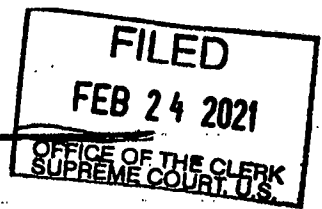


NO. 20-83



IN The
Supreme Court of The United States

Jacob Jones And Bryan Wright,
petitioners,

VS.

Wayne Duke Kalbaugh,
Respondent.

On petition for writ of certiorari to
the United States Court of Appeals from
the Tenth Circuit Court 18-6205 and
from The Western District Court of OK 16-1314

"Brief in Opposition" & "Joint Appendix"

Respectfully Submitted - 2-15-2021

Wayne Duke Kalbaugh #450429

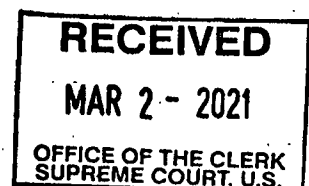
15/ Wayne D Kalbaugh

Respondent pro-se on NO-20-83

N.F.C.C. / C-N-229

1605 East Main Street

Sayre, Oklahoma 73662



IN The Supreme Court of the United
States

Jacob Jones and Bryan
Wright, et al
petitioner,

VS.

Case No. 20-83

Wayne Duke Kalbaugh,
Respondent.

Brief in Opposition with Joint Appendix
(pursuant to Rule 15)

(Oral Argument Requested pursuant to Rule 28)

Comes now, Respondent, Wayne D. Kalbaugh DOC#
450429 pro-se without the aid or assistance
of any trained or licensed counsel, with
his "Brief in Opposition pursuant to rule
15 in the above referenced case Number.

Respectfully Submitted- 2-15-2021

~~/s/ Wayne D. Kalbaugh~~

Wayne Duke Kalbaugh #450429

N.F.C.C./ C-N-229

1605 East Main Street

Sage, Oklahoma 73662

pro-se Status

Respondent prays this Honorable court will liberally construe his pleadings and hold him to a less stringent standard than a trained and licensed attorney, in view of his pro-se status. Pursuant to Hall VS. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), Hines VS. Kerner, 404 U.S. 519, 520 (1972), and Erickson VS. Pardus, 551 U.S. 89, 127 S. Ct. 2200, 167 L. Ed. 2d 2200, the court will provide liberal construction to pro-se type pleadings.

Also, Mr Kalbaugh is currently housed at North Fork Correctional center, which does not have a law library as demanded by the U.S. Supreme court. pursuant to Hayes VS. Johnson, 969 F.2d 700, 703-704 (8th Cir. 1992) and Bounds VS. Smith, 97 S. Ct 1491 (1977) Also North Fork Correctional center has been on Covid-19 quarantine, and is now on a state wide security lockdown, therefore giving Mr Kalbaugh No access to the law library.

In conducting A Review of this Case
Mr Kalbaugh initiated this case in the Western District court and therefor the reviewing court must accept Mr Kalbaugh's allegations as true and construe them, and any reasonable inferences to be drawn from the allegations and must consider any material disputed facts in light most favorable

to Mr. Kalbaugh. *Kay vs. Bernis*, 500 F.3d 1214, 1217 (10th Cir. 2007), *Henderson vs. Glanz*, 813 F.3d 938, 947 (10th Cir. 2015), *Tolan vs. Cotton*, 572 U.S. 650, 657, 134 S.Ct. 1861, 188 L. Ed. 2d 895 (2014)

Request For Equal Justice

Mr. Kalbaugh asserts where the administration of the law is applied with an "evil eye" and "unequal hand" unequal Justice is the result.

The U.S. Supreme Court in *Yick Wo vs. Hopkins*, 118 U.S. 365, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) Held: "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an 'evil eye' and 'unequal hand,' so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal Justice is still within the prohibition of the Constitution."

Capacities of plaintiffs 42 U.S.C. § 1983

pursuant to Doc. No. 18 plaintiff's amended complaint page 4 Id @ 2 and 3 plaintiff marked the Box for both individual and official Capacity's, AS is Also seen and recognized by the Defendants in Doc. No. 30 page 2 Id @ 14th and 15th line. Which was re-referred to Magistrate Judge Suzanne Mitchell for further screening and passed, and was in both Capacities for over (6) six months from

preliminary screening review before Suzanne Mitchell tried to say it was only in Individual capacities biasedly in Doc. No. 40 page 2 Id @ 12-16, which was conferred by District Judge David L. Russell in Doc. No. 48 @ page 3. The Complaint was still before the court in both official and individual capacities, and therefore plaintiff's Judgment by default motion should have been granted but was denied and official capacities claims were biasedly dismissed.

Also The Tenth Cir. Judge Harris L. Hartz erred in the order and Judgment Filed March 30, 2020 WL 1510054 in that under Footnotes Id @ 3 Mr Hartz states "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." This is error plaintiff did in his combined opening Brief to the 10th Cir. in ground 4. Doc. No. 81 is requesting Jones and Wright be reinstated in both official and individual capacities.

pursuant to the aforementioned plaintiff's 42 USC § 1983 should be in both official and individual capacities.

Request for Appointment of Counsel

Mr Kalbaugh requested Appointment of Counsel from

the Western District Court multiple times All denied. In *Parham VS. Johnson*, 6 F.3d 456, 461 (3rd Cir. 1997) The court of appeals held that "Where a plaintiff's case appears to have merit, the courts should make every attempt to appoint counsel."

plaintiff's case had sufficient factual merit accepted as true to state a claim to relief that is plausible on its face, and prove that the defendants are liable for the misconduct alleged in both official and individual capacities to pass the re-referred screening of Judge Suzanne Mitchell.

The Judge Suzanne Mitchell states in Doc. No. 44, 65, and 107 that the plaintiff continues to show competence in his ability to present his claims and make cogent legal arguments. Yet all but one of plaintiff's claims have been dismissed.

At Doc. No. 40 Suzanne Mitchell Id @ 4 states "As plaintiff well knows, The undersigned recommended the dismissal of his official capacity claims against these two defendants because he failed to effectively describe official policy or custom that was both deliberately indifferent to his constitutional rights and the moving force behind his injury."

Mr. Kalbaugh requested through discovery from the defendants police policy and standard operating procedures but was denied and told he could download them off the internet, with defendants knowing

plaintiff Don't have access to the internet or a printer in prison. Thus plaintiff was unable to litigate this Issue of effectively describing official policy or custom that was both deliberately indifferent to his constitutional right and the moving force behind his Injury at bar.

Also with plaintiff being pro-se the special report from defendants in there official capacity's would have helped yet plaintiff was denied this eventhough he proved his case was still pending in its official capacity. This is when plaintiff filed for summary Judgment by Default Doc. No. 39 which was biasedly denied eventhough proven by plaintiff and acknowledged by District Judge David L. Russell in Doc. No. 48.

If plaintiff "failed to effectively describe official police or custom that was both deliberately indifferent to his constitutional rights and the moving force behind his Injury." Then he is not showing competency in his ability to present his Legal Claims.

Also pursuant to Doc. No. 69 plaintiff's motion Doc. No. 67 is Not in compliance with the Western District's Local Court Rules showing plaintiff's not competent in his ability to present his claims. And therefore should have had counsel Appointed to Represent him.

Determination of Judicial Bias

Both the District Judge David L. Russell and the Magistrate Judge Suzanne Mitchell from the Western District Court of Oklahoma have been bias against Mr. Kalbaugh. This biasedness includes Suzanne Mitchell's involvement in Civ-16-1314 And Civ-18-951 And David L. Russell's involvement in Civ-16-1314, Civ-18-951, and Civ-20-280 Both David L. Russell and Suzanne Mitchell were involved in these cases being Bias against Mr. Kalbaugh even after the court clerk Flagged and set/clear flags on both Judges and Civ-18-951 was transferred away from them and they even went back to the case even after it was transferred away.

All three cases were either Dismissed or Recommended to be Dismissed by these two Biased Judges Russell and Mitchell. pursuant to the aforementioned there was and is a conflict of Interest due to there Involvement in all three of these cases, and both Judges should recuse themselves. *Lite Ky VS. U.S.*, 510 U.S. 540, 544, 114 S. Ct. 1147, 1157 (1994), *U.S. VS. Cooley*, 1 F.3d 985 (10th Cir. 1993), *U.S. VS. Tucker*, 78 F.3d 1313, 1324 (5th Cir. 1996), and *Gray VS. university of Arkansas*, 883 F.2d 1394, 1398 (8th Cir. 1989) pursuant to the aforementioned the Judge's Involvement presents a Biased prejudicial assessment. see exhibit.

041 & 2 = DOCKET SHEETS.

Due to the aforementioned all three of these cases:

Civ-16-1314, Civ-18-951, Civ-20-280

Should be remanded and have a change of venue from the western District Court to another District Court out of Oklahoma to start over to Avoid a miscarriage of Justice.

Statement of the case

On November 25th 2014, members of the OKC police Department were conducting surveillance on a suspected drug house based on a tip they had received. OCPD. Impact unit along with plainclothes officers were part of this operation monitoring radio surveillance with the idea that they would be notified of the comings and goings from the suspected drug house. OCPD on the scene received word that a car had arrived at the house and had just left from the house.

O.C.P.D. pulled behind a red Toyota Corolla, Near Southeast 15th St. and Central. Shortly after leaving the intersection, the car was initiated in a traffic stop for allegedly straddling the lane line. The driver stopped but then drove off as the officer approached the car. The officer identified the driver at this time to be a female, with a male in the passenger seat. After the driver turned a few corners she bailed out of the car and Mr. Kalbaugh, who had been in the passenger seat, jumped into the driver's seat and continued

to drive.

At about 6:30 pm, the Toyota crashed at the National guard center, 420 south cedar ridge lane, mustang, OK 73064, in Canadian county. where Mr Kalbaugh attempted to drive through a fence trying to surrender himself to somebody who is not a police officer, in fear of the police. Helicopter pilot Jim Gardner for New's 9/ griffin T.V. OKC, LLC, 7401 N. Kelly Ave., OKC, OK 73111 caught this incident on video and Broadcast it live on National Television. This footage is contained on a C.D. DOC. No. 32 in the western District court. After being stopped by the fence, Mr. Kalbaugh exited his side of the car with his hands in the air, one gun fell out of his lap then he reached down in a non-threatening way and pulls both guns with only his index finger and thumb with all other fingers up and drops the guns to the ground. Returning his hands up in the air to show everyone he was of no threat, and he wanted to peacefully surrender. At this point Mr Kalbaugh heard someone yelling Shoot him, and that is all Mr Kalbaugh heard, at hearing this Mr Kalbaugh then backed over the fence to run to the National guard center building to surrender to someone who is not a police officer, in fear of the police killing him. Even at Mr Kalbaugh's criminal trial he testified to seeing the police beat and Kill Luis Rodriguez on Feb-15-2014 at the Warren movie theater in Moore, OK. Mr Kalbaugh Also explained at trial he had the guns in his lap because he thought about throwing them out the window

so as not to be caught and charged with them, but then decided not to throw them out to keep someone from finding them and getting hurt, and Mr Kalbaugh had also thought of using them on himself.

upon running across the National guard center parking lot to the building Mr Kalbaugh sees Sgt. Kevin Lee Dean whom resides at 404 S.W. 53rd St, OKC, OK 73109 phone No. (405) 406-2795, as is clearly seen from the undisputable video, Mr Kalbaugh upon seeing Mr. Dean changes his direction of running and runs directly to Mr. Dean to surrender himself to someone who is not a police officer, in fear of the police killing him.

Mr Kalbaugh believes the OCPD was angry with him for leading them on a high speed vehicular chase, and also believes that officer Bryan Wright was angry because he had just tripped, fell and rolled on the ground.

Mr Dean along with fellow employee Sgt. Dimitri Diaz whom resides at 220 N. Lakeside Ter, Mustang, OK 73064 phone No. (724) 968-8066, who had been watching see Mr. Kalbaugh running towards them, Mr. Kalbaugh was not resisting arrest or attempting to flee, Mr. Kalbaugh was under the impression he had just surrendered to Mr. Dean.

Mr Kalbaugh layed down with his hands out so everyone would see he was not trying to reach for anything fearing of being shot and killed. Mr Kalbaugh was assisted to the ground by Mr Dean who then sat down on Mr Kalbaugh's back straddling him

and had him in a position of restraint, holding his left arm immobilized and effectively subduing him. Mr. Kalbaugh was then at this point under the custody of Sgt. Dean who was keeping order by himself until officers Wright and Jones arrived.

Once O.C.P.D. officers Bryan Wright Badge No. 1912 and Jacob Jones Badge No. 1763 arrived who were both working in their official capacities as Oklahoma City police officers representing the city of Oklahoma City, wearing their utility belts containing their duty weapons.

Both Wright and Jones directed Sgt. Dean to move and proceeded to abuse their authority through the unwarranted excessive force used intending malicious punishment with the intent of purposely ignoring Justice in favor of the suffering of Mr. Kalbaugh with "Evil Intent" by proceeding to severely and unjustly beat with purposeful and biased extreme malicious and "Evil Intent" to inflict torture, physical harm, and emotional distress as punishment. This brutal attack was by both Wright and Jones whom Mr. Kalbaugh was then at this point under their custody, with both on top of him while he was laying on his stomach on the ground with each officer in control of one of Mr. Kalbaugh's arms. Mr. Kalbaugh was not resisting arrest or attempting to flee, and never did try to resist arrest and was not trying to hurt anyone and was of no threat to anyone. Mr. Kalbaugh was knocked unconscious two or three times, and just remembers trying to say while choking on his own

blood and teeth "I'm Not resisting" and "I surrender"
"please stop."

Mr Kalbaugh was repeatedly punched, and elbowed in the face, mouth, head, neck, ears, and back by both Jones and Wright. Mr Kalbaugh also had a knee placed on his neck. Mr. Kalbaugh was wearing Dickey's carpenter jeans which have a pocket located at the right side of the right knee located inside this side pocket is where Mr Kalbaugh had a knife, that he didn't even remember he had on his person or he would have dropped it to the ground when he dropped the guns disarming him self.

Mr Kalbaugh was carrying this knife without conscious knowledge or intent. Mr Kalbaugh never tried to reach for the knife let alone try to pull it out. Mr. Kalbaugh didn't even remember he had the knife on his person.

Also the knife snaps into its sheath and it would take both hands to pull this knife. one to hold the sheath and one to pull the knife, because the sheath was not attached to a belt or pocket or anything and was just free floating in the side pocket of his jeans. Once Wright observed the knife he was in possession of it because he pulled the knife out of Mr Kalbaugh's pocket while patting him down, once the officers found the knife they also used it as an excuse to beat to punish Mr Kalbaugh. Mr. Kalbaugh's pocket was not see through and the knife was not hanging out of the pocket. It is clear Mr Kalbaugh never pulled this knife

and that Wright pulled it out. see exhibit 3 & 4 & 5 & 6
Not only did both officers abuse their authority through
the unwarranted excessive force used intending to punish
Mr Kalbaugh with "Evil Intent" by proceeding to severely
and unjustly beat with purposeful and biased extreme
malicious "Evil Intent" to inflict torture, physical harm, and
emotional distress to punish. Both officers Wright and Jones
Also failed to protect Mr Kalbaugh from each other.

The duration of the episode of unlawful and unconstitutional
use of excessive force by both officers was sufficient to
permit either one to interfere and intervene with the
excessive force of the other one, in a reasonable manner
to stop or try to stop the unconstitutional violation and
criminal activity of the other officer. Instead both
officers collaborated together with the excessive use
of force. see exhibit 7-through-13 photos of officers

Both officers use of force was excessive and violates
the Fourth, eighth, and Fourteenth Amendment of Mr Kalbaugh's
because it was not applied in an effort to maintain or restore
discipline or order but was used to maliciously and
sadistically cause harm with "evil intent," and wanton
infliction of pain to punish.

Mr Kalbaugh remembers Wright punching him in the mouth
repeatedly, while yelling stop trying to bite my hand.
Mr Kalbaugh never tried to bite anyone.

from the time Sgt. Dean placed Mr Kalbaugh on the ground
to the time He was picked up off the ground, He was
on his stomach on the ground.

Mr. Kalbaugh was beat so bad he lost control of his bladder and urinated on himself. See exhibit 4 other than Mr. Kalbaugh Not surrendering to the O.C. pd. out of fear of being killed, but instead surrendering to Sgt. Dean.

Mr. Kalbaugh Never disobeyed any orders, and never posed an immediate threat or any threat to himself, officers, or any others. And taking No threatening actions at any time other than reaching down in a non-threatening way and pulling both guns with only his index finger and thumb with all other fingers up and dropping the guns to the ground as soon as they cleared his waistband before putting his hands back up in the air. Therefore there is no evidence that Mr. Kalbaugh posed any threat to anyone at anytime. See exhibit 14 through 17.

After the crimes without Justifiable or excusable use of force, Assault and Battery, and Neglect of Due process of the law and liberty interest among other violations of Mr. Kalbaugh's State, Federal, Civil, and Constitutional rights were knowingly and willfully Feloniously committed against Mr. Kalbaugh with deliberate indifference and disregard for the law to punish by Jones and Wright whose actions violated clearly established State, Federal, Civil, and Constitutional rights and laws against Mr. Kalbaugh.

When Mr. Kalbaugh was picked up from the ground and woke up from being knocked unconscious and sitting leaned up against the rear tire of a police car, he remembers spitting out Blood and teeth.

Due to the police beating Mr Kalbaugh while the News Aired it live on T.V. And the use of force, The Internal Affairs showed up on the scene, to Investigate and take pictures of the crime scene, and of Mr Kalbaugh the victim because of the obvious guilt of the police officers Jones and Wright.

Mr Kalbaugh didn't call Internal Affairs, Internal Affairs don't show up to all police arrests, and ask do you the victim want to press charges on the police.

Mr Kalbaugh was being given aid by EMSA on the scene. Mr Kalbaugh remembers Internal affairs officers taking pictures of himself both at the place of Incident and at Integri's south west medical center Hospital emergency Room, where he was immediately taken and treated for only some of his injuries.

It is also plainly obvious by the extent of Mr Kalbaugh's injuries which are inconsistent with the testimony of Jones and Wright and are consistent with the claims of Mr Kalbaugh that Jones and Wright are guilty of violating.

Mr Kalbaugh at his criminal trial admitted to possessing the firearms, eluding the police in his car and possessing the item referred to as a "Smokers Kit."

Mr Kalbaugh had no actual quantity of drugs only a glass pipe with meth residue in the "Smokers Kit."

B.C.P.D forensic chemist Matthew Scott Verified the

presence of "Trace quantities." of Methamphetamine from residue obtained from the glass pipe collected from Mr Kalbaugh's "Smokers Kit", Mr Scott classified the case as a "residue case" this should have been a charge of possession of drug paraphernalia. Then Mr. Kalbaugh would have only been charged with Aggravated Attempted to elude Afc and possession of Firearm Afc. But Mr. Kalbaugh was found guilty of 4 charges

count(1) Aggravated Attempted to elude Afc

count(2) possession of CDS (meth) Afc

count(3) possession of firearm Afc

count(4) possession of an offensive weapon during the commission of a felony (said felony being possession of the aforementioned CDS meth residue in a glass pipe "Smokers Kit" count(2) while possessing the firearm of count(3).) this is also a Double Jeopardy by Double enhancement Because Both count(2) and (3) were already enhanced with Afc's.

During Mr Kalbaugh's criminal trial the Introduction and argument regarding litigation of Mr Kalbaugh's civil claims along with all of Mr Kalbaugh's civil case was admitted to the court trying to punish Mr Kalbaugh for exercising his civil rights through filing this civil case on the police for beating him, this admission of Mr Kalbaugh's civil case and persicution for the exercising of Mr Kalbaugh's legal right to the civil court, was done by Judge Timothy R. Henderson.

District Attorney David praiter, Jimmy Harmon, and Kelly collins.

Mr Kalbaugh believes he was punished so excessive with one hundred (100) years Imprisonment, No credit for county Jail time of 450 days, and a five thousand dollar fine for each count, because he exercised his civil rights with filing this case. See exhibit 18

This is also evident where Mr Kalbaugh's co-defendant who also had the same charges of

(1) Aggravated Attempted to elude AFC X 2

(2) possession of CDS (meth) AFC X 2

only received a (6) six year and a (3) three year sentence to run concurrently for a total of (6) six years with credit for time served and no fine. For the same charges Mr Kalbaugh received (45) years with No credit for time served and a five thousand dollar fine for each count. This is a difference of (39) thirty nine years for the same charges. See exhibits 19 through 22

pursuant to qualified immunity

Mr Kalbaugh asserts qualified immunity is not available to either Jacob Jones or Bryan Wright because their conduct was not within the scope of their employment, because they violated clearly established Constitutional, State, Federal, and customary International law. In Saucier Vs. Katz, 533 U.S. 194 (2001), Krout Vs. Goemmer, 583 F.3d

557, 565 (8th Cir. 2009), *Mick VS. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996), *Priester VS. City of Riviera Beach*, 208 F.3d 919, 924 (11th Cir. 2000) the Court held that a police officer was not entitled to qualified immunity when he failed to interfere when other police officers used excessive force.

The text of 42 U.S.C. § 1983 "Makes No mention of defenses or immunities." *Ziglar VS. Abbasi*, 582 U.S. 137 S. Ct. 1843, 1870, 198 L. Ed. 2d 290 (2017) (Opinion of Thomas, J)

For the first century of the laws existence, the court did not recognize an immunity under § 1983 for good-faith official conduct. Although the court did not squarely deny the availability of a good-faith defense, it did reject an argument that plaintiff's must prove malice to recover. *Myers VS. Anderson*, 238 U.S. 368, 378-379, 35 S. Ct. 932, 59 L. Ed. 1349 (1915) (imposing liability); *Id.* @ 371, 35 S. Ct. 932 (argument by Counsel that malice was an essential element.) No other case appears to have established a good-faith immunity.

Bande, is qualified immunity unlawful? 106 Cal. L. Rev. 45, 57 (2018); Engdahl, Immunity and Accountability for positive governmental wrongs, 44 U. Colo. L. Rev. 1, 48-55 (1972). But officials were not always immune from liability for their good-faith conduct. see *Little VS. Barrere*, 2 Cranch 170, 179, 2 L. Ed. 243 (1804); *Miller VS. Horton*, 152 Mass. 540, 548,

26 N.E. 100, 103 (1891); see Bauder, *supra*, at 55-58; Woolhandler, *Patterns of official immunity and Accountability*, 37 *Cases W. Res. L. Rev.* 396, 414-422 (1986); Engdahl, *supra*, at 14-21 "was qualified immunity historically accorded the relevant official in an analogous situation at common law." Ziglar, *supra* @ 137. (quoting *Imbler v. Pachtman*, 424 U.S. 409, 421, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). Also this court has continued to conduct this inquiry in absolute immunity cases, even after the sea change in qualified immunity doctrine. *Burns v. Reed*, 500 U.S. 478, 489-492, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991) This should be the same in qualified immunity cases as well. "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)

when a defendant asserts a qualified immunity defense on summary judgment, "The plaintiff must meet the heavy two-part burden of showing that."

(1) A reasonable jury could find facts supporting a violation of a constitutional right.

And

(2) The constitutional right was clearly established at the time of the defendant's conduct."

Farrell vs. Montoya, 878 F.3d 933, 937 (10th Cir 2017).

The defense for good-faith official conduct/qualified immunity is limited to authorized actions within the officers Jurisdiction. See Wilkes vs. Dinsman, 7 How. 89, 130-131, 12 L. Ed. 618 (1849).

Mr. Kalbaugh contends that the OCPd and the state of Oklahoma lacked Jurisdiction to Arrest him and prosecute him because he is an American Indian by blood quantum, and hereby declares to the court that he was tried in the wrong court, Mr. Kalbaugh should have been tried in tribal court, or Federal court, and not state court pursuant to Title 18 U.S.C.A. § 1151.

Objections to Petition for writ of certiorari Questions Presented

Persuant to the questions presented it is unequivocal that Jones and Wright are cajoling to get back there qualified immunity defense the Tenth Cir. Court rightly reversed.

Pursuant to question NO. 1 presented while the reasonableness standard is an objective standard, it is Judged from the perspective of a reasonable officer at the scene. while Mr Kalbaugh had previously posed a threat to officers and members of the public, The

Circumstances had changed the high-speed chase had ended. Mr. Kalkaugh was no longer in his car, he had dropped the guns and was on the ground effectively subdued by Kevin Dean. "It is clearly established that officers may not continue to use force against a suspect who is effectively subdued." *Estate of Smart VS. City of Wichita*, 951 F.3d 1161, 1164-66, 1175-76 (10th cir. 2020) "Id @ 1175-76 Force Justified at the beginning of an encounter is not justified even seconds later, if the justification for the initial force has been eliminated." *Graham and Lindsey VS. Hyler*, 918 F.3d 1109, 1113 (10th cir 2019) "for the proposition that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer at the scene. see exhibit 14 through 17 And 23 through 29. Here is the perspective of a reasonable officer at the scene.

A reasonable Jury could conclude Based on this evidence that Jones and Wright "should have been able to recognize and react to the changed circumstances." *McCoy VS. Meyers*, 887 F.3d 1050 (10th cir. 2018) And further conclude that under these circumstances, a reasonable officer would not have believed that Mr. Kalkaugh posed an immediate threat to officers, himself or to the public.

Taking the Facts in the light most favorable to Mr Kalbaugh, a reasonable Jury could conclude that officers Jones and Wright continued to beat Mr Kalbaugh after he was effectively subdued by Mr. Deon and then Jones and Wright. And pursuant to *Graham VS. Connor*, 490 U.S. 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) and *Turner VS. Scott*, 119 F.3d 425 (6th Cir 1997) this would be a violation of Mr. Kalbaugh's constitutional rights. Though Jones and Wright dispute material portions of Mr Kalbaugh's account of the events for summary Judgment purposes such "disputes of fact" must be on the Record viewed in light in favor of Mr Kalbaugh pursuant to *McCoy VS. Meyers*, 1050, Supra. And *Osterhout VS. Morgan*, 763 Fed. Appx. 757, NO. 18-7023 (10th Cir 2019)

The western District courts grant of summary Judgment by David L. Russell and Suzanne Mitchell was a Biased prejudicial assessment and should have never happened in the first place, it was a miscarriage of Justice, pursuant to the standard of review. *Bird VS. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016) viewing the factual record and making reasonable inferences from it in the light most favorable to the party not moving for summary Judgment, Mr Kalbaugh.

summary Judgment is appropriate "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(a).

"A dispute is genuine when the evidence is such that a reasonable jury could return a verdict for the party not moving for summary judgment," (such as Mr. Kalbaugh and such as the undisputable video evidence.) And "a fact is material when it might affect the outcome of the suit under the governing substantive law."

Pursuant to Question NO. 2 Presented

"It is clearly established law that officers may not continue to use force against a suspect who is effectively subdued" *Estate of Smart VS. City of Wichita supra*. This case relied on case law predating the events at issue to show clearly established law.

Bell Atlantic Corp. VS. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1965, 167 L.Ed. 2d 929 (2007) held that in a complaint filed in federal court, a plaintiff's "Factual allegations must be enough to raise a right to relief above the speculative level."

Ashcroft VS. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed. 2d 868 (2009) held a plaintiff in a § 1983 action is not held to comply with a "heightened" pleading requirement in order to overcome the qualified immunity defense, as it results in cases governed by Fed. B. Civ. P. 8. See also *Back VS. Hall*, 537 F.3d 552, 558 (6th Cir. 2008) holding that there is no heightened pleading requirement for civil rights plaintiffs in cases in which the defendant raises the defense of qualified immunity; *Robbins VS.*

Oklahoma, 519 F.3d 1242-49 (10th Cir. 2008) noting in a case involving qualified immunity, that the Supreme Court in *Twombly supra* had rejected a heightened pleading standard; *Thomas vs. Independence Township*, 463 F.3d 285, 294-95 (3rd Cir. 2006) no heightened pleading standard required in §1983 actions.

Ashcroft vs. Al-Kidd, — U.S. —, 131 S.Ct. 2074, 179 L. Ed. 2d 2074 (2011) stating that for a government official's conduct to violate clearly established law, so that the official is not entitled to qualified immunity from claims for money damages, a case directly on point is not required. clearly established law at the time of the violation. *Tolan*, 572 U.S. @ 656, 134 S.Ct. 1861. The focus of this analysis "is whether the state of the law at the of an Incident provided fair warning to the defendants that their conduct was unconstitutional."

"A clearly established right is one that is sufficiently clear that every reasonable officer would have understood that what he is doing violates that right." *Mullenix vs. Luna*, — U.S. —, 136 S.Ct. 305, 308, 193 L. Ed. 2d 255 (2015)

Perea vs. Baca, 817 F.3d 1198, 1204 (10th Cir. 2016) held "It is clearly established that specific conduct violates a Constitutional right when 10th Cir. or Supreme Court precedents would make it clear to every reasonable officer that such conduct is prohibited."

"An officer's violation of the *Graham supra* reasonableness test is a violation of clearly established law if there are no substantial grounds for a reasonable officer to

conclude that there was a legitimate justification for acting as he did." See exhibit 14 - through 17 and 27 through 29. *Casey VS. City of Federal Heights*, 508 F.3d 1278, 1286 (10th Cir. 2007).

Thus, we have concluded force was unconstitutional when it was used against plaintiffs like Mr. Kelbaugh, "who posed little to no threat, and put up no resistance." Once more look at exhibit 14 - through 17 and 27 through 29.

Morris VS. Noe, 672 F.3d 1185, 1190, 1195-96 (10th Cir. 2012) held officers violated the plaintiffs Fourth Amendment rights when they threw him to the ground forcefully and without warning even though he had his hands raised, posed little or no threat to them or bystanders, was neither resisting arrest nor attempting to flee.

Olsen VS. Layton Hills Mall, 312 F.3d 1304, 1309-10, 1315 (10th Cir. 2002) held the district court erred in granting qualified immunity (Just like in this case at bar) to an officer where the plaintiff whom the officer suspected of committing credit card fraud, had presented evidence that the officer forcefully pushed him into a storefront window and wrenched his arm up his back before handcuffing him, despite the fact that the plaintiff was not resisting arrest or acting belligerently. And in *Casey supra*, the court held that a reasonable jury could find an officers use of force was excessive when he without warning grabbed and then tackled the plaintiff, even though the plaintiff was not threatening anyone and

was not attempting to flee.

Glenn Vs. Washington County, 661 F.3d 460, 471-72 (9th cir. 2011) held police are required to consider what other tactics, if any, are available, and if there are clear, reasonable, and less intrusive alternatives to the Force employed that militates against finding the use of force reasonable for the purposes of analysis of the Fourth Amendment excessive force claim.

In light of all the aforementioned and cited cases, and others like them, it would have been obvious to officers Jones and Wright that it was unconstitutional for them to use violent force on Mr. Kalbaugh when he was not resisting arrest, not attempting to flee, and there was no objective reason to believe that he posed an immediate threat to the officers, himself, or to the public, and was on the ground immobilized. See exhibit 14-through 17 and 25 through 29.

Objections to Petition for writ of certiorari

page 5.

Statement of Case

pursuant to Sgt Deon saying he saw Kalbaugh get out of the car with a gun, as is clearly seen from the undisputable video Sgt Deon is lying because from the place he was at in the parking lot, it is clear he could not have seen Mr Kalbaugh on the other side of the car, the driverside with Mr Kalbaugh also having the car door open and being in between the car and the door with his back towards Mr Deon, and Mr Deon on the passengerside

of the car. see exhibit 30-31

The testimony is just coached from the Defendants,
the police see exhibit 32

Also see Kevin Dean's Audio Interview of 11-25-2014

where he was also sworn in and under oath and
perjured himself see exhibit 33-then-30-31 and 34.
where Dean states first that he is on the passenger
side of the car exhibit 24-25 then He said he
was not on the passenger side of the car exhibit 33.
then he states that he could only see something
drop but not show what it was exhibit 33 & 34
and even states "the only reason I keep on telling the
officer is because I didn't know if it was the police officers
weapons or who the weapons was" see exhibit 35.

then at Mr Kalbaugh's criminal trial Mr Dean is lying
on Mr Kalbaugh trying to get him into trouble for the
police. Mr Dean states "I seen him... And he had a
weapon in his hand see exhibit 36-through-38.

If Mr Dean had seen Mr Kalbaugh get out of the car with the
guns, he wouldn't have thought they were the police's guns
see exhibit 35.

page 5, pursuant to Kalbaugh encountering Sgt Dean. As is
clearly seen from the undisputable video, Mr Kalbaugh
was running toward the building until he hears and
sees Mr Dean, and then he makes a distinct change in
direction and runs directly towards Mr. Dean. see
exhibit 39

page 5, pursuant to Dean Jumping on Mr Kalbaugh and

slamming his face. This is a lie, as is clearly seen in the undisputable video this is not true Mr Dean did not jump on Mr Kalbaugh and slam his face. This statement is coached by Defendant's Counsel, and to cover up the Defendant's misconduct. See exhibit 40 & 23 & 25 & 9 & 39

page 7,
pursuant to officer Wright observing a knife in Mr Kalbaugh's pocket, Wright couldn't have because it was inside the pocket, see exhibit 3 & through 6, once officer Wright observed the knife, he was in possession of it because he pulled the knife out of Mr. Kalbaugh's pocket, and therefore he didn't observe the knife until he was in possession of it, so Mr Kalbaugh could Not have been a threat with said knife. See exhibit 24

page 7. pursuant to the District Court held the video showed Mr Kalbaugh continued to fight even after he was stopped, The District Court has been biased this is a lie Mr Kalbaugh did not fight or resist, even the 10th Cir. Court said "we respectfully disagree" see also supra Determination of Judicial Bias. And exhibit 15 & 16 And 27 through 29.

page 8. pursuant to "Kalbaugh's admission that he was moving his hands behind his back." Mr Kalbaugh is only a layman at law and when he said this he was "implying" he was relaxed and moving his arms in accordance with directions, and the forced direction from both Jones and Wright moving his arms. See exhibit 27 - through - 29

page 10. pursuant to "the district court held no reasonable jury could conclude Kalbaugh was effectively subdued when officers Jones and Wright used force." see supra, Judicial Bias And see exhibit 27-through-29 Also see exhibit 41 officer Jones even states after Mr. Kalbaugh was handcuffed he was slapping him in the face.

Extent of Injuries

- (1) Contusion of the face
- (2) Facial laceration on the chin
- (3) Laryngeal fracture
- (4) cervical fracture / and spinal problems
- (5) cervical strain
- (6) bleeding from multiple places on head and face
- (7) Neck pain and facial pain
- (8) unable to bite, which Mr. Kalbaugh still can't properly
- (9) Back pain, pinched syatic nerve on right side
- (10) ear pain and bleeding, also problems hearing to this day
- (11) Nose bleed
- (12) At time of Incident loss of control of bladder
- (13) post-traumatic-stress disorder
- (14) problems sleeping and nightmares
- (15) Broken and chipped teeth
- (16) tenderness, swelling, and bruising of the head, face, neck and

The degree of Injuries suffered is relevant insofar as it shows the amount and type of force used! see exhibits 42-through-70

Argument IN support

In support, Mr Kalbaugh shows this court the following:
pursuant to Proffitt VS. Ridway, 279 F.3d 503, 506 (7th Cir 2002)
once an arrestee is under the custody of an official, the
said official has a duty to provide for the arrestee's safety.
In Turner VS. Scott, 119 F.3d 425 (6th Cir. 1997) The
court held that a police officer can be held liable
for using excessive force when it is shown he,
(1) actively participated in the use of excessive
force.
(2) supervised the officer who used excessive
force.
(3) owed the victim a duty of protection against
the use of excessive force.

All of the three were fulfilled and completed
by Both Jacob Jones and Bryan Wright.
Here in Mr Kalbaugh's case there is video of the events
at issue, the court should not adopt a version of
the facts from officers Jones and Wright that is
blatantly contradicted by the record of the video.
See Kalbaugh VS. Jones and Wright, WL 1510054 (2020)
Id. @ 2 under Legal Standard "We cannot ignore
clear... video evidence in the record depicting
the events as they occurred."
Cf. York VS. City of Las Cruces, 523 F.3d 1205, 1210-
11. (10th Cir. 2008) holding that the plaintiff's story was
not blatantly contradicted by the recording of
his arrest (as is in the instant case at bar) where

portions of the audiotape were unintelligible.

Also the introduction and argument regarding litigation of Mr Kalbaugh's civil claims to the court, during Mr Kalbaugh's criminal trial CF-2014-8557 Trying to punish Mr Kalbaugh for exercising his civil Rights. see exhibit 18. Also the court in, International Union, United Mine Workers of America vs. Bagwell, 512 U.S. 821, 828-34, 114 S. Ct. 2552 (1994) held. punishing persons with incarceration for things they do in civil litigation sounds to us a lot like criminal contempt, which requires the same protections that a defendant in a criminal prosecution receives.

use of De minimis or Minimal Degree of force In Morrison vs. Board of Trustees, 583 F.3d 394, 404-08 (6th Cir. 2009) the court held that gratuitous violence inflicted upon an incapacitated detainee constitutes an excessive use of force. (which is the same here with Mr Kalbaugh.)

Focusing on the perspective of a reasonable officer at the scene. see exhibit 14 through 17 And 27 through 29. At exhibit 17 officer carpenter said I was never a threat and ~~at~~ exhibit 26 He didn't understand why the officers were yelling those commands while beating on Mr Kalbaugh because Mr Kalbaugh was not fighting or resisting see exhibit 71 & 72.

It is clear Mr Kalbaugh didn't resist see exhibit 71 & 72 where Sgt Diaz says I didn't follow orders when I got out of the car, but I never did resist.

It's clear Mr Kalbaugh hears Sgt Deon and runs toward him to surrender see exhibit 39, he then gave up and starts saying please help the police are trying to kill me. see exhibit 72 & 73 Sgt Deon grabbed and placed Mr Kalbaugh on the ground. see exhibit 23 & 40. It's clear Mr Kalbaugh was not trying to flee or run see exhibit 15. It's clear Mr Kalbaugh was not resisting see exhibit 74 It's clear Sgt Deon was on Mr Kalbaugh's back and had Mr Kalbaugh's left arm immobilized see exhibit 27. It's clear as soon as the officers arrived they had control of Mr Kalbaugh arms right away and had his arms immobilized and started to strike Mr Kalbaugh see exhibit 28 & 29. It's clear Sgt Deon don't like and don't care what happens to Mr Kalbaugh see exhibit 75. It's clear Sgt Diaz feels the same and don't like Mr Kalbaugh see exhibit 76. It's clear that Sgt Deon will lie under oath for the police see exhibit 29 where Deon states he seen officers strike Mr Kalbaugh After they had his arms immobilized, then see exhibit 77 where Deon said he never saw the officers hit, strike or kick or punch Mr Kalbaugh. It obvious Mr Deon is trying to cover for the police see exhibit 75 Also Mr Diaz is covering for the police see exhibit 76. It's clear Jones used force even after Mr Kalbaugh was handcuffed see exhibit 41. It's clear Jones

had his knee on Mr. Kalbaugh's neck. See exhibit 78.

Also this Honorable court on Monday June 15th, 2020 declined to hear eight cases involving qualified immunity, including seven involving police accused of excessive force or other misconduct. See exhibit 79.

Conclusion

These are complex issues of law and fact brought before this court in Respondent's civil claims. These issues are beyond the ability of the Respondent to adequately research and present before this Honorable court so as to preserve his substantial rights to a fair and impartial hearing and or trial when weighed against the knowledge and resources of Jacob Jones, Bryan Wright, and their counsel.

This being said Mr. Kalbaugh is asking this Honorable court to find that both Jones and Wright knew of the excessive use of force with evil intent each of them were using and also the other was using on Mr. Kalbaugh and had plenty of time and opportunity to intervene and respond to the use of force in a reasonable manner to stop or try to stop the unconstitutional violations and criminal activity of an other officer. Mr. Kalbaugh is asking this Honorable court to continue the denial of qualified immunity and issue an order in favor of Mr. Kalbaugh.

As is pointed out by the tenth Cir. court "we cannot ignore clear... video evidence in the record depicting the events as they occurred."

Therefore there are no genuine issues of material fact and Mr Kalbaugh is entitled to Judgment In his favor as a matter of law.

Mr Kalbaugh ASK'S this Honorable court to reinstate his claims against officers Jones and Wright in their official capacities and issue order and Judgment in his favor.

Mr Kalbaugh ALSO ASKS for a remand of CIV-18-951 and CIV-20-280 with a change of venue from the Western District court of Oklahoma Due to Biasedness from the Judges.

Mr Kalbaugh is entitled to impunity and prays this Honorable court will not go for Jones and Wright's unequivocal way of Cañole, it is so prayed to Yahweh through Yahshua the messiah "you shall not fall in with the many to do evil, nor shall you bear witness in a lawsuit, siding with the many, so as to pervert Justice, nor shall you be partial to a poor man in his lawsuit." Exodus 23: 2-3

In the Intrest of Justice to Avoid
"so the law is paralyzed, and Justice never goes forth, for the wicked surround the righteous, so Justice goes forth perverted." Habakkuk 1: 4. A miscarriage of Justice!

Certification of Compliance and
Declaration in Compliance with 28 USC §1746
(Pursuant to Rule 33.2)

I Wayne Duke Kalbaugh Certify that
this "Brief in opposition" is in compliance
with Rule 33.2. This Document is not
over 40 pages pursuant to Rule 33.2(b)
the actual page count I am submitting
as my "Brief in opposition" is this is
Not including the cover sheet, verification/
Declaration under penalty of Perjury, or the
certificate of service & Mail Box Rule, or the
"Joint Appendix"

Respectfully Submitted - 2-15-2021

Wayne Duke Kalbaugh #450429

/s/ Wayne D Kalbaugh

Respondent Pro-se on NO-20-83

N.F.C.C. / C-N-229

1605 East Main Street

Sayre, OK 73662