitutional violation. *Waldrop v. Wexford Health Sources, Inc.*, 646 Fed.Appx. 486, 490 (2016). Deliberate indifference may be inferred when the doctor disregarded those risks by changing a prescribed insulin treatment, as well as lowering

the dosage, all which did not remotely treat the inmate's serious medical condition. *Egebergh v. Nicholson*, 272 F.3d 925, 928 (7th Cir.2001) (officer's knowledge that diabetes can be fatal, coupled with decision to deprive arrestee of insulin, permits jury inference of deliberate indifference).

The Ninth Circuit holds a plaintiff "need not identify a prior identical action to conclude that the right is clearly established." *Ioane v. Hodges*, 939 F.3d 945, 956 (9th Cir. 2018).

The Tenth Circuit holds that a case involving the same facts is not required for a constitutional right to be clearly established. *Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016) ("[T]he qualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts.") The Tenth Circuit holds that to find clearly established law, "[t]here need not be precedent declaring the exact conduct at issue to be unlawful." *DeSpain v. UpHoff*, 264 F.3d 965,979. (10th Cir. 2001).

This Court applied the same reasoning in the *Taylor* decision by citing *Hope:* "holding that "[t]he obvious cruelty inherent" in putting inmates in certain wantonly "degrading and dangerous" situations provides officers "with some notice that their alleged conduct violate[s]" the Eighth Amendment. *Taylor v. Riojas*, 141 St. Ct. 52, 53-54 (2020)(*citing, Hope* at 536 U.S. at 745).

In this matter, however, and after disregarding this Court's ruling in *County of Sacramento v. Lewis,* 523 U.S. 833, 841(1998) as discussed *supra*, pg. 22-23, the Eleventh Circuit also refused to apply *Estell* to Hammonds' facts because it claimed did not apply to the "specific circumstances of this case- treatment of Type I diabetes with

only short acting insulin." The principles in *Estelle* are not factually limited however. Though agreeing, as a general matter, that the deliberate disregard of a pretrial detainee's serious medical needs violates the detainee's constitutional rights, the Eleventh Circuit panel found:

> But cases addressing deliberate indifference to serious medical needs "are very fact specific," *Youmans v. Gagnon*, 626 F.3d 557, 564 (11th Cir. 2010), and we hold that *Estelle*'s general rule *does not obviously apply to the specific circumstances of this case—treatment of Type 1 diabetes with only shortacting insulin.(emphasis added)*

Pet. App. A, ECF 105-1, p. 8.

The Eleventh Circuit opinion repeated the general principles for proving established constitutional rights:

> We have identified three ways for a plaintiff to prove that a particular constitutional right is clearly established: (1) "[A] plaintiff can show that a materially similar case has already been decided," (2) "a plaintiff can also show that a broader, clearly established principle should control the novel facts of a particular case," or (3) "a plaintiff could show that the case fits within the exception of conduct which so obviously violates the Constitution that prior case law is unnecessary." *Waldron v. Spicher*, 954 F.3d 1297], at 1304-05 (citations omitted) (internal quotation marks omitted) (alterations adopted).

Pet. App. A, ECF 105-1 p. 7. But, like with *Estelle*, the panel below refused to apply those principles as well and instead engrafted further requirements on the plaintiff thus posing the conflict with this Court and other circuits.

> To demonstrate that a principle is "clearly established," a plaintiff must show that "preexisting law [] make[s] it obvious that the defendant's acts violated the plaintiff's rights in the specific set of circumstances at issue." Youmans, 626 F.3d at 563 (emphasis added). The unlawfulness of the defendant's acts must be "made truly obvious, rather than simply implied, by the preexisting law."

Pet. App. A, ECF 105-1, p. 8.

By requiring the plaintiff to prove "preexisting law" in "the specific set of circumstances at issue" before qualified immunity can be avoided and the claim even reviewed, the Eleventh Circuit placed itself in clear conflict with this Court and other circuits. The panel below found the deliberate indifference standard to be "onerous." (App. C. ECF 105-1, p. 9) and a "very high burden." App. C. ECF 105-1, p. 10. These restraints, together with the panel's contortion of this Court's prior opinions, unfairly extinguish the claims of deliberate indifference.

Hammonds offered proof and briefs which demonstrated: (1) a materially similar case has already been decided in other courts of appeals; (2) the evidence at the summary judgment phase taken in light most favorable to Hammonds showed that Respondents' actions constituted a gross deviation from any standard of care concerning how a Type-I diabetic detainee should have been reasonably treated; and (3) substantial evidence of egregious and deliberate indifference which so obviously violates the Constitution that prior case law is unnecessary. Pet. App. B, pp. 2-11, 15-16; R.O.A. 91-12; 91-1, p. 26 at depo p. 103, 104; Doc. 82-43, p. 23 at depo p. 78; 82-33, p. 17 at depo p. 5782-14; p. 20; Doc. 82-6, p. 24 at depo p. 89; 82-4, p. 19 at depo p. 71).

Finding such cases as "very fact specific" (App. C. ECF 105-1, p. 8) in its review of a summary judgment, the Eleventh Circuit nonetheless misstated many facts, ignored others and then affirmed, finding it permissible for the Court to grant qualified immunity without first even considering the constitutional violation.

The Eleventh Circuit's review ignored *Estelle,* the points of proof listed above, and any discussion of the "obvious" nature of the Constitutional violations committed by

Respondents. Instead, the Eleventh Circuit elevated Hammonds' "onerous" and "very high burden" beyond any holdings of this Court by the additional requirement of "preexisting law" in "the specific set of circumstances at issue."

The Third, Fourth, Sixth, Seventh and Ninth, Tenth Circuits reviewed cases similar to Hammonds under the same claims, applicable rules and prevailing decisions and denied qualified immunity because the medical care and treatment provided amounted no care at all.

The appellate opinion below creates an inter circuit conflict and a conflict with decisions rendered by this Court. Per U.S. Supreme Court Rule 10(a) and Rule 10(c) this Court's review is necessary.

A review of the appellate opinion below should be granted (or, alternatively, summarily reverse) to restore uniformity among other court of appeals and this Court on this important aspect of the qualified immunity doctrine.

B. The Decision Below Further Entrenches A Deep And Acknowledged Circuit Division On Factual Similarity Required in Prior Precedent For A Constitutional Right To Be Clearly Established.

The Eleventh Circuit opinion stands at one end of the spectrum in applying a remarkably restrictive approach to overcoming qualified immunity, which permits government officials to avoid accountability for patently unconstitutional behavior so long as there is no published precedent recognizing that the exact conduct under identical circumstances violates the Constitution. Pet. App. ECF 105-1 A, pp. 7-10.

Circuits uniformly agree that dangerously deficient medical care may violate the

Eighth and Fourteenth Amendments. S*upra*, Petition Section II(A). Despite this consensus that confinement in an isolated cell without adequate medication to care for a serious medical condition violates the Fourteenth Amendment, the Eleventh Circuit in this case found qualified immunity should be summarily granted. That ruling eviscerates claims of deliberate indifference and erases the opportunity for those to be heard by a jury. The court below justified its holding because it had not previously specifically held that depriving a Type-I diabetic of required insulin violated the Fourteenth Amendment. Pet. App. A, ECF 105-1, pp. 11-12. Such a restriction is not justified by this Court's rulings and conflicts with other circuits.

The Third, Fourth, Sixth, and Seventh Circuits hold where an inmate was held without adequate insulin and/or was provided a different and ineffective course of insulin treatment a clearly established constitutional violation existed.[7] Unlike the Eleventh Circuit here, those Courts did not quibble over the precise number of days the inmate was locked in without sufficient insulin or what types of insulin caused the deprivation when an inmate received "some" insulin. Pet. App. A, ECF 105-1 pp. 11-12. Rather, those courts followed the direction set by this Court to examine whether the contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right. *See also*, *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Respondents conceded that failing to provide Hammonds sufficient insulin would

[7] *Natale*, 318 F.3d at 582-83 (3d Cir. 2003); *Scinto,* 841 F.3d. at 228 (4th Cir. 2016); *Derfiny,* 106 Fed.Appx. at 934-937 (6th Cir. 2004); *Kotter*, 541 F.3d at 697 (7th Cir.2008).

result in DKA, permanent nerve damage, or even death, and their failure to do did in fact cause Hammonds great pain and permanent injury. R.O.A. 91-1, p. 26 at depo p. 103, 104;. 82-6, p. 24 at depo p. 89; 82-23, pp. 2 - 6; 82-25, pp. 22-23; 82-33, p. 39 at depo p.143; Doc. 91-11.

Congress enacted § 1983 "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Congress's purpose is thwarted by the Eleventh Circuit's decision because state actors can avoid accountability so long as there is no direct precedent that addresses the precise conduct at issue.

The Eleventh Circuit's holding below largely nullifies § 1983 claims for deliberate indifference by vulnerable persons detailed in jails with no other recourse. Its conflict with decisions of this Court and other Circuits warrants this Court's review.

CONCLUSION

A petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

s/ Daniel Patrick Evans
Daniel Patrick Evans
ASB-3209-R67G
G. Daniel Evans
ASB-1661-N76G
The Evans Law Firm, P.C.
1736 Oxmoor Road, Suite 101
Birmingham, Alabama 35209
Telephone: (205) 870-1970
Fax: (205) 870-7763
E-Mail: dpevans@evanslawpc.com

E-Mail: gdevans@evanslawpc.com
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I, Daniel Patrick Evans, counsel for Petitioner, certify that this document complies with Sup. Ct. R. 33.2 because it contains 40 pages, excluding the parts of the brief exempted. The brief complies with the typeface and type-style requirements of Sup. Ct. R. 33.1(b) because this document has been prepared in a proportionately spaced typeface using WordPerfect, Version 20.0.0.200 in Century Schoolbook12-point font.

Dated: April 1, 2021.

/s/ Daniel Patrick Evans
Daniel Patrick Evans
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Daniel Patrick Evans, hereby certify that on this 1st day of April, 2021, I electronically mailed and mailed a copy of the foregoing Petition for Writ of Certiorari to the following, first class mail, postage prepaid:

J. Randall McNeill, Esq.
Todd Brown, Esq.
Jamie Kidd, Esq.
WEBB & ELEY, P.C.
7475 Halcyon Pointe Drive (36117)
P.O. Box 240909
Montgomery, Alabama 36124
rmcneill@webbeley.com
tbrown@webbeley.com
jkidd@webbeley.com

/s/ Daniel Patrick Evans
Daniel Patrick Evans

APPENDIX A

ELEVENTH CIRCUIT OPINION

NOVEMBER 3, 2020

AFFIRMED

(ECF DOC. 105-1)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14123
Non-Argument Calendar

D.C. Docket No. 4:16-cv-01558-KOB

STEPHEN HAMMONDS,

Plaintiff-Appellant,

versus

ROBERT THEAKSTON, et al.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(November 3, 2020)

Before GRANT, LUCK, and TJOFLAT, Circuit Judges.

PER CURIAM:

I.

On September 29, 2014, Stephen Hammonds, a Type 1 diabetic who takes insulin, was arrested on charges of possession of a controlled substance, possession of drug paraphernalia, and failure to appear – domestic violence third degree; he was booked into the DeKalb County Correctional Center later that day. Jail personnel confiscated short-acting R insulin and long-acting N insulin from Hammonds when he was booked.[1]

Dr. Robert Theakston treated Hammonds at the DeKalb County Correctional Center. He placed Hammonds on an insulin sliding scale regimen in which medical staff checked Hammonds's blood sugar twice a day. When his blood sugar was unhealthy, medical staff would administer a dose of short-acting insulin. The sliding scale regimen involved only short-acting insulin and no long-acting insulin.

Hammonds alleges that jail staff knew that he required both short- and long-acting insulin because (1) he had both types of insulin in his possession when he was arrested; (2) he told the arresting police officer, booking officer, nurses, jailers, and others that he needed both insulins; and (3) he had been held and

[1] Short-acting insulin counteracts the spike in glucose that occurs when eating. Long-acting insulin helps maintain a healthy baseline glucose level.

treated at DeKalb County Correction Center twice before, and on both occasions Dr. Theakston was the jail physician.[2]

Five days into his incarceration, on October 3, 2014, Hammonds felt "very sick" and feared that he "might not live." He called his parents and said he might die. Hammonds's mother called 911 to report that Hammonds was having a medical emergency at the jail. The 911 operator reported the same to Chief Jail Administrator Matthew Martin. According to an affidavit from Hammonds's mother, Martin called Hammonds's mother back and said that "he was going to make some arrests if anyone called 911 again and that he was tired of having his supper interrupted." Hammonds alleges that jail staff then brought him to a phone so that Martin could tell him that he would be placed in solitary confinement if his family called 911 again, after which "things would get worse for [Hammonds] and [his] family."[3]

Over the next two days, jail medical staff struggled to treat Hammonds's high blood sugar, and on October 5, Dr. Theakston ordered jail medical staff to transport Hammonds to the DeKalb County Regional Medical Center emergency

[2] In 2007, Hammonds was in the DeKalb County Correction Center and was treated with both short- and long-acting insulin. In 2013, Hammonds was treated at the DeKalb County Correction Center and—although he reported that he needed both short- and long-acting insulin—he was only given short-acting insulin (without incident).

[3] Martin disputes the facts alleged by Hammonds. For the purposes of summary judgment, we accept Hammonds's version of the facts as true. *See Case v. Eslinger*, 555 F.3d 1317, 1324–25 (11th Cir. 2009)

room for diabetic ketoacidosis. The diabetic ketoacidosis was resolved by October 8, 2014. The hospital discharged Hammonds back to the DeKalb County Correctional Center and instructed jail medical staff to administer a mixture of short- and long-acting insulin twice a day and to call the hospital if Hammonds's blood glucose level exceeded 400 mg/dl.

In the eight days following Hammonds's discharge from the hospital, he twice had a blood glucose level above 400 mg/dl. Jail personnel did not call the hospital on either occasion. Additionally, medical records indicate that jail staff sometimes administered a dose of short-acting insulin smaller or larger than the dose required by the hospital's instructions. The DeKalb County Correctional Center released Hammonds on October 16, 2014, eight days after he was discharged by the hospital.

Hammonds now suffers from diabetic peripheral neuropathy, which he alleges was caused by the diabetic ketoacidosis that he suffered at the DeKalb County Correctional Center. Hammonds brought a claim under 42 U.S.C. § 1983 against Dr. Theakston and Martin in their individual capacities, alleging that they violated his Eighth Amendment right to be free from deliberate indifference to his serious medical needs. U.S. Const. amend. VIII.

Dr. Theakston and Martin moved for summary judgment. The District Court granted summary judgment to both defendants, finding that both Dr. Theakston

and Martin are entitled to qualified immunity. In reaching its conclusion, the District Court did not address whether Dr. Theakston or Martin violated Hammonds's constitutional rights. Instead, the District Court addressed only qualified immunity. Hammonds appeals.

II.

We review "de novo the district court's disposition of a summary judgment motion based on qualified immunity, resolving all issues of material fact in favor of Plaintiffs and then answering the legal question of whether Defendants are entitled to qualified immunity under that version of the facts." *Case v. Eslinger*, 555 F.3d 1317, 1324–25 (11th Cir. 2009) (quoting *West v. Tillman*, 496 F.3d 1321, 1326 (11th Cir. 2007)).

Government officials are shielded by qualified immunity when they act within the scope of their discretionary authority, *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991), and when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982).

III.

A.

On appeal, Hammonds argues that the District Court erred by addressing qualified immunity first and not addressing Hammonds's allegations that Dr. Theakston and Martin violated his constitutional rights. We disagree. It is well settled in this Circuit that we may address the two core questions in a qualified immunity case—that is, (1) whether the official violated the plaintiff's constitutional rights, and (2) if so, whether those rights were clearly established—"in either order." *Waldron v. Spicher*, 954 F.3d 1297 (11th Cir. 2020) (quoting *Maddox v. Stephens*, 727 F.3d 1109, 1120 (11th Cir. 2013)).[4]

B.

Hammonds also argues that the District Court erred in granting Dr. Theakston qualified immunity on the basis that Hammonds failed to show that Dr.

[4] The U.S. Supreme Court has held that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 1714 n.5 (1998) (citing *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 1793 (1991)). As we have explained, however:

> We do not understand [*County of Sacramento*] as an absolute requirement that lower courts must always follow this "normally" "better approach." In *County of Sacramento*, the district court decided the case strictly on qualified immunity grounds, that is, on the ground of the unsettled nature of the law; but the Supreme Court never said the district court erred. And if the Supreme Court intended to impose an absolute requirement on lower courts always to address the merits of constitutional issues even where qualified immunity obviously applies and readily resolves the case, we believe the Supreme Court would have said so more directly.

Santamorena v. Ga. Military Coll., 147 F.3d 1337, 1343 (11th Cir. 1998) (footnote omitted).

Theakston violated a clearly established right. For the following reasons, we agree with the District Court.

We have identified three ways for a plaintiff to prove that a particular constitutional right is clearly established: (1) "[A] plaintiff can show that a materially similar case has already been decided," (2) "a plaintiff can also show that a broader, clearly established principle should control the novel facts of a particular case," or (3) "a plaintiff could show that the case fits within the exception of conduct which so obviously violates the Constitution that prior case law is unnecessary." *Waldron*, 954 F.3d at 1304–05 (citations omitted) (internal quotation marks omitted) (alterations adopted).

To demonstrate that his right to receive more than just short-acting insulin was clearly established, Hammonds makes two arguments. First, Hammonds argues that a single case, *Flowers v. Bennett*, 123 F. Supp. 2d 595 (N.D. Ala. 2000), establishes that Dr. Theakston's treatments constituted deliberate indifference. We can dispose of this argument quickly: "[C]learly established law consists of holdings of the Supreme Court [of the United States], the Eleventh Circuit, or the highest court of the relevant state." *Sebastian v. Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019). Because it is a district court opinion, *Flowers* is insufficient to clearly establish the law for Hammonds's claim.

Second, Hammonds argues that existing law clearly established the broad principle that "jail officials should not act with deliberate indifference to the serious medical needs of pretrial detainees." We agree that, as a general matter, the deliberate disregard of a pretrial detainee's serious medical needs violates the detainee's constitutional rights. *See Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976). But cases addressing deliberate indifference to serious medical needs "are very fact specific," *Youmans v. Gagnon*, 626 F.3d 557, 564 (11th Cir. 2010), and we hold that *Estelle*'s general rule does not obviously apply to the specific circumstances of this case—treatment of Type 1 diabetes with only short-acting insulin.

To demonstrate that a principle is "clearly established," a plaintiff must show that "preexisting law [] make[s] it obvious that the defendant's acts violated the plaintiff's rights in the *specific set of circumstances* at issue." *Youmans*, 626 F.3d at 563 (emphasis added). The unlawfulness of the defendant's acts must be "made truly obvious, rather than simply implied, by the preexisting law." *Id.* And to prevail on a claim of deliberate indifference to serious medical need, a plaintiff must demonstrate (1) a serious medical need and (2) "that the prison official acted with an attitude of 'deliberate indifference' to that serious medical need." *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003).

The first prong, "a serious medical need," is objective. *Id.* "A serious medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1307 (11th Cir. 2009) (quotations omitted). For either of these situations, the medical need must be "one that, if left unattended, 'pos[es] a substantial risk of serious harm.'" *Farrow*, 320 F.3d at 1243 (alteration in original) (quoting *Taylor v. Adams*, 221 F.3d 1254, 1257 (11th Cir. 2000)).

The "deliberate indifference" prong, on the other hand, is subjective. *Id.* To meet the "onerous" deliberate indifference standard, *Goodman v. Kimbrough*, 718 F.3d 1325, 1332 (11th Cir. 2013), a plaintiff must demonstrate "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than [gross] negligence." *Townsend v. Jefferson Cnty.*, 601 F.3d 1152, 1158 (11th Cir. 2010) (citation omitted) (alteration in original). The Constitution does not require that a detainee's medical care be "perfect, the best obtainable, or even very good." *Harris v. Thigpen*, 941 F.2d 1495, 1510 (11th Cir. 1991). Rather, for treatment (or lack thereof) to amount to deliberate indifference, it must be "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Id.* at 1505 (quotation omitted). For example, we have held that "[w]hen the need for treatment is obvious, medical care

which is so cursory as to amount to no treatment at all may amount to deliberate indifference." *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) (alteration in original) (emphasis added) (citations omitted). Likewise, "[d]eliberate indifference may be established by a showing of grossly inadequate care as well as by a decision to take an easier but less efficacious course of treatment." *Id.* (citations omitted).

On the "serious medical condition" prong, we find that Hammonds's Type 1 diabetes is a "serious medical condition" within the meaning of our precedents, and Dr. Theakston does not meaningfully contest this point. Appellees' Br. at 24–27 (focusing on the "deliberate indifference" prong and calling Hammonds's Type 1 diabetes "his serious medical need"). The evidence shows that Hammonds was diagnosed with Type 1 diabetes by a physician in 1994 and that Hammonds generally managed his blood sugar levels by administering himself a mixture of insulin. The evidence also reveals that Hammonds's diabetes led to hypoglycemic and hyperglycemic episodes, and he required emergency medical care for his diabetes on multiple occasions. This evidence is sufficient to show that Hammonds had a serious medical need.

But the subjective prong, "deliberate indifference," is a very high bar: Hammonds must show that the treatment he received from Dr. Theakston was "grossly inadequate" or "so cursory as to amount to no treatment at all." *Brown*,

387 F.3d at 1351. In an effort to make this showing, Hammonds relies on the testimony of his expert, Dr. Venters, who stated that he had "almost never seen a patient who is known to be insulin dependent be given only short-acting insulin" and that it was his "sense" that short-acting insulin alone would be insufficient treatment. By contrast, one of Dr. Theakston and Martin's experts, Dr. Trippe, testified that treating Type 1 diabetes with short-acting insulin alone was a "reasonable" protocol given the difficulties of providing medical treatment to inmates. And Dr. Theakston and Martin's other expert, Dr. Jones, testified that treating Hammonds with only short-acting insulin was "reasonable" until a "baseline insulin need" was established.

We have recognized that courts have a difficult job in these "battle of the expert" situations: "Confronted with an inmate who has a serious medical condition, a reviewing court hears from experts about measures that (in their view) would provide the most effective treatment. When the court then sees evidence that prison authorities aren't taking those measures—that perhaps they could be doing more, doing better—it concludes that liability must presumably follow." *Hoffer v. Sec'y, Fla. Dep't of Corr.*, 973 F.3d 1263, 1271 (11th Cir. 2020). But we do not operate under a "perhaps they could be doing more" standard. *See id.* Instead, the question before us is whether preexisting case law—that is, case law predating September 29, 2014—made it obvious that Dr. Theakston's treatment of

Hammonds's diabetes with only short-acting insulin would be *conscience-shocking*. *See Harris*, 941 F.2d at 1505. For at least three reasons, we conclude that it did not.

First, Hammonds's expert's testimony does not establish that Dr. Theakston's course of treatment was so grossly inadequate or cursory "*as to amount to no treatment at all*." *Brown*, 387 F.3d at 1351 (emphasis added). Hammonds's expert, Dr. Venters, hedged that he had "*almost* never seen" an insulin-dependent patient treated with only short-acting insulin. (emphasis added). And the mere fact that Dr. Venters had a "sense" that short-acting insulin alone was inadequate is not enough: "[W]here a prisoner has received *some* medical attention and the dispute is over the *adequacy* of the treatment, federal courts are generally reluctant to second guess medical judgments." *Harris*, 941 F.2d at 1507 (emphasis added) (quoting *Westlake v. Lucas*, 537 F.2d 857, 860 n.5 (6th Cir. 1976)). It is undisputed that Dr. Theakston provided Hammonds with some medical care (short-acting insulin), and we will not second-guess Dr. Theakston's medical judgment now.

Second, jail officials are not required to provide a detainee with the precise treatment the detainee requests. *See Hamm v. DeKalb Cnty.*, 774 F.2d 1567, 1575 (11th Cir. 1985) ("Although [the inmate] may have desired different modes of treatment, the care the jail provided did not amount to deliberate indifference.").

That is exactly what happened here: Dr. Theakston may not have provided Hammonds with the *precise* treatment that Hammonds wanted (a combination of short- and long-acting insulin), but he did not turn a blind eye to Hammonds's medical needs. This falls well short of conscience-shocking conduct.

Third, and relatedly, Dr. Theakston treated Hammonds's diabetes in 2013 with only short-acting insulin without incident. It is difficult to imagine how—after treating Hammonds with only short-acting insulin in the past—an objectively reasonable prison official in Dr. Theakston's place could "have been on advance notice that [his] acts in this case would *certainly* violate the Constitution." *Youmans*, 626 F.3d at 564 (emphasis added). As a matter of common sense, it would be an odd result for us to deny Dr. Theakston qualified immunity because, after successfully managing Hammonds's diabetes with only short-acting insulin in 2013, he decided to follow the same course of treatment in 2014. Dr. Theakston's decision "'is a classic example of a matter for medical judgment' and therefore not an appropriate basis for grounding liability under the Eighth Amendment." *Adams v. Poag*, 61 F.3d 1537, 1545 (11th Cir. 1995) (quoting *Estelle*, 429 U.S. at 107, 97 S. Ct. at 293).

As a result, we hold that the law did not clearly establish that providing Hammonds with only short-acting insulin would amount to deliberate indifference

to Hammonds's serious medical need. We accordingly affirm the District Court's grant of qualified immunity to Dr. Theakston.

C.

Hammonds also appeals the District Court's grant of summary judgment in favor of Martin. Hammonds argues that Martin, a nonmedical official who supervised Dr. Theakston, knew Hammonds was a Type 1 diabetic, knew he was in medical need, and did nothing. Hammonds's argument is foreclosed by *Keith v. DeKalb County*, 749 F.3d 1034 (11th Cir. 2014).

In *Keith*, a DeKalb County Jail pretrial detainee, Godfrey Cook, was murdered by his cellmate. *Id.* at 1038. The administrator of Cook's estate, Nadine Keith, brought a § 1983 claim against DeKalb County Sheriff Thomas Brown. *Id.* The DeKalb County Jail placed inmates in holding cells upon booking and then classified the inmates to determine where to place them. *Id.* at 1039. Inmates were classified based on criminal history and medical and mental health risk. *Id.* Medical staff spearheaded the medical and mental health risk assessments and sent inmates with mental health problems to one of three locations in the jail. *Id.* at 1040. Jail medical staff "*alone* decided whether an inmate should be housed in" one of the three locations. *Id.* (emphasis added).

One of the three locations, called 3SW, was for mental health inmates who did not present a risk of harm to themselves or other inmates. *Id.* Cook and his

cellmate were housed in 3SW, despite Cook's cellmate's history of violent criminal behavior. *Id.* at 1042–43.

Keith argued that Sheriff Brown was deliberately indifferent to Cook's serious medical need by failing to separate inmates who had committed violent crimes—like Cook's cellmate—from inmates charged with nonviolent crimes—like Cook. *Id.* at 1050. We summarized Keith's argument thus: "Sheriff Brown created a substantial risk of harm by relying on [the medical] staff's determination[] that an inmate did not pose a substantial risk of harm to other inmates." *Id.* Keith therefore "aim[ed] to hold Sheriff Brown liable for *not* disregarding the expert medical opinions of [medical] staff." *Id.*

We held that "Keith's theory of liability does not square with the law. Simply put, the law does not require that Sheriff Brown ignore the determination and recommendation of [medical] staff." *Id.*

Hammonds's argument here is analogous to the argument in *Keith*. Hammonds argues that Martin—a nonmedical official—is liable for not disregarding Dr. Theakston's determination and recommendation to treat Hammonds's Type 1 diabetes with only short-acting insulin and for not intervening by supplying Hammonds with additional medication—long-acting insulin. Here, as in *Keith*, Martin was not required by law to ignore Dr. Theakston's

determination and recommendation regarding the proper treatment of Hammonds's Type 1 diabetes.[5]

IV.

For the foregoing reasons, we affirm the District Court's grant of summary judgment in favor of Dr. Theakston and Martin.

AFFIRMED.

[5] That a 911 operator called Martin to report Hammonds's medical condition does not change the outcome here. Martin was still entitled by law to rely on his medical staff to determine how to treat Hammonds's diabetes.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

November 03, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-14123-GG
Case Style: Stephen Hammonds v. Robert Theakson, et al
District Court Docket No: 4:16-cv-01558-KOB

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.

Please use the most recent version of the Bill of Costs form available on the court's website at www.ca11.uscourts.gov.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Joseph Caruso, GG at (404) 335-6177.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1A Issuance of Opinion With Costs

APPENDIX B

MEMORANDUM OPINION OF THE DISTRICT COURT (ECF DOC. 96)

AND

ORDER OF THE DISTRICT COURT GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (ECF DOC. 97

FILED
2019 Sep-20 PM 03:05
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

STEPHEN HAMMONDS,	]	
	]	
Plaintiff,	]	
	]	
v.	]	**CIVIL ACTION NO.**
	]	**4:16-CV-01558-KOB**
ROBERT THEAKSTON, et al.,	]	
	]	
Defendants.	]	

MEMORANDUM OPINION

This § 1983 case concerns the medical care that Plaintiff Stephen Hammonds received for his diabetes while incarcerated at DeKalb County Corrections Center. Defendants Dr. Robert Theakston and Matthew Martin filed a motion for summary judgment. (Doc. 80). To resolve the motion for summary judgment, the court must analyze whether any reasonable official in the same circumstances as Dr. Theakston and Mr. Martin would have understood that administering only short-acting insulin to Mr. Hammonds, as opposed to both short-acting and long-acting insulin, violated his constitutional right to be free from the deliberate indifference to his serious medical needs. The court answers this overriding question in the negative and finds that Defendants are entitled to qualified immunity to Mr. Hammonds's § 1983 claim and grants their motion for summary judgment.

I. STANDARD OF REVIEW

A trial court can resolve a case on summary judgment only when the moving party establishes two essential elements: (1) no genuine disputes of material fact exist; *and* (2) the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

Under the first element of the moving party's summary judgment burden, "'[g]enuine disputes [of material fact] are those in which the evidence is such that a reasonable jury *could* return a verdict for the non-movant.'" *Evans v. Books-A-Million*, 762 F.3d 1288, 1294 (11th Cir. 2014) (emphasis added) (quoting *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996)). And when considering whether any genuine disputes of material fact exist, the court must view the evidence in the record in the light most favorable to the non-moving party and draw reasonable inferences in favor of the non-moving party. *White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188, 1191 (11th Cir. 2015).

Pursuant to these rules, the court next presents the facts supported by evidence on the record in the light most favorable to Mr. Hammonds.

II. BACKGROUND

Mr. Hammonds suffers from type 1 diabetes mellitus. To treat his diabetes, he regularly checks his blood glucose level and takes insulin.

On September 29, 2014, Mr. Hammonds was arrested and booked into the

DeKalb County Corrections Center. At the time of booking, he had short-acting R insulin and long-acting N insulin on his person, which the jail personnel confiscated. Short-acting R insulin counteracts the spike in glucose that occurs when eating a meal, whereas long-acting N insulin helps maintain a healthy baseline glucose level.

Dr. Theakston directed Mr. Hammonds's medical care in the jail. Dr. Theakston placed Mr. Hammonds on a regular insulin sliding scale regimen. According to this protocol, jail medical staff checked Mr. Hammonds's blood sugar at least twice a day, and, depending on his blood sugar level, administered a dosage of only short-acting R insulin, not long-acting N insulin.

According to Mr. Hammonds, the jail staff knew that he had to take both R insulin and N insulin. Mr. Hammonds testified that he told the arresting officer, the booking officer, nurses, jailers, and "everyone who would listen" that he required R insulin and N insulin. (Doc. 91-2 at 3–4).

Nurse notes taken during a prior incarceration in 2007 at the same jail shows that jail staff treated Mr. Hammonds with both R insulin and N insulin then. (Doc 82-4 at 48–50, 54–56, 62–70). A medical screening form and nurse's notes taken during a prior incarceration in 2013 show that Mr. Hammonds reported that he took both R insulin and N insulin, but that the jail staff treated him with only R insulin without issue then. (Doc. 82-4 at 72–73; Doc. 82-17 at 4–6). Dr.

Theakston was also the jail physician during those two prior incarcerations.

On October 3, 2014, Mr. Hammonds was "very sick and felt like [he] might not live." (Doc. 91-2 at 4). He called his father from jail and said that he did not think that he would survive the night.

Mr. Hammonds's mother called 911 and told the operator that Mr. Hammonds was having a medical emergency at the jail. The 911 operator called Mr. Martin, the Chief Jail Administrator, to inform him about the call. The parties paint different pictures of how Mr. Martin responded, but, for purposes of summary judgment only, the court accepts Mr. Hammonds's version of events.

According to Mr. Hammonds, Mr. Martin called Mr. Hammonds's mother back and "said he was going to make some arrests if anyone called 911 again and that he was tired of having his supper interrupted." (Doc. 91-3 at 2). Mr. Martin admonished Mr. Hammonds's mother for "misusing the 911 system," accused Mr. Hammonds of "just whining and crying and carrying on," and kept telling his mother that "someone was going to be arrested" for wrongfully calling 911. (*Id.* at 2–3; Doc. 82-46 at 10).

According to Mr. Hammonds, after the phone call, jailers took Mr. Hammonds to an empty medical ward and gave him a phone with Mr. Martin on the other line. (Doc. 91-2 at 5). Mr. Hammonds testified that Mr. Martin threatened him with solitary confinement and "four walls to complain to" if his

family called 911 again, after which "things would get worse for [him] and [his] family." (Doc. 91-2 at 5).

Two days after the 911 call, on October 5, 2014, the jail staff could not successfully treat Mr. Hammonds's high blood sugar. So Dr. Theakston ordered Mr. Hammonds to be transported to the DeKalb County Regional Medical Center emergency room.

Mr. Hammonds was hospitalized from October 5 to October 8, 2014 for diabetic ketoacidosis. The hospital treated Mr. Hammonds with IV insulin until the ketoacidosis was resolved on October 8, 2014, at which point the hospital discharged him back to the jail with instructions for the jail staff to administer 70/30 insulin (a mixture of R insulin and N insulin) twice a day, administer R insulin according to a sliding scale protocol, and call the hospital if Mr. Hammonds's blood glucose level exceeded 400 mg/dl. (Doc. 82-23 at 3; Doc. 91-1 at 63).

The jail followed the hospital's discharge instructions and administered 70/30 insulin twice a day from October 8, 2014 until Mr. Hammonds's release from jail on October 16, 2014. (Doc. 82-15 at 2). But the jail did not perfectly follow the hospital's regular insulin sliding scale during those eight days. Mr. Hammonds twice had a blood glucose level exceeding 400 mg/dl. According to the hospital's sliding scale, someone at the jail should have called the hospital for

such a high level, but nobody ever did. And medical records show that, sometimes during Mr. Hammonds's last eight days at the jail, the jail staff gave Mr. Hammonds a dose of R insulin smaller or larger than the dose required by the hospital's sliding scale. (*See* Doc. 82-15 at 2; Doc. 91-1 at 30–32, 63).

Mr. Hammonds alleges that the diabetic ketoacidosis that he suffered at the jail caused the diabetic peripheral neuropathy from which he now suffers. Disputed evidence on the record shows that diabetic ketoacidosis *can* cause diabetic peripheral neuropathy.

Mr. Hammonds brings a § 1983 claim against Dr. Theakston and Mr. Martin in their individual capacities, alleging that they violated his Fourteenth Amendment right to be from the deliberate indifference to his serious medical needs and caused his diabetic peripheral neuropathy. Mr. Hammonds attributes all of the medical care he received to Dr. Theakston and asserts that Mr. Martin's supervision and policies engendered the allegedly unconstitutional medical care. Mr. Hammonds also asserts that Mr. Martin was deliberately indifferent to his serious medical needs by threatening him and his family for calling 911.

Dr. Theakston and Mr. Martin move for summary judgment on two grounds, asserting that (1) no genuine dispute exists as to whether they are entitled to qualified immunity; and (2) no substantial evidence exists to show a causal link between the alleged constitutional violations and Mr. Hammonds's continuing

injuries. For the following reasons, the court will grant their motion for summary judgment on grounds of qualified immunity and need not address the causation question.

III. ANALYSIS

Qualified immunity protects government officials to some extent from lawsuits against them in their individual capacities. *Goebert v. Lee Cty.*, 510 F.3d 1312, 1329 (11th Cir. 2007). To receive qualified immunity, a government officer must first establish that he was acting within the scope of his discretionary authority when the alleged wrongful acts occurred. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). Then the burden shifts to the plaintiff to show that the government officer violated his "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The parties agree that Dr. Theakston and Mr. Martin were acting within the scope of their discretionary authority when the alleged wrongful acts occurred. So the court proceeds by analyzing whether any genuine issue exists about whether the Defendants violated Mr. Hammonds's clearly established rights.

For a right to be clearly established, it must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. ---, 136 S. Ct. 305, 308 (2015) (internal

quotation omitted). The Supreme Court recently "reiterate[d] the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 580 U.S. ---, 137 S. Ct. 548, 552 (2017) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). Instead, "the clearly established law must be 'particularized' to the facts of the case." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Accordingly, a government officer violates clearly established law only when "the violative nature of [*his*] *particular conduct* is clearly established . . . in light of the specific context of the case." *Mullenix*, 136 S. Ct. at 308 (emphasis in original) (internal quotations omitted).

So, identifying a right that the defendant allegedly violated is not enough; rather, the plaintiff must show that "the right's contours were sufficiently definite that *any* reasonable official in the defendant's shoes would have understood" that *what he did* violated that right. *Kisela v. Hughes*, 584 U.S. ---, 138 S. Ct. 1148, 1153 (2018) (emphasis added).

Mr. Hammonds contends that Defendants violated his clearly established right to be free from the deliberate indifference to his serious medical needs under the Due Process Clause of the Fourteenth Amendment. True, when Mr. Hammonds was incarcerated, the law "clearly established that a jail official violates a pre-trial detainee's Fourteenth Amendment right to due process if he acts with deliberate indifference to the serious medical needs of the detainee."

Lancaster v. Monroe County, Ala., 116 F.3d 1419, 1425 (11th Cir. 1997) (*overruled on other grounds by LeFrere v. Quezada*, 588 F.3d 1317, 1318 (11th Cir. 2009)). But, merely stating a constitutional right does not show that a right is clearly established for qualified immunity purposes; Mr. Hammonds must show how Defendants allegedly violated that right and whether reasonable officials in their position would have known that what they did violated that right.

So the court turns to the law that governs a claim of deliberate indifference to serious medical needs. To state such a claim, a plaintiff "must shoulder three burdens." *Goebert*, 510 F.3d at 1326. First, he must show that he had a serious medical need. *Id.* (citing *Bozeman v. Orum*, 422 F.3d 1265, 1272 (11th Cir. 2005) (per curiam)). Next, he must show that the prison official acted with deliberate indifference to his serious medical needs. *Goebert*, 510 F.3d at 1326. Finally, he must show that the defendant's wrongful conduct caused him injury. *Id.* (citing *Hale v. Tallapoosa County*, 50 F.3d 1579, 1582 (11th Cir. 1995)).

For purposes of their motion for summary judgment only, Defendants concede that Mr. Hammonds had a "serious medical need" because of his diabetes to satisfy the objective component of a deliberate indifference claim. (*See* Doc. 81 at 20). So the court turns to Mr. Hammonds's second burden; *i.e.*, to satisfy "the subjective component by showing that the prison official acted with deliberate indifference to [his] serious medical need." *Goebert*, 510 F.3d at 1326.

The subjective component of a claim of deliberate indifference to medical needs itself requires three elements: "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; and (3) by conduct that is more than [gross] negligence." *Goebert*, 510 F.3d at 1327 (alteration in original). Though "[t]he meaning of 'more than gross negligence' is not self-evident," the Eleventh Circuit's "past decisions have developed the concept." *Id.*

For example, medical treatment is "more than gross negligence" when "'it is so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.'" *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1280 (11th Cir. 2017) (quoting *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986)). A medical provider commits more than gross negligence if he refuses to obtain treatment, delays treatment, or provides care "'which is so cursory as to amount to no treatment at all.'" *Nam Dang*, 871 F.3d at 1280 (quoting *Lancaster*, 116 F.3d at 1425, and *Mandel v. Doe*, 888 F.2d 783, 789 (11th Cir. 1989)) (citing *Harris v. Coweta Cty.*, 21 F.3d 388, 393–94 (11th Cir. 1994)). And "grossly inadequate care as well as . . . a decision to take an easier but less efficacious course of treatment" may also constitute conduct that is more than gross negligence. *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999).

Also, the plaintiff must demonstrate that his medical care provider's actions

"violated a clear and specific standard and that similarly situated reasonable health care providers would have known that their actions violated [the plaintiff's] constitutional right." *Adams v. Poag*, 61 F.3d 1537, 1543 (11th Cir. 1995). The plaintiff can show the existence of a clearly established medical standard "either through reference to prior court decisions or to the contemporary standards and opinions of the medical profession." *Id.* But the Eleventh Circuit has cautioned that, though "this inquiry may sound in medical malpractice, a plaintiff must demonstrate more than mere negligence . . . to assert a[Fourteenth Amendment] violation." *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Only "'obduracy and wantonness, not inadvertence or error in good faith,'" in providing inmate medical care violates the Constitution. *Adams*, 61 F.3d at 1544 (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

Here, Mr. Hammonds asserts that his expert witness's testimony and one prior court decision shows a clearly established medical standard to treat a patient like him with both short-acting and long-acting insulin, that the violation of such standard constitutes more than gross negligence, and that any reasonable official in Dr. Theakston's and Mr. Martin's position would have known that violating that standard would constitute deliberate indifference. Defendants have moved to exclude Mr. Hammonds's expert witness's testimony from the summary judgment record, but for purposes of summary judgment only, the court will deny

Defendants motion in limine as to Mr. Hammonds's expert and construe the expert testimony in the light most favorable to Mr. Hammonds.

Having set out the governing qualified immunity law and Mr. Hammonds's primary contentions for why Dr. Theakston and Mr. Martin should not enjoy qualified immunity, the court will separately evaluate each Defendant's arguments for qualified immunity.

1. Dr. Theakston's Qualified Immunity

Mr. Hammonds first challenges Dr. Theakston's qualified immunity with expert witness testimony. Mr. Hammonds's expert witness, Dr. Homer Venters, is a "physician, internist, and epidemiologist with over a decade of experience in providing, improving, and leading health services for the incarcerated"; was the Chief Medical Officer for the New York City Jail Correctional Health Service where he was "responsible for development and oversight of all health policies in the NYC jail system"; and has treated many inmates with type 1 and type 2 diabetes with various types of insulin (Doc. 82-43 at 8–9; Doc. 82-44 at 32).

Dr. Venters testified that, in his opinion, Mr. Hammonds suffered diabetic ketoacidosis at the jail because he was not provided any long-acting insulin before he was hospitalized. (Doc. 83-43 at 23; Doc. 82-44 at 39). He testified, "my experience as a physician is that it is not possible to treat insulin dependent diabetes only with short-acting insulin with maybe the exception of care provided

in an intensive care unit where there's constant medical monitoring." (Doc. 82-43 at 23). He also testified that, based on his knowledge and experience with treating insulin-dependent diabetics, administering only short-acting insulin "was a gross deviation from not just a clinical standard, but just an acceptance approach to the care of the patient." (*Id.* at 21). And, as Mr. Hammonds frequently notes, Dr. Venters testified:

> A. It's my assessment that the failure of Dr. Theakston to assess the basal insulin needs of this patient and prescribe long-acting insulin as part of his regimen, represents a gross deviation from any standard of care I'm aware of as directly related to his development of diabetic ketoacidosis.
> . . . .
> But I have almost never seen a patient who is known to be insulin dependent be given only short-acting insulin, and I would -- I assess this as just a very gross deviation from any standard of care, not simply a matter of
> . . .
> the wrong medicine, or the wrong treatment.
> But my sense is this is no treatment for half the problem, and treatment for the other half of the problem.

(Doc. 82-43 at 28).

Mr. Hammonds contends that Dr. Venters's testimony alone establishes that treating type I diabetics with Mr. Hammonds's symptoms with only short-acting

insulin constitutes more than gross negligence according to well-known objective medical standards, such that similarly situated officials would have known that Dr. Theakston's treatment violated Mr. Hammonds's constitutional rights. The court disagrees.

Dr. Venters's testimony falls short of Mr. Hammonds's interpretation of it. Though the testimony *could* create a genuine dispute over the cause of Mr. Hammonds's diabetic ketoacidosis and the reasonableness of Mr. Hammonds's pre-hospitalization treatment at the jail for a negligence claim, it does *not* create a genuine dispute over what Mr. Hammonds must actually show to strip Dr. Theakston of qualified immunity.

As stated above, Mr. Hammonds must show a genuine dispute of whether the "contours" of his right to receive more than just short-acting insulin "were sufficiently definite that any reasonable official in [Dr. Theakston's] shoes would have understood" that what Dr. Theakston did violated that right, and that Dr. Theakston disregarded the risk of providing only short-acting insulin by conduct that is more than gross negligence. *See Kisela*, 138 S. Ct. at 1153; *Goebert*, 510 F.3d at 1327. Dr. Venters's testimony does not create such a genuine dispute.

Dr. Venters's testimony only shows that he has not had success treating type I diabetics with only short-acting insulin and has not seen the kind of treatment that Dr. Theakston provided. It does not show a clearly established medical standard

that required Dr. Theakston to treat Mr. Hammonds with both short-acting and long-acting insulin, and, even if such a standard existed, that Dr. Theakston's failure to meet the standard amounted to more than gross negligence. The testimony sheds no light on what any similarly situated reasonable health care providers in Dr. Theakston's position should have done, much less whether Dr. Theakston should have been aware of a substantial risk of serious harm to Mr. Hammonds.

And, even accepting Dr. Venters's opinion that Dr. Theakston only treated half of the problem as true, no evidence shows that doing so was "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Nam Dang*, 871 F.3d at 1280 (citations and quotations omitted). No evidence disputes that Dr. Theakston did not refuse to treat Mr. Hammonds, delay his treatment, provide only cursory treatment as to amount to no treatment at all, or take an easier but less effacious course of treatment.

Dr. Venters's testimony might raise a genuine issue of the reasonableness of Dr. Theakston's decision to administer only short-acting insulin to support an inference of negligence. But that is not enough; only "'obduracy and wantonness, not inadvertence or error in good faith,'" in providing inmate medical care violates the Constitution. *Adams*, 61 F.3d at 1544 (quoting *Whitley*, 475 U.S. at 319). Dr.

Venters's testimony simply does not bridge the gap from an inference of negligence to an inference of conduct that is more than gross negligence to strip Dr. Theakston of qualified immunity.

The court turns next to Mr. Hammonds's lone case that he contends satisfies his burden of showing a clearly established right that Dr. Theakston violated, *Flowers v. Bennett*, 123 F. Supp. 2d 595 (N.D. Ala. 2000).

In *Flowers*, a deliberate indifference to medical needs case, evidence showed that the diabetic plaintiff told the jail medical staff that she needed a dosage of insulin the night she was booked into the jail. The staff did not give her any insulin. In the morning of her second day at the jail, she was hospitalized for diabetic ketoacidosis brought on, in part, by the jail staff's failure to provide her any insulin. From this evidence, the court found a genuine issue of material fact as to whether the jail officials knew that the plaintiff needed insulin but deliberately failed to provide her insulin. *Flowers*, 123 F. Supp. 2d at 601–02. So the court denied qualified immunity at the summary judgment stage. *Id.*

But *Flowers* does not support Mr. Hammonds's position. The case advises the court to deny qualified immunity when evidence shows that jail officials failed to give *any* insulin to a known diabetic inmate, which, unsurprisingly, could support an inference of the deliberate indifference to the inmate's serious medical needs. But no such evidence exists in this case. Unlike in *Flowers*, the issue in

this case is not whether Dr. Theakston provided Mr. Hammonds *any* insulin. Rather, the issue in this case is whether any evidence creates a genuine dispute of whether any reasonable medical official in Dr. Theakston's position would have known that giving Mr. Hammonds only short-acting insulin, as opposed to both short-acting and long-acting insulin, would violate Mr. Hammonds's clearly established rights. So *Flowers* does not change the court's qualified immunity analysis in this case.

Mr. Hammonds then ropes his post-hospitalization treatment at the jail into his § 1983 claim. According to Mr. Hammonds, Dr. Theakston's failure to perfectly follow the hospital's discharge instructions—by itself and/or combined with his pre-hospitalization treatment—strips him of qualified immunity. Again, the court disagrees.

After discharging Mr. Hammonds on October 8, 2014, the hospital instructed the jail to administer 70/30 insulin—a mixture of short-acting and long-acting insulin—twice a day, measure his blood glucose level three times a day, and administer regular insulin according to a sliding scale. (*See* Doc. 91-1 at 63). The jail mostly, but not perfectly, complied with these instructions.

A log of Mr. Hammonds's insulin dosages from his return to the jail on October 8, 2014 and his release from jail on October 16, 2014 shows that the jail medical staff missed one of the twice-daily doses of 70/30 insulin. (*See* Doc. 91-1

at 61) (entry for evening of 10/11/2014). The staff once failed to measure his blood glucose level. (*See id.* at 61) (entry for midday of 10/12/2014). The log has no record of a regular insulin dosage on three occasions. (*See id.*) (entries for morning 10/9/2014, evening 10/11/2014, and midday 10/12/2014). The staff did not administer the correct dose of regular insulin on several occasions, usually providing two units less or two units more than the hospital's sliding scale. (*See id.*) (for example, entries for evening 10/8/2014, evening 10/9/2014, morning 10/10/2014, evening 10/10/2014, and morning and midday 10/11/2014). And, on four occasions, the jail should have called the hospital because Mr. Hammonds's blood sugar exceeded 400 mg/dl, but Dr. Theakston testified that he was not aware if the jail ever did call the hospital. (*See id.*) (entries for morning and midday 10/9/2014, morning 10/12/2014, and evening 10/15/2014).

Though the jail deviated from the hospital discharge instructions, no evidence supports the inference that those deviations meet the substantially high qualified immunity bar. Dr. Venters testified about the risks involved with missing insulin doses and not taking enough insulin, but his testimony does not show whether Dr. Theakston violated an objective standard of care of which any reasonable official in his position would have known by conduct that is more than gross negligence. No evidence shows that administering two units of R insulin instead of four units, not going to the hospital with a blood glucose level exceeding

400 mg/dl, and missing one out of three insulin doses in a day is "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Nam Dang*, 871 F.3d at 1280 (quotation omitted). So no genuine dispute of material fact exists as to whether Mr. Hammonds's post-hospitalization treatment strips Dr. Theakston of qualified immunity.

Finally, the court expresses concern with the quality of medical care that Mr. Hammonds received at the jail. The jail staff did not give Mr. Hammonds's condition all of the serious attention it deserved. Mr. Hammonds told everyone at the jail that he needed two types of insulin, but he only received one type of insulin and ended up in the hospital. And the jail staff was careless upon Mr. Hammonds's return to the jail by, assuming that the insulin log is accurate, neglecting to follow the hospital discharge instructions to the letter.

But the troubling deficiencies with Mr. Hammonds's medical care do not meet the substantially heavy burden to overcome qualified immunity under the Supreme Court and Eleventh Circuit precedent that the court has described throughout this opinion. So the court will grant the motion for summary judgment as to Dr. Theakston because of his qualified immunity.

2. Mr. Martin's Qualified Immunity

Next, Mr. Hammonds asserts that Mr. Martin is liable for the alleged

deliberate indifference to his serious medical needs because, according to Mr. Hammonds, Mr. Martin (1) supervised Mr. Hammonds's care at the jail; (2) instituted a policy that caused the allegedly deficient medical care; and (3) threatened Mr. Hammonds and his family for calling 911.

To establish supervisory liability for a § 1983 claim, the plaintiff must show that "the supervisor personally participate[d] in the alleged unconstitutional conduct or . . . a causal connection between the actions of a supervising official and the alleged constitutional deprivation." *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003). And the plaintiff may establish the requisite causal connection "when a supervisor's custom or policy . . . result[s] in deliberate indifference to constitutional rights or when facts support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so." *Id.* (citations and quotations omitted).

Here, no evidence shows that Mr. Martin personally participated in Mr. Hammonds's medical care. And, because the court has found no genuine issue of whether Mr. Hammonds received unconstitutionally deficient medical care, no genuine issue exists of a causal connection between Mr. Martin's supervisory actions or policies and a constitutional violation. So Mr. Hammonds cannot strip Mr. Martin of qualified immunity under theories of supervisory or policy liability.

Finally, the court looks at Mr. Hammonds's most specific allegation against Mr. Martin—that Mr. Martin violated his Fourteenth Amendment rights by threatening him and his family for calling 911 and warning them against calling 911 again. The court assumes the truth of Mr. Hammonds's testimony about the events surrounding the 911 call, but no evidence supports a reasonable inference that Mr. Martin's actions violated clearly established law.

As stated above, to show that a defendant violated the plaintiff's clearly established right to be free from the deliberate indifference to his serious medical needs, the plaintiff must show that the defendant's conduct caused the plaintiff's injury. *Goebert*, 510 F.3d at 1326. Here, no evidence shows that Mr. Martin's threats to Mr. Hammonds and his family caused any injury or had any effect on Mr. Hammonds's medical treatment whatsoever. No evidence shows, for example, that Mr. Hammonds or his family called 911 again and suffered consequences from Mr. Martin, or that Mr. Hammonds or his family needed to call 911 for a medical emergency but could not because of Mr. Martin's threats. So no genuine dispute of material fact exists as to whether Mr. Martin's threats to Mr. Hammonds and his family concerning 911 violated Mr. Hammonds's clearly established Fourteenth Amendment rights.

IV. CONCLUSION

For the reasons stated above, by separate order, the court will **GRANT**

Defendants' motion for summary judgment on the grounds of each Defendant's qualified immunity. (Doc. 80). Summary judgment is appropriate even when considering Mr. Hammonds's expert witness's testimony, so the court will **DENY** Defendants' motion in limine to exclude that testimony. (Doc. 83). And the court will **DISMISS** this case **WITHOUT PREJUDICE**.

DONE and **ORDERED** this 20th day of September, 2019.

Karon O. Bowdre

KARON OWEN BOWDRE
CHIEF UNITED STATES DISTRICT JUDGE

FILED
2019 Sep-20 PM 03:07
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

STEPHEN HAMMONDS,	]	
	]	
Plaintiff,	]	
	]	
v.	]	**CIVIL ACTION NO.**
	]	**4:16-CV-01558-KOB**
ROBERT THEAKSTON, et al.,	]	
	]	
Defendants.	]	

ORDER

For the reasons stated in the court's Memorandum Opinion entered contemporaneously with this Order, Defendants Robert Theakston and Matthew Martin are entitled to qualified immunity from Plaintiff Stephen Hammonds's § 1983 claims against them. So the court **GRANTS** Defendants' motion for summary judgment. (Doc. 80). Because summary judgment is appropriate even when considering Mr. Hammonds's expert witness's testimony, the court **DENIES** Defendants' motion in limine to exclude that testimony. (Doc. 83). Accordingly, the court **DISMISSES** this case **WITHOUT PREJUDICE** and **DIRECTS** the clerk to close this case.

DONE and **ORDERED** this 20th day of September, 2019.

Karon O. Bowdre

KARON OWEN BOWDRE
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

NOVEMBER 24, 2020

APPELLANT'S PETITION FOR REHEARING

APPEAL NUMBER 19-14123-G

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STEPHEN HAMMONDS

Plaintiff - Appellant,

v.

ROBERT THEAKSTON and MATTHEW MARTIN

Defendants - Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama
District Court Docket No.: 4:16-cv-01558-KOB

APPELLANT'S PETITION FOR REHEARING

Daniel Patrick Evans
ASB-3209-R67G
G. Daniel Evans
ASB-1661-N76G
The Evans Law Firm, P.C.
1736 Oxmoor Road, Suite 101
Birmingham, Alabama 35209
Telephone: (205) 870-1970
Fax: (205) 870-7763
E-Mail: dpevans@evanslawpc.com
E-Mail: gdevans@evanslawpc.com
Counsel for Appellant

CERTIFICATE OF INTERESTED PERSONS

Pursuant to the 11th Circuit Rule 26.1-1, undersigned counsel for the Appellant certifies that the following list includes all persons and entities having an interest in the outcome of this case, as well as all persons and entities listed on all certificates filed in the appeal prior to the filing date of this petition for rehearing.

1. Bowdre, The Honorable Karen Owen
2. Brown, Todd A.
3. DeKalb County Correctional Facility
4. Evans, Daniel Patrick
5. Evans, G. Daniel
6. The Evans Law Firm, P.C.
7. Hammonds, Stephen
8. Kidd, Jamie Helen
9. Martin, Matthew
10. McNeill, J. Randall
11. Theakston, Robert M.D.
12. Webb & Eley, P.C.

RULE 35 STATEMENT OF COUNSEL

Pursuant to Fed. R. App. P. 35(b)(1) and 11th Cir. R. 35-5(c), undersigned counsel for the United States makes the following statement:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Estelle v. Gamble*, 429 U.S. 97 (1976); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Goebert v. Lee County*, 510 F.3d 1312 (11th Cir. 2007); *Brown v. Hughes*, 894 F. 2d 1533, 1537-38 (11th Cir. 1990); *Durruthy v. Pastor*, 351 F.3d 1080, 1084 (11th Cir. 2003); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 150 (2000); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849–50, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); *Tolan v. Cotton,* 572 U.S. 650(2014); *Lancaster v. Monroe County, Alabama*, 116 F.3d 1419, 1425 (11th Cir.1997)*; Harris v. Coweta County*, 21 F.3d 388, 394 (11th Cir.1994); *McElligott v. Foley*, 182 F.3d 1248, 1260 (11th Cir.1999); *Ancata v. Prison Health Servs. Inc.*, 769 F.2d 700, 705 (11th Cir. 1985); *Carswell v. Bay County*, 854 F.2d 454, 455 (11th Cir.1988); *Mandel v. Doe*, 888 F.2d 783, 788–90 (11th Cir.1989).

I also express a belief, based on a reasoned and studied professional judgment,

that this appeal involves the following question of exceptional importance: Whether Theakston and Martin acted with deliberate indifference towards Hammonds' serious medical needs in violation of 42 U.S.C.§1983 and Hammonds' constitutional rights secured by the Fourteenth Amendment. U.S. Const. Amend. XIV. The Panel's reasoning and its holding conflicts with the authoritative decisions rendered by the Third, Fourth, Sixth, and Seventh Court of Appeals: *Scinto v. Stansberry*, 841 F.3d 219 (2016); *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 582-83 (3d Cir. 2003); *Derfiny v. Pontiac Osteopathic Hospital*, 106 Fed.Appx.929 (2004); *Briggs v. Westcomb*, 801 Fed.Appx. 956 (2020); *Waldrop v. Wexford Health Sources, Inc*, 646 Fed.Appx 486 (2016); *Egebergh v. Nicholson*, 272 F.3d 925 (2001); *Lemarbe v. Wisneski*, 266 F.3d 429, 439 (6th Cir. 2001); *Jackson v. Kotter*, 541 F.3d 688, 697 (7th Cir.2008).

/s/ Daniel Patrick Evans
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW AUTHORITY FROM OTHER CIRCUITS:

Third Circuit:

Fourth Circuit:

Sixth Circuit:

Seventh Circuit:

STATEMENT OF THE ISSUES

1. Whether the Panel considered all material facts in light most favorable to the Appellant-Non Movement in rendering its decision.

2. Whether the Panel's Opinion conflicts with decisions and holdings rendered by The United States Supreme Court and the Eleventh Circuit.

3. Whether the Panel's Opinion and analysis creates a conflict with other circuits.

STATEMENT OF COURSE PROCEEDINGS

On December 27, 2018, Theakston and Martin moved for summary judgment asserting qualified immunity and moved to exclude the testimony and report of Hammonds' Expert, Dr. Homer Venters. (Docs. 80, 81, 82, 83). Hammonds responded on January 23, 2019. (Docs. 90, 91, 92) On September 20, 2019, the District Court denied the motion to strike Plaintiff's expert witness but granted summary judgment for both Dr. Theakston and Martin granting both qualified immunity without addressing causation. (Docs. 96, 97) This appeal followed. Appellant filed his Brief on December 11, 2019. Appellees filed their response on February 21, 2020. Appellant filed his reply on March 13, 2020. The Court issued its Opinion on November 3, 2020 affirming the district court's Order granting summary judgment for Defendants. Appellant hereby files his petition for rehearing concerning the same.

STATEMENT OF THE CASE

In reaching its Opinion, the Panel substantially disregarded material facts offered by Hammonds and though required to do so, failed to view the facts in light most favorable to Hammonds.

FACTS AND ARGUMENT IN SUPPORT OF GRANTING THE PETITION

I. The Panel Misapplied The Summary Judgment Standard.

In reviewing the lower court ruling granting summary judgment, the Panel ignored substantial material facts submitted by Hammonds and misstated others. In its review, the Court must "resolve all issues of material fact in favor of the plaintiff, and then determine the legal question of whether the defendant is entitled to qualified immunity under that version of the facts." *Durruthy v. Pastor*, 351 F.3d 1080, 1084 (11th Cir. 2003). The Panel's brief and selective recitation of Hammonds' factual submission failed to view all the evidence, and failed to draw all reasonable inferences, in the light most favorable to plaintiff. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).

Though acknowledging that Hammonds was a known Type I diabetic, the opinion did not address or even mention Dr. Venter's testimony in which he stated that care provided Hammonds was:

> ***grossly inadequate*** in that not only did it **fail to meet any applicable**

> **medical standard of care, but that it involved gross neglect of Mr. Hammonds' medical needs.** As I previously discussed to some degree in my deposition, that there are obvious incidences where Dr. Theakston simply ***failed to exercise any professional judgment or to make any response to urgent medical needs of Mr. Hammonds. He failed to provide any basal insulin for Mr. Hammonds, failed to monitor even the medication that was given Hammonds, and failed to respond to Mr. Hammonds' continually deteriorating condition up until shortly before Mr. Hammonds was hospitalized, suffering diabetic ketoacidosis, a life-threatening condition. Even after being released from the hospital, Dr. Theakston failed to abide by the discharge directions and failed to indicate any reason why he had not, clearly showing he simply failed to exercise any professional judgment.*** As a result for eight days after Mr. Hammonds was released from the hospital back to the jail he continued to suffer. ***These are not merely professional errors or alternative choices, but instead show egregious lapses of involvement of the medical care for Mr. Hammonds, far exceeding negligence, or even gross negligence***.
> Emphasis added. (Doc. 91-12)

The opinion at 10 states "Hammonds must show that the treatment he received from Dr. Theakston was "grossly inadequate" or "so cursory as to amount to no treatment at all." citing *Brown* at 387 F.3d at 1351. Ironically, the Panel then ignores the above-cited testimony of Dr. Venters where he explicitly stated the care to be "grossly inadequate" and elsewhere where he testified that Theakston's act of giving Stephen only R insulin for this period of time "is no treatment for half the problem, and treatment for the other half of the problem." (Doc. 82-43, p. 28 at depo pp. 101).

The opinion also disregarded other material facts which negate summary judgment. Factual issues presented here on the subjective prong of Defendants'

deliberate indifference prevent a legal conclusion of qualified immunity. Only by removing or ignoring these facts can the lower court's summary grant of immunity be approved.

The record here shows Theakston and Martin knew Hammonds was a brittle Type-I diabetic. (Doc 82-14, p. 20). They knew DKA and even death if Hammonds' diabetes was not properly treated. (Doc. 91-1, p. 26 at depo p. 103, 104; Doc. 82-6, p. 24 at depo p. 89). When jailed Hammonds was on a regimen of both short and long insulin, Theakston ignored this and changed to treating him sporadically with only R or short acting insulin. Though Theakston maintained a supply of "70/30" which is a premixed insulin ratio of both NPH and R insulins, (Doc. 82-4, p. 19 at depo p. 71) this was not provided to Hammonds until after he was hospitalized due to DKA. (Doc. 82-4, p. 26 at depo pp. 99-100).

The Panel did not address Theakston's change of treatment in this 2014 event and was simply wrong in concluding that Hammonds was treated with the only R insulin in a 12-hour stay in 2013. (See Opinion at 13) In fact, Theakston had previously successfully treated Hammonds by using both N and R in 2013 but changed prescribed treatment in 2014 for no medical reason. (See Doc. 82-4, p. 72-73). The Opinion's conclusion that it is therefore "common sense" to award immunity to Theakston because he used this same treatment in 2013, is erroneous.

The unquestionable facts in the record as above cited belie this statement. And, as a result of the factual error, the Court is led further astray.

The opinion did not acknowledge that both experts concluded that Theakston's change in Hammonds' prescribed insulin type and regimen was not adequate. Dr. Venters testified that a Type-I individual cannot be adequately treated with only short-acting R insulin other than in a hospital "intensive care setting where there is constant medical monitoring." (Doc. 82-43, p. 23 at depo p. 78) Only in a hospital setting with IV administration, constant monitoring, and R insulin administration through an insulin pump can Type I diabetics be treated with R alone. (Doc. 82-43, at depo. pp. 42.

Similarly, Defendants' expert, Dr. Bruce Trippe, confirmed that using R insulin does not adequately treat a Type-I diabetic because "It (R insulin) doesn't work quick enough and it didn't last long enough . . . I call it R irregular" (Doc. 82-33, p. 17 at depo p. 57). Despite this, and his knowledge of Hammonds' condition and the past care he was given, Theakston testified that for insulin administration, he treated Type I and Type II diabetics the same using a sliding scale. (Doc. 91-1, p. 25 at depo p. 98). In fact, the parameters of even that sliding scale were not followed in caring for Hammonds. (Docs. 82-16, p. 2; 91-6). The Opinion does not give any consideration to any of these fact from which a reasonable jury could conclude support a finding of

deliberate indifference– a subjective fact specific conclusion.

The Panel gave no consideration that Hammonds had never suffered DKA until this event since he was diagnosed with Type-1 Diabetes in 1994. (Docs. 82-23, -24, - 25, - 26, -27, -28, -29). Instead, the Panel concluded that "Hammonds disagreed" with the course of treatment Theakston was providing him in 2014. The facts show differently because Hammonds could barely care for himself, let alone argue with the treatment he was receiving. From October 3, 2014 - October 5, 2014, Hammonds could not eat or drink water, was vomiting, having difficulty moving, could not bathe himself, control his body temperature, or otherwise tend to his personal needs. (Doc. 91-2, pp. 4-6)

There is no dispute that Theakston's order to change insulin type and dosage resulted in a substantial change in Hammonds' health. By September 30, 2014, his second day in jail, Hammonds started exhibiting hyperglycemic symptoms. Hammonds testified that he pleaded to see the doctor because he knew the risk of diabetic ketoacidosis. (Doc. 91-2, p. 4). From September 30, 2014 until October 3, 2014, Hammonds' blood glucose levels averaged 311 mg/dl. (Doc. 91-6) Defendants' expert, Dr. Bruce Trippe, testified that a glucose level over 100 mg/dl is high when fasting and that DKA can begin with glucose levels of 240 mg/dl. (Doc. 82-33, p. 31 at depo p. 112) This causes extreme pain because in DKA, the body cannibalizes its

own tissue due to inadequate insulin and the blood becomes acidic. (Doc. 82-43, at depo pp. 51-53; 91-2, pp. 2-4; Doc. 91-12, pp. 3-4; Doc. 82-33, at depo p. 118; Doc. 82-43, at depo pp. 51-53; 91-2, pp. 2-4; Doc. 91-12, pp. 3-4) Hammonds began suffering DKA starting around October 1, 2020 and the condition leads to nerve damage, blindness, systemic organ failure and death if not remedied. His warning signs of approaching DKA were apparent: vomiting, dehydration, shortness of breath, mental confusion, inability to eat or retain food, and unconsciousness. (Doc. 82-33, at depo p. 115; Doc. 91-12).

The Opinion glossed over Martin without examining the facts Hammonds raised concerning the extent of Martin's direct involvement. When viewed in light most favorable to Hammonds, the facts show Martin was directly involved in **denying** Hammonds his requested care. By October 3, Hammonds feared death due to inadequate insulin and called his family. (Doc. 91-2, p. 2). His family called 911 about the emergency. (Docs. 91-3, pp. 2-3 , 91-4, pp. 2-3) Martin called and threatened Hammonds' entire family with jail time for calling 911 and for "interrupting his dinner." (Doc. 82-46, pp. 9-10 at depo pp. 32-36; Doc. 91-3, pp. 2-3; Doc. 91-4, pp. 2-3). Hammonds' mom asked see her son and bring him his insulin medication, which Martin refused. (Doc. 91-3, pp. 2-3). Despite Ms. Hammonds' efforts to get care for her son, Martin did not contact jail medical personnel. (Doc.

82-6, pp. 25, 27 at depo pp. 96, 101). On October 3, 2014, the circuit court granted Hammonds a pretrial release on a "OR" bond, but Theakston and Martin never informed him of this fact and kept him detained until October 16, 2014. (Doc. 82-14, p. 12)

Martin admitted he did not talk with jail medical staff, that he never looked at Hammonds' records to which he had access, and that he only knew Stephen went through medical screening when he was booked in four days earlier (Doc. 82-6, p. 28 at depo pp. 107-08; p. 36 at depo p. 139) Instead, Martin threatened Hammonds and ordered him to solitary confinement with "four walls to complain to" this served no purpose other than retaliation. (Doc.91-2, p. 5).

The Opinion erred in concluding that Martin was not involved in Hammonds' care. When viewed in Hammonds' favor, the facts show Martin was instrumental in isolating Hammonds and denying him care. By October 4, 2014, Hammonds remained isolated and was given only intermittent doses of only R insulin and was not provided a diabetic diet. (Docs. 82-44 pp. 36-38; Doc. 82-43, p. 32 at depo pp. 115-16; 91-2) . Hammonds' glucose was 444mg/dl and the jail records show he was given 10 units R insulin. There was no further measurement of his levels or any insulin given until at least 8:00 p.m. that evening. By then, his glucose level was measured at 543 mg/dl and he was unable to care for himself. (Doc. 91-6).

Martin kept Hammonds in isolation and by 5:40 a.m. on October 5, 2014, Hammonds' blood glucose was 534mg/dl and over 543 mg/dl at 9:20 a.m. when it was recorded as simply "high" meaning the measurement exceeding the glucometer's reading (Doc. 91-6; Doc. 91-1, p. 28 at depo p. 109) Dr. Theakston was informed, but took no action to speak with or examine Hammonds. (Doc. 82-4, p. 29 at depo p. 109)

Throughout October 5, 2014, Hammonds remained in isolation with a blood glucose level above 534 mg dl from at least 5:40 a.m. until at least 1:52 p.m.(Doc. 91-1, pp. 56-57). The record shows Hammonds was hyperglycemic and was noted in the medical record "DKA ?" *Id*. Defendants' expert, Dr. Trippe, testified that Hammonds was suffering from DKA and it is a "state of pre-death" because he was decompensating. (Doc. 82-33, pp. 32-33 at depo pp. 115, 117-119; Doc. 91-1, pp. 56-57; Doc. 82-4, p. 30 at depo p. 113, 116) Despite this, Theakston never examined Hammonds and waited for hours to order him to the hospital. (Doc. 91-1, p. 57, 63; 91-1 at depo p. 109). Dr. Venters stated that Theakston's act of giving Stephen only R insulin for this period of time "is no treatment for half the problem, and treatment for the other half of the problem." (Doc. 82-43, p. 28 at depo pp. 101).

October 8, 2014, Hammonds was discharged and returned to the jail isolation chamber, despite hospital discharge orders. (Docs. 82-20, p. 2; Doc. 82-23, pp. 2 - 6; 91-1, p. 63; 91-2, pp. 5-6; 91-6). While the Panel acknowledged Theakston admitted

that there was not a single day that the discharge orders were correctly followed.(Doc. 91-1, pp. 29-33 at depo pp. 119-129). Theakston offered no reason for the deviation or for his lack of attention to Hammonds' serious medical issue (Doc. 91-1, pp. 29-33 at depo pp. 119-129).

Upon his return, Theakston perpetuated Hammonds' problems by not following the discharge orders for an additional eight days. The Panel does note that Hammonds' blood sugar remained abnormally high after he returned, but it fails to acknowledge it remained high be because the discharge Orders and directions were not followed. (Doc. 91-6).

On October 16th, Hammonds' glucose was measured at 481 mg/dl at 11:07 a.m., and though he required insulin, no insulin was provided. (Doc. 91-6). Hammonds remained in solitary confinement until October 16, 2014.

Hammonds was released later that day and directed to the pay phone where he called for an ambulance himself and then collapsed. (Docs. 91-2, p. 6, 91-6) Martin saw Hammonds at the around the time of collapse in the jail lobby and testified that Hammonds' mouth was drawn as if he had suffered a stroke. (Doc. 82-6, p. 34 at depo p. 132; Doc. 91-2, pp. 6-8). Hammonds' was taken to the hospital again and diagnosed with numbness and bilateral facial paresthesis. (Doc. 82-24, pp. 3, 14, 15). Hammonds was diagnosed for the first time with peripheral neuropathy in November

2014, which was later confirmed by a nerve conduction study. (Doc. 82-25, pp. 22-23, Doc. 82-33, p. 39 at depo p.143-44;Doc. 82-43, p. 28 at depo p. 99; Doc. 91-11; Doc. 91-12, pp. 2-4)

The Panel erred in concluding a trier of fact– under these facts all of which are not referenced by this Court-- could not reasonably find that Hammonds' damages are a result of Theakston's or Martin's deliberate indifference. As such, the Opinion erred in not considering the complete factual submissions. It is required to "draw all reasonable inferences in favor of the nonmoving party, and . . . may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 150 (2000).

II. The Panel Ignored Supreme Court Precedent directing that claims of Constitutional deprivation should be addressed before granting qualified immunity.

The Supreme Court warned courts that a prison official may "not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk he strongly suspected to exist." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Furthermore, "[w]hether a prison official has the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inferences from circumstantial evidence." *Id*. at 842,. As shown above, only by avoiding substantial

parts of the factual record, does this Court support the lower court's decision.

Hammonds asserts that the district court erred in granting qualified immunity to all Defendants without finding they acted constitutionally- that is, were not deliberately indifferent to this known medical need. Qualified immunity cases are "highly fact-specific and involve an array of circumstances pertinent to just what kind of notice is imputed to a government official and to the constitutional adequacy of the official's acts and omissions." *Goebert v. Lee County*, 510 F.3d 1312, 1330 (11th Cir. 2007)." The opinion of this Court has avoided the many fact issues concerning deliberate indifference to affirm a lower court which simply granted immunity while never even reaching the constitutional question. This approach perverts Rule 56 and ignores direction from the Supreme Court in *County of Sacramento v. Lewis,* 523 U.S. 833, 841(1998). By avoiding even that ruling as only a "suggestion,"[1] an illogical result occurs where a court grants qualified immunity without addressing factual issues of deliberate indifference first. *Also see, Tolan v. Cotton,* 572 U.S. 650(2014).

The Panel correctly held Hammonds satisfied the objective component of the deliberate indifference analysis because his medical need as a Type-1 Diabetic was sufficiently serious and clearly known to the Defendants who also knew the

[1]*See* Opinion at 6 fn. 4 citing *Santamorena v. Ga. Military Coll.*, 147 F. 3d 1337, 1343(11th Cir. 1998)

consequence of poor treatment.

However, the Panel, without explanation or cited authority, imposed a much higher subjective evidentiary burden on Hammonds than *Farmer* or *Estelle* requires to overcome summary judgment. *Estelle v. Gamble*, 429 U.S. 97 (1976) *Farmer* held in constitutional contexts relating to detainee care, "deliberate indifference" that amounts to a constitutional violation falls somewhere in the middle of the culpability spectrum. *Farmer*, 511 U.S. at 835–36; *see also Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849–50, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). "[D]eliberate indifference describes a state of mind more blameworthy than negligence," ***but it also involves something less than acting or failing to act*** "for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835. (emphasis added). Deliberate indifference exists when a jail doctor and/or administrator denied an inmate humane conditions of confinement when "the official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837. "Since a finding of deliberate indifference requires a finding of the defendant's subjective knowledge of the relevant risk, a genuine issue of material fact exists where "the record contains evidence, albeit circumstantial, of such subjective awareness.'" *Melton v. Abston*, 841 F.3d 1207, 1224 (11th Cir. 2016) (quoting *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999). The Panel did not follow

Melton in analyzing whether or not Hammonds met his evidentiary burden.

This Circuit in fact holds that "an official acts with deliberate indifference when he intentionally delays providing an inmate with access to medical treatment, knowing that the inmate has a life-threatening condition or an urgent medical condition that would be exacerbated by delay." *Lancaster v. Monroe County, Alabama*, 116 F.3d 1419, 1425 (11th Cir.1997); *also see, Goebert v. Lee County*, 510 F.3d 1312, 1331 (2007)(*Citing Harris v. Coweta County*, 21 F.3d 388, 394 (11th Cir.1994); *McElligott v. Foley*, 182 F.3d 1248, 1260 (11th Cir.1999); *Mandel v. Doe*, 888 F.2d 783, 788–90 (11th Cir.1989).

When viewing the full facts in Hammonds, the Panel's decision contradicts *Ancata v. Prison Health Servs. Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) holding "knowledge of the need for medical care and intentional refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference. *Id*. at 704. *See also*, *Carswell v. Bay County*, 854 F.2d 454, 455 (11th Cir.1988) (finding deliberate indifference, where the detainee's requests for treatment and risks for ignoring them were known by jail, but the detainee was given ineffective treatment or ignored altogether).

Dr. Venters' testimony when considered in full presented more than sufficient evidence to create a fact question whether Theakston was subjectively aware of – and

disregarded– the risk of harm to a Type 1 diabetic who does not receive regular insulin. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

III. The Panel's Holding Also Conflicts with Multiple other Circuits:

Third Circuit: It held"in the absence of expert testimony, a reasonable jury could conclude that prison officials who knew the inmate was diabetic and needed insulin regularly were deliberately indifferent in denying sufficient insulin or insulin for non-medical reasons." *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 582-83 (3d Cir. 2003).

Fourth Circuit: It held that fact issues precluded summary judgment on a prisoner's claim where a doctor's failure to provide him insulin opposite of his diagnoses and known prescription created a genuine issue of material fact the Circuit held that the doctor's failure to supplement a dose of insulin when Plaintiff's blood sugar was 200 mg/dl (**more than three times LESS than when Hammonds was finally placed in the ICU**) may be sufficient alone to meet the object test set forth in *Farmer*. *Scinto v. Stansberry*, 841 F.3d. 219, 228 (2016). The Circuit held further expert testimony is not necessary to establish that an insulin dependent diabetic's inability to receive and take insulin regularly suffers a sufficiently serious risk of harm. *Id*. at 230.

Sixth Circuit: A summary judgment was reversed regarding Defendants'

alleged deliberate indifference to a diabetic's needs in *Derfiny v. Pontiac Osteopathic Hospital*, 106 Fed.Appx.929, 934 (2004). The Circuit remanded the district court's decision involving a doctor who reduced an inmate's insulin dosage and thereafter failed to increase it despite his suffering adverse effects. *Briggs v. Westcomb*, 801 Fed.Appx. 956, 958 (2020). See *Lemarbe v. Wisneski*, 266 F.3d 429, 439 (6th Cir. 2001). *Brown v. Hughes*, 894 F. 2d 1533, 1537-38 (11th Cir. 1990)

Seventh Circuit: It held a jury could find that a physician's decision to prescribe low insulin doses insufficient to treat the inmate's diabetes to be "such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that actually did not base the decision on medical judgment," *Jackson v. Kotter*, 541 F.3d 688, 697 (7th Cir.2008). The Court held further denying sufficient insulin to a Type-I diabetic constitutes a serious risk of harm. *Waldrop v. Wexford Health Sources, Inc*., 646 Fed.Appx. 486, 490 (2016)

A jury can infer a doctor was deliberately indifferent when he disregarded those risks by changing a prescribed insulin treatment, as well as lowering the dosage, all which did not remotely treat the inmate's serious medical condition. *See Egebergh v. Nicholson*, 272 F.3d 925, 928 (7th Cir.2001) (officer's knowledge that diabetes can be fatal, coupled with decision to deprive arrestee of insulin, permits jury inference of deliberate indifference).

These circuits clearly reviewed cases similar to Hammonds under the same applicable rules and prevailing established constitutional law.

CONCLUSION

Upon consideration of this matter, Appellant urges that this Court should vacate its decision and remand the matter for trial to the district court.

RESPECTFULLY SUBMITTED,

s/ Daniel Patrick Evans
Daniel Patrick Evans
ASB-3209-R67G
G. Daniel Evans
ASB-1661-N76G
Attorneys for the Plaintiff
The Evans Law Firm, P.C.
1736 Oxmoor Road, Suite 101
Birmingham, Alabama 35209
Telephone: (205) 870-1970
Fax: (205) 870-7763
E-Mail: dpevans@evanslawpc.com
E-Mail: gdevans@evanslawpc.com
Counsel for Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE AND TYPE-STYLE REQUIREMENTS

I, Daniel Patrick Evans, counsel for Appellant, certify that this document complies with Fed.R.App.P 32(a)(7)(B)(I) because it contains 3,862words, excluding the parts of the brief exempted. The petition complies with the typeface requirements

of Fed.R.App.P. 32(a)(5) and type-style requirements of Fed.R.App.P. 32(a)(6) because this document has been prepared in a proportionately spaced typeface using WordPerfect, Version X9 in Times New Roman 14-point font. The petition complies with Fed.R.App.P. 35(b)(2)(A) in that it does not exceed 3900 words.

Dated: November 24, 2020

/s/ Daniel Patrick Evans
Daniel Patrick Evans
Counsel for Appellant

CERTIFICATE OF SERVICE

I, Daniel Patrick Evans, hereby certify that four copies of the foregoing Petition for Rehearing were mailed to the Court of Appeals via Federal Express this 24th day of November, 2020, I also certify that, on the same day, the foregoing petition was electronically filed and served on all counsel of record using the CM/ECF System which will send notification of such filing to the following:

J. Randall McNeill, Esq.
Todd Brown, Esq.
Jamie Kidd, Esq.
WEBB & ELEY, P.C.
7475 Halcyon Pointe Drive (36117)
P.O. Box 240909
Montgomery, Alabama 36124
rmcneill@webbeley.com
tbrown@webbeley.com
jkidd@webbeley.com

/s/ Daniel Patrick Evans
Daniel Patrick Evans
Counsel for Appellant

ADDENDUM

11TH CIRCUIT OPINION DATED 11/3/2020

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14123
Non-Argument Calendar

D.C. Docket No. 4:16-cv-01558-KOB

STEPHEN HAMMONDS,

Plaintiff-Appellant,

versus

ROBERT THEAKSTON, et al.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(November 3, 2020)

Before GRANT, LUCK, and TJOFLAT, Circuit Judges.

PER CURIAM:

I.

On September 29, 2014, Stephen Hammonds, a Type 1 diabetic who takes insulin, was arrested on charges of possession of a controlled substance, possession of drug paraphernalia, and failure to appear – domestic violence third degree; he was booked into the DeKalb County Correctional Center later that day. Jail personnel confiscated short-acting R insulin and long-acting N insulin from Hammonds when he was booked.[1]

Dr. Robert Theakston treated Hammonds at the DeKalb County Correctional Center. He placed Hammonds on an insulin sliding scale regimen in which medical staff checked Hammonds's blood sugar twice a day. When his blood sugar was unhealthy, medical staff would administer a dose of short-acting insulin. The sliding scale regimen involved only short-acting insulin and no long-acting insulin.

Hammonds alleges that jail staff knew that he required both short- and long-acting insulin because (1) he had both types of insulin in his possession when he was arrested; (2) he told the arresting police officer, booking officer, nurses, jailers, and others that he needed both insulins; and (3) he had been held and

[1] Short-acting insulin counteracts the spike in glucose that occurs when eating. Long-acting insulin helps maintain a healthy baseline glucose level.

treated at DeKalb County Correction Center twice before, and on both occasions Dr. Theakston was the jail physician.[2]

Five days into his incarceration, on October 3, 2014, Hammonds felt "very sick" and feared that he "might not live." He called his parents and said he might die. Hammonds's mother called 911 to report that Hammonds was having a medical emergency at the jail. The 911 operator reported the same to Chief Jail Administrator Matthew Martin. According to an affidavit from Hammonds's mother, Martin called Hammonds's mother back and said that "he was going to make some arrests if anyone called 911 again and that he was tired of having his supper interrupted." Hammonds alleges that jail staff then brought him to a phone so that Martin could tell him that he would be placed in solitary confinement if his family called 911 again, after which "things would get worse for [Hammonds] and [his] family."[3]

Over the next two days, jail medical staff struggled to treat Hammonds's high blood sugar, and on October 5, Dr. Theakston ordered jail medical staff to transport Hammonds to the DeKalb County Regional Medical Center emergency

[2] In 2007, Hammonds was in the DeKalb County Correction Center and was treated with both short- and long-acting insulin. In 2013, Hammonds was treated at the DeKalb County Correction Center and—although he reported that he needed both short- and long-acting insulin—he was only given short-acting insulin (without incident).

[3] Martin disputes the facts alleged by Hammonds. For the purposes of summary judgment, we accept Hammonds's version of the facts as true. *See Case v. Eslinger*, 555 F.3d 1317, 1324–25 (11th Cir. 2009)

room for diabetic ketoacidosis. The diabetic ketoacidosis was resolved by October 8, 2014. The hospital discharged Hammonds back to the DeKalb County Correctional Center and instructed jail medical staff to administer a mixture of short- and long-acting insulin twice a day and to call the hospital if Hammonds's blood glucose level exceeded 400 mg/dl.

In the eight days following Hammonds's discharge from the hospital, he twice had a blood glucose level above 400 mg/dl. Jail personnel did not call the hospital on either occasion. Additionally, medical records indicate that jail staff sometimes administered a dose of short-acting insulin smaller or larger than the dose required by the hospital's instructions. The DeKalb County Correctional Center released Hammonds on October 16, 2014, eight days after he was discharged by the hospital.

Hammonds now suffers from diabetic peripheral neuropathy, which he alleges was caused by the diabetic ketoacidosis that he suffered at the DeKalb County Correctional Center. Hammonds brought a claim under 42 U.S.C. § 1983 against Dr. Theakston and Martin in their individual capacities, alleging that they violated his Eighth Amendment right to be free from deliberate indifference to his serious medical needs. U.S. Const. amend. VIII.

Dr. Theakston and Martin moved for summary judgment. The District Court granted summary judgment to both defendants, finding that both Dr. Theakston

and Martin are entitled to qualified immunity. In reaching its conclusion, the District Court did not address whether Dr. Theakston or Martin violated Hammonds's constitutional rights. Instead, the District Court addressed only qualified immunity. Hammonds appeals.

II.

We review "de novo the district court's disposition of a summary judgment motion based on qualified immunity, resolving all issues of material fact in favor of Plaintiffs and then answering the legal question of whether Defendants are entitled to qualified immunity under that version of the facts." *Case v. Eslinger*, 555 F.3d 1317, 1324–25 (11th Cir. 2009) (quoting *West v. Tillman*, 496 F.3d 1321, 1326 (11th Cir. 2007)).

Government officials are shielded by qualified immunity when they act within the scope of their discretionary authority, *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991), and when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982).

III.

A.

On appeal, Hammonds argues that the District Court erred by addressing qualified immunity first and not addressing Hammonds's allegations that Dr. Theakston and Martin violated his constitutional rights. We disagree. It is well settled in this Circuit that we may address the two core questions in a qualified immunity case—that is, (1) whether the official violated the plaintiff's constitutional rights, and (2) if so, whether those rights were clearly established—"in either order." *Waldron v. Spicher*, 954 F.3d 1297 (11th Cir. 2020) (quoting *Maddox v. Stephens*, 727 F.3d 1109, 1120 (11th Cir. 2013)).[4]

B.

Hammonds also argues that the District Court erred in granting Dr. Theakston qualified immunity on the basis that Hammonds failed to show that Dr.

[4] The U.S. Supreme Court has held that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 1714 n.5 (1998) (citing *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 1793 (1991)). As we have explained, however:

> We do not understand [*County of Sacramento*] as an absolute requirement that lower courts must always follow this "normally" "better approach." In *County of Sacramento*, the district court decided the case strictly on qualified immunity grounds, that is, on the ground of the unsettled nature of the law; but the Supreme Court never said the district court erred. And if the Supreme Court intended to impose an absolute requirement on lower courts always to address the merits of constitutional issues even where qualified immunity obviously applies and readily resolves the case, we believe the Supreme Court would have said so more directly.

Santamorena v. Ga. Military Coll., 147 F.3d 1337, 1343 (11th Cir. 1998) (footnote omitted).

Theakston violated a clearly established right. For the following reasons, we agree with the District Court.

We have identified three ways for a plaintiff to prove that a particular constitutional right is clearly established: (1) "[A] plaintiff can show that a materially similar case has already been decided," (2) "a plaintiff can also show that a broader, clearly established principle should control the novel facts of a particular case," or (3) "a plaintiff could show that the case fits within the exception of conduct which so obviously violates the Constitution that prior case law is unnecessary." *Waldron*, 954 F.3d at 1304–05 (citations omitted) (internal quotation marks omitted) (alterations adopted).

To demonstrate that his right to receive more than just short-acting insulin was clearly established, Hammonds makes two arguments. First, Hammonds argues that a single case, *Flowers v. Bennett*, 123 F. Supp. 2d 595 (N.D. Ala. 2000), establishes that Dr. Theakston's treatments constituted deliberate indifference. We can dispose of this argument quickly: "[C]learly established law consists of holdings of the Supreme Court [of the United States], the Eleventh Circuit, or the highest court of the relevant state." *Sebastian v. Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019). Because it is a district court opinion, *Flowers* is insufficient to clearly establish the law for Hammonds's claim.

Second, Hammonds argues that existing law clearly established the broad principle that "jail officials should not act with deliberate indifference to the serious medical needs of pretrial detainees." We agree that, as a general matter, the deliberate disregard of a pretrial detainee's serious medical needs violates the detainee's constitutional rights. *See Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976). But cases addressing deliberate indifference to serious medical needs "are very fact specific," *Youmans v. Gagnon*, 626 F.3d 557, 564 (11th Cir. 2010), and we hold that *Estelle*'s general rule does not obviously apply to the specific circumstances of this case—treatment of Type 1 diabetes with only short-acting insulin.

To demonstrate that a principle is "clearly established," a plaintiff must show that "preexisting law [] make[s] it obvious that the defendant's acts violated the plaintiff's rights in the *specific set of circumstances* at issue." *Youmans*, 626 F.3d at 563 (emphasis added). The unlawfulness of the defendant's acts must be "made truly obvious, rather than simply implied, by the preexisting law." *Id.* And to prevail on a claim of deliberate indifference to serious medical need, a plaintiff must demonstrate (1) a serious medical need and (2) "that the prison official acted with an attitude of 'deliberate indifference' to that serious medical need." *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003).

The first prong, "a serious medical need," is objective. *Id.* "A serious medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1307 (11th Cir. 2009) (quotations omitted). For either of these situations, the medical need must be "one that, if left unattended, 'pos[es] a substantial risk of serious harm.'" *Farrow*, 320 F.3d at 1243 (alteration in original) (quoting *Taylor v. Adams*, 221 F.3d 1254, 1257 (11th Cir. 2000)).

The "deliberate indifference" prong, on the other hand, is subjective. *Id.* To meet the "onerous" deliberate indifference standard, *Goodman v. Kimbrough*, 718 F.3d 1325, 1332 (11th Cir. 2013), a plaintiff must demonstrate "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than [gross] negligence." *Townsend v. Jefferson Cnty.*, 601 F.3d 1152, 1158 (11th Cir. 2010) (citation omitted) (alteration in original). The Constitution does not require that a detainee's medical care be "perfect, the best obtainable, or even very good." *Harris v. Thigpen*, 941 F.2d 1495, 1510 (11th Cir. 1991). Rather, for treatment (or lack thereof) to amount to deliberate indifference, it must be "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Id.* at 1505 (quotation omitted). For example, we have held that "[w]hen the need for treatment is obvious, medical care

which is so cursory as to amount to no treatment at all may amount to deliberate indifference." *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) (alteration in original) (emphasis added) (citations omitted). Likewise, "[d]eliberate indifference may be established by a showing of grossly inadequate care as well as by a decision to take an easier but less efficacious course of treatment." *Id.* (citations omitted).

On the "serious medical condition" prong, we find that Hammonds's Type 1 diabetes is a "serious medical condition" within the meaning of our precedents, and Dr. Theakston does not meaningfully contest this point. Appellees' Br. at 24–27 (focusing on the "deliberate indifference" prong and calling Hammonds's Type 1 diabetes "his serious medical need"). The evidence shows that Hammonds was diagnosed with Type 1 diabetes by a physician in 1994 and that Hammonds generally managed his blood sugar levels by administering himself a mixture of insulin. The evidence also reveals that Hammonds's diabetes led to hypoglycemic and hyperglycemic episodes, and he required emergency medical care for his diabetes on multiple occasions. This evidence is sufficient to show that Hammonds had a serious medical need.

But the subjective prong, "deliberate indifference," is a very high bar: Hammonds must show that the treatment he received from Dr. Theakston was "grossly inadequate" or "so cursory as to amount to no treatment at all." *Brown*,

387 F.3d at 1351. In an effort to make this showing, Hammonds relies on the testimony of his expert, Dr. Venters, who stated that he had "almost never seen a patient who is known to be insulin dependent be given only short-acting insulin" and that it was his "sense" that short-acting insulin alone would be insufficient treatment. By contrast, one of Dr. Theakston and Martin's experts, Dr. Trippe, testified that treating Type 1 diabetes with short-acting insulin alone was a "reasonable" protocol given the difficulties of providing medical treatment to inmates. And Dr. Theakston and Martin's other expert, Dr. Jones, testified that treating Hammonds with only short-acting insulin was "reasonable" until a "baseline insulin need" was established.

We have recognized that courts have a difficult job in these "battle of the expert" situations: "Confronted with an inmate who has a serious medical condition, a reviewing court hears from experts about measures that (in their view) would provide the most effective treatment. When the court then sees evidence that prison authorities aren't taking those measures—that perhaps they could be doing more, doing better—it concludes that liability must presumably follow." *Hoffer v. Sec'y, Fla. Dep't of Corr.*, 973 F.3d 1263, 1271 (11th Cir. 2020). But we do not operate under a "perhaps they could be doing more" standard. *See id.* Instead, the question before us is whether preexisting case law—that is, case law predating September 29, 2014—made it obvious that Dr. Theakston's treatment of

Hammonds's diabetes with only short-acting insulin would be *conscience-shocking*. *See Harris*, 941 F.2d at 1505. For at least three reasons, we conclude that it did not.

First, Hammonds's expert's testimony does not establish that Dr. Theakston's course of treatment was so grossly inadequate or cursory "*as to amount to no treatment at all*." *Brown*, 387 F.3d at 1351 (emphasis added). Hammonds's expert, Dr. Venters, hedged that he had "*almost* never seen" an insulin-dependent patient treated with only short-acting insulin. (emphasis added). And the mere fact that Dr. Venters had a "sense" that short-acting insulin alone was inadequate is not enough: "[W]here a prisoner has received *some* medical attention and the dispute is over the *adequacy* of the treatment, federal courts are generally reluctant to second guess medical judgments." *Harris*, 941 F.2d at 1507 (emphasis added) (quoting *Westlake v. Lucas*, 537 F.2d 857, 860 n.5 (6th Cir. 1976)). It is undisputed that Dr. Theakston provided Hammonds with some medical care (short-acting insulin), and we will not second-guess Dr. Theakston's medical judgment now.

Second, jail officials are not required to provide a detainee with the precise treatment the detainee requests. *See Hamm v. DeKalb Cnty.*, 774 F.2d 1567, 1575 (11th Cir. 1985) ("Although [the inmate] may have desired different modes of treatment, the care the jail provided did not amount to deliberate indifference.").

That is exactly what happened here: Dr. Theakston may not have provided Hammonds with the *precise* treatment that Hammonds wanted (a combination of short- and long-acting insulin), but he did not turn a blind eye to Hammonds's medical needs. This falls well short of conscience-shocking conduct.

Third, and relatedly, Dr. Theakston treated Hammonds's diabetes in 2013 with only short-acting insulin without incident. It is difficult to imagine how—after treating Hammonds with only short-acting insulin in the past—an objectively reasonable prison official in Dr. Theakston's place could "have been on advance notice that [his] acts in this case would *certainly* violate the Constitution." *Youmans*, 626 F.3d at 564 (emphasis added). As a matter of common sense, it would be an odd result for us to deny Dr. Theakston qualified immunity because, after successfully managing Hammonds's diabetes with only short-acting insulin in 2013, he decided to follow the same course of treatment in 2014. Dr. Theakston's decision "'is a classic example of a matter for medical judgment' and therefore not an appropriate basis for grounding liability under the Eighth Amendment." *Adams v. Poag*, 61 F.3d 1537, 1545 (11th Cir. 1995) (quoting *Estelle*, 429 U.S. at 107, 97 S. Ct. at 293).

As a result, we hold that the law did not clearly establish that providing Hammonds with only short-acting insulin would amount to deliberate indifference

to Hammonds's serious medical need. We accordingly affirm the District Court's grant of qualified immunity to Dr. Theakston.

C.

Hammonds also appeals the District Court's grant of summary judgment in favor of Martin. Hammonds argues that Martin, a nonmedical official who supervised Dr. Theakston, knew Hammonds was a Type 1 diabetic, knew he was in medical need, and did nothing. Hammonds's argument is foreclosed by *Keith v. DeKalb County*, 749 F.3d 1034 (11th Cir. 2014).

In *Keith*, a DeKalb County Jail pretrial detainee, Godfrey Cook, was murdered by his cellmate. *Id.* at 1038. The administrator of Cook's estate, Nadine Keith, brought a § 1983 claim against DeKalb County Sheriff Thomas Brown. *Id.* The DeKalb County Jail placed inmates in holding cells upon booking and then classified the inmates to determine where to place them. *Id.* at 1039. Inmates were classified based on criminal history and medical and mental health risk. *Id.* Medical staff spearheaded the medical and mental health risk assessments and sent inmates with mental health problems to one of three locations in the jail. *Id.* at 1040. Jail medical staff "*alone* decided whether an inmate should be housed in" one of the three locations. *Id.* (emphasis added).

One of the three locations, called 3SW, was for mental health inmates who did not present a risk of harm to themselves or other inmates. *Id.* Cook and his

cellmate were housed in 3SW, despite Cook's cellmate's history of violent criminal behavior. *Id.* at 1042–43.

Keith argued that Sheriff Brown was deliberately indifferent to Cook's serious medical need by failing to separate inmates who had committed violent crimes—like Cook's cellmate—from inmates charged with nonviolent crimes—like Cook. *Id.* at 1050. We summarized Keith's argument thus: "Sheriff Brown created a substantial risk of harm by relying on [the medical] staff's determination[] that an inmate did not pose a substantial risk of harm to other inmates." *Id.* Keith therefore "aim[ed] to hold Sheriff Brown liable for *not* disregarding the expert medical opinions of [medical] staff." *Id.*

We held that "Keith's theory of liability does not square with the law. Simply put, the law does not require that Sheriff Brown ignore the determination and recommendation of [medical] staff." *Id.*

Hammonds's argument here is analogous to the argument in *Keith*. Hammonds argues that Martin—a nonmedical official—is liable for not disregarding Dr. Theakston's determination and recommendation to treat Hammonds's Type 1 diabetes with only short-acting insulin and for not intervening by supplying Hammonds with additional medication—long-acting insulin. Here, as in *Keith*, Martin was not required by law to ignore Dr. Theakston's

determination and recommendation regarding the proper treatment of Hammonds's Type 1 diabetes.[5]

IV.

For the foregoing reasons, we affirm the District Court's grant of summary judgment in favor of Dr. Theakston and Martin.

AFFIRMED.

[5] That a 911 operator called Martin to report Hammonds's medical condition does not change the outcome here. Martin was still entitled by law to rely on his medical staff to determine how to treat Hammonds's diabetes.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

November 03, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-14123-GG
Case Style: Stephen Hammonds v. Robert Theakson, et al
District Court Docket No: 4:16-cv-01558-KOB

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.

Please use the most recent version of the Bill of Costs form available on the court's website at www.ca11.uscourts.gov.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Joseph Caruso, GG at (404) 335-6177.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1A Issuance of Opinion With Costs

APPENDIX D

JANUARY 5, 2021 ORDER OF ELEVENTH CIRCUIT DENYING PEITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14123-GG

STEPHEN HAMMONDS,

Plaintiff - Appellant,

versus

DR. ROBERT THEAKSTON,
MATTHEW MARTIN,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

BEFORE: GRANT, LUCK, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

ORD-41

APPENDIX E

ELEVENTH CIRCUIT JUDGMENT OF DISTRICT COURT AFFIRMED - NOVEMBER 3, 2020

(ECF DOC. 105)

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 19-14123

District Court Docket No.
4:16-cv-01558-KOB

STEPHEN HAMMONDS,

Plaintiff - Appellant,

versus

DEKALB COUNTY, ALABAMA,
SHERIFF JIMMY HARRIS,

Defendants,

DR. ROBERT THEAKSTON,
MATTHEW MARTIN,

Defendants - Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: November 03, 2020
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch