UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WAYNE DUKE KALBAUGH, Plaintiff - Appellant, v. JACOB JONES; BRYAN WRIGHT, Defendants - Appellees.	No. 18-6205 (D.C. No. 5:16-CV-01314-R) (W.D. Okla.)

ORDER AND JUDGMENT*

(Filed Mar. 30, 2020)

Before **HARTZ**, **MORITZ**, and **EID**, Circuit Judges.

Wayne Kalbaugh appeals the entry of summary judgment in favor of the Defendants, Oklahoma City Police Department (OCPD) Officers Jacob Jones and

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 1 0th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Bryan Wright, on his claim that they violated his constitutional rights when they used excessive force in arresting him following a car chase. The district court held that Defendants were entitled to qualified immunity. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm in part and reverse and remand in part.

I. BACKGROUND

On November 25, 2014, an OCPD officer initiated a traffic stop of the automobile in which Plaintiff was a passenger. After the driver bailed out of the moving car, Plaintiff took the driver's seat and led officers on a high-speed chase in heavy traffic. Shortly thereafter, a police helicopter took over the pursuit for safety reasons. A local news station helicopter also followed the chase and recorded it on video. The video shows Plaintiff speeding, weaving through traffic, driving on the median and the shoulder, and running red lights.

Plaintiff turned up a private road that dead-ended at a chain-link fence. Although he tried to back up, approaching police cars prevented his escape, so he drove forward and attempted to crash through the fence. The car knocked over a portion of the fence and stalled. Plaintiff got out of the car and dropped three handguns. He put his hands in the air and backed over the downed fence on foot. He then turned and ran toward the adjacent National Guard parking lot, still with his hands in the air. He heard the officers yelling at him, but said he thought they were threatening to shoot him.

When Plaintiff reached the parking lot, he approached Army Reservist Kevin Deon, who had seen Plaintiff ram the fence and exit the car with a gun. Deon put him on the ground and straddled Plaintiff for the few seconds it took for Officers Jones and Wright to reach them. Before they were able to handcuff Plaintiff, the officers discovered a knife in his pocket.

Ultimately, Officers Jones and Wright subdued Plaintiff, handcuffed his hands behind his back, and arrested him. Plaintiff alleged that he did not resist but the officers nevertheless struck him repeatedly. He also asserted that he did not reach for his knife. Thus, he claimed that the blows administered by Defendants were unnecessary and excessive. Defendants, in contrast, asserted that the force they used to subdue Plaintiff was reasonable in light of the circumstances that confronted them.

Plaintiff sued Officers Jones and Wright in their individual and official capacities, as well as the Oklahoma City Police Department. The district court dismissed the Police Department and the official-capacity claims against the individual officers. Plaintiff filed an amended complaint, naming as defendants only Officers Jones and Wright, but again checking the box indicating they were sued in both their individual and official capacities.

Thereafter, both sides filed motions for summary judgment. The district court, adopting the report and recommendation of a magistrate judge, denied Plaintiff's motion and granted Defendants' motion.

II. LEGAL STANDARDS

"We review the grant of summary judgment de novo. We view the facts in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor. Summary judgment is appropriate only if there is no genuine dispute as to any material fact." *Jones v. Norton*, 809 F.3d 564, 573 (10th Cir. 2015) (citations and internal quotation marks omitted). If a fact "could have an effect on the outcome of the lawsuit," it is material. *Id.* "A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented." *Id.* (internal quotation marks omitted). Where, as here, there is video of the events at issue, the court should not adopt a version of the facts that "is blatantly contradicted by the record, so that no reasonable jury could believe it" when ruling on a motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007); *accord Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1207 (10th Cir. 2017) ("[W]e cannot ignore clear . . . video evidence in the record depicting the events as they occurred.").

We liberally construe Johnson's [sic] pro se complaint and other filings in our review, but we do not act as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). Notwithstanding his pro se status, Johnson [sic] must comply with the same rules of procedure as other litigants. *See id.*

III. DISCUSSION

A. Excessive Force

An injured person may seek damages under 42 U.S.C. § 1983 against "an individual who has violated his or her federal rights while acting under color of state law. Individual defendants named in a § 1983 action may raise a defense of qualified immunity, which shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (citations, ellipsis, and internal quotation marks omitted). When a defendant raises a qualified-immunity defense, "the plaintiff carries the two-part burden to show: (1) that the defendant's actions violated a federal constitutional or statutory right, and, if so, (2) that the right was clearly established at the time of the defendant's unlawful conduct." *Id.* (internal quotation marks omitted).[1]

Plaintiff contends that Defendants violated his federal constitutional rights by using excessive force. "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer at the scene, and not with perfect hindsight." *Lindsey v. Hyler*, 918 F.3d 1109, 1113 (10th Cir. 2019) (internal quotation marks omitted). We evaluate "whether the

[1] Plaintiff asserts that his rights under the Fourth, Eighth, and Fourteenth Amendments were violated. But it is "the Fourth Amendment . . . [that] governs excessive force claims arising from treatment of an arrestee detained without a warrant and prior to any probable cause hearing." *Estate of Booker*, 745 F.3d at 419 (emphasis, brackets, and internal quotation marks omitted).

officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989) (internal quotation marks omitted). Factors relevant to this inquiry include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

Plaintiff asserts the force used was unreasonable because he did not resist arrest, as demonstrated by the fact that when he exited his car he dropped his guns and "placed his hands high up in the air to show everyone he was of no threat, and that he wanted to peacefully surrender." Aplt. Opening Br. at 4. He claims he ran from the police because he thought he heard them yelling to shoot him. He characterizes his contact with Deon as trying to lie down with his hands out to show he was not resisting. He contends that even though he was not resisting or struggling when Officers Jones and Wright reached him, the officers nevertheless punched him repeatedly. And although he admits he was carrying a knife in his trousers pocket, he did not remember that he was carrying it and he would have needed both hands to unsheathe it.

About 20 seconds elapsed from the time Defendants reached Plaintiff to the time they clearly had him sitting up and under control. Plaintiff argues that during this period, if he moved his hands at all, it was only in response to the officers' order to "cuff up." R. Vol. 2,

at 24-26. Otherwise, Plaintiff contends that he was subdued and compliant during his arrest. The district court found that the video blatantly contradicts this account. We respectfully disagree. The video is inadequate to show the actions of all parties during the 20-second period. Notably, not only is the video blurry, but one of the officers obstructs the view of Plaintiff's torso, making it impossible to determine whether Plaintiff was, as Defendants alleged, moving his upper body and arms to resist arrest. Therefore, the district court could not rely on the video as requiring summary judgment. *See Scott*, 550 U.S. at 380 (explaining that videos relied on for summary judgment must "blatantly contradict" the nonmoving party's version of the facts).

Taking the facts in the light most favorable to Plaintiff, a reasonable jury could conclude that Defendants continued to beat Plaintiff after he was effectively subdued. And under the *Graham* factors this would be a violation of his constitutional rights. Although Plaintiff's crimes were significant (he had led officers on a high-speed chase, he had weapons on his person, and he ran from arresting officers), under his version of events—that he was trying to lie down with his hands out to show he was not resisting—he did not "pose[] an immediate threat to the safety of the officers or others," *Graham*, 490 U.S. at 396. Defendants are free to argue to a jury that Plaintiff was not subdued, but this disputed issue of material fact precludes summary judgment.

Having concluded that Plaintiff established a constitutional violation, "we next address whether—at the

time of the events of this case—it was clearly established that [Defendants'] actions constituted excessive force." *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016). "It is clearly established that specific conduct violates a constitutional right when Tenth Circuit or Supreme Court precedent would make it clear to every reasonable officer that such conduct is prohibited." *Id.* But "the qualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts." *Id.* (internal quotation marks omitted).

We have held that an officer violated clearly established law by shooting the victim after the officer had "enough time to recognize and react to the changed circumstances and cease firing his gun." *Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013) (ellipsis and internal quotation marks omitted); *cf. Dixon v. Richer*, 922 F.2d 1456, 1463 (1 0th Cir. 1991) (officers' continued use of force after the plaintiff "had already been frisked, had his hands up against the van with his back to the officers, and was not making any aggressive moves or threats" was unreasonable). Thus, "it is clearly established that officers may not continue to use force against a suspect who is effectively subdued." *Estate of Smart v. City of Wichita*, 951 F.3d 1161, 2020 WL 913089, at *10 (10th Cir. Feb. 26, 2020) (ellipsis and internal quotation marks omitted); *see id.* at *1 (analyzing applicable clearly established law where events at issue occurred on March 10, 2012); *id.* at *10 n.14 (explaining that court relied on cases postdating the events at issue because those cases relied on

caselaw predating those events). "Force justified at the beginning of an encounter is not justified *even seconds later*, if the justification for the initial force has been eliminated." *Id.* at *10 (brackets and internal quotation marks omitted). Taking the facts in the light most favorable to Plaintiff, Defendants violated clearly established law if they continued beating Plaintiff after it would have been clear to a reasonable officer that he had been effectively subdued.

We reverse the district court's order granting qualified immunity to Defendants on Plaintiff's excessive-force claim and remand for further proceedings.

B. Appointment of Counsel

Plaintiff claims the district court erred in denying his three motions for appointment of counsel. We review the denial of a motion for appointment of counsel in a civil case for abuse of discretion. *See Toevs v. Reid*, 685 F.3d 903, 916 (10th Cir. 2012). "Only in those extreme cases where the lack of counsel results in fundamental unfairness will the district court's decision be overturned." *Id.* (internal quotation marks omitted). "The burden is on the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel." *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir. 2004) (internal quotation marks omitted). We reject Plaintiff's claim. We discern no abuse of discretion in the district court's denial of appointment of counsel.

C. Official-Capacity Claims

Plaintiff assigns error to the order dismissing his official-capacity claims against Officers Jones and Wright. The district court adopted the magistrate judge's recommendation to dismiss these claims for failure to state a claim under 28 U.S.C. §§ 1915A(b)(1) & 1915(e)(2)(B)(ii), a decision we review de novo, *see Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009) (reviewing dismissal under § 1915A); *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007) (reviewing dismissal under § 1915(e)(2)(B)(ii)).

"Suing individual defendants in their official capacities under § 1983 . . . is essentially another way of pleading an action against the county or municipality they represent." *Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010). To state an official-capacity claim, Plaintiff was required to "identify a specific deficiency that was obvious and closely related to his injury, so that it might fairly be said that the official policy or custom was both deliberately indifferent to his constitutional rights and the moving force behind his injury." *Id.* (citation and internal quotation marks omitted).

On appeal Plaintiff asserts that he requested through discovery the police policy and standard operating procedures, but was unable to obtain them via the Internet as Defendants directed because he did not have Internet access in prison. The record reflects that Plaintiff requested production of the policies and included Defendants' failure to produce them in his initial motion to compel discovery. But he did not pursue

this matter in the subsequent proceedings concerning discovery, nor did he invoke Fed. R. Civ. P. 56(d), which requires a plaintiff to file an affidavit if additional discovery is needed to respond to a summary judgment motion. Therefore, we affirm the order dismissing Plaintiff's official-capacity claims against Officers Jones and Wright.

Plaintiff also contends that he was entitled to a default judgment against Defendants in their official capacities because they never answered the magistrate judge's order requiring service of a response to the complaint and a special report. He argues that because he "marked the box for both individual and official capacitys [sic]" on his amended complaint, Defendants defaulted those claims when they failed to include in their answer a response to any official-capacity claims. Aplt. Opening Br. at 17. But the district court had dismissed the official-capacity claims before Plaintiff filed his amended complaint, and the magistrate judge's order required a response pertaining to Officers Jones and Wright only in their *individual* capacities. The district court did not err in denying Plaintiff's motion for a default judgment.

D. Amendment of Complaint to Add Defendants

Finally, Plaintiff appeals the order denying his motion to amend his complaint to add new

defendants.[2] He sought to add as defendants Sergeant Deon and Mustang Police Officer Carpenter, claiming they failed to intervene in the actions of defendants Jones and Wright. In the proposed amended complaint, Plaintiff asserted that the date of injury was November 25, 2014. He filed his motion to add defendants on December 22, 2017, over three years after the date of injury. The district court denied leave to add these defendants because the applicable two-year statute of limitations had expired. *See* Okla. Stat. tit. 12, § 95(A)(3) (imposing a two-year limitations period for "an action for injury to the rights of another, not arising on contract"); *see also Meade v. Grubbs*, 841 F.2d 1512, 1523 (10th Cir. 1988) (holding two-year statute of limitations applies to § 1983 claims), *abrogated in part on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

Plaintiff asserts that he did not discover the facts underlying his claims against the proposed defendants until he received the special report containing the video and Defendants' responses to his discovery requests. Accordingly, he contends that the limitations period did not begin to run until he learned of the proposed defendants' violation of his rights. Plaintiff's proposed new claims were § 1983 claims, so federal law governs when the action accrues. *See Braxton v. Zavaras*, 614 F.3d 1156, 1159 (10th Cir. 2010). "A civil rights action accrues when the plaintiff knows or has

[2] Plaintiff does not challenge on appeal the district court's denial of his proposed amendment to reinstate his claims against Officers Jones and Wright in their official capacities.

reason to know of the injury which is the basis of the action. Indeed, it is not necessary that a claimant know all of the evidence ultimately relied on for the cause of action to accrue." *Price v. Philpot*, 420 F.3d 1158, 1162 (10th Cir. 2005) (citation and internal quotation marks omitted). Here, the injury that is the basis for this action is Plaintiff's November 25, 2014, arrest, which he knew of at the time of the arrest; thus, his claims accrued on that date. *See Johnson v. Johnson Cty. Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) ("Claims arising out of police actions toward a criminal suspect, such as arrest, interrogation, or search and seizure, are presumed to have accrued when the actions actually occur.").

Plaintiff relies on Fed. R. Civ. P. 15(c)(1)(B) to argue that his proposed new claims relate back to the date he filed his original complaint, thus making his new claims timely. For an amended complaint adding a new party to relate back, Rule 15(c)(1) requires the following: (1) the claim arose out of the same conduct or occurrence alleged in the original pleading, Rule 15(c)(1)(B); (2) the proposed new party "received such notice of the action that it will not be prejudiced in defending on the merits," *id.* 15(c)(1)(C)(i); (3) the proposed new party "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity," *id.* 15(c)(1)(C)(ii); (4) the second and third criteria were met within 90 days of the filing of the original complaint, *see id.* 15(c)(1)(C); and (5) the original complaint was filed within the applicable limitations period, *see id.* 15(c)(1)(A); *see also Hogan v. Fischer*, 738 F.3d 509,

517 (2d Cir. 2013) (setting out these requirements for an amended complaint to relate back); *May v. Segovia*, 929 F.3d 1223, 1231 (10th Cir. 2019) (noting stringent restrictions on relation back when adding a new defendant). He has failed to make the required showing. And he does not argue that he qualified for tolling of the statute of limitations under Oklahoma's strict construction of exceptions to a statute of limitations. *See Resolution Tr. Corp. v. Grant*, 901 P.2d 807, 813 (Okla. 1995) ("Exceptions to statutes of limitation are strictly construed and are not enlarged on consideration of apparent hardship or inconvenience."); *see also Braxton*, 614 F.3d at 1159 (equitable tolling is governed by state law). Therefore, we affirm the order denying leave to amend to add new defendants.

IV. CONCLUSION

We grant Plaintiff's motion for leave to proceed in forma pauperis on appeal, and we remind him of his obligation to continue making partial payments until the entire appellate filing fee is paid. We reverse the district court's order granting qualified immunity to Defendants on Plaintiff's excessive-force claim and remand that claim for further proceedings consistent with this order and judgment. We affirm the district court's judgment in all other respects.

Entered for the Court

Harris L Hartz
Circuit Judge

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

WAYNE DUKE KALBAUGH,	)	
Plaintiff,	)	
v.	)	**Case No. CIV-16-1314-R**
OKLAHOMA CITY POLICE DEPARTMENT; JACOB JONES, Police Officer, individual capacity; and BRYAN WRIGHT, Police Officer, individual capacity,	)	
Defendants.	)	

REPORT AND RECOMMENDATION

(Filed Oct. 2, 2018)

Through his verified amended complaint,[1] Wayne Duke Kalbaugh (Plaintiff), appearing pro se,[2] seeks monetary relief under 42 U.S.C. § 1983[3] from Oklahoma City Police Department (OCPD) officers Jacob Jones and Bryan Wright (Defendants) in their individual capacities, claiming they "stripped [his] rights

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[1] Plaintiff's amended complaint, Doc. 18, is the operative pleading in this matter. This Court previously denied Plaintiff's motion to file a second amended complaint naming, in part, William Carpenter and Kevin Deon as additional Defendants. *See* Docs. 81, 89, 93.

[2] The undersigned construes Plaintiff's pro se filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

[3] *See* Doc. 18, at 2.

under the Fourth Amendment"[4] through the "excessive use of force" when taking him into custody after a high-speed car pursuit and foot chase.[5] Doc. 18, at 9.[6] He alleges that "[a]t the time of this incedent [he had] surrendered and was placed on the ground with [his] hands placed behind [his] back by [a] member of the army reserve. . . ." *Id.* at 10. He further claims he "was not trying to flee or resist arrest . . . when both [Defendants] aproched [him] and proceded to severly and unjustly beat [him]." *Id.* And, he concludes that "[b]oth officers used a degree of force that was outrageousley above the use of force nescery to place hand cuff's on [him] who was of no threat." *Id.* at 10-11.

Plaintiff has now moved for summary judgment, *see* Doc. 104, as have Defendants who jointly assert entitlement to qualified immunity. *See* Doc. 105. After

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[4] Plaintiff also alleges that he was "subject[ed] to cruel and unusual punishment" in violation of the Eighth Amendment. Doc. 18, at 9. But "[a]ny force used leading up to and including an arrest [is] actionable under the Fourth Amendment's prohibition against unreasonable seizures," while the Eighth Amendment governs "claims of excessive force involving convicted prisoners . . . under the Eighth Amendment." *Estate of Booker v. Gomez*, 745 F.3d 405, 419 (10th Cir. 2014) (internal quotation marks omitted).

[5] United States District Judge David L. Russell has referred the matter to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). *See* Doc. 4.

[6] Citations to a court document are to its electronic case filing designation and pagination. The undersigned alters Plaintiff's use of the uppercase. Otherwise, quotations are verbatim unless shown.

careful review, the undersigned recommends that this Court grant Defendants' motion.[7]

I. The summary judgment facts.

A. Summary judgment principles.

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(1). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a "genuine dispute" exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

"[O]n summary judgment, 'a court must view the evidence in the light most favorable to the opposing party' and 'draw inferences in favor of the nonmovant.'" *McCoy v. Meyers*, 887 F.3d 1034, 1039 (10th Cir. 2018) (quoting *Tolan v. Cotton*, 572 U.S. 650, 134 S. Ct. 1861, 1866 (2014) (brackets omitted)). A court "[t]herefore resolve[s] 'genuine disputes of fact' in the record in favor of [the nonmovant].'" *Id.* "But for dispositive issues on which [Plaintiff] will bear the burden of proof at trial, the record must contain evidence that is based on more than mere speculation,

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[7] Plaintiff's motion for summary judgment is grounded on the same facts and on the same legal analysis. *See* Doc. 104. Necessarily, then, the undersigned further recommends that this Court deny his motion. *See id.*

conjecture, or surmise." *Id.* (internal quotation marks omitted).

Under this Court's local civil rules (LCvR) governing summary judgment procedure, "[t]he brief in opposition to a motion for summary judgment . . . shall begin with a section responding, by correspondingly numbered paragraph, to the facts that the movant contends are not in dispute and shall state any fact that is disputed." LCvR56.1(c). Any "material facts set forth in the statement of material facts of the movant may be deemed admitted for the purpose of summary judgment unless specifically controverted by the nonmovant using the procedures set forth in this rule. *Id.* 56.1(e).

B. Facts from Plaintiff's state court criminal proceedings.

The testimony cited by the parties in support of various statements of fact was given at Plaintiff's criminal jury trial. The undersigned takes judicial notice that the State of Oklahoma brought criminal charges against Plaintiff in the District Court of Oklahoma County based on his actions bearing on Defendants' use of force.[8] *See* http://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=

[8] *See* Fed. R. Evid. 201; *see also United States v. Pursley*, 577 F.3d 1204, 1214 n.6 (10th Cir. 2009) (noting court's "discretion to take judicial notice of publicly-filed records in our court and certain other courts concerning matters bearing directly upon the disposition of the case at hand") (internal quotation marks omitted).

CF-2014-8557&cmid=3209131. A jury found Plaintiff guilty of Aggravated Attempting to Elude an Officer, Possession of Methamphetamine, Possession of a Firearm After Conviction of a Felony, and Possession of an Offensive Weapon in the Commission of a Felony. *See id.* docket entry dated Feb. 9, 2017. By summary opinion, the Oklahoma Court of Criminal Appeals affirmed the trial court's Judgment and Sentence and outlined the factual underpinnings of Plaintiff's criminal conviction:

> [Plaintiff] was convicted of crimes stemming from a high-speed pursuit in November 2014. Police attempted a traffic stop on [Plaintiff's] vehicle after observing it at a suspected drug house. . . . A chase ensued. When the vehicle eventually stopped . . . [Plaintiff] exited with two firearms and a knife on his person. Inside his car police found a kit of smoking pipes, scales, and small plastic baggies. Methamphetamine residue was found on this paraphernalia. Two more firearms were also found in the car. At trial, [Plaintiff] testified and admitted (1) that he was a multiple felon, (2) that all the firearms were his, and (3) that he had smoked methamphetamine shortly before the chase.

Kalbaugh v. Oklahoma, No. F-2017-304, slip op. at 2 (Okl. Crim. App. May 3, 2018).[9]

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[9] *See* http://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=F-2017-304.

C. Facts from the parties' factual statements.

It is uncontroverted that on November 25, 2014, an OCPD officer initiated a traffic stop of a red Toyota Corolla. The driver initially stopped but drove off as the officer approached the car. The driver then bailed out of the moving car and Plaintiff, who had been in the passenger seat, jumped into the driver's seat and drove on at a high rate of speed in heavy rush hour traffic. The officer followed the car for several miles before a police helicopter arrived at the scene and took over the pursuit for safety reasons. A local news station's helicopter also followed the car during the latter part of the pursuit. The news station's video of the pursuit, *see* Doc. 32 [Video], shows Plaintiff speeding, driving in the median, driving on the shoulder, and running red lights.[10] *See* Video, at 0:09 to 3:26.[11]

There is also no dispute that Defendant Jones heard and followed the pursuit. He set up stop sticks to try to stop the car, but Plaintiff was able to evade the stop sticks by turning into a parking lot and cutting across the grass to a private road. *See* Video, at 3:26 to 3:46. Defendant Wright also heard the pursuit and followed Defendant Jones. The private road dead-ended, and it was blocked by a chain-link fence around a National Guard facility. *See* Video, at 3:46 to 4:04. Plaintiff then backed up the dead-end road and drove

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[10] *See* Doc. 105, at 7-9 ¶¶ 1, 2-5; *see also* Doc. 115, at 2-3 ¶¶ 1, 2-5.

[11] All references to specific time-markers are to the undersigned's best approximations after reviewing the Video in normal, enlarged, and frame-by-frame modes.

in reverse, but police cars approaching from behind him blocked his attempted exit. At that point, Plaintiff accelerated forward and tried—unsuccessfully—to crash through the chain-link fence. Because of the crash, Plaintiff's car became inoperable.[12] *See* Video, at 4:05 to 4:22.

The parties also agree that when Plaintiff then stepped out of car, he had handguns within his reach—three guns according to Plaintiff, including one that fell from his lap—and he put his hands in the air.[13] Defendant Jones ordered him not to move and to keep his hands up.[14] Instead, Plaintiff pulled two guns from his waistband,[15] dropped them on the ground and, with his hands once again in the air, backed away from the officers just long enough to step over the downed fence.[16] As soon as he was over the fence, he turned and ran to the National Guard facility's parking lot.[17] Defendants

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[12] *See* Doc. 105, at 9-10 ¶¶ 6-9; *see also* Doc. 115, at 3 ¶¶ 6-9.

[13] *See* Doc. 105, at 10-11 ¶ 10; *see also* Doc. 115, at 3-4 ¶ 10. The undersigned, as required, has accepted Plaintiff's version of both the number of guns and the sequence of these events.

[14] *See* Doc. 105, at 10-11 ¶ 11; *see also* Doc. 115, at 4 ¶ 11. Plaintiff does not deny that Defendant Jones issued those commands, stating instead that "[a]ll he heard is someone yelling shoot him." Doc. 115, at 4 ¶ 11.

[15] Plaintiff states that he did so "in the most nonthreatening way. . . ." Doc. 115, at 3-4 ¶ 10.

[16] *See* Doc. 105, at 10-11 ¶¶ 10, 12; *see also* Doc. 115, at 3-4 ¶¶ 10, 12.

[17] *See* Doc. 105, at 11 ¶ 12; *see also* Doc. 115, at 4 ¶ 12. Once again, Plaintiff does not contradict this. But, as before, he states this was "only after hearing someone yelling shoot him." Doc. 115, at 4 ¶ 12.

pursued him on foot, and Defendant Wright continued to shout commands for him to stop.[18] *See* Video, at 4:25 to 4:50.

Further, it is uncontested that Sergeant Kevin Deon, an Army reservist, was in the National Guard facility's parking lot when Plaintiff rammed the fence. He saw Plaintiff get out of the vehicle with a gun. He was concerned there would be a shoot-out between Plaintiff and the police officers because he had seen Plaintiff with one gun and was concerned he might have another. He was also concerned that Plaintiff might enter the building with a weapon if he made it all the way across the parking lot.[19]

Defendant Wright fell during the foot pursuit,[20] and Plaintiff encountered Sergeant Deon before Defendant Wright caught up.[21] *See* Video, at 4:41 to 4:55. Sergeant Deon put Plaintiff on the ground then jumped on the back of his neck and slammed his face into the concrete with the full force of his body weight.[22] *See* Video, at 4:55 to 4:56. He straddled

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[18] *See* Doc. 105, at 11 ¶ 13; *see also* Doc. 115, at 4 ¶ 13. Plaintiff does not contest the fact that Defendant Wright ordered him to stop. Instead, he swears that he "never heard [Defendant] Wright give any commands to stop." Doc. 115, at 4 ¶ 13.

[19] *See* Doc. 105, at 11-12 ¶ 14; *see also* Doc. 115, at 4 ¶ 14.

[20] "[P]laintiff believes this is part of the reason Defendant Wright was mad at the plaintiff and beat him." Doc. 115, at 4-5 ¶ 15.

[21] *See* Doc. 105, at 12 ¶ 15; *see also* Doc. 115, at 4-5 ¶ 15.

[22] See Doc. 105, at 12 ¶ 16; *see also* Doc. 115, at 5 ¶ 16. According to Plaintiff's evidence, Sergeant Deon weighed 210 pounds. *See* Doc. 115, Ex. 6, line 16. Sergeant Deon also testified

Plaintiff until Defendants reached them[23]—Defendant Wright first and then Defendant Jones—within seconds of the takedown.[24] *See* Video, at 4:58, 5:02.

At this point, the parties' versions of events diverge. They agree that Defendants struck Plaintiff before he was handcuffed[25] but disagree on details, including the number of strikes.[26] And in response to Defendants' description of the efforts required to subdue him and the perception that he was reaching for a knife in his back pocket,[27] Plaintiff submits that the strikes were purely gratuitous: He denies that he reached for his knife[28] or struggled with Defendants in

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at the criminal trial that Plaintiff attempted to buck him off. *See* Doc. 105, at 12 ¶ 16; *see also id.* Ex. 11, p. 19, lines 2-3. Plaintiff denies this and generally claims that Sergeant Deon "exagerated his use of force on [him] due to his extreme haterid tords [him]." Doc. 115, at 5 ¶ 16.

[23] *See* Doc. 105, at 12 ¶ 16; *see also* Doc. 115, at 5 ¶ 16.

[24] *See* Doc. 105, at 12-13 ¶¶ 16, 17, 19; *see also* Doc. 115, at 5-6 ¶¶ 16, 17, 19.

[25] *See* Doc. 105, at 12-14 ¶¶ 18, 20, 21, 22; *see also* Doc. 115, at 5-8 ¶¶ 18-23.

[26] According to Defendant Wright, he struck Plaintiff a total of three times. *See* Doc. 105, at 12 ¶ 18. Plaintiff denies this, but states only that it was "more than three times." Doc. 115, at 5 ¶ 18. Defendant Jones states that he "struck [Plaintiff] several times in the face." Doc. 105, at 13 ¶ 20. Plaintiff swears Defendant Jones struck him "more than just a few times being several times in the face, head, neck and back with evil intent." Doc. 115, at 6-7 ¶ 20.

[27] *See* Doc. 105, at 12-14 ¶¶ 18-22.

[28] Plaintiff does not deny there was a knife in his back pocket. *See* Doc. 115, at 5-6, ¶ 18. Instead, he submits he "didn't even remember he had the knife on his person. . . ." *Id.*

resisting their efforts to take him into custody, and he depicts himself as compliant, with his arms immobilized.[29] This echoes his verified allegations in his amended complaint: "[a]t the time of this incedent [he had] surrendered" and had been "placed . . . on the ground on [his] stomic with [his] hands behind [his] back" by Sergeant Deon. Doc. 18, at 10.

Nonetheless, another of Plaintiff's verified statements plainly contradicts his assertion that he was lying motionless with his hands behind his back at the time of "this incedent." *Id.* In moving for summary judgment, Plaintiff averred that "once [Defendants Wright and Jones] arive [he] heard one say cuff up so [he] attempted to put his hands behind his back."[30] So, in that version of events, Plaintiff's hands were not behind his back, and he was admittedly moving.

Finally, the Video also appears to show that Plaintiff was in motion with free use of his legs and not, as he contends, passive and compliant, and under the control of Defendants at the time of the incident. *See id.* at 4:58 to approximately 5:22.[31] And where, as here, "opposing parties tell two different stories, one of

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[29] *See* Doc. 115, at 6-7 ¶¶ 18-22.

[30] *See* Doc. 104, at 11-12 ¶ 6.

[31] Plaintiff endorses this "News 9 video footage." Doc. 18, at 7. And, while it is difficult (if not impossible) to make out precise details in the twenty or so seconds between the time Defendants Wright and Jones both reached Plaintiff and the time they clearly had him sitting up and under control, *see* Video, at 4:58 to 5:22, the fact that Plaintiff was *not* subdued during that time is evident.

which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Factually, Plaintiff was not subdued at the time Defendants used force.

The parties agree that Plaintiff received medical treatment for injuries at the scene; that an OCDP officer transported him to the hospital as required by OCPD policy; that he was cleared and released back into the custody of the OCPD; and, finally, that he acknowledged at his criminal trial that he did not know if any of his injuries were caused by Sergeant Deon instead of Defendants Jones and Wright because "[e]verything happened so fast."[32]

III. Application of the law to the summary judgment facts.

A. Qualified immunity.

"Public officials enjoy qualified immunity in civil actions that are brought against them in their individual capacities and that arise out of the performance of their duties." *McCoy*, 887 F.3d at 1044 (brackets and internal question marks omitted).[33] "They are entitled to qualified immunity if their conduct does not violate

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[32] *See* Doc. 105, at 14-15 ¶¶ 24, 26; *see also* Doc. 115, at 8-9 ¶¶ 24, 26.

[33] Plaintiff is mistaken that "qualified immunity is not available to individual capacity suits." Doc. 115, at 11.

clearly established statutory or constitutional rights." *Id.* (internal quotation marks omitted).

B. Two-prong analysis.

On summary judgment, a court can determine entitlement to qualified immunity on either of two prongs. *Id.* at 1045. The first prong questions whether the facts, as construed in favor of the party claiming injury, show that Defendants violated a constitutional right, and the second prong questions whether that right was clearly established when the violation occurred. *Id.* at 1044.

The undersigned addresses both prongs alternatively.

1. First prong—violation of a constitutional right.

Any "claim[] that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen [is] analyzed under the Fourth Amendment and its 'reasonableness' standard. . . ." *Graham v. Connor*, 490 U.S. 386, 395 (1989). "[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* at 396. The issue for the court is "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or

motivation." *Id.* at 397. Factors to consider when evaluating the reasonableness of the officers' actions include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* A court's "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

The "situation" facing Defendants in this case included these "particular[s]": (1) Plaintiff had just led police on a high-speed car chase; (2) then, when cornered, he had accelerated off a dead-end road in an attempt to crash his car through a chain-link fence; (3) Defendants had seen him with firearms on his person;[34] (4) then, although he had put his hands in the air, he had run from Defendants and the other assembled officers who were moving toward him with their weapons drawn and aimed; and (5) he had ignored commands to stop during the ensuing foot pursuit. *Id.* at 397. *See* Video, at 0:09 to 4:50.

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[34] That Plaintiff dropped three guns does not obviate this fact. It could not be known that he had no others.

In sum, when Defendants were finally able to catch up with Plaintiff—only seconds after Sergeant Deon had grounded him—and used force, they were apprehending an individual who had just committed a life-endangering offense, was unpredictable and possibly armed—"a threat to safety,"—and had used extreme and irrational measures to elude them and avoid capture. *Graham*, 490 U.S. at 396. Each of the three *Graham* factors weighs in favor of Defendants, *see id.*, and their use of force was objectively reasonable under the facts and circumstances presented here.

Under the facts "taken in the light most favorable to [Plaintiff]," Defendants' use of force did not violate his Fourth Amendment rights. *McCoy*, 887 F.3d at 1044.

2. Second prong—clearly established law.

Alternatively, under the second prong of the qualified immunity analysis, "no reasonable jury could conclude that [Plaintiff] was effectively subdued" when Defendants used force in this case, and "preexisting precedent would not have made it clear to every reasonable officer that using the force employed here on a potentially dangerous individual—who has not yet been effectively subdued—violates the Fourth Amendment." *McCoy*, 887 F.3d at 1048. Thus, Plaintiff "has [also] failed to show clearly established law." *Id.*

In *McCoy*, a police officer pulled the plaintiff, Mr. McCoy, off a motel room bed to arrest him after a hostage standoff. *See id.* at 1040. The officer, believing

Mr. McCoy was trying to take his gun, yelled out a warning. *Id.* "Once Mr. McCoy was on the ground, lying face-down with his hands behind his back, [a Defendant officer] 'immediately' placed him in a carotid restraint" and other officers 'simultaneously' pinned [Plaintiff] down and hit him in the head, shoulders, back, and arms." *Id.* at 1040-41. The officer "maintained the carotid restraint for approximately five to ten seconds and increased pressure, even though [Plaintiff] was not resisting, thereby causing [Plaintiff] to lose consciousness." *Id.* at 1041. "While [Plaintiff] was unconscious, the officers handcuffed his hands behind his back and zip-tied his feet together." *Id.*

The court first held that "[n]o reasonable jury could conclude that Mr. McCoy was effectively subdued when the allegedly excessive pre-restraint force occurred." *Id.* at 1048. It explained that "[w]hether an individual has been subdued from the perspective of a reasonable officer depends on the officer having enough time to recognize that the individual no longer poses a threat and react to the changed circumstances." *Id.* (brackets and internal quotation marks omitted). Under the circumstances before it, the court concluded that "[e]ven if [Plaintiff] was, as he maintains, lying down with his hands behind his back and with several officers pinning him, . . . reasonable officer[s] in [Defendants'] position could conclude that he was not subdued when the allegedly excessive force occurred." *Id.* (citation omitted). Then, after examining

the cases cited by Mr. McCoy,[35] the court determined that "[u]nder these circumstances, the preexisting precedent would not have made it clear to every reasonable officer that striking Mr. McCoy and placing a carotid restraint on him violated his Fourth Amendment rights." *Id.*

The same rationale applies here. Defendants were in full pursuit of Plaintiff—an undeniable safety-threat and flight-risk—when a bystander took him to the ground. Only seconds elapsed before Defendants caught up. This was not "enough time to recognize that [he] no longer pose[d] a threat and react to the changed circumstances" and "reasonable officer[s] in [Defendants'] position could conclude that [Plaintiff] was not subdued when the allegedly excessive force occurred." *Id.*

Likewise, "[t]he cases cited by" Plaintiff "would not have made it clear to every reasonable officer that striking [Plaintiff] violated his Fourth Amendment rights." *Id.* at 1048-49. Both in his own motion for summary judgment, *see* Doc. 104, at 1-29, and in his response to Defendants' motion, *see* Doc. 115, at 1-14, Plaintiff cited the following authorities and explained his rationale for doing so:

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[35] The court examined "three Tenth Circuit cases published before the events at issue in th[e] appeal": *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991); *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007); and *Weigel v. Broad*, 544 F.3d 1143 (10th Cir. 2008). *McCoy*, 887 F.3d at 1045.

- *Proffitt v. Ridgway*, 279 F.3d 503, 506 (7th Cir. 2002), for the proposition that "once an arrestee is under the custody of an official, the said official has a duty to provide for the arrestee's safety," Doc. 104, at 12 ¶ 9;
- *Mick v. Brewer*, 76 F.3d 1127, 1137 (10th Cir. 1996), for the proposition that "[a]n official who does not prevent another official from using excessive force has been held ineligible for qualified immunity," Doc. 104, at 21 ¶ 39;
- *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997), citing three bases for excessive force liability under the law of the Sixth Circuit, Doc. 104, at 22 ¶ 40;
- *Latta v. Keryte*, 118 F.3d 693, 701 (10th Cir. 1997), citing factors to consider in determining whether the "use of force is excessive," Doc. 105, at 24 ¶ 47;
- *Henry v. Storey*, 658 F.3d 1235, 1239 (10th Cir. 2011), citing factors used to determine if a use of force is reasonable, Doc. 104, at 25 ¶ 48;
- Okla. Stat. tit. 21 § 151, contending both Defendants violated a state crime, Doc. 104, at 26 ¶ 50;
- *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980), asserting that "[b]oth Defendants violated customary international law," Doc. 104, at 26 ¶ 51; and
- *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 924 (11th Cir. 2000), pointing to the court's "hold[ing] that a police officer was not

> entitled to qualified immunity when he failed to interfere when other officers used excessive force." Doc. 115, at 11.

None of these authorities bear on Plaintiff's allegations, *see* Doc. 18, or, as with the recitation of the *Graham* factors in *Henry*, are determinative.[36] His specific citations to both *Proffitt* and *Latta* relate to Fourteenth Amendment claims; the cited holdings in *Mick* and *Priester* are not pertinent to his allegations and, in any event, neither Defendant would have been in position to intervene with the other under the facts of this case; *Turner* applies the law of the Sixth Circuit; *Filartiga* involves claims of torture under international law; and Okla. Stat. tit. 21 § 151 appears to be a miscite.

Plaintiff "has failed to show clearly established law prohibiting [Defendants'] use of force" and Defendants "are therefore entitled to qualified immunity as to [Plaintiff's] claims based on this conduct." *McCoy*, 887 F.3d at 1049.

IV. Recommendation and notice of right to object.

For the stated reasons, the undersigned recommends that this Court deny Plaintiff's Motion for Summary Judgment, Doc. 104, and grant the Motion

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[36] In responding to Defendants' motion, Plaintiff lists various case names but does not explain their applicability to the instant action. *See* Doc. 115, at 11. As such, the undersigned will not speculate on his behalf.

for Summary Judgment of Defendants Jacob Jones and Bryan Wright, Doc. 105.

The undersigned advises the parties of the right to file an objection to this Report and Recommendation with the Clerk of Court on or before October 23, 2018, under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). The undersigned further advises the parties that failure to file a timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation disposes of all issues and terminates the referral to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 2nd day of October, 2018.

/s/ Suzanne Mitchell
SUZANNE MITCHELL
UNITED STATES
MAGISTRATE JUDGE

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

WAYNE DUKE KALBAUGH,	)	
Plaintiff,	)	
v.	)	**Case No. CIV-16-1314-R**
JACOB JONES and BRYAN WRIGHT,	)	
Defendants.	)	

ORDER

(Filed Oct. 31, 2018)

This matter comes before the Court on Plaintiff's timely objection to the October 2, 2018 Report and Recommendation issued by Judge Suzanne Mitchell, wherein she recommends that Plaintiff's Motion for Summary Judgment be denied and that Defendants' Motion for Summary Judgment be granted. (Doc.No. 118). The objection gives rise to this Court's obligation to undertake a *de novo* review of those portions of the Report and Recommendation to which Plaintiff makes specific objection. Having considered the Report and Recommendation and objection thereto, the Court finds as follows.

Plaintiff alleges that he was subjected to excessive force by Oklahoma City Police Officer Jones and Officer Wright during his arrest on November 25, 2014, following a high-speed vehicle chase and Plaintiff's

subsequent attempt to flee on foot. Judge Mitchel concluded the Defendants, against whom only individual capacity claims remain, are entitled to qualified immunity. Her conclusion was that, construed in the light most favorable to Plaintiff, the facts failed to establish that Defendant Jones or Defendant Wright violated Mr. Kalbaugh's constitutional rights. Judge Mitchell further recommended dismissal in Defendants' favor on the basis that Plaintiff's constitutional rights under the facts of this case were clearly established in November 2014. Citing *McCoy v. Meyers*, 887 F.3d 1034 (10th Cir. 2018), Judge Mitchell concluded that Plaintiff presented a safety-threat and flight risk and that Defendants lacked sufficient time to recognize that Plaintiff no long posed a threat when they used force to subdue him; reasonable officers in their positions could conclude Plaintiff was not subdued when the allegedly excessive force was utilized and the law at the time of the arrest did not establish that using force against a person in Plaintiff's position violated the Fourth Amendment (Doc.No. 18, p. 18).

In his objection Plaintiff asserts Defendants are not entitled to qualified immunity and devotes much of his brief to addressing the legal issues without specifically challenging Judge Mitchell's conclusions. Plaintiff characterizes the facts in his objection in a manner inconsistent with the video evidence submitted. Although he is correct that he exited the vehicle and dropped weapons, the evidence does not establish that Plaintiff was no longer a threat: officers could not see what he might have stashed elsewhere on his person,

nor did he cease moving. Rather, Plaintiff took off running away from the officers. To the extent Plaintiff contends he surrendered to Sergeant Deon, a member of the National Guard who is not a Defendant herein and who is not alleged to have acted under color of state law, the video establishes that even after Sergeant Deon stopped Plaintiff in his attempt to evade the Defendant officers, who were chasing him on foot, he was not subdued, but rather continued to fight.

The Court has conducted its *de novo* review of the Report and Recommendation and the Plaintiff's objection thereto. Having conducted this review, the Court finds no basis for altering or amending Judge Mitchell's thorough and well-written Report and Recommendation. Judgment shall be entered in favor of the Defendants Jones and Wright in their individual capacities.

IT IS SO ORDERED this 31st day of October 2018.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

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

WAYNE DUKE KALBAUGH,	)	
Plaintiff,	)	
v.	)	**Case No. CIV-16-1314-R**
JACOB JONES and BRYAN WRIGHT,	)	
Defendants.	)	

JUDGMENT

(Filed Oct. 31, 2018)

Judgment is hereby entered in favor of Defendants Wright and Jones.

ENTERED this 31st day of October 2018.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WAYNE DUKE KALBAUGH, Plaintiff - Appellant, v. JACOB JONES, et al., Defendants - Appellees.	No. 18-6205 (D.C. No. 5:16-CV-01314-R) (W.D. Okla.)

ORDER

(Filed Apr. 23, 2020)

Before **HARTZ**, **MORITZ**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk