Nos. 26-, 26-

IN THE

Supreme Court of the United States

PARIS THORPE, AS NEXT FRIEND OF A.B.,

Petitioner,

v.

JERRIKA WEAVER, *et al.*,

Respondents.

MARTINA PENA, AS NEXT FRIEND OF A.P.,

Petitioner,

v.

STARR COUNTY, TEXAS, *et al.*,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when a reasonable jury could find deliberate indifference because a custodial officer actually recognized and consciously disregarded an obvious, substantial risk of serious medical harm, qualified immunity may nevertheless be granted on the ground that prior decisions establishing the constitutional duty to obtain timely medical assistance involved different symptoms, causes of distress, or custodial circumstances?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE

THORPE: Petitioner Paris Thorpe, as next friend of A.B., was a plaintiff-appellant below. By order dated March 2, 2022, the district court also substituted Paris Thorpe for Keisha Boykin as the plaintiff pursuing the survival action on behalf of the Estate of Darren Boykin, Jr., for the benefit of A.B. *Thorpe*, Pet. App. 74a. Respondents Jerrika Weaver, Brent Hobbs, and William Scott were defendants-appellees. Darren Boykin, Sr., identified as Darren Boykin in the Fifth Circuit's caption, was an intervenor plaintiff-appellant below but is not joining this petition and is not represented by counsel for Petitioners.

PENA: Petitioners Martina Pena, individually and as next friend of A.P., and Aristedes Pena, individually and on behalf of the Estate of Alberto Pena were plaintiffs-appellants below. Respondents Starr County, Texas; Evelario Garza; Ubaldo Suarez; Chester Cervantes; Daniel Garcia; Hector Lopez III; Joel Garza; Emilio Garza; Jesus Barrera Jr.; and Cesar Juarez Jr. were defendants-appellees.

None of the parties identified above is a publicly traded corporation; no corporate disclosure statement is applicable.

DIRECTLY RELATED PROCEEDINGS

1. *Thorpe v. Weaver*, No. 5:21-cv-00106 (E.D. Tex.): magistrate judge's report and recommendation issued October 20, 2023 (Doc. 159); district court order adopting report, granting summary judgment, and dismissing the action with prejudice entered June 18, 2024 (Doc. 170).

2. *Thorpe v. Weaver*, No. 24-40472 (5th Cir.): judgment July 8, 2026; panel rehearing and rehearing en banc denied July 29, 2026 (Doc. 103-1); mandate issued August 5, 2026 (Doc. 105-1).

3. *Pena v. Starr County*, Texas, No. 7:22-cv-00276 (S.D. Tex.): final judgment August 12, 2025.

4. *Pena v. Starr County*, Texas, No. 25-40481 (5th Cir.): judgment August 28, 2026; panel and en banc rehearing denied September 25, 2026; mandate issued October 2, 2026.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in *Thorpe v. Weaver* and *Pena v. Starr County, Texas*.

OPINIONS BELOW

The Fifth Circuit's published opinion in *Thorpe v. Weaver*, 180 F.4th 834 (5th Cir. 2026), is reproduced at Pet. App. 1a–13a. The Fifth Circuit's published opinion in *Pena v. Starr County, Texas*, No. 25-40481 (5th Cir. Aug. 28, 2026), is reproduced at Pet. App. 14a–45a. The *Thorpe* district court's June 18, 2024 order adopting its magistrate judge's report and granting summary judgment is at App. 46a–69a, and the incorporated October 20, 2023 report is at App. 70a–164a. The *Pena* district court opinion and order is at App. 165a–224a. The rehearing orders appear at App. 225a–226a (*Thorpe*) and App. 227a–228a (*Pena*); the appellate judgment and mandate documents appear at App. 229a–230a (*Thorpe*) and App. 231a–232a (*Pena*).

JURISDICTION

In *Thorpe*, the Fifth Circuit entered judgment on July 8, 2026, and denied timely sought panel rehearing and rehearing en banc on July 29, 2026. Pet. App. 225a–226a, 229a–230a. The ordinary 90-day period expires October 27, 2026. In *Pena*, the Fifth Circuit entered judgment on August 28, 2026, and denied rehearing on September 25, 2026. Pet. App. 227a–228a, 231a–232a. This petition is timely as to both judgments. Sup. Ct. R. 13.1, 13.3. The district courts had original federal question and civil

rights jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). This Court has jurisdiction under 28 U.S.C. § 1254(1). Because both judgments are from the same court and present closely related questions, petitioners seek their review through one petition under Rule 12.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

A. *Thorpe*: an unconscious, barely breathing detainee transported past a hospital

In August 2019, Darren Boykin fled police on foot on a hot Texas day and was apprehended after a roughly half-mile chase. He had difficulty walking to Officer Jerrika Weaver's patrol vehicle, and officers carried him. Boykin complained that he could not breathe. Officer Brent Hobbs believed the difficulty resulted from exertion and increased the air conditioning; Sergeant William Scott relied on that assessment. The officers did not know Boykin had sickle cell trait, which placed him at risk of collapse after intense exercise. *Thorpe*, Pet. App. 2a–3a.

During Weaver's approximately ten-minute drive to jail, Boykin said he was about to pass out and cried for help. He then slumped toward the partition, appeared to lose consciousness, and stopped answering Weaver. She looked toward the rear compartment repeatedly, including after his silence, and asked whether he was getting air. At one point, Weaver looked back at Boykin, who was flopped over and unconscious. The patrol car passed Wadley Hospital; yet, Weaver continued to jail without radioing ahead for medical assistance to be waiting, arriving approximately four minutes later. Upon opening the rear door, Boykin was unresponsive and had no pulse, she began resuscitation, and radioed for emergency aid. He died at Wadley Hospital. *Id.* at 3a–4a.

A magistrate judge recommended summary judgment after concluding that the evidence did not establish deliberate indifference and, alternatively, did not defeat

qualified immunity. Pet. App. 70a–73a, 154a–164a. The district judge overruled petitioners' objections, adopted the report, and granted summary judgment by dismissing the claims with prejudice on June 18, 2024. Pet. App. 46a–69a. On appeal, the Fifth Circuit affirmed for Hobbs and Scott because a reasonable jury could not find that either actually knew of a grave medical danger. *Thorpe*, Pet. App. 7a–9a. However, it reached a different conclusion as to Weaver. The rear compartment video showed Boykin unconscious, barely breathing, and with facial twitching; although Weaver disputed perceiving that condition, her looks backward and contemporaneous comments could permit a jury to infer actual knowledge. The court expressly held that resolving that dispute in her favor would usurp the jury's role and that a genuine dispute existed whether she was deliberately indifferent. *Id*. at 9a–11a.

Nevertheless, the panel granted Weaver qualified immunity. It framed the question as whether it was clearly established in August 2019 that an officer who observes a serious threat to a detainee's life "during transport to jail" must immediately secure aid. *Id*. at 11a. The panel relied on *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021), to assert that a duty to promptly seek emergency assistance was not established until 2021. It distinguished earlier medical care decisions because Boykin's needs were said to be less extreme, the delay shorter, and the transport setting different. *Id*. at 11a–13a. The court affirmed final summary judgment for Weaver, Hobbs, and Scott. *Id*. at 13a. Petitioner Thorpe asserted both A.B.'s wrongful-death claim and a survival claim on behalf of Boykin's estate. Although Defendants separately challenged whether the failure to obtain medical assistance caused

Boykin's death, the magistrate judge did not resolve that issue, instead recommending summary judgment based on the absence of deliberate indifference and qualified immunity. The report expressly distinguished the causation requirements for wrongful death and survival claims. *Thorpe*, Pet. App. 151a–152a.

B. *Pena*: repeated head trauma, collapse, and a failure to summon care

In August 2020, Starr County officers arrested Alberto Pena for criminal mischief. Before the patrol car departed, Pena struck his head twice against its interior, then struck his head a third time during transport, prompting the officers to stop the vehicle. Viewing the evidence favorably to petitioners, the panel accepted that Pena briefly lost consciousness and that Deputy Daniel Garcia at least suspected that he had. Deputy Garcia testified that he observed Pena lying on his side with his eyes closed "acting like he was unconscious," and that Pena "look[ed] passed out." Garcia also acknowledged that Lt. Rios told Pena he had "knocked himself out," and Rios relayed via radio that Pena had "lost consciousness for a few seconds." *Pena*, Pet. App. 24a-25a.

At the jail, Pena repeatedly struck his head and body against his detox cell. At approximately 5:38 p.m. he struck his head fourteen times against ballistic glass in quick succession, fell to the floor, and possibly lost consciousness. Sergeant Hector Lopez III and Officer Joel Garza encountered him, but no one sought medical evaluation. Further head- and body-striking followed. Later he was placed in a WRAP restraint system. *Id*. at 28a-32a.

At approximately 8:51 p.m., officers allowed Pena's cousin Edgar, another detainee, to speak with him. Edgar testified that he saw Pena change color, with saliva and bubbles around his mouth, heard him complain that he could not breathe, and heard him request that his restraints be loosened. The officers contested both the description and their awareness of it. Pena stopped moving at approximately 9:01 p.m.; foam was observed around 9:12 p.m.; officers attempted CPR at approximately 9:13 p.m. He was pronounced dead at the hospital. *Id.* at 32a-37a. Petitioners' medical expert concluded that concussive head injury and prolonged restraint in the WRAP system played a significant role in Pena's death, identified perivascular hemorrhages and swelling in Pena's brain, and testified in a deposition that prompt medical attention based on his intoxicated state and resulting head trauma and unconsciousness could have saved his life. *Id.* at 20a.

The panel held a jury could find deliberate indifference by Lopez and Joel Garza, given their awareness of repeated violent head strikes and the absence of medical aid. But it granted qualified immunity because it found the law was not clearly established. *Id.* at 30a-32a. It distinguished *Dyer v. Houston*, 964 F.3d 374 (5th Cir. 2020) – a pre-incident decision involving a detainee repeatedly striking his head – because *Dyer* included a different constellation of intoxication-related behavior, notably what the panel called an ingredient of obvious delusion. *Pena*, Pet. App. 25a-32a. Its treatment of the arresting officers and the night shift officers likewise demanded closer factual matches. *Id.* at 24a–28a, 32a–37a.

The Fifth Circuit affirmed all defendants' summary judgments, including distinct supervisory and municipal

liability rulings. *Id.* at 37a–45a. The court also affirmed dismissal of Petitioners' wrongful death and survival claims under § 1983 on the stated grounds that every individual defendant was entitled to qualified immunity and that Starr County had not violated Pena's constitutional rights. *Pena*, Pet. App. 44a–45a. The instant question concerns the clearly established law inquiry for the individual officers; it does not ask the Court to set aside the panel's independent holding on Starr County's liability. The court denied panel and en banc rehearing September 25, 2026. *Pena*, Pet. App. 227a–228a.

REASONS FOR GRANTING THE PETITION

I. The decisions conflict with the fair warning principle established by this Court.

For more than four decades, this Court has held that officials responsible for persons in custody may not consciously disregard a substantial risk of serious medical harm. *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976); *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244–45 (1983); *Farmer v. Brennan*, 511 U.S. 825, 837, 842-43 (1994). Deliberate indifference is not negligence, and officials need not diagnose an underlying condition. A claimant must show that the particular defendant drew the inference of a substantial risk and disregarded it; a factfinder may infer subjective knowledge from an obvious danger. *Farmer*, 511 U.S. at 837, 842-43.

Qualified immunity adds an independent fair warning requirement. That inquiry must be specific enough to identify prohibited conduct but cannot demand a prior decision with the same factual details. *Hope v. Pelzer*,

536 U.S. 730, 739–41 (2002), rejected a rigid insistence on materially identical precedent. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), explains that an on-point case is not invariably required if existing law places the constitutional question beyond debate. The obviousness principle is necessarily demanding; neither a generic citation to *Estelle* nor proof of a bad outcome by itself defeats immunity. However, the claim here is narrower: an officer whom the factfinder could find actually appreciated an obvious, life-threatening collapse, yet delayed or withheld any timely attempt to obtain help, was on notice of the danger of that conduct.

The specificity requirement is real. *City of Tahlequah v. Bond*, 595 U.S. 9, 12–13 (2021) (per curiam), and *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5–6 (2021) (per curiam), warn against defining clearly established rights at excessive generality, particularly during rapidly unfolding Fourth Amendment encounters. Yet those decisions did not discard *Hope*'s recognition that some misconduct is so obviously unconstitutional that a factually identical predecessor is unnecessary. *See also Taylor v. Riojas*, 592 U.S. 7, 8–9 (2020) (per curiam) (describing an obvious constitutional violation). *Taylor*, decided after both underlying incidents, is cited only to describe this Court's framework, not as pre-incident fair warning.

The Fifth Circuit's two opinions took the opposite path. In *Thorpe*, the panel held that a jury could infer Weaver's actual knowledge that Boykin had become unconscious and was barely breathing, but then defined the clearly established right in terms of an officer's duty to interrupt transportation to jail. *Thorpe*, Pet. App. 9a–13a. Prior decisions arising in custody or after the application

of force were deemed insufficiently alike, even though the alleged wrong was consciously letting an apparent medical collapse go untreated. Its reliance on *Cope*, a 2021 case arising from a suicide watch situation, effectively made the timing and setting of an emergency act as defining prerequisites for notice. *Id.* at 11a–13a.

In *Pena*, the same court held that a jury could find Lopez and Joel Garza deliberately indifferent after the jail cell's repeated head trauma and possible collapse, but found no fair warning because pre-incident cases included more elaborate intoxication symptoms or visible injuries. *Pena*, Pet. App. 28a–32a. It treated the "ingredient of obvious delusion" in *Dyer* as essential, notwithstanding the more basic overlap: actual knowledge of repeated violent impacts, a risk of serious head injury, and no medical evaluation. *Id.* at 25a–32a. In addressing arresting Deputies Cervantes and Garcia, the panel separately and explicitly declined to decide whether unconsciousness itself constituted a visible and serious indication of head injury. *Id.* at 27a, n.5.

The Fifth Circuit's decisions illustrate how the clearly established law inquiry can become an excessively rigid comparison of facts. In *Pena*, the panel treated manifestations of intoxication described in earlier decisions as critical to whether those decisions provided fair warning. In *Thorpe*, it similarly treated the location and duration of the medical emergency as critical distinctions from prior authority. Although those circumstances may be relevant to an officer's awareness of danger and the apparent unlawfulness of the response, they should not automatically defeat the application of established constitutional principles. The decisions below raise the

question whether the Fifth Circuit's recurring approach demands a degree of factual correspondence inconsistent with this Court's fair warning jurisprudence.

The conflict with this Court's precedent is particularly apparent in *Thorpe*. After acknowledging that an exact factual match was unnecessary, the panel stated in a footnote that "*Hope v. Pelzer*'s obviousness exception does not relieve plaintiffs of the analogous-case requirement." *Thorpe*, Pet. App. 13a, n.3. The panel then rejected clearly established law because Petitioners had not identified a prior decision establishing the duty to obtain emergency medical assistance for an officer who observes a life-threatening medical condition during transport to jail. *Id.* at 11a–13a. Although the panel distinguished the severity of the misconduct in *Hope*, that distinction does not establish that a detainee's medical emergency must persist for a particular duration or occur in a particular location before existing constitutional law can provide fair warning. The relevant inquiry remains whether the officer's alleged conduct was obviously unlawful in light of preexisting law.

The panel's reasoning is difficult to reconcile with *Hope*. This Court rejected a rigid requirement that preexisting cases be materially similar to the conduct at issue. 536 U.S. at 739–41. The relevant inquiry is whether existing law provided fair warning, recognizing that a general constitutional rule may apply with obvious clarity to particular conduct even when that conduct has not previously been adjudicated. *Id.* at 741. Although analogous precedent is often necessary to establish the law with sufficient specificity, *Hope* does not impose a categorical requirement that a plaintiff identify a

previous decision involving comparable facts. The panel's formulation threatens to eliminate that distinction.

Pena illustrates the same problem. There, the court acknowledged that a jury could find Sergeant Lopez and Officer Garza deliberately indifferent after repeated violent head strikes, possible loss of consciousness, and the failure to obtain medical evaluation. *Pena*, Pet. App. 30a–32a. Nevertheless, it distinguished preexisting decisions involving serious head trauma because those detainees displayed different manifestations of intoxication, including an "ingredient of obvious delusion." *Id.* at 31a–32a. The panel thus treated a descriptive feature of earlier cases as critical to the clearly established law inquiry, notwithstanding the evidence that officers recognized a substantial risk of serious injury and disregarded it.

Petitioners do not contend that every complaint of difficulty breathing, every self-inflicted head strike, or every brief delay in obtaining medical care establishes deliberate indifference. Nor does a triable constitutional violation automatically defeat qualified immunity. The question is narrower: whether existing law can provide fair warning when an officer is shown to have actually recognized an obvious, substantial risk of serious medical harm and consciously disregarded it, even though previous decisions involved different medical manifestations or custodial circumstances. The decisions below effectively require precedent addressing the particular manner in which a detainee's medical emergency manifested itself. This Court's fair warning decisions do not permit factual specificity to become an inflexible requirement that each

recurring form of an obvious constitutional violation first be established in a separate case.

II. Other circuits recognize that established constitutional principles can provide fair warning without precedent involving identical medical emergencies.

The courts of appeals recognize the same general principles governing qualified immunity, but their decisions reflect an important divergence in how those principles are applied to the fair warning requirement when custodial officers knowingly disregard an obvious medical emergency. The Eleventh and Tenth Circuits have recognized that established constitutional law may provide fair warning without a prior decision involving closely corresponding symptoms, injury mechanisms, or custodial circumstances. The Fifth Circuit's decisions below, by contrast, gave dispositive weight to differences between the particular manifestations and settings of the medical emergencies before it and those addressed in earlier decisions. The disagreement is not whether qualified immunity requires clearly established law. It is how specifically that law must anticipate the circumstances of an emergency before an officer may be held accountable for knowingly disregarding it, even when the officer is assumed to have actually recognized an obvious risk of serious harm.

The Eleventh Circuit addressed that question directly in *Patel v. Lanier County*, 969 F.3d 1173 (11th Cir. 2020). There, a detainee confined in an unventilated, un-air-conditioned transport van became unconscious and exhibited signs of serious physical distress, including

abnormal breathing and shaking. Viewing the evidence favorably to the detainee, the court concluded that an officer could have recognized his need for medical attention yet failed to provide timely assistance. *Id.* at 1179-80. Although the court acknowledged the absence of a controlling decision with closely analogous facts, it held that the officer had fair warning under the broader, preexisting prohibition against intentionally withholding medical care from a person whose serious need was known. *Id.* at 1190–91. The court distinguished inadequate treatment, whose reasonableness might be disputed, from the complete failure to respond to a known serious medical need. *Id.* It specifically recognized that unconsciousness, absent a benign explanation, strongly indicates a need for immediate medical attention. *Id.* at 1189. The court therefore denied qualified immunity on the deliberate indifference claim without requiring precedent involving the particular combination of heat exposure, unconsciousness, and respiratory distress. Decided on August 11, 2020 – after the *Thorpe* incident and two days before the *Pena* incident – *Patel* is offered as evidence of the Eleventh Circuit's approach to preexisting law, not as binding notice to the officers in either case here.

The Tenth Circuit adopted a comparable approach in *Estate of Booker v. Gomez*, 745 F.3d 405 (10th Cir. 2014). There, officers allegedly rendered a detainee unconscious through the use of force and then delayed checking his vital signs or obtaining medical assistance for approximately three minutes. *Id.* at 430–34. The defendants argued that no preexisting decision gave notice that such a brief delay could violate the Constitution. The court rejected that argument, explaining that the unlawfulness of an officer's conduct may be apparent under established law even

without a prior case adjudicating the precise act. *Id.* at 433–34. The court cited to *Hope*, stating, "[t]he law can be clearly established even when 'the very action in question' has not 'previously been held unlawful.' " *Id.* The court held that officers who knew the detainee was limp and unconscious could be denied qualified immunity for failing to check his condition or seek immediate assistance. *Id.* at 434. The officers' participation in causing the injuries and their training strengthened the inference of fair warning. But the Tenth Circuit did not treat the absence of an earlier case involving a three-minute delay as dispositive.

Other preexisting appellate decisions likewise recognize that an apparent medical emergency can provide fair warning without a precedent matching every circumstance. In *Bozeman v. Orum*, 422 F.3d 1265, 1272–74 (11th Cir. 2005), abrogated on other grounds by *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), the Eleventh Circuit denied immunity where officers allegedly knew a detainee was unconscious and not breathing but failed for approximately fourteen minutes to check his condition, administer CPR, or summon medical assistance. *Bozeman* did not require a prior decision involving exactly the same emergency in the same setting. In *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 600–04 (6th Cir. 2005), the Sixth Circuit affirmed denial of qualified immunity after officers allegedly observed a detainee in serious physical distress and failed for approximately six minutes to obtain care, including while he was confined in a police vehicle. It rejected an argument that the detainee's recent arrest and resistance required a different, narrower rule. *Id.* at 604. Those cases involved significant factual differences, including officers' participation in the events producing the detainees' injuries. Nevertheless, they demonstrate

that courts have applied established custodial medical care principles to obvious emergencies without requiring precedent involving identical durations of delay or places of confinement. In *Iko v. Shreve*, 535 F.3d 225, 241–43 (4th Cir. 2008), the Fourth Circuit held that officers who knew of a prisoner's collapse after force and chemical exposure could not claim lack of fair warning for withholding medical evaluation. The Fourth Circuit defined the right at issue as "the right to adequate medical care" and affirmed the district court's denial of qualified immunity. *Id.* at 243, n.12. In *McRaven v. Sanders*, the Eighth Circuit denied immunity where jail officers allegedly failed to respond appropriately to an unconscious detainee in obvious need of resuscitation. 577 F.3d 974, 979–84 (8th Cir. 2009). Each of these cases applies an already established rule to the emergency actually apparent to each official.

The decisions below demonstrate the significance of this divergence. In *Thorpe*, the Fifth Circuit acknowledged evidence permitting a jury to find that Weaver actually recognized Boykin's unconsciousness and respiratory distress, but granted qualified immunity because earlier decisions did not sufficiently establish the obligation to obtain medical assistance during transport to jail. *Thorpe*, Pet. App. 9a–13a. In *Pena*, the court similarly recognized that a jury could find deliberate indifference by officers who failed to seek medical care following repeated violent head trauma, but concluded that earlier cases did not provide fair warning because the detainees in those cases exhibited different manifestations of intoxication, particularly obvious delusion. *Pena*, Pet. App. 30a–32a.

The significance of these decisions extends beyond their particular facts. Under the approach reflected in

Patel and *Estate of Booker*, established constitutional principles may provide fair warning when an officer actually recognizes an obvious, substantial risk of serious medical harm and consciously fails to respond, even without precedent addressing the precise emergency. The decisions below instead accorded controlling significance to differences in symptoms and custodial circumstances notwithstanding evidence of actual awareness and deliberate indifference. That difference in approach can determine whether an officer receives qualified immunity for the same essential misconduct: the knowing disregard of an obvious and serious medical need.

Petitioners do not suggest that differences in symptoms, duration, or custodial circumstances are irrelevant. Those facts may bear directly on whether an officer actually recognized a substantial risk of serious harm and whether preexisting law provided fair warning that the officer's response was unlawful. The divergence among the courts of appeals concerns whether those factual differences can be treated as dispositive notwithstanding evidence permitting a jury to find that an officer actually recognized and consciously disregarded an obvious medical emergency. This Court's review is warranted to clarify the proper level of factual specificity in the clearly established law inquiry and whether established constitutional principles may provide fair warning without a prior decision involving the same manifestation or setting of a serious medical emergency.

III. These companion judgments present a recurring legal question and permit a clean, appropriately limited resolution.

This is not a request to bypass the subjective deliberate indifference standard. Both panels considered the defendants individually and expressly rejected or limited claims where the record did not permit a finding of actual knowledge. In *Thorpe*, Hobbs and Scott prevailed because no reasonable jury could find that they recognized Boykin's condition at the scene. *Thorpe*, Pet. App. 7a–9a. In *Pena*, the panel described different evidence concerning arresting deputies, day shift officers, and night shift officers. *Pena*, Pet. App. 24a–37a.

The cleanest vehicles are Defendant Weaver in *Thorpe* and Defendants Lopez and Joel Garza in *Pena*. For Weaver, the panel itself identified a triable issue whether her contemporaneous observations furnished actual awareness of an unconscious, barely breathing detainee. *Thorpe*, Pet. App. 9a-13a. For Lopez and Joel Garza, the panel expressly held that a jury could find deliberate indifference in the failure to seek care following the violent head striking episodes. *Pena*, Pet. App. 30a–32a. In each, qualified immunity turned on the court's narrow definition of fair warning, not the absence of any evidence supporting subjective culpability.

The clearly established law question also governs the qualified immunity rulings concerning arresting Deputies Cervantes and Garcia in *Pena*. The Fifth Circuit assumed that a reasonable jury could find that Pena briefly lost consciousness after striking his head in the patrol car and that Garcia at least suspected his unconsciousness.

Pena, Pet. App. 24a–25a. Nevertheless, the court granted both deputies qualified immunity because prior decisions involved more extreme manifestations of intoxication and self-injurious behavior. *Id.* at 25a–28a. Although the evidence of subjective awareness differs between the deputies and the jail officers, the challenged fair warning analysis is the same. The Court need not determine whether either deputy violated Pena's constitutional rights; that issue can be considered on remand under the proper qualified immunity framework.

Petitioners acknowledge important factual distinctions. In *Thorpe*, Weaver obtained assistance upon arriving at jail, and the disputed delay lasted only several minutes. She also had no knowledge of Boykin's underlying sickle cell trait. In *Pena*, Alberto's intermittent responsiveness and continued activity may affect a jury's ultimate assessment of the officers' knowledge and culpability. Those considerations do not eliminate the legal question presented. In *Thorpe*, and as to Lopez and Joel Garza in *Pena*, the panels identified evidence sufficient to permit a finding of deliberate indifference. The Pena panel also resolved the claims against Deputies Cervantes and Garcia on clearly established law grounds without separately deciding whether their conduct violated the Constitution. The challenged qualified immunity rulings therefore present a common fair warning question, although the evidence of each officer's subjective awareness differs.

These judgments therefore offer an appropriately limited opportunity to clarify the clearly established law inquiry. Petitioners do not seek a rule requiring officers to diagnose unusual medical conditions, provide medical care whenever a detainee complains of discomfort, or

interrupt every custodial transport. They ask whether the absence of precedent involving the same symptoms or circumstances necessarily defeats fair warning when the officer is shown to have actually recognized an obvious and substantial risk of serious harm and consciously failed to obtain timely assistance.

The question is recurring and important. Head injuries, respiratory distress, overdose, seizures, and other medical emergencies can present different symptoms and arise in different custodial settings. An officer's constitutional obligations cannot depend categorically upon whether an earlier reported decision involved the same combination of symptoms and location. The Constitution requires an individualized assessment of what the officer knew and did; qualified immunity requires fair warning, not a separate judicial decision for every manifestation of a recognizable medical emergency.

The Court should grant certiorari to clarify the proper level of factual specificity in the clearly established law inquiry. Review can be confined to the qualified immunity rulings concerning Weaver in *Thorpe* and Deputies Cervantes and Garcia, Sergeant Lopez, and Officer Joel Garza in *Pena*. If those rulings are vacated, the corresponding judgments should also be vacated insofar as they dismiss Petitioners' related § 1983 wrongful death and survival claims based on the challenged qualified immunity determinations. The Court need not resolve disputed facts, determine whether each officer's conduct violated the Constitution, adjudicate causation or damages, or disturb independent rulings concerning other defendants or supervisory and municipal liability. Those matters can be addressed on remand.

CONCLUSION

For the foregoing, the petition for a writ of certiorari should be granted to review the judgments in *Thorpe v. Weaver*, No. 24-40472, and *Pena v. Starr County, Texas*, No. 25-40481.

Respectfully submitted,

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October 27, 2026

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 8, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-40472

PARIS THORPE, AS NEXT FRIEND A.B.,

Plaintiff-Appellant,

DARREN BOYKIN,

Intervenor Plaintiff-Appellant,

v.

JERRIKA WEAVER; BRENT HOBBS;
WILLIAM SCOTT,

Defendants-Appellees.

Filed July 8, 2026

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:21-CV-106

Before SOUTHWICK, GRAVES, and WILSON, *Circuit Judges.*

JAMES E. GRAVES, JR., *Circuit Judge*:

Appendix A

After a long run from police on a hot summer day, Darren Boykin died. When officers apprehended him, he complained that he could not breathe, which they attributed to exhaustion. But in fact, Boykin had a condition—sickle cell trait—that made him particularly vulnerable to sudden death from extreme exercise. On the drive to jail, Boykin's condition deteriorated and he lost consciousness. He arrived without a pulse, and resuscitation efforts ultimately failed.

Plaintiffs sued, alleging that three officers were deliberately indifferent to Boykin's medical needs: Brent Hobbs, William Scott, and Jerrika Weaver (the Officers). The district court granted summary judgment on qualified immunity grounds, and plaintiffs appeal. We affirm.

Plaintiffs can show only that Hobbs mistook the symptoms of a more serious condition for exercise exhaustion, and that Scott, who never interacted with Boykin, relied on Hobbs's assessment. This alone cannot sustain plaintiffs' deliberate indifference claims against Hobbs and Scott. But Weaver enjoys qualified immunity—even if she might have learned that Boykin had fallen unconscious. It was not clearly established in 2019 that an officer who observes a detainee lose consciousness during transport to jail must immediately secure aid.

Appendix A

I. Background

A. After a long run triggered a latent medical condition, Boykin died.

On a hot Texas summer day in 2019, Boykin fled from Texarkana College police officers on foot. They caught him after a half-mile chase. He resisted; they subdued him. Soon, several officers from the Texarkana, Texas Police Department arrived, including Hobbs, Weaver, and later a sergeant, Scott. Boykin had difficulty walking to Weaver's patrol car, so the officers carried him.

Once Boykin was in the car, he complained of being unable to breathe. Hobbs responded by turning up the air conditioning. He attributed Boykin's breathing complaints to breathing hard from intense exercise, and he relayed this assessment to Scott.

Just after Scott arrived, Weaver departed with Boykin for the jail. Over the ten-minute drive, Boykin's condition deteriorated. A few minutes in, Boykin told Weaver that he was "about to pass out," and cried for help. Boykin then flopped into the divider. Weaver reacted to the sound, peeked into the rearview mirror, and offered Boykin "some water up there at the jail." Boykin then seemed to lose consciousness. But Weaver sustained a one-sided conversation. At one point, Weaver looked back at Boykin, who was flopped over and unconscious. As Weaver continued talking, they drove past Wadley Hospital. They arrived at the jail about four minutes later.

When Weaver opened the rear door, she found Boykin unresponsive and pulseless. Weaver then examined him, began resuscitation efforts, and radioed for emergency medical assistance. Even though the paramedics restored Boykin's pulse, he eventually died at Wadley Hospital.

The officers never knew that Boykin had sickle cell trait, an uncommon, red-blood-cell condition. Although generally asymptomatic, sickle cell trait increases the risk of sudden death after extreme exercise. This complication is called Exercise Collapse Associated with Sickle Cell Trait, or ECAST. Boykin's flight from police precipitated an ECAST event, which caused his death.

B. Boykin's family sued, but the district court granted the Officers summary judgment.

Members of Boykin's family and his estate (plaintiffs) sued the Officers in federal court under 42 U.S.C. § 1983. *Thorpe v. Weaver*, No. 5:21-CV-106, 2023 WL 11796842, at *1 (E.D. Tex. Oct. 20, 2023). Plaintiffs alleged that the Officers were deliberately indifferent to Boykin's serious medical needs. *Id.* After discovery, the district court granted summary judgment. *Thorpe v. Weaver*, No. 5:21-CV-106, 2024 WL 3043372, at *1 (E.D. Tex. June 18, 2024).

II. Our Review

Plaintiffs appeal the district court's grant of qualified immunity to each Officer. To overcome qualified immunity, plaintiffs must show: "(1) that the [officer] violated a statutory or constitutional right, and (2) that the right was

clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (citation modified).

We review a grant of summary judgment de novo. *First Am. Bank v. First Am. Transp. Title Ins. Co.*, 585 F.3d 833, 836 (5th Cir. 2009). We affirm if the moving party shows that no genuine dispute of material fact remains, and they are entitled to judgment as a matter of law. *Id.* at 837. "We view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in [their] favor." *Harrison Co. v. A-Z Wholesalers, Inc.*, 44 F.4th 342, 346 (5th Cir. 2022) (citation modified).

When unambiguous "video evidence is available, we view the facts in the light depicted by the video[]." *See Boyd v. McNamara*, 74 F.4th 662, 665-66 (5th Cir. 2023) (citation modified). But "when video evidence is ambiguous or . . . supports a nonmovant's version" we "credit that party's account if" sufficient evidence supports it. *Aguirre v. City of San Antonio*, 995 F.3d 395, 411 (5th Cir. 2021).

III. Discussion

A. The deliberate indifference standard requires proof that an official actually inferred a risk of serious harm and disregarded it.

"The Fourteenth Amendment . . . bars law enforcement from responding to a [pretrial] detainee's serious medical needs with deliberate indifference." *Williams v. City of Yazoo*, 41 F.4th 416, 423-24 (5th Cir. 2022) (citing *Farmer*

v. Brennan, 511 U.S. 825, 828, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). To prevail on a deliberate indifference claim, a detainee must show that an official: (1) knew "facts from which the inference could be drawn that a substantial risk of serious harm exists," (2) that they "actually drew the inference," and (3) "disregarded that risk." *Baldwin v. Dorsey*, 964 F.3d 320, 326 (5th Cir. 2020) (citation modified).[1] "[D]eliberate indifference is an extremely high standard." *Domino v. Tex. Dep't of Crim. Just.*, 239 F.3d 752, 756 (5th Cir. 2001).

B. Plaintiffs cannot show that Hobbs or Scott actually knew of the risk to Boykin, but a reasonable jury could find that Weaver knew.

Plaintiffs allege that the Officers were deliberately indifferent to Boykin's medical needs "by ignoring [his] complaints and refusing to provide him medical care." There were facts from which a reasonable officer could infer that Boykin's health was at serious risk. But we must resolve whether there is adequate evidence that the Officers actually knew that Boykin's needs were serious.[2]

---

1. The same standard that governs a prisoner's Eighth Amendment deliberate indifference claim governs a pretrial detainees' Fourteenth Amendment claim. *Baughman v. Hickman*, 935 F.3d 302, 306 (5th Cir. 2019).

2. The Officers also press various forfeiture arguments, claiming granular inconsistencies with plaintiffs' arguments in the district court and this one. These theories find little support in our caselaw. *See*, *e.g.*, *Dartez v. Owens-Ill., Inc.*, 910 F.2d 1291, 1294 (5th Cir. 1990) ("[L]iberal pleading . . . rules prevent[] the use of arguably inconsistent pleadings and discovery as admissions.")

The actual-knowledge inquiry is "subjective," so "[w]e ask what the officials knew, not what they should have perceived but did not." *Williams*, 41 F.4th at 423 (citation modified). Plaintiffs may show this through direct evidence. *See id.* at 423 n.5. Or through evidence that "the risk was obvious." *Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006). "We consider each defendant's knowledge and response individually." *Williams*, 41 F.4th at 423.

1. No reasonable jury could find that Hobbs or Scott actually knew of Boykin's medical needs at the arrest scene.

The most plaintiffs can show is that Hobbs and Scott misconstrued the symptoms of an ECAST event for those of exercise exhaustion. This cannot sustain an inference of actual knowledge.

No evidence shows that any Officer knew that Boykin was having an ECAST event, or even that he was vulnerable to one. *See Thorpe*, 2023 WL 11796842, at *28. So this presents a "symptoms-only scenario," where "officials had to assess the risk to the detainee's health based on symptoms alone." *See Williams*, 41 F.4th at 424. Because law enforcement officers lack a medical professional's training, we afford them "latitude." *Id.* As a result, "[we] have granted qualified immunity when law enforcement misconstrued the symptoms of a serious medical condition for intoxication." *Id.* at 424 (citing

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(quoting *Whatley v. Armstrong World Indus., Inc.*, 861 F.2d 837, 839 (5th Cir. 1988)).

Roberts v. Lessard, 841 F. App'x 691, 694 (5th Cir. 2021) (per curiam)). And when an officer mistook the symptoms of a serious illness for a mild one. *Id.* (citing *Est. of Cheney v. Collier*, 560 F. App'x 271, 274-75 (5th Cir. 2014) (per curiam) ("[An official's] knowledge of . . . symptoms consistent with the flu or a bad cold" cannot alone sustain an inference of actual knowledge.)).

Hobbs likewise mistook the symptoms of a serious condition for exercise exhaustion. Boykin had just sprinted a half mile on a Texas summer day. With this context, Hobbs viewed Boykin's complaints of being unable to breathe as indicating that he was breathing hard from exhaustion. Boykin was alert, talking, and his chest was rising and falling, which confirmed to Hobbs that Boykin was, in fact, breathing. Hobbs rendered aid consistent with his assessment: he increased the air conditioning.

Of course, Hobbs was wrong. Boykin was having a medical emergency. But no evidence suggests that Hobbs actually knew this, nor were Boykin's needs obvious enough for a jury to reasonably infer actual knowledge. *Cf. United States v. Gonzales*, 436 F.3d 560, 573-75 (5th Cir. 2006) (upholding actual-knowledge finding where there was evidence that a detainee was lying on the ground with a broken neck, begging for help, and "foaming at the mouth"), *overruled on other grounds by United States v. Vargas-Ocampo*, 747 F.3d 299 (5th Cir. 2014) (en banc).

Scott had even less reason to know. He was the "on-duty sergeant." When he arrived, Hobbs reported, "[Boykin] says he can't breathe, but you can hear him

hollering from the back seat." Weaver told Scott, "He just ran too much." Scott then got into his car and followed Weaver to the jail. Scott was on scene for about a minute, and he never interacted with Boykin. Quite understandably, Scott relied on Hobbs and Weaver's assessment: that Boykin could breathe, but was breathing hard from exhaustion. Without interacting with Boykin further, Scott could not have learned more. Nor does his reliance on his subordinates' benign explanation allow a jury to reasonably infer that Boykin's needs were obvious to Scott.

In this symptoms-only situation, we owe the Officers latitude. The most plaintiffs can show is that Hobbs mistook ECAST symptoms for exercise exhaustion, and that Scott relied on this mistake. No reasonable jury could find that this gave either officer actual knowledge. Hence the qualified immunity analysis for Scott and Hobbs ends, and we affirm summary judgment on the claims against them.

2. A reasonable jury could find that Weaver discovered Boykin's medical needs.

But a reasonable jury could find that Weaver discovered Boykin's needs. At the scene, she had the same knowledge as Hobbs and Scott: that Boykin was reporting difficulty breathing, which she too misinterpreted as a reaction to exertion. Just like the others, this is not enough to show her actual knowledge at the scene. *See Williams*, 41 F.4th at 424. But on the drive to jail, Boykin's condition deteriorated, and he eventually lost consciousness.

Because Weaver could observe this deterioration, she could have discovered Boykin's medical needs.

Recall that a few minutes into the drive, Boykin appeared to lose consciousness and stopped responding to Weaver. The rear compartment camera shows Boykin clearly, and his medical distress is obvious; he was unconscious, barely breathing, and his face was twitching. Weaver denies that she discovered Boykin's condition. And the video is ambiguous whether she did, since what she saw from the driver's seat is unclear. With ambiguous video evidence, we must credit plaintiffs' account if sufficient evidence supports it. *See Aguirre*, 995 F.3d at 410-11.

The video evidence here shows that Weaver could have learned that Boykin had fallen unconscious. Several times, Weaver looked back at him. At one point, she glanced at her rearview mirror, seemingly in response to Boykin's silence. She reacted to his condition, looking over her shoulder at him. She then said, "You know you're going to jail either way right?" Less than a minute later, she glanced at the rearview mirror and asked, "Hey, Darren. Are you getting air back there?" When Boykin was silent, she looked back over her shoulder at him again.

From Boykin's obvious distress in the video, Weaver's glances to the rear, and her contemporaneous reactions to this distress, a reasonable jury could infer her actual knowledge. Although a jury might ultimately find otherwise, we cannot do the same without usurping the factfinder's role. While Weaver's demeanor suggests that she was unaware of Boykin's condition, other evidence suggests that

she was. This conflicting evidence creates a genuine dispute whether Weaver was deliberately indifferent.

C. Plaintiffs cannot show that Weaver violated clearly established law.

Even if Weaver learned of Boykin's distress, we still grant her qualified immunity. At the second stage of the immunity analysis, we "ask[] whether the detainee's right to treatment for serious medical needs was clearly established such that every reasonable official would understand that what [they are] doing violates that right." *Baldwin*, 964 F.3d at 326 (citation modified). A factually indistinguishable case is unnecessary, but "existing precedent must have placed the . . . constitutional question beyond debate." *Id.*

Plaintiffs frame the allegedly violated right too broadly. They claim that all they need show is that Weaver "refused to treat [Boykin], ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *See Easter*, 467 F.3d at 464. Yet plaintiffs cannot rest on "generalized propositions." *Stevenson v. Tocé*, 113 F.4th 494, 504 (5th Cir. 2024). Instead, they must identify "similar circumstances" in previous cases that established "particular conduct as unlawful." *Id.*

Our framing is consequently narrower: Was it clearly established in August 2019 that an officer who observes a serious threat to a detainee's life during transport to jail must immediately secure aid?

No. Until 2021, our court had not established that "failing to [promptly] call for emergency assistance in response to a serious threat to an inmate's life constitutes deliberate indifference." *Cope v. Cogdill*, 3 F.4th 198, 209 (5th Cir. 2021). It was only in *Cope* that our court held that "watching an inmate attempt suicide and failing to [immediately] call for emergency medical assistance" violated the Constitution. *Id.* at 209-10. Even if *Cope* recognized a duty to intervene in an inmate's serious medical emergency, Boykin died in 2019—two years before *Cope* established this duty. So *Cope* cannot clearly establish Weaver's alleged neglect as unconstitutional.

Allen does not show that Weaver deprived Boykin of a clearly established right either. *See Allen v. Hays*, 65 F.4th 736, 747-48 (5th Cir. 2023). There, a police officer allegedly shot a suspect five times, causing him to crash his car into a tree. *Id.* at 742-43. The detainee was "bleeding, moaning, . . . and in obvious and critical need of emergency medical care." *Id.* at 747. The officer delayed six minutes before summoning medical aid. *Id.* For a 2015 injury, this stated a violation of clearly established law. *See id.* at 747-48. But Boykin's needs were not so obviously extreme. Hence *Allen* addressed different circumstances, and it cannot establish Weaver's particular conduct as unlawful.

Plaintiffs' other cases likewise addressed more obvious needs, and more deliberate neglect. For example, in *Nerren*, officers intentionally refused a detainee's requests for medical assistance after a car accident, so he received aid only when a relative took him to hospital after his release the next day. *See Nerren v. Livingston*

Police Dep't, 86 F.3d 469, 473-74 (5th Cir. 1996). Here though, Weaver secured aid after only a few minutes. And in *Fielder*, officers ignored a detainee's deteriorating medical condition over three days, while displaying "a cold hearted, casual unwillingness to investigate what [could] be done for a man who is obviously in desperate need of help." *Fielder v. Bosshard*, 590 F.2d 105, 107-08 (5th Cir. 1979). There is little overlap between *Fielder*'s prolonged and knowing neglect and a slight delay in responding to an ambiguous medical condition. *See id.*[3]

Simply put, plaintiffs offer no case that clearly established, in 2019, that an officer who observes a serious threat to a detainee's life during transport to jail must immediately secure aid. So they fail to overcome qualified immunity, and Weaver enjoys the immunity as a matter of law. We thus affirm summary judgment on plaintiffs' claim against her.

* * *

For these reasons, we AFFIRM the district court's grant of summary judgment to the Officers.

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3. *Hope v. Pelzer*'s obviousness exception does not relieve plaintiffs of the analogous-case requirement. 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). It was obvious in *Hope* that handcuffing a prisoner to a "hitching post" for seven hours, denying him water, and taunting him violated the Eighth Amendment. *Id.* at 736-38, 122 S.Ct. 2508. Weaver's alleged indifference to Boykin's rights was nowhere near as severe.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 28, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-40481

MARTINA PENA, INDIVIDUALLY, AND AS NEXT BEST FRIEND OF A.P.; ARISTEDES PENA, INDIVIDUALLY, AND ON BEHALF OF ESTATE OF ALBERTO PENA,

Plaintiffs-Appellants,

v.

STARR COUNTY, TEXAS; EVELARIO GARZA; UBALDO SUAREZ; CHESTER CERVANTES; DANIEL GARCIA; HECTOR LOPEZ, III; JOEL GARZA; EMILIO GARZA; JESUS BARRERA, JR.; CESAR JUAREZ, JR.,

Defendants-Appellees.

Filed August 28, 2026

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:22-CV-276

Appendix B

Before STEWART, ENGELHARDT, and DOUGLAS, *Circuit Judges.*

DANA M. DOUGLAS, *Circuit Judge*:

Alberto Pena was arrested for criminal mischief in Starr County, Texas. In the course of the arrest by Starr County Deputies Miguel Cervantes and Daniel Garcia, Pena banged his head on the interior of a patrol car three times and may have gone unconscious. After transporting Pena to the Starr County Jail, Deputy Cervantes filed an arrest complaint noting that Pena was under the influence of alcohol and drugs, but did not inform the jail of the head strikes or possible unconsciousness. During the day shift at the jail, Pena banged his head and other body parts against surfaces of his detox cell several times, including one episode in which he hit his head fourteen times against his cell window and fell to the floor, again possibly unconscious. Day shift Officer Joel Garza ("Officer Garza") and Sgt. Hector Lopez III regularly checked on Pena and placed him in a full-body restraint, but did not seek medical help.[1] Night shift Officers Cesar Juarez Jr. and Ubaldo Suarez, under the supervision of Sgt. Evelario Garza, observed Pena rolling on the floor and brought Pena's cousin Edgar, another inmate, to speak with him. Edgar later testified that Pena showed signs of distress and complained that he could not breathe, but the officers dispute this. Shortly after this conversation, Pena stopped

1. Because Officer Emilio Garza's actions are not at issue in this appeal, all references to "Officer Garza" are to Officer Joel Garza. *See infra* note 3. After the first reference, Sgt. Evelario Garza is referred to as "Sgt. Garza."

moving and was observed to be foaming at the mouth. Pena was then taken to the Starr County Memorial Hospital and pronounced dead.

Pena's parents, child, and estate sued pursuant to 42 U.S.C. § 1983, alleging deliberate indifference to Pena's medical needs by the Starr County officer defendants, failure to supervise by Sgt. Garza, a practice and custom of deliberate indifference by Starr County, and wrongful death and survival actions against all defendants. The defendants separately moved for summary judgment, and the district court granted the motions. We AFFIRM.

I

A

On August 13, 2020, Starr County Sheriff's Deputies Cervantes and Garcia and Lt. Erasmo Rios Jr. arrested Alberto Pena for criminal mischief for causing damage to property. Pena's father advised Deputy Cervantes that Pena was highly intoxicated and under the influence of drugs. Deputy Cervantes noted Pena's slurred speech, unsteady balance, and odor of alcohol, and handcuffed him without incident. Lt. Rios and Deputy Garcia placed him in the back of Deputy Cervantes's patrol unit.

Before the patrol unit departed, Pena hit the interior of the patrol car with his head twice. It is disputed whether he lost consciousness or was observed to have done so, but it is undisputed that Deputy Garcia saw Pena slumped over and mumbling to himself with his eyes closed, and

that Deputy Garcia tapped his face and shouted to provoke a response. On the drive to the jail, as Deputy Garcia followed Deputy Cervantes's car in his own vehicle, Pena again hit himself on the interior of the patrol car, causing the officers to stop the car so that Lt. Rios could monitor him from the back seat.

Deputy Cervantes arrived at the Starr County Jail with Pena around 3:16 PM. He completed an arrest complaint noting that Pena was under the influence of drugs and alcohol, but did not inform the jail of the head strikes or possible unconsciousness.

B

Once at the jail, Pena was placed in a detox holding cell. At around 3:34 PM, Pena struck his forehead on the cell door's ballistic glass window three times, loudly enough to draw the attention of detention officers. Sgt. Lopez, Officer Garza, and another officer promptly entered the cell to try to get Pena to calm down. Pena appeared responsive and compliant, and conversed with the officers.

At approximately 4:29 PM, Pena was taken to the jail's booking area, where he was booked without incident and escorted back to the detox cell by Officer Garza. Pena walked to booking without assistance and conversed with Officer Garza while being escorted. At approximately 5:38 PM, Pena struck his head fourteen times in a single burst against the ballistic glass window. After the final strike, he collapsed to the floor and stayed on the ground rocking back and forth on his elbows and knees. It is

disputed whether he lost consciousness or was perceived to have done so. Sgt. Lopez and Officers Garza and Javier Gonzalez promptly entered the cell to talk to him, then escorted him out of his cell and escorted him back around 5:41 PM. Pena again walked without assistance and conversed with officers before returning to his cell.

Pena was conscious and occasionally active—pacing his cell, talking, holding a note against the cell window, and gesturing toward officers—from approximately 5:41 PM to 6:39 PM. During this period, he also struck the cell door, the door's window, and the floor several times with his shoulder and hands. After Pena became more aggressive, Sgt. Lopez and Officers Garza, Gonzales, and Jesus Barrera Jr. entered the cell at 6:39 PM and spoke with him.

At approximately 6:48 PM, Pena struck the door with his left foot. Around the same time, the officers were advised that he was making threats to Officer Gonzalez, and Sgt. Lopez decided to place Pena in a full-body WRAP restraint system. At about 6:50 PM, Sgt. Lopez and Officers Gonzalez and Barrera approached Pena's cell. Officer Gonzalez deployed pepper spray, then Pena kneeled and was handcuffed and escorted out of the cell. He was escorted back by the same officers around 6:53 PM in a WRAP restraint system on a rolling cart.

Around 7:48 PM, Pena was almost entirely flat on the rolling cart due to squirming. Officers Garza and Barrera entered the cell, repositioned him in an upright position, and gave him water.

C

Night shift came on duty at 8 PM. At 8:05 PM, Pena broke loose from the cart, fell to the ground, and rolled around on the floor. At about 8:11 PM, officers observed him out of the cart and kicking the cell door, and night shift supervisor Sgt. Garza and Officers Suarez, Juarez, Emilio Garza, and Barrera entered the cell. The officers removed Pena from the WRAP chair and kept him upright while adjusting the chair's straps, in addition to adjusting his handcuffs and pouring water over his head.

At approximately 8:51 PM, Officer Suarez escorted Pena's cousin and fellow inmate Edgar Pena to the holding cell's window to calm Pena down. Edgar spoke with Pena for a few minutes, then was escorted away. Edgar testified in a deposition that he observed Pena turning purple with saliva and bubbles on his mouth, complaining that he was unable to breathe and asking that his restraints be loosened, but the officers dispute whether this was the case and whether they perceived it.[2]

Around 9:01 PM, Pena stopped moving. At approximately 9:12 PM, Officer Emilio Garza conducted an observation check on Pena and saw foam on Pena's mouth. Around 9:13 PM, officers entered Pena's cell, removed him from the cart, and attempted CPR. Emergency Medical Services paramedics and the Rio Grande City Fire Department arrived between 9:25 PM and 9:28 PM,

2. Except for this complaint about breathing, Pena is not alleged to have complained about his medical condition, nor is he alleged to have specifically requested medical care.

and Pena was transported to Starr County Memorial Hospital in Rio Grande City, where he was pronounced dead at 10:12 PM.

Pena had several substances including alcohol, cocaine by-products, and marijuana ingredients in his system at the time of his death. The autopsy report listed Pena's cause of death as "Cardiorespiratory Arrest While Under the Influence of Mixed Drugs" and his manner of death as "Accidental." The Penas' medical expert concluded that concussive head injury and prolonged restraint in the WRAP system also played a significant role in Pena's death, identified perivascular hemorrhages and swelling in Pena's brain, and testified in a deposition that prompt medical attention based on his intoxicated state and resulting head trauma and unconsciousness could have saved his life.

II

Pena's mother, Martina, both individually and as next best friend of Pena's minor child A.P.; his father Aristedes; and his estate (collectively, "the Penas") sued Starr County, Sgt. Garza, and Officer Suarez in the Southern District of Texas on August 12, 2022. The Penas filed an amended complaint on June 27, 2023, adding as defendants Deputies Cervantes and Garcia, Lt. Rios, Sgt. Lopez, and Officers Gonzalez, Barrera, Juarez, and Joel and Emilio Garza. The Penas brought their suit pursuant to 42 U.S.C. § 1983, alleging deliberate indifference to Pena's medical needs by the deputies and detention officers, failure to supervise by Sgt. Garza, and a practice

and custom of deliberate indifference by Starr County, and brought wrongful death and survival actions against all defendants. Lt. Rios and Officer Gonzalez moved to dismiss for insufficient service of process pursuant to Federal Rule of Civil Procedure 12(b)(5), and the Penas stipulated to dismissal of these defendants in exchange for acceptance of trial subpoenas. The district court dismissed the claims against Lt. Rios and Officer Gonzalez in light of the Penas' voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a).

Defendants Deputies Cervantes and Garcia, Officers Garza, Juarez, and Suarez, Sgt. Lopez, Sgt. Garza, and Starr County separately moved for summary judgment. On August 1, 2025, the district court granted the motions on the grounds that (1) there was no dispute of material fact as to whether Deputies Cervantes and Garcia or Officers Juarez and Suarez were deliberately indifferent to Pena's medical needs and they were entitled to qualified immunity; (2) although there was a dispute of fact as to whether Officer Garza and Sgt. Lopez were deliberately indifferent to Pena's medical needs, they were entitled to qualified immunity because the law was not clearly established at the time; and (3) there was no factual dispute regarding the Penas' supervisory liability claim against Sgt. Garza or their policy-or-practice claim against Starr County due to their failure to show a pattern of violations, official policy, or conduct constituting punishment. After granting the Penas ten days to show cause why they did not timely serve Officers Emilio Garza and Barrera in its August 1 opinion, the district court subsequently dismissed the claims against Officers Emilio Garza and

Barrera pursuant to Federal Rule of Civil Procedure 4(m) on August 12, 2025.[3] With no claims remaining, the district court entered a final judgment closing the case that same day.

Pena filed a timely notice of appeal on August 14, 2025.

III

We have jurisdiction to review a district court's decision granting motions for summary judgment under 28 U.S.C. § 1291.

We review a district court's grant of summary judgment de novo. *E.E.O.C. v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014). 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." *McVae v. Perez*, 120 F.4th 487, 491 (5th Cir. 2024) (quoting Fed. R. Civ. P. 56(a)). When reviewing a motion for summary judgment, the court views the evidence "in the light most favorable to the nonmoving party." *Id.* There is no genuine dispute "if a reasonable jury could not return a verdict for" the nonmoving party. *Id.* To survive summary judgment when a defendant makes a good-faith assertion of qualified immunity, "the plaintiff must then present evidence demonstrating that the defense does not apply." *Id.* (citing *Ratliff v. Aransas Cnty.*, 948 F.3d 281, 287 (5th Cir. 2020)).

3. The Penas do not challenge the district court's order of dismissal as to Officers Emilio Garza and Barrera, so they are not addressed here.

Appendix B

A

First, the Penas alleged that the deputy and detention officer defendants—arresting officers, day shift, and night shift—were deliberately indifferent to Pena's medical needs.

"To succeed on a deliberate-indifference claim, plaintiffs must show that (1) the official was 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,' and (2) the official actually drew that inference." *Dyer v. Houston*, 964 F.3d 374, 380 (5th Cir. 2020) (quoting *Domino v. Tex. Dep't of Crim. Just.*, 239 F.3d 752, 755 (5th Cir. 2001)). On the first prong, "[w]hether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). As to the second prong, "[a] prison official acts with deliberate indifference 'only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.'" *Delaughter v. Woodall*, 909 F.3d 130, 136 (5th Cir. 2018) (quoting *Farmer*, 511 U.S. at 847, 114 S.Ct. 1970). "It is . . . fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Garza v. City of Donna*, 922 F.3d 626, 635 (5th Cir. 2019) (quoting *Farmer*, 511 U.S. at 836, 114 S.Ct. 1970).

Appendix B

To overcome qualified immunity, a plaintiff must establish that "the plaintiff's version of th[e] disputed facts . . . constitute[s] a violation of clearly established law." *Joseph ex rel. Est. of Joseph v. Bartlett*, 981 F.3d 319, 330 (5th Cir. 2020). "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates the right." *Dyer*, 964 F.3d at 383 (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012)). This does not require a "directly on point" case, but "existing precedent" must "place[] the statutory or constitutional question beyond debate." *Id.* (alteration in original) (quoting *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (en banc)).

i

We first start with the arresting officers, Deputies Cervantes and Garcia. It is undisputed that, at the time of Pena's arrest, Deputy Cervantes was told Pena was under the influence of drugs and alcohol and noted signs of intoxication. It is also undisputed that, while in Deputy Cervantes's patrol unit under Deputy Garcia's observation before leaving the scene of the arrest, Pena hit the interior of the patrol unit with his head twice. Pena again hit himself against the interior of the vehicle later on the drive to the jail in Deputy Cervantes's vehicle, causing the officers to stop so that Lt. Rios could switch vehicles to monitor Pena in the back of the car. Upon arrival at the Starr County Jail, Officer Cervantes completed an arrest complaint noting that Pena was under the influence of drugs and alcohol. The deputies did nothing further to

inform authorities at the jail of any potential head injury or need for medical care.

The parties dispute whether Pena lost consciousness in the patrol unit or was believed by either deputy defendant to have done so. Deputy Garcia's testimony is ambiguous on this issue: he testified that he observed Pena lying on his side with his eyes closed "acting like he was unconscious," and that Pena "look[ed] passed out," but drew a distinction between this state and actual unconsciousness. Deputy Garcia also acknowledged that Lt. Rios told Pena he had "knocked himself out," and relayed via radio that Pena had "lost consciousness for a few seconds." Viewing this evidence in the light most favorable to Pena, we assume a reasonable jury could find that Pena was unconscious for a brief period in the back of the patrol car, and that Deputy Garcia at least suspected that this was so.

To carry his burden to show that clearly established law was violated on his version of the facts, Pena relies primarily on *Dyer v. Houston*, where a pretrial detainee "died after violently bashing his head over 40 times against the interior of a patrol car while being transported to jail." 964 F.3d at 377. In that case, we held that fact issues precluded summary judgment as to all officer defendants because a reasonable jury could find that the officers were aware of the detainee's repeated, violent bashing of the head and that it posed an obvious risk of serious injury, but did not seek medical care or inform jail officials. *Id.* at 385.

The encounter at issue in *Dyer*, however, began with the detainee's "erratic behavior" requiring physical restraint, during which time the detainee was "rolling" and "yelling" while officers tried to calm him. *Id.* at 378. Once in the patrol car, the detainee bit an officer as he attempted to secure him, was placed in leg restraints, screamed and "thrashed violently," then slammed his head nineteen times against the interior of the car. *Id.* at 378-79. After the patrol car stopped so he could be resecured, the detainee continued to scream and thrash, provoking the officers to tase him several times, then "bashed his head another 27 times before they arrived at jail." *Id.* at 379. We described the officers' awareness of the risk to the detainee in terms of his being "in the grip of a drug-induced psychosis." *Id.* at 381. Although Pena was seriously intoxicated and perceived as such by both deputies, given that the erratic and "delusional" behavior at issue in *Dyer* went far beyond ordinary intoxication, we cannot say that *Dyer* established with the requisite clarity that *any* combination of intoxication and three self-inflicted head strikes automatically requires medical care, or informing jail authorities. *Id.* at 384.[4] Wherever

4. Closest to the facts here, the *Dyer* court held that even an officer who arrived late at the scene was not entitled to qualified immunity as matter of law when he testified that he *assumed* the patrol car carrying the detainee was pulled over because the detainee was banging his head on the car, and that he tried to prevent the detainee from banging his head. *Dyer*, 964 F.3d at 382-83. At the same time, this was in the context of the officer's apparently arriving in time to see the detainee bite another officer and be placed in leg restraints, *id.* at 378, and the court's contextualization of the encounter in terms of a "drug-induced psychosis" applied to all officers involved, *id.* at 381.

the line is between ordinary intoxication and the erratic behavior resulting from drug-induced psychosis at issue in *Dyer*, Pena's behavior did not clearly cross it.[5]

The Penas' other principal case likewise includes an additional element of erratic behavior. In *Thompson v. Upshur County*, which *Dyer* relied on for its clearly established law analysis, a detainee suffered from *delirium tremens*, including shaking and hallucinations, colliding with objects in his cell, falling, and hitting his head repeatedly, resulting in a visible, bloody head injury. 245 F.3d 447, 452-54, 463-64 (5th Cir. 2001). In *Dyer*, we described *Thompson* in terms of the officer defendants' having custody of a "delusional detainee who was severely harming himself." 964 F.3d at 384. Again, the deputies here were not confronted with the kind of delusional, erratic behavior at issue in *Dyer*.

Finally, the Penas' appeal to the line of cases finding "obvious" constitutional violations is also unavailing. In *Hope v. Pelzer*, the Supreme Court reiterated that "[w]e may infer the existence of th[e] subjective state of mind [of deliberate indifference] from the fact that the risk of harm [to the detainee] is obvious." 536 U.S. 730, 738, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). The Court

5. Also unlike in *Dyer*, the Penas do not show Pena sustained a "visible and serious head [or other] injury." 964 F.3d at 377. We did not emphasize this point with respect to the officer defendants in *Dyer*, and the Penas argue that unconsciousness should itself be understood as a visible and serious sign of injury. Because we find *Dyer* distinguishable on other grounds, we need not address this argument here.

also explained that, for purposes of identifying clearly established law, a "general constitutional rule" may apply "with obvious clarity" to challenged conduct, even if that conduct has not been specifically addressed in prior cases. *Id.* at 741, 122 S.Ct. 2508 (quoting *United States v. Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)). Notably, *Pelzer* dealt with the "obvious cruelty" of hitching a prisoner to a post for an extended period of time in a painful position, as punishment for prior conduct and without any necessity. *Id.* at 745, 122 S.Ct. 2508. Although failing to act in the face of an obvious risk of harm may, under appropriate circumstances, constitute an obvious constitutional violation, *see Easter v. Powell*, 467 F.3d 459, 465 (5th Cir. 2006) (describing a failure to seek medical treatment such that "no reasonable official could have believed such conduct was lawful"), the Penas do not show that the deputies' failure to seek medical help for or inform the jail of Pena's multiple head strikes and possible unconsciousness rose to this level of obviousness.

On balance, even viewing the evidence in the light most favorable to the Penas, the Penas have not carried their burden to show that clearly established law was violated by Deputies Cervantes and Garcia. We therefore conclude that the deputies are entitled to qualified immunity.

ii

Turning to the detention officers on the day shift at Starr County Jail, it is undisputed that Pena was placed in a detox holding cell at the jail and struck his forehead on the cell's ballistic glass window three times around

3:34 PM. Sgt. Lopez, Officer Garza, and another officer promptly entered the cell to try to calm Pena down. At that time, Pena appeared responsive and compliant, and even conversed with the officers. About an hour later, Pena was taken to the jail's booking area, walking without assistance and conversing with Officer Garza while being escorted back.

Around 5:38 PM, Pena struck his head fourteen times against the ballistic glass in a quick, loud burst of hard strikes. Pena then crumpled to the ground and remained on the floor, rocking back and forth on his elbows and knees. It is disputed whether he lost consciousness when he fell. Sgt. Lopez and Officers Garza and Gonzalez promptly entered the cell to talk to Pena, then escorted him out of his cell and back. Pena again walked without assistance and conversed with officers before returning to his cell. Pena was occasionally active—pacing, talking, and gesturing—throughout the next hour.

Around 6:27 PM, Pena struck the door's glass five times with his right fist, then, around 6:33 PM, struck his right shoulder, and, around 6:38 PM, struck his right hand on the door, and then his hand once more against the cell wall. Sgt. Lopez and Officers Garza, Gonzalez, and Barrera entered the cell at 6:39 PM and spoke with him. At approximately 6:48 PM, Pena struck the door with his left foot. Officers were advised that Pena was making threats to Officer Gonzalez, and Sgt. Lopez decided to place him in a full-body WRAP restraint system. Around 6:50 PM, Sgt. Lopez and Officers Gonzalez and Barrera approached Pena's cell, and Officer Gonzalez deployed pepper spray

to make Pena face the wall. Pena was handcuffed and escorted out of the cell, then was escorted back around 6:53 PM in the WRAP restraint system on a rolling cart. Around 7:48 PM, Pena was almost entirely flat on the rolling cart due to squirming. Officers Garza and Barrera entered the cell, repositioned him in an upright position, and gave him water.

Unlike the other individual defendants, the district court ruled that there was indeed a fact dispute as to whether Sgt. Lopez and Officer Garza were deliberately indifferent to Pena's medical needs. Specifically, the court determined that "a factual dispute exists as to whether Defendants Lopez and Garza were aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that these officers drew that inference," because they "took no steps to address [Pena's] serious medical needs—a high state of intoxication." The court concluded that Sgt. Lopez and Officer Garza were aware of a substantial risk of harm to Pena because "they chose to place Alberto in a WRAP restraint system." The district court also determined, however, that the day-shift officers did not violate clearly established law, rejecting the Penas' appeal to *Dyer* and *Thompson.*

We decline to decide whether the district court correctly identified a fact dispute, because, even on the version of the facts most favorable to the plaintiffs, Sgt. Lopez and Officer Garza's failure to seek medical care for Pena did not violate clearly established law. *See Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019) (stating that a court may decide "one question or both"—

that is, whether there was a constitutional violation and whether the relevant law was clearly established—when addressing qualified immunity). The Penas' argument on this issue is the same as their argument with respect to Deputies Cervantes and Garcia: *Dyer*, together with *Thompson* and the "obvious" violation line of cases, clearly established that failure to seek care for a detainee under these circumstances was deliberate indifference.

This is a closer question than with respect to the arresting deputies, because Sgt. Lopez and Officer Garza saw more "erratic behavior," and more of Pena's "severely harming himself": Pena's repeated bursts of head strikes, crumpling to the floor and possible unconsciousness, strikes to other body parts, rocking and swaying, and his occasional failure to cooperate, culminating in threats to an officer and full-body restraint. *Dyer*, 964 F.3d at 378, 384. At the same time, as with the deputies, we cannot say that "every reasonable official would have understood" that a failure to seek medical treatment for Pena would be unlawful. *Dyer*, 964 F.3d at 383 (quoting *Reichle*, 566 U.S. at 664, 132 S.Ct. 2088). To overcome qualified immunity, "existing precedent" must place the "constitutional question beyond debate," and "the contours of the right in question" must be defined "with a high degree of particularity." *Id.* (quoting *Morgan*, 659 F.3d at 371-72). *Dyer* and *Thompson* make it clear that failure to seek care for a "delusional detainee who [i]s severely harming himself" may give rise to liability for deliberate indifference. *Id.* at 384. They do not make it clear, however, that failure to seek care for a detainee exhibiting Pena's unique mix of symptoms—some consistent with more

routine intoxication—would do the same. *See Stapleton v. Lozano*, 125 F.4th 743, 749-52 (5th Cir. 2025) (discussing a failure to "immediately recognize ambiguous symptoms" from intoxication "as a medical emergency" and finding no plausibly pleaded claim of deliberate indifference). On these facts, reasonable officers could have concluded that the symptoms exhibited by Pena did not rise to the level of the withdrawal-based *delirium tremens* episode in *Thompson* and the "drug-induced psychosis" in *Dyer* because they lacked an ingredient of obvious delusion. Therefore, the day shift officers did not have the "fair warning" required. *Dyer*, 964 F.3d at 381, 383.[6]

For the reasons given above, we hold that a reasonable jury could find that failure to seek care under the circumstances showed deliberate indifference, but that it was not clearly established that this was so. Thus, Sgt. Lopez and Officer Garza are entitled to qualified immunity.

iii

Night shift came on duty at 8 PM. At 8:05 PM, Pena broke loose from the WRAP restraint cart and fell to the ground, then rolled around on the floor. At about 8:11 PM, detention officers observed him out of the cart and kicking the cell door. Night shift supervisor Sgt. Garza

6. The Penas also fail to show that any alleged indifference on Sgt. Lopez and Officer Garza's part falls within the "obvious" violation line of cases, for substantially the same reasons stated above with respect to Deputies Cervantes and Garza. *See supra* Section III.A.i.

and Officers Suarez, Juarez, Emilio Garza, and Barrera entered the cell, removed Pena from the WRAP chair, and kept him upright while adjusting the chair's straps, in addition to adjusting his handcuffs and pouring water over his head.

At approximately 8:51 PM, Officer Suarez escorted Pena's cousin and fellow inmate, Edgar, to the holding cell's window to calm Pena down. Edgar testified that he had previously heard Pena screaming out for his parents and son for help. Edgar spoke with Pena for a few minutes, then was escorted away. It is undisputed that Officers Juarez and Suarez were present for this conversation and observed Pena during it. Edgar testified that he observed his cousin turning purple with saliva and bubbles on his mouth, and that Pena indicated that he was unable to breathe and asked for his restraints to be loosened, but it is disputed whether this was the case or whether the officers perceived it. Edgar also testified that he discussed Pena's breathing difficulty with Sgt. Garza, but it is now undisputed that Sgt. Garza was not present, though Officer Emilio Garza was. Officer Juarez testified that he saw that Pena's eyes were swollen and his pupils dilated. Officers Juarez and Suarez both testified that they did not see the discoloration and mouth foam described by Edgar, or hear Pena complain about breathing, either directly or through Edgar.

At about 9:01 PM, Pena stopped moving. At approximately 9:12 PM, Officer Emilio Garza conducted an observation check on Pena and saw foam on his mouth. Around 9:13 PM, officers entered Pena's cell, removed him

from the cart, and attempted CPR. Officer Suarez testified in a deposition that at that time Pena had some foam at the mouth and a "bluish color" around his lips. After paramedics and the Fire Department arrived, Pena was transported to Starr County Memorial Hospital, where he was pronounced dead at 10:12 PM.

The district court concluded that no reasonable jury could find that Officers Juarez and Suarez were deliberately indifferent to Pena's serious medical needs, and that, even if it could, *Dyer* and *Thompson* did not give them fair warning of a clearly established right to medical attention under the circumstances. It also noted that Edgar's testimony that Pena complained he could not breathe was "contradicted by the fact that [Pena] was yelling during this period of time," and that the night shift officers "had very limited interaction with [Pena]."

On appeal, to show that clearly established law was violated on their version of the facts, the Penas rely on the general rule that awareness of a serious risk of harm can be inferred where it is obvious, and argue that Pena's skin discoloration, mouth foam, and complaints of breathing issues rendered his need for medical care obvious. The Penas also cite *Sims v. Griffin*, 35 F.4th 945 (5th Cir. 2022), for the proposition that officers may not ignore a detainee's obvious distress and cries for help, but must instead seek medical assistance. They again rely on *Hope v. Pelzer* for the rule that precedent addressing similar circumstances is not needed when the constitutional violation is "obvious." *See* 536 U.S. at 741, 122 S.Ct. 2508. The Appellees argue in response that the Penas have not

made it clear what substantial risk Officers Juarez and Suarez were even ostensibly aware of, that their argument on this issue ultimately depends on Edgar's testimony, which is unreliable, and that they point to no clearly established law showing that failing to provide medical care based on any of the symptoms at issue was unlawful.

We agree with the Appellees that Officers Juarez and Suarez did not violate clearly established law. To carry his burden on this issue, Pena relies mostly on *Sims*. In *Sims*, applying the general rule from *Easter v. Powell* that officers may not evince a wanton disregard for serious medical needs, we held that clearly established law would be violated where officers allegedly knew a detainee "had swallowed a bag full of drugs, vomited multiple times, screamed for help, pleaded to go to the hospital, and had steadily deteriorated since his arrival at the jail," but did not seek medical attention. *Sims*, 35 F.4th at 952. Much like *Dyer, Sims* featured significant indicators of a medical crisis that were not present here: possible ingestion of a bag full of narcotics, repeated vomiting—"throwing up a dark black liquid and part of a plastic bag"—and steady signs of deterioration such as a failure to sleep, eat, or walk, crying out incoherently for help, and the detainee's lying in his own vomit and smearing himself with it. *Sims*, 35 F.4th at 947-48. As Appellees point out, in *Stapleton v. Lozano* we held that the failure to treat "ambiguous symptoms" such as bloodshot eyes, slurred speech, swaying and unsteadiness, and kneeling and rocking on the floor did not rise to the level of deliberate indifference, given that these were "typical symptoms of alcohol intoxication" with unclear meanings. 125 F.4th at

749-52. Taking Edgar's testimony as true, the facts here are somewhere between *Stapleton* and *Sims*, but *Sims* did not make it so clear that "every reasonable official would have understood" that a failure to seek medical treatment for Pena would be unconstitutional. *Dyer*, 964 F.3d at 383 (quoting *Reichle*, 566 U.S. at 664, 132 S.Ct. 2088).[7]

The Penas' appeal to the line of cases involving obvious risks of harm and obvious cruelty also fails. Even

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7. The detainee in *Sims* was also alleged to have "asked to go to the hospital," 35 F.4th at 952, like the detainee in *Easter* to whose "request for medical treatment" the defendant "turned a deaf ear," including specific requests for prescription refills and an electrocardiogram when the defendant prison nurse knew the detainee had a "history of cardiac problems [and] was experiencing severe chest pains" and was without his prescribed heart medication. 467 F.3d at 461-65. These facts firmly tied these cases to the rule that deliberate indifference will be found where an officer "refused to treat [a detainee], ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Easter*, 467 F.3d at 464 (quoting *Domino*, 239 F.3d at 756). Here, Edgar testified that Pena asked him to tell the officers to loosen his restraints, and that he did so and pointed out Pena's breathing problems, which the officers also, according to Edgar, heard Pena complain about directly but which the officer Edgar spoke with dismissed due to his understanding of how the WRAP restraint works. The officers' ignoring ambiguous signs of distress, without more, does not clearly rise to the level of deliberate indifference under *Sims* and *Easter*. *See Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Reg. Servs.*, 380 F.3d 872, 883 (5th Cir. 2004) ("[A]ctions and decisions by prison officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity." (citation omitted)).

assuming Pena showed some discoloration and saliva or bubbles at the mouth, and that he was complaining about breathing problems and asked Edgar to tell the officers to loosen the straps on his restraint, as Edgar testified, Pena was also "yelling and yelling and yelling" at the time. Edgar himself described the mouth saliva he observed as typical of severe intoxication in phone calls that evening. Furthermore, video evidence shows that Pena's symptoms and need for medical care were no more obvious than this description suggests. *See McVae*, 120 F.4th at 491 ("[W]hen video footage captures the incident at issue, we rely on the facts depicted in the footage." (citing *Carnaby v. City of Hou.*, 636 F.3d 183, 187 (5th Cir. 2011))). Although we again observe that doing nothing in the face of an obvious risk of harm may constitute an obvious constitutional violation, *see Easter*, 467 F.3d at 465, the Penas do not show that the officers' failure to seek medical care based on the symptoms described by Edgar, viewed together with the video, rose to the level of obvious cruelty addressed in this line of cases.

In sum, the Penas have not carried their burden to show a fact dispute as to whether Officers Juarez and Suarez violated clearly established law. Thus, these officers are entitled to qualified immunity.

B

The Penas also brought a failure to supervise claim against night shift supervisor Sgt. Garza, arguing on appeal that he "failed to ensure his subordinate jailers were adequately monitoring Alberto, which led to an

extended period of inattention and his death." Specifically, the Penas point to the discrepancy between the Texas Commission on Jail Standards' ("TCJS") requirement that detainees in WRAP restraints be checked every 15 minutes and the nineteen-minute gap preceding the 9:12 PM check when Pena was found dead, arguing that Sgt. Garza is responsible for this discrepancy and that a prompter observation check could have saved Pena's life.

As the district court held, the Penas allege at most a single violation of state standards, which is insufficient to support a theory of supervisory liability for a constitutional violation here. Supervisory liability requires a showing of deliberate indifference that caused, through a failure to train or supervise, a violation of the plaintiff's rights. *Smith v. Brenoettsy*, 158 F.3d 908, 911-12 (5th Cir. 1998). "To satisfy the deliberate indifference prong, a plaintiff usually must demonstrate a pattern of violations" and an inadequacy in training or supervision that is "obvious and obviously likely to result in a constitutional violation." *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003) (quoting *Thompson*, 245 F.3d at 459). The Penas do not show that the single nineteen-minute gap between observation checks was a constitutional violation, nor that it was part of a pattern of violations of state standards to which Sgt. Garza was deliberately indifferent. Instead, they point to one prior incident of detainee suicide, involving a different policy of allegedly insufficient checks of suicidal detainees. To establish a pattern, however, prior incidents must be sufficiently numerous and similar. *Est. of Davis ex. rel McCully v. City of N. Richland Hills*, 406 F.3d 375, 382-83 (5th Cir. 2005). In other words, "[p]rior indications cannot

simply be for any and all 'bad' or unwise acts"; rather, the prior acts must be "fairly similar to what ultimately transpired." *Id.* at 383 (quoting *Snyder v. Trepagnier*, 142 F.3d 791, 799 (5th Cir. 1998)). The two loosely related incidents here do not establish a pattern, and the Penas point to nothing else showing Sgt. Garza's awareness of a serious risk or an obvious likelihood of constitutional violations.

For these reasons, the Penas have not shown a dispute of material fact as to whether Sgt. Garza was deliberately indifferent to Pena's rights due to a failure to supervise.

C

The Penas also brought a claim against Starr County under *Monell v. N.Y. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), alleging that the county has a policy of failing to adequately monitor its jail cells and to provide appropriate medical care. They advanced both "episodic acts or omissions" and "unconstitutional conditions of confinement" theories under this heading. On appeal, they emphasize that Starr County Sheriff Fuentes allegedly failed to create and enforce policies requiring the adequate monitoring of inmates and medical training on topics such as how to detect head injuries, how to determine if a state of intoxication requires medical care, and how to detect a lack of oxygen and other medical distress. The district court's reasoning as to Starr County was much the same as its reasoning with respect to Sgt. Garza. Applying *Monell*'s requirement that to be held liable for an unconstitutional policy, a municipality must

be shown to have in place an official policy that was the moving force of a constitutional violation, the district court determined that the Penas' showing was deficient because there were no underlying violations and no evidence supporting a finding of an official policy or custom or an intended condition resulting in punishment.

An episodic acts or omissions claim requires a showing that the constitutional violation "resulted from a municipal policy or custom adopted and maintained with objective deliberate indifference." *Garza*, 922 F.3d at 634 (quoting *Brumfield v. Hollins*, 551 F.3d 322, 331 (5th Cir. 2008)). "To show deliberate indifference, a plaintiff normally must allege a pattern of similar constitutional violations by untrained employees." *Hutcheson v. Dall. Cnty.*, 994 F.3d 477, 482 (5th Cir. 2021). For the reasons set out above with respect to Sgt. Garza, the Penas' allegations of a policy of not conducting cell checks every 15 minutes are deficient on this score.

Likewise, a conditions of confinement claim requires showing "an intended condition or practice" or that jail officials' actions are "sufficiently extended or pervasive," which we have stated amounts in essence to the same policy requirement. *Est. of Bonilla v. Orange Cnty.*, 982 F.3d 298, 308 (5th Cir. 2020). Thus, the Penas' conditions of confinement claim against Starr County also fails for lack of showing a "pervasive pattern of serious deficiencies in providing for his basic human needs," rather than just two loosely related incidents, and for a consequent failure to show that Pena's injuries resulted from any such pervasive

practice. *Id.* at 309 (quoting *Shepherd v. Dall. Cnty.*, 591 F.3d 445, 454 (5th Cir. 2009)).[8]

The Penas' episodic acts or omissions claim with respect to an alleged policy of failure to train on how to provide adequate medical care presents a closer question. A failure-to-train claim requires proof that "(1) the [county] failed to train or supervise the officers involved; (2) there is a causal connection between the alleged failure to supervise or train and the alleged violation of the plaintiff's rights; and (3) the failure to train or supervise constituted deliberate indifference." *Hutcheson*, 994 F.3d at 482 (quoting *Peña v. City of Rio Grande City*, 879 F.3d 613, 623 (5th Cir. 2018)). To make a showing of deliberate indifference leading to Pena's injury, the Penas point to the "consistent testimony of jail employees" that they were not trained to identify latent head injuries and the like or to identify detainees' needs for medical care at all, and to officials' failure to reprimand the officers involved for their roles in Pena's death or otherwise remediate after the incident. As the Penas point out, we have held that consistent official testimony may support a finding of a de facto policy in a case where a jail's "explicit custom" was known to contradict the county's official prescriptions, *Montano v. Orange Cnty.*, 842 F.3d 865, 875 (5th Cir. 2016), and that the lack of apparent reprimand or other remediation after the incident may do the same, *Sanchez*, 956 F.3d at 793. Here, several officers testified to a lack of

8. Moreover, to the extent that they are really failure to train claims, such claims fall under the banner of episodic acts or omissions, not conditions of confinement. *Sanchez v. Young Cnty.*, 956 F.3d 785, 792 (5th Cir. 2020).

medical training, and Sgt. Lopez specifically testified that he had received no training from Starr County about how to detect a need for medical attention from a head injury or how to "determine whether anyone is in distress that necessitates medical attention" at all. The Penas also point to evidence showing a lack of reprimand or remediation after the fact.

Despite some similarities between these facts and our de facto policy cases, the cases the Penas rely on involved more discrete policies than the general categories of "lack of training on identifying head injuries" or "lack of training on when detainees require medical attention." In *Montano*, a jail's custom of isolating intoxicated detainees in a cell and simply leaving them until they became coherent contradicted the county's official policy, which prescribed a four-to-eight hour detoxification period, in a specific way. 842 F.3d at 875. In *Sanchez*, a de facto policy of ignoring the jail's written policy of placing potentially suicidal detainees in cells allowing for maximum visual observation, shown by numerous reports of similar failures and evidence of a specific log system that did not require actually entering a cell to conduct observation checks, pointed toward "extended or pervasive" misconduct of the kind required to attribute practices to an official policymaker without an explicit policy. 956 F.3d at 789, 792-93; *see also Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985) (discussing a lack of reprimand following an "incompetent and catastrophic performance" characterized by "repeated acts or abuse" including shooting at a fugitive on the highway and toward a home, showing a disregard of human life). Thus, it is not clear

that this line of cases supports the Penas' liability theory here.

More fundamentally, because the Penas do not point to a specific pattern of similar violations, they must fall back on the "extremely narrow" "single-incident exception" to the typical pattern requirement. *Hutcheson*, 994 F.3d at 482 (quoting *Valle v. City of Hou.*, 613 F.3d 536, 549 (5th Cir. 2010)). Their lack of specificity regarding the contours of the alleged de facto policy weakens any potential showing that the county's objective deliberate indifference as to any particular policy *caused* any particular officer's constitutional violation, such that the "specific injury suffered" was the "highly predictable consequence of a failure to train." *Id.* (quoting *Valle*, 613 F.3d at 549); *see also Garza*, 922 F.3d at 637 (noting that the alleged failure to train must be " 'closely related to the ultimate injury' and not just attributable to a particular officer's shortcomings" (quoting *City of Canton v. Harris*, 489 U.S. 378, 391, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)). The Supreme Court rejected a similar claim alleging a district attorney's office failed to train prosecutors on their *Brady* obligations on the grounds that the plaintiff had not shown an "obvious need for . . . *specific* training," noting that "[a]ttorneys are trained in the law" and subject to "threshold requirements . . . designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules." *Connick v. Thompson*, 563 U.S. 51, 64, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011) (emphasis added). Similarly, here, Appellees point to record evidence that Starr County detention officers had some first aid training from the county and, at least in some cases, some

medical training from prior jailer certification programs that they were expected to apply. The Penas do not point to evidence that, as a general matter, such training was so obviously insufficient that failure to supplement it further could amount to deliberate indifference on the part of the county. *See Kitchen v. Dall. Cnty., Tex.*, 759 F.3d 468, 485 (5th Cir. 2014) (describing the high bar for single-incident-based liability and requiring some showing that risk from a particular lack of training was patently obvious), *abrogated in part on other grounds by Kingsley v. Hendrickson*, 576 U.S. 389, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015). In other words, they do not show why we should not apply the typical pattern requirement.

For these reasons, we hold that the Penas have shown no dispute of material fact as to whether Starr County was deliberately indifferent to Pena's medical needs due to any official policy or practice, or intended an unconstitutional condition of confinement.

D

The district court dismissed the Penas' wrongful death and survival actions against all defendants for the same reasons it dismissed his constitutional claims: because such claims require an underlying constitutional violation with a causal connection to the death in question. Because we hold that all individual defendants are entitled to qualified immunity and that there is no dispute of material fact as to whether Starr County violated Pena's rights, we also conclude that the Penas' wrongful death

and survival statute claims brought pursuant to 42 U.S.C. § 1983 must fail.

IV

The Penas have not shown a dispute of material fact as to whether any of the individual defendants violated clearly established law, nor as to their *Monell* claim against Starr County. We AFFIRM.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION, FILED JUNE 18, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

CIVIL ACTION NO. 5:21-CV-106-RWS-JBB

PARIS THORPE, INDIVIDUALLY, AS NEXT FRIEND OF A.B. AND ON BEHALF OF THE ESTATE OF DARREN BOYKIN,

Plaintiff,

DARREN BOYKIN, SR. INDIVIDUALLY,

Intervenor Plaintiff,

v.

JERRIKA WEAVER, BRENT HOBBS, AND WILLIAM SCOTT,

Defendants.

Filed June 18, 2024

ORDER

Before the Court are Defendant Jerrika Weaver's Motion for Summary Judgment on Plaintiff and

Intervenor's Deliberate Indifference Claim (Docket No. 89) and Defendant Brent Hobbs and William Scott's Motion for Summary Judgment on Plaintiff and Intervenor's Deliberate Indifference Claim and Scott's Supervisory Liability Claim (Docket No. 91). The motions are fully briefed. Docket Nos. 89, 91, 113-118, 126, 127; *see also* Docket No. 138.

Plaintiff Paris Thorpe[1] and Intervenor Darren Boykin, Sr. (collectively "Plaintiffs") bring this action under 42 U.S.C. § 1983. Docket Nos. 1, 7, 10-1. The case was referred to United States Magistrate Judge Boone Baxter in accordance with 28 U.S.C. § 636. The Magistrate Judge issued a report recommending that Defendants' motions be granted and that Plaintiffs' claims against Defendants be dismissed. Docket No. 159. Plaintiff filed timely objections to the report (Docket No. 167), which Intervenor joined (Docket No. 168).

A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); *see also Williams v. Steward Health Care Sys., LLC*, No. 5:20-CV-00123-RWS-CMC, 2022 WL 575939, at *5 (E.D. Tex. Feb. 25, 2022). Any portion of the report for which no objection is filed is reviewed by the Court for clearly erroneous factual findings and conclusions of law. *Williams*, 2022 WL 575939, at *5.

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1. Thorpe replaced the original Plaintiff, Keisha Boykin. *See* Docket No. 39.

For the reasons given below, Plaintiffs' objections are **OVERRULED** and the report is **ADOPTED** as the opinion of the Court.

I. Background[2]

The above-captioned case arises out of the in-custody death of 23-year-old Darren Boykin, Jr. ("Boykin"). On August 29, 2019, Boykin was arrested by Texarkana College Police Officers after an approximately half-mile foot chase in around 90-degree Fahrenheit heat. Texarkana Texas Police Officers Brent Hobbs, William Scott, and Jerrika Weaver arrived at the scene of the arrest. At the scene of the arrest Boykin complained of an inability to breathe and difficulty in standing up, was carried partially to Weaver's vehicle, and repeatedly yelled for help. Boykin was able to climb into the backseat of Weaver's vehicle.[3] Weaver then transported Boykin to the Bi-State Justice Building ("Bi-State jail").

During the first half of transport, Boykin repeatedly stated that he was having difficulty breathing but was responding to Weaver. During the second half, Boykin lost consciousness and ceased responding to Weaver. After Weaver parked her vehicle at the Bi-State jail she

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2. This section includes a high-level summary of the undisputed facts. *See e.g.*, Docket Nos. 89 at 9-15, 91 at 10-16, 113 at 6-13, 115 at 8-12.

3. Before Boykin was transported to Bi-state jail all three Defendants were aware of Boykin's complaints but Scott had no direct interaction with Boykin.

discovered Boykin was unconscious and not breathing. Weaver began resuscitation efforts, which Scott took over after he arrived separately at the Bi-State jail. The Bi-State jail nurse and emergency medical services were called and arrived shortly thereafter. LifeNet transported Boykin to Wadley Regional Medical Center.

Boykin tragically died. An autopsy showed his death arose from exercise collapse associated with sickle cell trait ("ECAST"), which was triggered by the foot chase that occurred immediately prior to his arrest. It is undisputed that no one knew that Boykin had the sickle cell trait until after his death.

II. Legal Standards

A. Summary Judgment

Summary judgment is used to isolate and dispose of factually unsupported claims or defenses and is appropriate where 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 328 (5th Cir. 2017). The resolution of a dispute of material fact "is the exclusive province of the trier of fact and may not be decided at the summary judgment stage." *Ramirez v. Landry's Seafood Inn & Oyster Bar*, 280 F.3d 576, 578

n.3 (5th Cir. 2002). A court should construe all facts and reasonable inferences in favor of the non-movant. *See Austin*, 864 F.3d at 328.

The party moving for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Anderson*, 477 U.S. at 247. If the nonmovant bears the burden of proof, however, the movant may discharge its burden by showing that there is an absence of evidence to support the nonmovant's case. *Celotex*, 477 U.S. at 325. Here, "[a] qualified immunity defense alters the usual summary judgment burden of proof" because the plaintiff must overcome qualified immunity by "establishing a genuine [dispute of material fact] as to whether the official's allegedly wrongful conduct violated clearly established law." *Bey v. Prator*, 53 F.4th 854, 857 (5th Cir. 2022) (quoting *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010)) (alteration in original).

B. Qualified Immunity

The defense of qualified immunity protects Defendants if "their actions could reasonably have been believed to be legal." *McClelland v. Katy Indep. Sch. Dist.*, 63 F.4th 996, 1005 (5th Cir. 2023) (citing *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc)), *cert. denied*, 144 S. Ct. 348 (2023). "Once the defense of qualified immunity has been raised, the plaintiff has the burden of demonstrating that '(1) the official violated a statutory or constitutional right, and (2) the right was "clearly established" at the time.'" *Id.* (citations omitted). The Court has discretion to

decide which of these two prongs to analyze first depending on the circumstances of the case. *Id.* The Court "need not reach the more difficult constitutional question" if "the right asserted was not clearly established." *Id.* (citations omitted). As the Fifth Circuit recently summarized:

> Clearly established law is determined by controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity. With qualified immunity, the Supreme Court has repeatedly instructed that clearly established law is *not* to be defined at a high level of generality. This is particularly true in recent years. For conduct to be objectively unreasonable in light of clearly established law, there need not be a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.
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> . . . Thus, qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. It likewise shields an officer from suit when the officer makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances the officer confronted. In short, when properly applied, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

> Consequently, qualified immunity is justified unless no reasonable officer could have acted as the defendant officers did here, or every reasonable officer faced with the same facts would not have acted as the defendant officers did.

Tucker v. City of Shreveport, 998 F.3d 165, 173-174 (5th Cir. 2021) (citations and internal quotations omitted).

At the motion for summary judgment phase, courts must make all inferences in plaintiff's favor and may not resolve either prong of qualified immunity by "resolv[ing] genuine disputes of fact in favor of the party seeking summary judgment." *Id.* at 173 (citing *Brown*, 623 F.3d at 253). The Court may "consider[] only the facts that were knowable to the defendant officers"—facts learned after the incident are not relevant. *Id.* (citations omitted).

C. Deliberate Indifference

The Fourteenth Amendment "bars law enforcement from responding to a detainee's serious medical needs with deliberate indifference." *Williams v. City of Yazoo, Mississippi*, 41 F.4th 416, 423 (5th Cir. 2022) (citations omitted). To prove deliberate indifference the plaintiff must show "[1] defendants knew that [the decedent] faced a substantial risk of serious harm and [2] failed to take reasonable measures to abate that risk." *Id.* The inquiry evaluates each defendant's subjective knowledge—the question is what each defendant knew, "not what they 'should have perceived but did not.'" *Id.* The reasonableness

question is objective and considers whether the officers "response to a known risk was reasonable as a matter of law." *Id.* This means that the plaintiff must show that the law enforcement officer was aware of a substantial risk of serious harm and nevertheless refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs. *See Davis v. Lumpkin*, 35 F.4th 958, 963 (5th Cir. 2022). "[A]n officer's failure to immediately recognize ambiguous symptoms as a medical emergency does not amount to deliberate indifference." *Trevino v. Hinz*, 751 F. App'x 551, 555 (5th Cir. 2018).

III. Analysis

The Magistrate Judge issued a 71-page report recommending that Defendants' motions for summary judgment be granted and that Plaintiffs' claims against Defendants be dismissed with prejudice. Docket No. 159. The report thoroughly evaluated the evidence in the record, including the video footage, expert reports, affidavits, and deposition testimony. *Id.* at 8-39. Based on this thorough review, the report determined that Defendants "failed to realize that there was a medical emergency" because the risk of serious harm to Boykin "was anything but obvious." *Id.* Separately, the report recommends dismissing these claims based on qualified immunity because even if Defendants' failure to provide medical aid amounted to a constitutional violation, Plaintiffs fail to demonstrate that such a constitutional

violation, if established, violated clearly established law at the time of Boykin's arrest in 2019. *Id.* at 3.

Plaintiffs make four objections to the report. Docket No. 167. First, Plaintiffs dispute the report's analysis of Defendants' actual knowledge at the scene of the arrest as well as Weaver's knowledge during transport. *See id.* at 2-8. Second, Plaintiffs argue the report misstates Plaintiffs' argument that Defendants had a duty to "provide aid" and "assure [Boykin] received medical attention" because of Boykin's "complaints of an inability to breathe, an inability, an inability to sit up." *Id.* at 8. Third, Plaintiffs challenge the report's reliance on *Batiste v. Theriot*, 458 F. App'x. 351 (5th Cir. 2012). Docket No. 167 at 9. Fourth, Plaintiffs object to the report because Plaintiffs "pointed to many cases that show [Defendants] had a duty to provide medical attention." *Id.* at 10. Upon a *de novo* review, each of Plaintiffs' objections lacks merit.

A. Plaintiffs' First Objection

Plaintiffs' first objection argues that the report failed to apply the proper summary judgment standard because the report "ignores the contradicting evidence and looks only to the evidence from the movants." Docket No. 167 at 6; *see also id.* at 2-8. Specifically, Plaintiffs allege the recommendations of the report could only be reached if the Magistrate Judge ignored "the video of Boykin [] at the scene of the arrest, the video in the back of Weaver's car in conjunction with the video showing the reflection of Weaver looking at Boykin [], or the opinion of [Plaintiffs' expert] Former Officer Madison." *Id.* at 5. Plaintiffs also

generally argue that the opinion improperly resolved several fact issues, such as whether Weaver could see Boykin's face during transport. *See id.* at 5-8. Plaintiffs also object to the report's finding that Plaintiffs failed to show deliberate indifference because at most they established "Weaver's understanding was wrong, *i.e.*, that she was negligent, unobservant, or drew the wrong inferences from the situation." *Id.* at 7-8.

Defendants respond that the report applied the correct burden of proof, assigned the video evidence the appropriate weight, and properly required Plaintiffs to rebut the defense of qualified immunity. Docket No. 169 at 1-2. Defendants primarily argue that Plaintiffs' objections rely heavily on portions of Madison's opinions that Plaintiffs did not cite or refer to either in Plaintiffs' briefing or at the hearing. *Id.* 2, 4. Defendants further argue that the report correctly considered Madison's opinion that "Weaver was able to observe from the front seat that Boykin was slumped over, unconscious, with agonal breathing, gasping for air" but that even if Weaver had seen this, the symptoms Weaver was aware of were not obvious enough to show Weaver had actual knowledge of a known serious medical condition. *Id.* Defendants also point to the report's reliance on Plaintiffs' expert who agreed that Weaver misconstrued symptoms during transport and became aware of Boykin's medical distress at the jail garage. *Id.* at 5. Defendants further note that the Plaintiffs' complaint alleges that Weaver could *not* see Boykin's face "as she passed by Wadley Hospital" approximately three to four minutes before arriving at Bi-state jail. *Id.* at 6. Defendants also argue Plaintiffs fail

to address that much of the evidence the report relied on was uncontroverted and unchallenged. *Id.* at 2, 5-6.[4]

The Court has extensively reviewed the video evidence, both alone and in combination, the expert reports, deposition testimony, and other record evidence to understand each officer's knowledge and actions during Boykin's arrest and transport.[5] As tragic as Boykin's death is, the Court must consider Defendants' motion for summary judgment in view of the officers' knowledge at the time of Boykin's arrest and transport—not based on how the officers should have acted with the benefit of hindsight. Viewed in the light most favorable to Plaintiffs, the Court agrees with the report that there is no fact dispute sufficient to show Defendants had knowledge of a *known* serious medical condition or that the symptoms that Defendants *were aware of* were so obvious that Defendants should have concluded Boykin was at substantial risk of

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4. Defendants also argue that Plaintiffs failed to rebut that presumption of qualified immunity because Plaintiffs were unable to articulate a statutory or constitutional right that was established "beyond debate" at the time of Boykin's death. *Id.* at 2, 6-7. The Court agrees and addresses this issue herein.

5. While performing the *de novo* review, the Court examined all the video evidence in this case extensively, including the multiple copies provided by the parties. *See*, *e.g.*, Docket Nos. 89-7, 89-9, 89-13, 114 at 485-488 (Exs. H-K), 116 at 367-370 (Exs. G-J). The Court considered any screenshots provided by the parties or their experts in view of the videos, giving greater weight to the recordings than a description of the facts. *See Salazar*, 37 F.4th at 280; *see also Poole v. City of Shreveport*, 13 F.4th 420, 425 n.4 (5th Cir. 2021).

serious harm. *Baldwin v. Dorsey*, 964 F.3d 320, 326 (5th Cir. 2020).

First, Plaintiffs mischaracterize the report's weighing of the evidence. The report does not ignore Plaintiffs' evidence—approximately 30 pages are spent summarizing facts from both parties' pleadings, including time-stamped references to the bodycam and dashcam videos as well as Officer Madison's report. Docket No. 159 at 11-39. The Magistrate Judge applied the proper summary judgment standard by viewing the evidence in the light most favorable to Plaintiffs. *See id.* at 6-7. The Magistrate Judge also correctly noted that the qualified immunity defense alters the usual summary judgment burden of proof. *Id.* at 6-8. Finally, the Magistrate Judge correctly explained that "when there is video evidence available in the record, the court is not bound to adopt the nonmoving party's version of the facts if it is contradicted by the record, but rather should 'view[] the facts in the light depicted by the videotape.'" *See* Docket No. 159 at 7 (quoting *Cass v. City of Abilene*, 814 F.3d 721, 728 (5th Cir. 2016)); *see also Salazar v. Molina*, 37 F.4th 278, 280 (5th Cir. 2022) (finding that if there is video or bodycam footage, the court should "view[] the facts in the light depicted by the videotape" and give greater weight to the recording than a party's description of the facts). The Magistrate Judge correctly applied these legal standards—Plaintiffs' objections are without merit.[6]

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6. Plaintiffs' objections provide several examples of what they believe to be a failure to view the evidence in the light most favorable to the non-movant. *See generally* Docket No. 167 at 3-8. The Court has considered each of these arguments and finds the

Second, Plaintiffs' objections are a reversal of their original position, where Plaintiffs downplayed the importance of the video evidence and failed to cite Madison's opinions that they now rely on.[7] *See*, *e.g.*, Docket Nos. 113 at 13-14, 115 at 12-13; *compare also, e.g.*, Docket No. 167 at 3-4, 7 (citing pages 16-22 of Madison's report[8] in which he summarizes the video evidence) *with* Docket No. 113 at *also id.* at 13, 22 (citing Madison's testimony about Defendants' duty but not his opinions about the videos or Weaver's knowledge); *see also id.* at 22 (same). Nevertheless, the report correctly considered Madison's opinions—including his characterizations of the videos—and Defendants' knowledge in light of the video evidence.

The Magistrate Judge correctly considered Madison's characterizations of the videos, despite Plaintiffs' failure to cite or rely on these opinions and characterizations of the videos in their original briefing. *See*, *e.g.*, Docket No. 159 at 13-15, 19, 33-34 (citing portions of Madison's report that Plaintiffs' original briefing did not rely on).

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report correctly weighs each example. For example, while the video itself is more probative than an individual's characterizations of videos, the report correctly determines the affidavits at issue are consistent with the video evidence at the scene and considers the affidavits in light of the videos in making its recommendation.

7. Local Rule CV-56 instructs the parties that a summary judgment motions (and responses) "should use appropriate citations to proper summary judgment evidence." Local Rule CV-56(a)-(b). The rule instructs parties to cite relevant evidence by "page and, if possible, line." *Id.* at 56(d).

8. *See* Docket No. 116 at 161-167.

Indeed, the report specifically notes that "according to Madison, Weaver was able to observe from the front seat that Boykin was 'slumped over, unconscious, with agonal breathing, gasping for air.'" *Id.* at 54 (quoting Docket No. 116 at 161). Contrary to Plaintiffs' assertion that the "opinion does not even consider the video of the transport," the report includes six distinct references to "Weaver Rear Seat Video" and seven references to the "Weaver Body Camera" while discussing Boykin's transport from the scene of the arrest to the jail garage. *Id.* at 27-31. The report does not use the video evidence to "contradict" Plaintiffs' evidence; rather, it views Plaintiffs' facts in the light of the video evidence.

The report correctly finds that, even assuming Weaver could see Boykin as alleged by Madison, the symptoms Weaver was aware of were not so obvious to conclude she had actual knowledge of Boykin's distress. *See*, *e.g.*, Docket No. 159 at 54.[9] The medical experts agreed that it was not apparent that Boykin was in serious distress until around the 14:25 to 14:50 video mark. *See*, *e.g.*, Docket Nos. 89-1 at 46:14-22, 89-18 at 13; 114 at 163, 339-340 (O'Connor Dep. at 68:12-69:4). Plaintiffs' medical expert, Dr. Francis O'Connor, also testified he would not expect nonmedical professionals such as police officers to be able to recognize an exercise collapse associated with sickle cell trait ("ECAST") event. Docket No. 114 at 317 (O'Connor

9. Plaintiffs mention Weaver's admission that she would have made different choices if she had been able to see the rear dash cam video while driving Boykin. But knowledge obtained after the incident is not relevant. *See Tucker*, 998 F.3d at 17.

Dep. at 46:18-22); *see also id.* at 344 (O'Connor Dep. at 73:5-18).[10]

For the second half of transport, Madison opines that Weaver looked back at Boykin approximately 10 times after Boykin's medical distress became evident to the medical professionals. Docket No. 116 at 163-167. But the longest time Madison alleges Weaver stared at the unconscious Boykin was for eight seconds. *Id.* As Plaintiffs point out, Weaver's "fun fact" shortly thereafter shows that she was at least aware that Boykin was slumped over, whether she could see his face or not. Even crediting Madison's assumption[11] that Weaver had an unobstructed view of Boykin's face during each of those 10 brief glances, the Court agrees with the report's conclusion that the most Plaintiffs "could establish is that Weaver's understanding was wrong, *i.e.*, that she was negligent, unobservant, or drew the wrong inferences from the situation—which, as explained [in the report], is not sufficient to show deliberate indifference." *See* Docket No. 159 at 61. The evidence shows that Weaver first recognized Boykin's symptoms were serious when they reached Bi-state jail.

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10. The medical experts' agreement that Boykin's symptoms were not obvious to medical professionals until he lost consciousness during transport also supports the report's finding that Scott and Hobbs were not deliberately indifferent.

11. Plaintiffs rely solely on Madison's opinions to rebut Weaver's assertions that she could not see Boykin's face during transport. The report, however, correctly finds that neither Madison nor Plaintiffs provide any evidence rebutting the reconstruction report of Alex Germane, which supports Weaver's testimony that she could not see Boykin's face.

See, *e.g.*, Docket No. 89-1 at 14:18-16:12, 19:14-20:18; *see also* Docket No. 114, Exs. H and I; *id.* at 344 (O'Connor Dep. at 73:5-18).

The report does not "ignore" Plaintiffs' arguments or evidence—instead the report correctly considers both parties' summary judgment evidence. The evidence before the Court—viewed in the light most favorable to the Plaintiffs—simply does not create a fact issue sufficient to show that Defendants had knowledge of a known serious medical condition or that the symptoms that they were aware of were so obvious that they should have concluded otherwise. Thus, Plaintiffs' first objection is without merit.

B. Plaintiffs' Second Objection

Plaintiffs' second objection is that the report misstates their argument that "based on the circumstances then facing the Defendants, they had a duty to provide aid." Docket No. 167 at 8. Plaintiffs argue that "Defendants did not have to diagnose the medical condition, instead based on complaints of an inability to breathe, an inability to sit up, etc. the movants had a duty to assure non-movant received medical attention." *Id.* Defendants respond that the report correctly applies the law to find that Defendants misunderstood the source of Boykin's symptoms, their seriousness, and the possible complications. *See* Docket No. 169 at 7. Defendants emphasize that Boykin's sickle cell trait condition was unknown at the time. *Id.*

The Magistrate Judge did not misstate Plaintiffs' argument. There is no dispute that Defendants knew that

Boykin complained of his symptoms, including the difficulty he had breathing and talking, sitting and standing up, his pain, and other symptoms. Defendants placed him in an air-conditioned car and informed him he would see a nurse when he arrived at Bi-State jail. Throughout this litigation, Plaintiffs argued that Defendants should have "summoned emergency medical assistance" to the scene of the arrest. At the hearing, however, Plaintiffs conceded this argument fails as a matter of law. *See* Docket No. 151 at 102:8-11.[12]

Given this concession, Plaintiffs shifted their theory. Plaintiffs now argue that Defendants should have offered "aid" in response to those known complaints and symptoms. But Plaintiffs submit no evidence of the alleged missing "aid" in their summary judgment briefing. *See*, *e.g.*, Docket Nos. 113, 115. Plaintiffs fail to show that the aid provided—air conditioning, removing Boykin from the sun, and offering to take him to see the jail nurse—was objectionably unreasonable. Moreover, the examples of aid provided by Plaintiffs—*e.g.* providing water or oxygen at the scene or stopping at Wadley Hospital as Weaver drove by—have not been shown to be supported

12. The report correctly found—and Plaintiffs do not challenge—that this right was not clearly established at the time of Boykin's 2019 arrest based on *Cope v. Cogdill*, in which the Fifth Circuit stated "[u]ntil today, we have not spoken directly on whether failing to call for emergency assistance in response to a serious threat to an inmate's life constitutes deliberate indifference." 3 F.4th 198, 209 (5th Cir. 2021); *see also Reed v. Nacogdoches Cnty.*, No. 22-40126, 2023 WL 3563017, at *2 (5th Cir. May 19, 2023).

by clearly established law. *See id.*; *see also id.* at 61:8-11. Accordingly, Plaintiffs' failure to provide medical aid argument fails because it is not (1) supported by the evidence of record, (2) sufficiently described by Plaintiffs' counsel, or (3) supported by clearly established law. The Magistrate Judge properly determined Plaintiffs' failure to provide medical aid argument fails as a matter of law. Thus, Plaintiffs' second objection is without merit.

C. Plaintiffs' Third Objection

Plaintiffs also object to the report's reliance on *Batiste*. Docket No. 167 at 8. Plaintiffs argue that the report uses *Batiste* "to show that a sickle cell trait could not rise to the level of a serious medical condition for which treatment has been recommended or which is so apparent even a layman would recognize it and thus there could be no deliberate indifference." *Id.* at 9 (citing Docket No. 159 at 3). According to Plaintiffs, *Batiste* is distinguishable because in that case "although unaware [of a serious medical condition], the police called an ambulance within two minutes of using a taser and the EMTs found no need to immediately transport Appellant to the hospital." *Id.*[13] Plaintiffs argue that *Batiste* does not apply here because "the police never called the ambulance and while at the scene of the arrest [and] did not have any medical professional examine a man who repeatedly claimed he could not breathe." *Id.* at 9-10.

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13. In *Batiste*, the ambulance was called "as required by department policy" because the decedent had been tased. 458 F. App'x at 356. Here, Boykin was not tased.

Plaintiffs mischaracterize the report's reliance on *Batiste*. The Magistrate Judge did not rely on *Batiste* to show that sickle cell trait could *never* rise to the level of a serious medical condition. Instead, consistent with the medical experts' testimony, the report relied on *Batiste* to show that labored breathing following a foot chase was not so obvious as to imbue subjective knowledge of serious medical distress to the officers. The Magistrate Judge's report relies on *Batiste* simply to show that the Fifth Circuit has found that " 'sickling' brought on by exertion" (*i.e.*, an ECAST event) may present confusing symptoms, especially if the condition is unknown at the time. *See* 458 Fed. Appx. at 355-58.

The Court agrees that this precedent, coupled with the testimony of the experts here, shows that Defendants did not have actual knowledge that Boykin was in serious medical distress based on the symptoms and circumstances that Defendants were aware of. Accordingly, Plaintiffs' third objection is without merit.

D. Plaintiffs' Fourth Objection

Finally, Plaintiffs take issue with the report's analysis of qualified immunity.[14] First, Plaintiffs object to the report's opinion that "Plaintiffs' other complaint is that Defendants failed to 'do anything meaningful,' 'provide' medical care themselves, 'refused to treat,' or otherwise

14. Plaintiffs' other objections are additionally and independently meritless because Plaintiffs still cannot articulate a specific constitutional right that was established "beyond debate" at the time of Boykin's death.

'ignored' [Boykin]'s urgent medical risks, including that Weaver should have taken [Boykin] directly to the hospital (rather than anticipating aid from jail." Docket No. 167 at 10 (internal citations omitted). Plaintiffs dispute the report's conclusion that there is no "existing precedent" that "place[s] the . . . constitutional question[s]" in this case "beyond debate" because of the "many cases that show the movants had a duty to provide medical attention." *Id.* Defendants believe that Plaintiffs are simply rehashing their second objection. Docket No. 169 at 9.

To overcome Defendants' assertion of qualified immunity, Plaintiffs must show there is a genuine issue of material fact concerning (1) "whether the officer[s] violated a constitutional right" and (2) "whether the right at issue was clearly established at the time of the alleged misconduct." *Williams v. Zachary*, No. 21-60753, 2022 WL 2101518, at *3 (5th Cir. June 10, 2022) (quoting *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019)). The report determined that Defendants did not commit a constitutional violation. Docket No. 159 at 64. In an abundance of caution, however, the Magistrate Judge assumed a constitutional violation had occurred and proceeded to the second question—whether Defendants violated a clearly established constitutional right at the time of Boykin's arrest in 2019. *Id.*

As discussed above, Plaintiffs fail to meet this burden for any of the alleged constitutional violations, including Defendants' failure to provide unspecified aid, Defendants' failure to call an ambulance at the scene of the arrest, and Weaver's failure to drive Boykin to Wadley Hospital.

Regardless of the correct level of specificity in framing the constitutional violation, the Magistrate Judge correctly concluded Plaintiffs have not met the "heavy burden" of showing that Defendants violated "clearly established" law. *See id.* at 67. Plaintiffs do not specifically challenge this finding. Instead, Plaintiffs refer to cases already addressed in the report, arguing this precedent shows Defendants had a duty to provide medical attention to Boykin. Docket No. 167 at 10. As addressed above, there was not a "known" medical risk here. After performing a *de novo* review of the record, the Court agrees with the report's finding that it is not fair to say Defendants "refused" to treat Boykin, or that they "ignored" his complaints despite a known medical risk. *See* Docket No. 159 at 66.

As the Magistrate Judge addressed in the report, the cases cited by Plaintiffs involving violations of clearly established law do not involve officers acting under similar circumstances. *See generally* Docket No. 159. For example, the report discussed *Nerren v. Livingston Police Dep't*, 86 F.3d 469 (5th Cir. 1996), explaining that in *Nerren* the detainee's "face and chest were marred with abrasions, he was in [obvious] pain, and he informed the [a]rresting [o]fficers that he needed medical attention" for his injuries and the detainee's need for care was obvious because the officers knew he "had recently been involved in a multiple vehicle . . . accident." *Id.* at 59-60 (quoting *Zachary*, 2022 WL 2101518, at *4). The report distinguished Defendants here from the officers in *Nerren* because Defendants were not on notice that Boykin had sickle cell trait—the cause of his death. *Id.* The report correctly found that the

Fifth Circuit has held that officers who are not medical professionals are entitled to qualified immunity when they attribute the source of labored breathing to a foot chase. *Id.* at 68-69 (citing *Batiste*, 458 F. Appx. at 357-58). Plaintiffs' objections do not show how the report errs in its analysis of *Nerren.* Plaintiffs also cite *Williams* in this objection but again fail to address the report's extensive discussion of *Williams* and why it does not control here. *Id.* at 48-52 (finding *Williams* distinguishable on the subjective awareness prong). Accordingly, Plaintiffs' objections are meritless.

Importantly, Plaintiffs do not specifically object to several important findings regarding qualified immunity, including the finding that the right to have emergency medical services called was not clearly established on August 29, 2019. Further, Plaintiffs do not object to the report's finding that the officers' conduct was objectively reasonable under the circumstances (*i.e.*, their knowledge that Boykin was breathing heavily following a long run in the summer heat). *See* Docket No. 159 at 70. These portions of the Magistrate Judge's report are not clearly erroneous. Thus, the unobjected-to portions of the report are sufficient to adopt the report's independent basis for recommending that summary judgment be granted in Defendants' favor on qualified immunity grounds. For these additional reasons, Plaintiffs' fourth objection is also without merit.

IV. Conclusion

The Court has conducted a thorough and careful *de novo* review of those portions of the Magistrate Judge's proposed findings and recommendations to which Plaintiffs objected. *See* 28 U.S.C. § 636(b)(1)(C) (District Judge shall "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). Upon such *de novo* review, the Court has determined that the report of the Magistrate Judge is correct, and the Plaintiffs' objections are without merit. Accordingly, it is

ORDERED that Plaintiffs' objections (Docket Nos. 167, 168) are **OVERRULED**. It is further

ORDERED that the Report of the Magistrate Judge (Docket No. 159) is **ADOPTED** as the opinion of the District Court. It is further

ORDERED that Motion for Summary Judgment of Defendant Jerrika Weaver on Plaintiff and Intervenor's Deliberate Indifference Claim (Docket No. 89) and Motion for Summary Judgment of Defendants Brent Hobbs and William Scott on Plaintiff and Intervenor's Deliberate Indifference Claim and Defendant William Scott's Motion for Summary Judgment on Supervisory Liability Claim (Docket No. 91) are **GRANTED**. It is further

ORDERED that the above-captioned matter is **DISMISSED WITH PREJUDICE**.

So ORDERED and SIGNED this 18th day of June, 2024.

/s/ Robert W. Schroeder III
ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

APPENDIX D — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION, FILED OCTOBER 20, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:21-cv-106-RWS-JBB

PARIS THORPE, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DARREN BOYKIN, PLAINTIFF, DARREN BOYKIN, SR., INDIVIDUALLY,

Intervenor Plaintiff,

v.

JERRIKA WEAVER, BRENT HOBBS, AND WILLIAM SCOTT,

Defendants

Filed October 20, 2023

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case arises out of the tragic death of twenty-three year old Darren Boykin, Jr. ("Boykin, Jr.").[1] On August

1. The above-entitled and numbered cause of action was referred to the undersigned United States Magistrate Judge for pretrial purposes pursuant to 28 U.S.C. § 636.

29, 2019, after being arrested by Texarkana College Police Officers near Texarkana College and transported by Texarkana Texas Police Officer Jerrika Weaver ("Weaver") to the Bi-State Justice Building ("Bi-State jail"), Boykin, Jr. died as a result of complications of sickle cell trait caused by a half-mile foot chase immediately prior to his arrest. Paris Thorpe, as next friend of A.B. and on behalf of the Estate of Darren Boykin, Jr. ("Plaintiff"), and Darren Boykin, Sr., individually ("Intervenor") (together, "Plaintiffs"), bring this action pursuant to 42 U.S.C. § 1983 against Weaver and two other Texarkana Texas Police Officers present at the scene of the arrest, Brent Hobbs ("Hobbs") and William Scott ("Scott") (together with Weaver, "Defendants") for their alleged deliberate indifference to Boykin, Jr's medical needs. According to Plaintiffs, Defendants—knowing that Boykin, Jr. was having difficulty breathing and requesting help—were deliberately indifferent to Boykin, Jr.'s known[2] medical needs in violation of his Fourteenth Amendment rights by Defendants' failure to provide medical aid at the scene of the arrest and by Weaver's subsequent failure to provide medical aid during transport.

There are two pending motions for summary judgment before the Court: (1) Motion for Summary Judgment of Defendant Jerrika Weaver on Plaintiff and Intervenor's Deliberate Indifference Claim (Dkt. No. 89); and (2) Motion for Summary Judgment of Defendants Brent

2. While it is undisputed that Defendants were aware of Boykin Jr.'s difficulty breathing following the foot chase, it is also undisputed that no one, apparently even Boykin, Jr., knew he had sickle cell trait until after he was deceased.

Hobbs and William Scott on Plaintiff and Intervenor's Deliberate Indifference Claim and Defendant William Scott's Motion for Summary Judgment on Supervisory Liability Claim (Dkt. No. 91). The Court, having carefully considered the relevant briefing and hearing arguments of counsel August 30, 2023, recommends the motions be **GRANTED**.

Specifically, the Court finds Defendants are entitled to summary judgment on the deliberate indifference (and supervisory liability) claims. Deliberate indifference requires showing Defendants were subjectively aware that Boykin Jr. faced a substantial risk of serious bodily harm and yet they disregarded that risk by failing to take reasonable measures to abate it. In the context of Plaintiffs' claims that Defendants denied Boykin, Jr. medical care, Plaintiffs must show a wanton disregard for his medical needs, such as a decision to intentionally treat him incorrectly. *See Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006). However, the evidence shows that Defendants believed (as did the other officers at the scene of the arrest) that Boykin, Jr.'s labored breathing was due to exhaustion following the foot pursuit, and they failed to realize that there was a medical emergency. In this case, the risk of serious harm to Boykin Jr. "was anything but obvious," and the situation cannot rise to the level of a serious medical need for which "treatment has been recommended or for which the need is so apparent that even laymen would recognize that care is required." *Batiste v. Theriot*, 458 Fed. Appx. 351, 356 (5th Cir. 2012) (reversing a district court's denial of qualified immunity in a case where the plaintiffs' expert opined the decedent died

of sickle cell trait which was caused by physical exertion when he fled from the officers) (citation omitted). Even if Defendants' failure to provide medical aid amounted to a constitutional violation, the Court would be compelled to recommend that summary judgment be granted on the basis of qualified immunity because Plaintiffs fail to demonstrate any constitutional violation, if established, violated clearly established law at the time of Boykin, Jr.'s arrest in 2019.

I. BACKGROUND

A. Plaintiffs' § 1983 claims

Keisha Boykin was the original Plaintiff and filed her Original Complaint (Dkt. No. 1) on August 29, 2021. She filed individually as the natural mother of Boykin, Jr. and as representative of her son's estate. On September 7, 2021, Keisha Boykin and Paris Thorpe, the natural mother of A.B., a minor child, filed a First Amended Complaint (Dkt. No. 7), adding Plaintiff Paris Thorpe, as next friend of the minor child. Thus, the amended complaint only added the wrongful death claim of minor A.B. On October 12, 2021, the Court granted Intervenor Boykin, Sr.'s unopposed amended motion to intervene.[3] Dkt. No. 15.

Paris Thorpe, as next friend of A.B., and Intervenor (Boykin, Jr.'s father) both bring wrongful death claims for

3. The Court has since determined that Intervenor's complaint (Dkt. No. 21, which is deemed filed September 9, 2021) was timely filed. *See* Dkt. Nos. 131, 142.

injuries suffered by A.B. and Intervenor (respectively) arising from Boykin, Jr.'s death. Dkt. No. 7 at 4; Dkt. No. 21, ¶ 3. In addition to A.B.'s wrongful death claims, Paris Thorpe, on behalf of the Estate of Darren Boykin, Jr., also brings a survival action on behalf of Boykin, Jr.'s estate for the pain and suffering Boykin, Jr. experienced prior to his death.[4] Dkt. No. 7 at 4.

B. Defendants' motions for summary judgment

Defendant Weaver has filed a motion for summary judgment on all the deliberate indifference claims brought by Plaintiffs. Dkt. No. 89. Defendants Hobbs and Scott have filed a similar motion for summary judgment on the deliberate indifference claims brought by Plaintiffs and further seek summary judgment as to the supervisory liability claim asserted by Plaintiffs against Defendant Scott. Dkt. No. 91. Given the overlapping evidence and issues, the undersigned considers both motions together herein.

Defendants have moved for summary judgment on a number of grounds. Defendants first contend Plaintiffs cannot establish deliberate indifference to support their

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4. On January 26, 2022, Keisha Boykin died. On March 2, 2022, the Court granted the Notice of Suggestion of Death and Unopposed Amended Motion to Substitute Proper Party Pursuant to Federal Rule of Civil Procedure 25(A) (Dkt. No. 36), substituting Paris Thorpe, the mother and sole guardian of A.B., for Keisha Boykin, deceased, as the Plaintiff bringing the estate's survival action. Dkt. No. 39. Thus, the survival claim of the estate is for the sole benefit of A.B. *See* Dkt. No. 131 at 23.

§ 1983 claims. Additionally, with regard to the wrongful death claims, Defendants assert Plaintiffs cannot establish the causal link between Defendants' unconstitutional acts or omissions and the death of Boykin, Jr., as required by Texas's wrongful death statute. According to Defendants, "the expert medical testimony and evidence developed in this case establishes that, within a reasonable medical probability, Boykin, Jr. would ***not*** have survived the sickle cell crisis episode even if medical attention had been called to the scene of the arrest." Dkt. No. 89 at 29 (emphasis original); Dkt. No. 91 at 25 (emphasis original). In other words, Defendants assert emergent medical care would not have changed the outcome. *Id.* Finally, Scott maintains that Plaintiffs' supervisory liability claim against him cannot be established in this case because, in part, there was no underlying unconstitutional deprivation.

Defendants further claim they are entitled to qualified immunity because Plaintiffs cannot show that they committed a constitutional violation and that their actions were objectively unreasonable in light of clearly established law at the time of the conduct in question.

II. LEGAL STANDARDS

A. Summary judgment standard

A district 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." *Cass v. City of Abilene*, 814 F.3d 721, 728 (5th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)). "A court

considering a motion for summary judgment must consider all facts and evidence in the light most favorable to the nonmoving party." *Id.* (quoting *Haverda v. Hays Cty.*, 723 F.3d 586, 591 (5th Cir. 2013)). "However, to avoid summary judgment, the non-movant must go beyond the pleadings and come forward with specific facts indicating a genuine issue for trial." *Id.* (quoting *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007)). Furthermore, "when there is video evidence available in the record, the court is not bound to adopt the nonmoving party's version of the facts if it is contradicted by the record, but rather should 'view[] the facts in the light depicted by the videotape.'" *Id.* (quoting *Harris v. Serpas*, 745 F.3d 767, 771 (5th Cir. 2014) (quoting *Scott v. Harris*, 550 U.S. 372, 381, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)), *cert. denied*, 574 U.S. 823, 135 S.Ct. 137, 190 L.Ed.2d 45 (2014)).

B. Qualified immunity affirmative defense

Because the individual defendants asserted qualified immunity, Plaintiffs bear the burden of overcoming the affirmative defense. *Reed v. Nacogdoches Cnty.*, No. 22-40126, 2023 WL 3563017, at *2 (5th Cir. May 19, 2023) (citing *Cass v. City of Abilene*, 814 F.3d 721, 728 (5th Cir. 2016)). Once the burden is on the plaintiff, "[t]he plaintiff must show that there is a genuine dispute of material fact and that a jury could return a verdict entitling the plaintiff to relief for a constitutional injury." *Frederick v. LeBlanc*, No. 21-30660, 2023 WL 1432014, at *3 (5th Cir. Feb. 1, 2023) (quoting *Joseph*, 981 F.3d at 330). "The plaintiff bears the burden of negating qualified immunity, but all inferences are drawn in his favor." *Id.* (quoting *Brown*

v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010) (citation omitted in *Frederick*)).

To succeed, Plaintiffs must prove "(1) that the official[s] violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Reed*, 2023 WL 3563017, at *2 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982))). The court may address the two prongs in any order. *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)).

III. SUMMARY JUDGMENT EVIDENCE

A. Parties' evidence

Defendant Weaver attached the following to her motion for summary judgment: (1) Excerpts of March 8, 2023 Deposition of Dr. Francis G. O'Connor ("O'Connor Dep."); (2) Affidavit of Brandon Washington ("Washington Aff."); (3) Affidavit of Steven Gass ("Gass Aff."); (4) Affidavit of Vick Thornburg ("Thornburg Aff."); (5) Affidavit of Gisela Altamirano ("Altamirano Aff."); (6) Second Affidavit of Jerrika Weaver ("Weaver Second Aff."); (7) Weaver Body Camera Video (Flash Drive Per Order, Dkt. No. 86); (8) March 22, 2023 Report of Alex Germane ("Germane Report"); (9) Alex Germane Rear Compartment View with Mirror Field of View Overlay Video (Flash Drive Per Order, Dkt. No. 86); (10) Excerpts of July 19, 2022 Deposition of Brent Hobbs ("Hobbs Dep.");

(11) Excerpts of July 19, 2022 Deposition of Jerrika Weaver ("Weaver Dep."); (12) Second Affidavit of Shawn Fitzgerald ("Fitzgerald Second Aff."); (13) Weaver Rear Seat Video (Flash Drive Per Order, Dkt. No. 86); (14) Plaintiffs' First Amended Complaint; (15) Intervenor Plaintiff's Amended Original Complaint; (16) medical records ("Def. Ex. 16"); (17) autopsy records ("Def. Ex. 17"); (18) December 18, 2022 Report of Stacey L. Hail, M.D. ("Hail Report"); (19) September 1, 2022 Report of Kevin R. Madison, CCP, PCI, PI ("Madison Report"); (20) Madison Revised Report dated January 2, 2023 ("Madison Revised Report"); (21) Texas Commission on Law Enforcement Persona Status Report regarding Kevin R. Madison ("Def. Ex. 21"); (22) Excerpts of March 6, 2023 Deposition of Kevin R. Madison ("Madison Dep."); (23) Second Affidavit of Joshua Mason ("Mason Second Aff."), with attached transcript of the August 30, 2019 interview with Weaver (Ex. A) and Mason's Investigative Report (Ex. B) (herein, "Investigative Report"); (24) March 22, 2023 Report of Thomas Charles Kerss ("Kerss Report"); (25) November 14, 2022 Report of Francis G. O'Connor, M.D. ("O'Connor Report"); and (26) a copy of the opinion in *Reed v. Nacogdoches Cnty.*, No. 22-40126, 2023 WL 3563017 (5th Cir. May 19, 2023).

Hobbs and Scott attached to their motion for summary judgment the same exhibits attached as Exhibits 1-7, 10-21,[5] 23-24, and 26 to Weaver's motion. Additionally, Hobbs

5. Whereas Weaver attaches only portions of Plaintiff's First Amended Complaint and Intervenor Plaintiff's Amended Original Complaint (Exhibits 14-15), Hobbs and Scott attached the complaints in their entirety.

and Scott attached the following: (1) Second Affidavit of Brent Hobbs ("Hobbs Second Aff."), attached as Exhibit 8; (2) Second Affidavit of William Scott ("Scott Second Aff."), attached as Exhibit 9; (3) additional excerpts of March 6, 2023 Deposition of Kevin R. Madison ("Madison Dep."), attached as Exhibit 22; (4) Hobbs Body Camera Video, attached as Exhibit 25; (5) Scott Front Dash Camera, attached as Exhibit 26; and (6) Scott Body Camera Video, attached as Exhibit 27.

Plaintiffs attached the following evidence (Dkt. Nos. 114, 116) in support of their responses to Defendant' motions:[6] (1) Transcript of July 19, 2022 Deposition of Brent Hobbs ("Hobbs Dep."); (2) Transcript of July 18, 2022 Deposition of William Scott ("Scott Dep."); (3) Expert Report from Kevin Madison; (4) First Amended Complaint; (5) Expert Report from Dr. O'Connor; (6) Transcript of March 8, 2023 Deposition of Dr. O'Connor ("O'Connor Dep."); (7) Transcript of July 19, 2022 Deposition of Jerrika Weaver ("Weaver Dep."); (8) Weaver Body Camera (Flash Drive, Dkt. Nos. 117, 118); (9) Weaver Rear Dash Camera (Flash Drive, Dkt. Nos. 117, 118); (10) Hobbs Body Camera (Flash Drive, Dkt. Nos. 117, 118); and (11) Scott Body Camera (Flash Drive, Dkt. Nos. 117, 118).

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6. Intervenor did not file separate responses to Defendants' motions. Rather, Intervenor filed a Notice of Joinder and Adoption by Reference of Plaintiff's Responses to Defendants' Motions for Summary Judgment, joining in and adopting by reference all arguments and evidence included in and attached to Plaintiff's responses (Dkt. Nos. 113, 114, 115 and 116) to the Defendants' motions for summary judgment. *See* Dkt. No. 123.

Appendix D

Defendant Weaver attached the following to her reply (Dkt. No. 127): (1) additional excerpts of March 6, 2023 Deposition of Kevin R. Madison ("Madison Dep."), attached as Exhibit 27; and (2) Madison Revised Report dated January 2, 2023 ("Madison Revised Report").

B. Evidentiary issues

Defendants have filed two motions to strike. In their motion to strike Plaintiffs' retained police liability expert Kevin Madison, Defendants move to strike the following opinions from Madison's Report: (1) opinions 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, and 19 that Defendants violated Fourteenth Amendment rights when not based on clearly established law; (2) opinions 1, 3, 4, 5, 6, 7, 8, 9, 15, 16 and 17 regarding TTPD General Orders and/or the Code of Ethics; (3) opinions 1, 3, 9, 13, 15, 18 and 19 based on negligence standards; (4) opinions 2, 13, 14, 16, 17, 18 and 19 to the extent they contain improper legal conclusions; (5) opinions 3, 4, 5, 6, 7, 9, 10, 11, 12, 14, 15, 16, 17, 18, and 19 regarding Boykin, Jr.'s medical condition(s); and (6) opinions 4, 5, 6, 7, 8, 10, 15, 17, 18, and 19 which reference an assertion that Boykin, Jr. "passed out" before being transported to the Bi-State jail. Dkt. No. 87. In their motion to strike Intervenor's expert Stan Smith, Defendants move to strike Smith's opinions as to alleged damages (the loss of financial support, loss of household/family services, and loss of society or relationship) sustained by Intervenor, Boykin, Jr.'s surviving father. Dkt. No. 88.

Defendants' motions to strike need not be addressed for purposes of Defendants' present motions for summary judgment. This does not mean the objections are without merit; rather, the cited evidence is insufficient to create a genuine issue of material fact for the reasons discussed below. *Cortez-Burlingame v. Galveston Cnty.*, No. 3:18-CV-00183, 2020 WL 2062263, at *4 (S.D. Tex. Apr. 27, 2020), *report and recommendation adopted sub nom. Burlingame v. Galveston Cnty.*, No. 3:18-CV-00183, 2020 WL 4018830 (S.D. Tex. July 16, 2020), *aff'd sub nom. Cortez-Burlingame v. Galveston Cnty.*, No. 20-40540, 2022 WL 1114413 (5th Cir. Apr. 14, 2022) (citing *Dallas Police Ass'n v. City of Dallas*, No. 3:03-CV-0584D, 2004 WL 2331610, at *1 n.4 (N.D. Tex. Oct. 15, 2004)) ("Because the court's decision is not affected even if the court assumes the objections have merit, it need not decide the objections and it overrules them as moot.").

C. Material facts[7]

Following an incident with Texarkana College Police Department ("TCPD") officers on August 29, 2019, Boykin, Jr. was transported by Texarkana Texas Police Department ("TTPD") officer Weaver to the Bi-

7. The material facts set forth in this section represent the facts as discerned by the Court from the pleadings and the parties' respective evidentiary submissions, in light of the relevant summary judgment standard requiring the record be viewed in the light most favorable to the nonmoving party. Accordingly, these are the "facts" for purposes of summary judgment only; they may not be the actual facts. *See Willmore-Cochran v. Wal-Mart Assocs., Inc.*, 919 F. Supp. 2d 1222, 1228 (N.D. Ala. 2013).

State jail. Boykin, Jr. was unconscious upon arrival. Investigative Report at 3. CPR was attempted at the scene, and a LifeNet ambulance responded. *Id.* After being transported to Wadley Regional Medical Center, Boykin, Jr. died. *Id.* Texas Ranger Joshua S. Mason was contacted by TCPD Chief Steven Gass to assist with a Custodial Death Investigation.[8] Gass Aff., ¶ 3. Plaintiff and Intervenor have filed Fourteenth Amendment claims under § 1983 against three TTPD officers, alleging they each deliberately denied treatment for Boykin, Jr.'s serious medical needs following his arrest.

1. Events involving TCPD officers

Video footage from College Bowl in Texarkana, Texas depicts Boykin, Jr. walking to the Texarkana Community College campus on August 29, 2019 at 1:58 p.m. (and later running from the campus at approximately 2:09 p.m.). Investigative Report at 16. TCPD Chief Steven Gass ("Chief Gass") was in his office at the college at approximately 2:00 p.m. that day when he overheard Officer Vickey "Vic" Lynn Thornburg ("Thornburg") say a theft suspect was spotted at the Health and Science Building. *Id.* at 9.

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8. As part of his investigation, Ranger Mason secured incident reports from TCPD Chief Gass and TCPD officers Altamirano and Thornburg as well as TTPD officers Weaver, Hobbs, and Scott. Mason Second Aff., ¶ 4. He also secured recorded statements from Gass, Thornburg, Altamirano, and Weaver. *Id.* He secured the body camera and rear camera video of Weaver's interaction with Boykin, Jr. *Id.*

Appendix D

At approximately 2:03 p.m., Texarkana College Dean of Workforce, Community, and Business Education, Brandon Washington ("Washington"), advised TCPD officer Gisela Altamirano ("Altamirano") that he had observed a young black male with a blue backpack on campus and that the physical description matched the description of a suspect involved in two prior thefts occurring on the campus earlier in August 2019. Gass Aff., ¶ 4; Thornburg Aff., ¶ 4; Altamirano Aff., ¶ 4. Altamirano immediately responded to the Health Occupations Building. Altamirano Aff., ¶ 5 (stating Thornburg also responded to the Health Occupations Building to assist in locating the suspect).

Thornburg made initial contact with Boykin, Jr. on the second floor and asked his name. Thornburg Aff., ¶ 6 (stating Boykin, Jr. appeared nervous and replied his name was "Jason"). Thornburg also asked for identification. *Id.*

Altamirano walked around the corner while Thornburg was speaking with Boykin, Jr. Altamirano Aff., ¶ 6. After looking at Altamirano, Boykin, Jr. "began shifting his body away from Thornburg and as Thornburg attempted to grab and detain the suspect, he slid off the backpack" and ran towards the stairway. *Id.* Thornburg fell to the floor, and Altamirano pursued the subject outside. *Id.*, ¶¶ 6, 7. According to Thornburg, she notified Chief Gass by radio that the subject had fled. Thornburg Aff., ¶ 8 (stating she looked out the window and observed Altamirano running north).

Boykin, Jr. ran across a field behind College Bowl, crossed Richmond Road, and "hid in a car wash bay at

the intersection of Richmond Road and College Drive." Investigative Report at 5-6. Thornburg quickly left the building and entered the car Chief Gass was operating. *Id.* at 8; Gass Aff., ¶ 7. They drove toward the car wash. Investigative Report at 8.

Meanwhile, Altamirano pursued Boykin, Jr. on foot briefly, prior to being transported in a personal vehicle being driven by Washington. *Id.* at 2, 5-6; *see* Madison Revised Report at 6. As Washington's vehicle was driven to Boykin, Jr.'s location, Washington and Altamirano observed Boykin, Jr. "visibly tired and out of breath walk and slowly jog across Richmond Road to the car wash," where he "was bent over trying to catch his breath." Madison Revised Report at 6.

Boykin, Jr. began running again toward the EZ Mart parking lot. Investigative Report at 6. Altamirano exited Washington's vehicle and pursued Boykin, Jr. on foot. *Id.* Altamirano was able to "jump on the back area" of Boykin, Jr., causing them both to fall. *Id.*; *see also* Altamirano Aff., ¶ 9 (stating she was able to catch up to Boykin, Jr. and "grabbed him making us fall to the ground face down"); *see also* Madison Revised Report at 6.

Altamirano was able to handcuff Boykin, Jr.'s left wrist, but Boykin, Jr. put his right arm under his body. Altamirano Aff., ¶ 9. At that time, Chief Gass arrived and assisted in handcuffing Boykin, Jr.'s right arm. *Id.* Chief Gass stated that when he arrived he could see Altamirano sitting on top of Boykin, Jr., leaning forward with her legs straddling him holding onto her handcuffs. Gass Aff., ¶ 21.

Chief Gass could see Boykin, Jr. still trying to raise up which is why Gass placed his left hand on the right side of Boykin, Jr.'s head to keep him from lifting up and was able to get his right arm behind his back to secure the handcuffs. *Id.*, ¶¶ 9, 21.

According to Altamirano, the temperature was hot, and she "just rolled over after Boykin was secured and attempted to breathe normal again." Investigative Report at 6. According to Kevin R. Madison, Plaintiff's expert witness, the temperature on the afternoon of August 29, 2019 was approximately 90 degrees Fahrenheit with a relative humidity of 52%, resulting in a Heat Index Temperature of 96 degrees Fahrenheit. Madison Revised Report at 5. Madison further states that Washington noted Altamirano, "who pursued Boykin mostly by riding in Mr. Washington's pickup truck, was so exhausted and out of breath that Mr. Washington was concerned for her." *Id.* at 7 (noting that Altamirano could not talk or communicate but nodded yes when Washington asked if she was okay and further noting that Boykin, Jr. was out of breath but continued talking and answering questions).

In her affidavit, Altamirano states as follows:

> At that point I rolled over onto my back since he had been handcuffed. While on my back I was attempting to catch my breath. I suffer from asthma. It was extremely hot that day and I believe the suspect probably ran one-half (1/2) mile from the Health Occupations Building to the scene of the arrest. The suspect was

> identified as Darren Boykin, Jr. He commented several times that he was out of breath and was instructed by Chief Gass to sit up. However, he refused to do so. He advised the officers that he could not breathe and was told it would be easier for him to breathe if he sat up. However, he still would not sit up even after officers tried to help him up.

Altamirano Aff., ¶ 10.

Thornburg described Altamirano as "winded" after the event concluded, and he overheard Boykin, Jr. say he could not breathe. Investigative Report at 8. Chief Gass and Thornburg tried to get Boykin, Jr. to sit up, but he just leaned forward and laid down again. Gass Aff., ¶ 10 ("He was told several times that sitting up would help him breathe easier but he continued to lay on his back."). According to Madison, Boykin, Jr.'s position, with his arms handcuffed and behind his back, pulled the chest and arms backward, "making it more difficult for Mr. Boykin to expand and contract his chest, thus, impeding full inspiration of oxygenated air and full expiration of respiratory by-products." Madison Revised Report at 8.

Boykin, Jr. was searched incident to his arrest, and his identification card was located listing his name as Darren Boykin, Jr. Gass Aff., ¶ 11. Thornburg ran a check for warrants and was advised of a pending parole violation warrant from the State of Ohio. *Id.*; *see also* Thornburg Aff., ¶ 9. Boykin, Jr. was sitting upright on the ground while TCPD officers waited for TTPD offices to arrive

to transport him to the Bi-State jail. Madison Revised Report at 8.

2. Events involving Defendant (TTPD) officers

a. At the scene of the arrest

Officers Hobbs, Weaver, and Scott

Meanwhile, at approximately 2:10 p.m., TTPD officer Brent Hobbs heard the police dispatcher report that Texarkana College police officers were in a foot pursuit with a subject.[9] Hobbs Second Aff., ¶ 4. TTPD officer William Scott, an on-duty sergeant for TTPD, also heard the police dispatcher report.[10] Scott Second Aff., ¶ 4. The subject was reported to be running from Texarkana College in the area of 2500 block of N. Robinson Road. The police dispatcher then advised that the Texarkana College police officers had the subject in custody and that the foot pursuit ended at or near 2314 College Drive. *Id.*, *see also* Hobbs Second Aff., ¶ 4.

Hobbs was in the area and decided to drive to the arrest location to determine if any additional help was

9. Defendant Hobbs has been a peace officer with the City of Texarkana, Texas since February 2008. Hobbs Second Aff., ¶ 2.

10. Defendant Scott was employed as a peace officer with the City of Texarkana, Texas from June 2005 to October 2021. Scott Second Aff., ¶ 2. On August 29, 2019, Scott was on-duty as a sergeant for TTPD. *Id.* A sergeant is the first line supervisor to a police officer. *Id.* Scott was not a policymaker for the TTPD. *Id.*

needed. Hobbs Second Aff., ¶ 4. TTPD officer Jerrika Weaver also went to the scene of the arrest to assist.[11] Scott Second Aff., ¶ 4; Weaver Body Camera Video, time mark 2:38.

Weaver arrived on the scene and assisted Chief Gass. Investigative Report at 2, 6, 8. When Weaver arrived, Boykin, Jr. was in handcuffs and breathing heavily. *Id.* at 11. Weaver testified she saw Altamirano at the scene bent over with her hands on her knees, exhausted from running. Weaver Dep. at 26:1-9; *see also id.* at 27:5-14 (stating she saw Altamirano with her arms over her head, indicating she was physically exhausted from running); Weaver Body Camera Video, time mark 2:48 (Altamirano telling Boykin, Jr. "it's easier if you sit up to breathe," and Boykin, Jr. responding, "I can't sit up"). Altamirano then stood with her hands above her head while Chief Gass held Boykin, Jr. in a sitting up position. *Id.* at 3:10. While the officers were asking Boykin, Jr. his date of birth, Boykin, Jr. stated his leg hurt. *Id.* at 3:34. During this time, Boykin, Jr. was communicating with the officers. O'Connor Dep. at 33:9-19 (stating from his review of the video that Boykin, Jr. "never lost consciousness," "did not pass out," and "he was communicating with the officers"); Gass Aff., ¶ 17 (stating that Boykin, Jr. did close his eyes but also repeatedly was able to talk and also gave the officers an alias of Jason Williams when asked his name).

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11. Defendant Weaver has been a peace officer since 2013. Weaver Second Aff., ¶ 2. She has been employed by the City of Texarkana, Texas since April 2016, working as a patrol officer for the Texarkana Texas Police Department. *Id.*; Investigative Report at 11.

Appendix D

As Hobbs was driving down College Drive, he observed TCPD officer Altamirano standing next to the roadway; she was leaning over with her hands on her knees breathing heavily. Hobbs Second Aff., ¶ 5. Hobbs presumed that she was exhausted from the foot pursuit. *Id.* Hobbs also observed Chief Gass standing by an individual, later identified as Boykin, Jr., laying on the ground. Hobbs then drove a short distance down College Drive, turned around and parked in front of 2314 College Drive. *Id.* As Hobbs was parking, he observed Boykin, Jr. being carried toward Weaver's patrol car.[12] Hobbs Second Aff., ¶ 5.

Chief Gass states Boykin, Jr. was asked to walk to Weaver's patrol unit but he said his legs hurt, so Gass and Altamirano lifted his legs and carried Boykin, Jr. partially to the patrol unit for transport. Gass Aff., ¶ 13. Weaver then stated, "he ran all this way and then he acts like he can't . . . function." Weaver Body Camera Video, time mark 3:50. Weaver helped TCPD officers carry Boykin, Jr. part of the way to her patrol vehicle. Weaver Body Camera Video, time mark 3:51-4:26.

Weaver asked Boykin, Jr. if he was going to get into the car by himself, and Boykin, Jr. said "yes;" he then walked the rest of the way and was able to get into the

12. Hobbs stated in his report that, as he was parking, he observed Chief Gass, Thornburg, and Weaver carrying Boykin, Jr. toward Weaver's patrol vehicle; however, upon reviewing the videos, Hobbs now realizes that it was Chief Gass, Altamirano, and Weaver that carried Boykin, Jr. to Weaver's patrol vehicle. Hobbs Second Aff., ¶ 5.

vehicle "under his own power." Gass Aff., ¶ 13. According to Altamirano, although Boykin, Jr. at first said he could not walk, he "ultimately agreed he could enter the patrol unit by himself and did so." Altamirano Aff., ¶ 11; *see also* Weaver Body Camera Video, time mark 4:51. Weaver buckled him into the back seat.

As Hobbs was exiting his patrol vehicle, he could see that Boykin, Jr. had been placed into the right back seat of Weaver's patrol vehicle and the door was shut. Hobbs Second Aff., ¶ 6. After Boykin, Jr. was inside the back of Weaver's patrol unit, he remained there for approximately four and one-half minutes before departure. Germane Report at 4; Weaver Rear Seat Camera, time mark 05:00 to 9:40. The rear seat camera video from Weaver's patrol unit depicts Boykin, Jr. in the rear compartment. The video also captures a reflected image of Weaver from the plexiglass divider that separates the front and rear compartments. Weaver Dep. at 23:1-12, 44:19-45:6. The rear seat camera is mounted above the plexiglass divider inside the rear seat compartment. There was not a monitor or screen in the front compartment that provided Weaver a view of Boykin, Jr. the same as depicted in the rear seat video. Fitzgerald Second Aff., ¶ 4 & attached Exs. A&B (photos of rear seat camera).

Upon arrival, Hobbs retrieved a water bottle from his patrol vehicle and gave the bottle to Altamirano because she looked exhausted and was still breathing heavily. Hobbs Second Aff., ¶ 6; *see* Hobbs Dep. at 16:5-23 (stating he gave Altamirano two bottles of water and could have given water to Boykin, Jr. but did not); Weaver

Body Camera Video, time mark 5:44. Hobbs stated in his deposition as follows:

> I provided Officer Altamirano water. She was breathing heavily. She just got finished with a lengthy foot pursuit wearing a black uniform with a bullet proof vest and all of her police gear, and she was gasping for air herself. Mr. Boykin was being placed in the back seat of a patrol car that had air conditioning in the vehicle, which in a short time would be on his way to the jail to get water from the jail and get relief from the foot chase.

Hobbs Dep. at 15:8-16.

Hobbs then stood near the mailbox in front of 2314 College Drive near Altamirano, Chief Gass, and Weaver. Hobbs Second Aff., ¶ 6; Weaver Body Camera Video, time mark 5:47. Altamirano was still bending over and reaching above her head at times. Weaver Body Camera Video, time mark 5:59 to 6:14.

Around this time, Hobbs heard a loud muffled sound from the backseat of Weaver's patrol vehicle, but he could not make out what was being said. Hobbs then approached Weaver's vehicle. Hobbs Second Aff., ¶ 6. From inside the back seat (with the door closed), Boykin, Jr. had called out, "Help!" while wincing and breathing heavily. Weaver Rear Seat Camera, time mark 5:48. He then made a loud noise and yelled, "Help!" a second time. *Id.*, time mark 6:15.

Hobbs opened the front door of Weaver's patrol vehicle. Hobbs Second Aff., ¶ 6; *see also* Hobbs Dep. at 17:1-8. As Hobbs opened the front door, Boykin, Jr. stated, "please turn the air on, I can't breathe, please." Weaver Rear Seat Video, time mark 6:21. The air conditioner was already on,[13] but Hobbs increased the airflow to high and told Boykin, Jr. "I got some air going here." *Id.*, time mark 6:26. On the video, the air flow can be heard increasing. *Id.*, time mark 6:28. Madison testified that Hobbs adjusted the air-conditioning to make Boykin, Jr. more comfortable. Madison Dep. at 234:3-8.

Hobbs then shut the front door. Weaver Rear Seat Video, time mark 6:32; *see also* Hobbs Second Aff., ¶ 7. Hobbs stated to Weaver, "He's back here hollering he can't breathe." Weaver Body Camera Video, time mark 6:30. Weaver responded, "He will be fine." *Id.* at 6:32. When Hobbs opened the back door, he had the following conversation with Boykin, Jr.:

Hobbs: "I got the air going, lean up"

Boykin, Jr.: "I can't breathe"

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13. According to Madison, Weaver's patrol car was running, with the air conditioning on, when Boykin, Jr. was placed in the back seat; however, the metal and plexiglass partitions between the front and back seat areas "do not allow air conditioning to freely pass between the front seat area and the rear suspect area, which has no air conditioning ducts." Madison Revised Report at 10. During his deposition, Madison acknowledged he did not examine the patrol car in question so he "just assumed that there was no air vents in the backseat." Madison Dep. at 233:1-13.

> Hobbs: "You breathed long enough to get over here and run"
>
> "The air is on back here in the back"

Id., time mark 6:33 to 6:42.

Standing just outside the open door, Weaver stated, "You can't call I can't breathe after you ran forever and then you have felonies." *Id.*, time mark 6:43 to 6:47. As Weaver is talking, Boykin, Jr. softly stated, "I can't."[14] Weaver Rear Seat Video, time mark 6:46. Someone (maybe Hobbs) asked, "got felony warrants?"[15] Weaver responded, "Apparently, that's what they're saying." *Id.*, time mark 6:52.

Hobbs walked away from Weaver's patrol vehicle at time mark 6:52. Hobbs Second Aff., ¶ 8; Weaver Rear Set Video, time mark 6:52. Thus, the total amount of time of Hobb's interaction with Boykin, Jr. was approximately thirty-two (32) seconds. *Id.* Hobbs did not have any further interaction with Boykin, Jr. Hobbs Second Aff., ¶ 8.

Still standing outside the open back seat door with Boykin, Jr.'s identification card in her hand, Weaver asked

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14. This was over four minutes after Weaver knew that Boykin, Jr. was no longer running. Weaver Dep. at 35:10-16. According to Weaver, she has experienced on several occasions a person saying they can't breathe when charged with several felonies. *Id.* at 35:23-36:3.

15. Hobbs Body Camera Video does not start until after this interaction.

Boykin, Jr. if he could feel the air, to which he responded, "no." Weaver Body Camera Video, time mark 6:57. Weaver shut the back door as she said, "let me turn the vent, look." Weaver Rear Seat Video, time mark 7:00; Weaver Body Camera Video, time mark 7:00. Weaver then opened the passenger side front door and stood there. Weaver Body Camera Video, starting at time mark 7:04.

Chief Gass requested that Weaver transport Boykin, Jr. to the Bi-State jail. *Id.* at 7:26. According to Chief Gass, he did so because his vehicle did not have a protective screen between the front and rear seats. Gass Aff., ¶ 12. Chief Gass advised Weaver that he would have an officer meet her at the Bi-State jail to book Boykin, Jr. into jail because it was the TCPD that arrested Boykin, Jr. *Id.*; *see also* Weaver Second Aff., ¶ 5. Weaver agreed to transport Boykin, Jr. Gass Aff., ¶ 12.

Boykin, Jr. again asked for "help" while Weaver was standing outside the open front passenger seat door. Weaver Body Camera Video, time mark 7:56. Weaver stated, "I'm going to help you get your way down to the jail." *Id.*, time mark 7:58. Boykin, Jr. then asked for "help back here," to which Weaver asked, "what do you need help with?" *Id.*, time mark 8:03. Boykin, Jr. mentioned his leg, and Weaver asked, "what did you do to your leg?" *Id.*, time mark 8:07. Boykin, Jr. stated he did not know, but that he needed to "stretch it." *Id.*, time mark 8:13. Weaver stated, "it's probably a cramp." *Id.*, time mark 8:15. Boykin, Jr. then stated, "I can't move." *Id.*, time mark 8:17. Weaver then asked Boykin, Jr. how long he had been here, and Boykin, Jr. responded about six months. *Id.*, time mark

8:20 to 8:26. This was approximately two minutes before departing the scene of the arrest.

A few moments later, when Weaver and Hobbs were standing by Weaver's patrol unit discussing Boykin, Jr., Weaver stated, "he says his legs hurt." *Id.*, time mark 8:43. Hobbs stated, "His legs hurt because he ran." Hobbs Body Camera Video, time mark 00.30.[16] Weaver commented she was going to take him to Bi-State. Weaver Body Camera Video, time mark 8:50.

Hobbs then noticed that Scott arrived on scene in his patrol vehicle.[17] Hobbs Second Aff., ¶ 10. Scott exited his patrol vehicle and began walking toward Weaver and Hobbs. Scott Body Camera Video, time mark 0:53. Scott also noticed that Chief Gass and a second Texarkana College officer were near Weaver's patrol vehicle. The following conversation occurred:

> Officer Weaver: "I'm going to transport this guy down to the jail"
>
> Scott: "Alright, ok"

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16. The Body Camera Video provided to the Court starts at this point.

17. Hobbs had advised Scott, via police radio, that the subject was in custody, and that Texarkana College officers had requested TTPD to transport the subject to jail for them. Scott Second Aff., ¶ 4. Scott advised Hobbs that TTPD would transport. Id. Because Scott was in the area, he decided to drive to the arrest location to determine if any additional help was needed. Id.

> Hobbs: "He says he can't breathe, but you can hear him hollering from the backseat"
>
> Officer Weaver: "He just ran too much"
>
> Scott: "Ok, fair enough"
>
> Chief Gass: "Yeah, he ran from our campus"

Id., time mark 0:57-1:12;[18] *see also* Scott Second Aff., ¶ 5. During this time, Boykin, Jr. yelled out "Help!" a couple of times. Weaver Rear Seat Camera, time mark 9:00 to 9:14.

As Weaver got into the front seat of her patrol unit, Boykin, Jr. was softly stating in the back, "please, help me." Weaver Body Camera Video, time mark 9:22 to 9:25. Weaver asked, "Can you feel the air," to which Boykin Jr. responded, "No." *Id.*, time mark 9:28 to 9:31 (also stating "I can't breathe"). At that moment, Scott spoke to Weaver through the open front passenger window. *Id.*, time mark 9:32; Scott Body Camera Video, time mark 1:20; Weaver Dep. at 42:14-43:11 (stating she heard Boykin, Jr. say he could not breathe when she was cut off by Scott). Scott advised Weaver to give him a "thumbs up" when she was ready to back out and leave the scene so that Scott could direct traffic for her. Scott Body Camera Video, time mark 1:30.

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18. The above conversation is also depicted on the Weaver Body Camera Video at time mark 9:05 and on Hobbs Body Camera Video at time mark 0:48

Scott then walked back toward the roadway to assist with directing traffic. Scott Second Aff., ¶ 6. Scott got back in his patrol vehicle at time mark 2:02, and then left the scene. *Id.* Thus, Scott was at the scene of the arrest for approximately one (1) minute and nine (9) seconds. *Id.*

Meanwhile, Hobbs also assisted with directing traffic so that Weaver could leave the scene and proceed to the Bi-State jail. Thereafter, Hobbs left the scene and returned to duty. Hobbs Second Aff., ¶ 10.

After Scott left the scene, he made the decision to proceed to the Bi-State jail to assist Weaver. Scott Second Aff., ¶ 7. The reason Scott chose to do so is because Boykin, Jr. had already demonstrated that he would flee from the police. *Id.* Scott wanted to ensure that Weaver had assistance in the event Boykin, Jr. chose to flee again or resist transport. *Id.*; *see also* Scott Dep. at 64:12-17 (stating he made the decision to go to the jail to assist Weaver "in any way after her arrival at the jail, because it was an other than completely compliant arrest").

Awareness at the scene of the arrest of whether Boykin, Jr. was in serious medical distress requiring medical assistance

All three of the Defendant officers testified that they did not think Boykin, Jr. was in serious medical distress at the scene of the arrest. In her second affidavit, Weaver stated as follows:

> At the scene of the arrest I could see Officer Altamirano and Boykin, Jr. Both appeared to be physically exhausted which seemed normal after running ½ mile in the August heat. I could hear Boykin, Jr. say, 'I can't breathe' and that his legs hurt. Both complaints seemed consistent for a suspect having fled from the TCPD. I also saw Boykin, Jr. breathing, heard him speak, holler, kick and respond to questions. I did not think he was in serious medical distress when he was put into my patrol unit or when we departed the arrest scene. . . .

Weaver Second Aff., ¶ 6. Weaver testified that based on the circumstances she did not feel there was a need to call for an ambulance or for medical assistance at the scene of the arrest. Weaver Dep. at 17:1-3; *see also id.* at 18:4-5 ("TC College and myself did not feel that there was anything pressing."), 95:16-21. Weaver explained "there was a Chief of Police out there and his subordinates and they did not make it vocal, and I did not feel that there was a medical need that needed to be met or necessity for medical attention." *Id.* at 96:2-5. According to Weaver, Boykin, Jr. was able to speak, yell, step into the patrol car, kick the back seat of her car, and acknowledge the officers. *Id.* at 36:8-20.

According to Hobbs' second affidavit, at no time did Hobbs believe or infer that Boykin, Jr. was experiencing any type of serious medical crisis, or that a substantial risk of serious harm existed. Hobbs Second Aff., ¶ 9. During his deposition, Hobbs stated that Boykin, Jr. told Hobbs

that he could not breathe and asked if he could turn on the air conditioner. Hobbs Dep. at 17:9-15. Hobbs turned the air conditioner on high to give Boykin, Jr. relief from the foot chase, which Hobbs "presumed he was exhausted from . . . running that long distance in the heat of that day." *Id.* at 17:16-19. Hobbs could see Boykin, Jr.'s chest and that he was inhaling and exhaling; he could also hear him breathing heavily at the same time as he was talking. *Id.* at 19:16-25. Hobbs acknowledged that it is possible that when Boykin, Jr. said he could not breathe, he was trying to communicate he was having difficulty breathing. *Id.* at 20:1-4; *see also id.* at 23:11-17 (acknowledging that difficulty breathing could be a serious or potentially life threatening situation). However, Hobbs did not see a medical need when he was speaking to Boykin, Jr. or that Boykin, Jr. was in any distress. *Id.* at 20:5-13. Hobbs construed Boykin, Jr.'s complaints that he could not breathe as related to physical exhaustion from the pursuit. *Id.* at 22:12-23:2, 32:23-33:12.

When asked how someone in custody in the back seat of a patrol car would get medical attention, Hobbs stated the officers would either call for medical attention or get medical attention "when they get to the jail." *Id.* at 24:11-20; *see also id.* at 28:16-23 (stating that although TCPD was the initial arresting agency and TTPD was the transporting agency, TTPD is responsible for safe transport while an arrestee is in its custody). Hobbs testified he "made the decision not to get medical attention because there was a Police Chief, two other officers from Texarkana College plus one of [his] fellow co-workers on the scene, as well, and not one of them indicated that there

was a medical necessity or need because [Boykin, Jr.] did not exhibit any medical distress that needed medical attention." *Id.* at 26:16-22; *see also id.* at 38:11-13 (stating he "did not see that there was an immediate medical issue that required immediate assistance nor did any of the other officers on the scene").

During his short time at the scene of the arrest, Scott had no interaction with, or observation of, Boykin, Jr. Scott Second Aff., ¶ 6. Scott was the only sergeant from TTPD on the scene, and there was no TTPD officer there that ranked above him. Scott Dep. at 30:11-25. Scott had the authority to give Hobbs and Weaver orders and instructions. *Id.* at 31:1-3; *see also id.* at 93:19-94:3 (stating that as the highest rank at the scene of the incident, he had the ability and authority, if he had reached a conclusion that emergency medical services were needed based on the information and circumstances present, to direct Weaver to take Boykin, Jr. directly to the hospital to be observed); *see also id.* at 44:3-23 (stating that an officer can call for medical assistance without the supervisor's direction).

While at the scene of the arrest, Scott never believed or inferred that Boykin, Jr. was experiencing any type of serious medical crisis, or that a substantial risk of serious harm existed. Scott Second Aff., ¶ 9. Prior to arriving at the scene of the arrest, Scott was aware that a foot chase had occurred with Boykin, Jr. on a hot and humid August afternoon. *Id.* Based upon that information, and the information provided to Scott at the scene of the arrest by Hobbs, Weaver and Chief Gass, Scott fully believed

that Boykin, Jr. was simply experiencing exhaustion from the foot pursuit with the Texarkana College officers. *Id.* Further, when Scott arrived at the scene, four experienced and well-trained police officers were present. *Id.* None of these officers ever mentioned or even suggested to Scott that Boykin, Jr. was in any type of serious medical distress. *Id.* Scott had known Hobbs, Weaver, and Chief Gass for years prior to August 29, 2019. *Id.* Scott trusted their judgment because he knew they would have summoned medical assistance if they in any way believed it was needed. *Id.*

Thus, even though he had the ability to call for medical assistance by police radio, Scott did not call for medical assistance and did not instruct Hobbs or Weaver to do so. Scott Dep. at 37:15-38:3. Scott testified that Hobbs told him at the scene of the arrest that Boykin, Jr. was hollering from the back seat that he could not breathe and that "it was related to foot pursuit and exhaustion." Scott Dep. at 33:9-36:14, 37:7-14 (stating Boykin, Jr. was hollering that he could not breathe after a "lengthy foot pursuit" in the heat). According to Scott, he had no indication that emergency medical attention was needed at that time given the information he was given, the presence of other competent officers who had viewed Boykin, Jr., and the background circumstances of the "relatively lengthy foot pursuit." *Id.* at 40:11-20; *see also id.* at 48:2-10 (stating he did not reach the conclusion that there was a medical emergency based on all of the circumstances, including the "lengthy foot pursuit, the other officers present, the information given to [him] that he was hollering and appeared to be exhausted, [and] had ran far" in the heat).

Scott took information and circumstances and weighed them and did not reach the conclusion that Boykin, Jr.'s breathing issues constituted an emergency medical need. *Id.* at 84:3-90:10. According to Scott, the first time he learned that Boykin, Jr. was in any serious medical distress was when he approached Weaver's patrol vehicle at the jail. Scott Second Aff., ¶ 9; *see also* Scott Dep. at 91:17-18 ("Later at the jail, I arrived at the conclusion that he had a medical emergency, sir.").

Additionally, the TCPD officers and personnel present at the time of the arrest did not think Boykin, Jr. was in serious medical distress at the scene of the arrest. Altamirano stated Boykin, Jr. was breathing heavy but did not appear to be in any immediate medical distress. Altamirano Aff., ¶ 12 (stating that if she had believed Boykin, Jr. was in medical distress or needed medical attention, she would have immediately called the dispatcher for an ambulance or would have requested for Chief Gass to do so). Chief Gass stated it was apparent at the scene of the arrest that Boykin, Jr. was tired from running nearly one-half mile, and both Boykin, Jr. and Altamirano, who suffers from asthma, were breathing heavily. Gass Aff., ¶ 14. According to Chief Gass, he did not believe that there was a need to call for medical assistance to treat Boykin, Jr. and that if he had thought so, he would have immediately contacted the dispatcher and requested medical assistance. *Id.*

Washington stated both Boykin, Jr. and Altamirano seemed visibly out of breath and gasping for air, and it seemed apparent to Washington that both of them were

tired from having run a long distance in the August heat. Washington Aff., ¶ 7 (stating both were able to walk and talk and further stating that at no time at the scene of the arrest did Boykin, Jr. appear in serious medical distress, become unconscious, or briefly pass out). Similarly, Thornburg stated both Boykin, Jr. and Altamirano were breathing heavily, but both were able to talk. Thornburg Aff., ¶ 10. According to Thornburg, at no time while in custody of the TCPD at the scene of the arrest did Boykin, Jr. appear to be in a serious medical distress; rather, his condition seemed such as one would expect having been chased by police on foot for nearly one-half mile. *Id.*

According to Ranger Mason, there was nothing to indicate that Boykin, Jr. was in serious medical distress while at the scene of the arrest. Mason Second Aff., ¶ 7 ("Based on my review of the body camera video at the scene of the arrest, it was apparent that Boykin, Jr. and Officer Altamirano were physically exhausted after a foot pursuit of nearly ½ mile in the August heat.").

b. During transport

Officer Weaver

Weaver transported Boykin, Jr. from the EZ Mart to the Bi-State jail. Investigative Report at 12. Upon initial departure, Weaver asked, "Do you want me to roll your window down?" to which Boykin, Jr. responded, "No, it'll make it hotter." Weaver Body Camera Video, time mark 10:13. Weaver then commented, "Okay, you just want me to keep the air on high?" and asked, "Do you feel it?"

Boykin, Jr. responded, "Yes." Weaver Rear Seat Video, time mark 10:20.

During the next two minutes Weaver was on her cell phone speaking to the criminal investigation division of the TTPD. At one point during the conversation, Boykin, Jr.'s head fell forward and hit the divider, causing a "very quiet" noise on Weaver's side and causing her to look back. *See* Weaver Dep. at 47:3-48:13; Weaver Rear Seat Video, time mark 11:43 to 11:47.

According to her second affidavit, Boykin, Jr. was still moving around in the rear compartment and communicating with her during the first half of the transport. Weaver Second Aff., ¶ 7. Approximately two minutes and fourteen seconds after departure, Boykin, Jr. commented, "I'm about to pass out." Weaver Rear Seat Video, time mark 12:20. Weaver associated this with his physical exhaustion from the foot pursuit. Weaver Second Aff., ¶ 7. According to Weaver, she commented, "You'll be okay, just lean against the glass." *Id.*; Weaver Rear Seat Video, time mark 12:30. This was at least ten minutes since Boykin, Jr. had stopped running. Weaver Dep. at 52:1-9.

After another quick phone call, Weaver commented, "They'll get you some water up there at the jail, okay." Weaver Body Camera Video, time mark 13:04. Weaver attempted to look at Boykin, Jr. but had to scoot over and pull up on her steering wheel in order to look at his face; at that moment, Boykin, Jr. was leaned up against the glass, and Weaver saw Boykin, Jr. opening and closing his eyes. Weaver Dep. at 54:1-55:1. According to Weaver, she could see Boykin, Jr. "moving around, opening and closing his

eyes as a normal person does, blinking, and he had his mouth opened to breathe like normal." *Id.* at 55:14-16; *see id.* at 56:13-18 (stating she saw his chest raising and lowering when she moved over to look at him).

Boykin, Jr. then stated, "I can't even talk." Weaver Body Camera Video, time mark 13:18. Weaver responded, "okay." Boykin, Jr. slumped over four minutes into the transport, leaning to his left in the opposite direction of the back door window. Weaver Rear Seat Video, time mark 14:20. Boykin, Jr. remained leaning to his left for the remainder of the transport. Germane Report at 4.

During the last half of the transport, Weaver continued to communicate with Boykin, Jr., though he did not respond.[19] Weaver Second Aff., ¶ 8. She was approximately four minutes from the jail garage and did not associate his silence with a cardiac event or other serious medical distress; rather, she continued to believe that he was physically exhausted. *Id.* (further stating that based on her training, experience, and judgment, "it is common for some detainees when going to jail to become silent"). Weaver testified she could not see Boykin, Jr. after that point because he was leaned to the side toward the middle of the vehicle. Weaver Dep. at 59:25-60:4; 66:3-18.

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19. Video footage from an in-car camera indicate Boykin, Jr. appeared to become unconsciousness in the backseat during the last half of the transport. Investigative Report at 15; *but see* O'Connor Dep. at 73:5-18 (stating that although Boykin, Jr. had an "abnormal breathing pattern" in the latter portion of the transport when things worsened, Weaver could have misconstrued what was going on because "he was still breathing; he was still conscious").

Boykin, Jr. was non-responsive when Weaver asked, "Where you staying at now?" and "What's your address?" and commented, "You know you're still going to jail either way, right." Weaver Body Camera Video, time mark 15:06 to 15:23. She then commented to herself, "okay." *Id.*, time mark 15:36. Weaver testified she thought Boykin, Jr. was ignoring her because "he did not want to respond to [her] questions." Weaver Dep. at 61:16-25. During this time, Weaver was passing Wadley Hospital. *Id.* at 63:3-17.

Approximately two minutes and ten seconds before arriving at the jail garage, Weaver asked several questions, all without response. Weaver Body Camera Video, time mark 15:52 to 16:29. She asked, "Are you comfortable?" Then, after hitting a pothole, Weaver looked in the rearview mirror and asked, "Are you getting air back there?" Weaver Dep. at 72:16-73:3. She then asked again, "Hey, Darren, are you getting any air?" *Id.* at 74:1-11. Despite the fact that Boykin, Jr. had not responded to her since telling her he could not talk, Weaver was still not concerned that there was a medical issue. *Id.* at 75:19-25.

Approximately one minute and nine seconds before arriving at the jail garage, Weaver turned left from Texas Boulevard onto Third Street approximately three-four (3-4) blocks from the Bi-State Building. Weaver had applied the brakes for a stop sign prior to turning onto Third Street. Weaver commented, "You know somebody that passes out isn't able to stop themselves from falling forward, right" as she completed the turn. Weaver then stated, "Fun fact." Weaver Body Camera Video, time mark 16:52; *see also* Weaver Second Aff., ¶ 9 (stating she did not

see Boykin, Jr.'s body move forward when she applied the brakes). At time mark 17:14, Boykin, Jr. was still gasping for air but Weaver was unable to see him. Weaver Dep. at 78:5-20.

Weaver arrived at the Bi-State jail garage. Weaver Body Camera Video, time mark 18:00. Weaver Dep. at 80:2-4.

Awareness during transport of whether Boykin, Jr. was in serious medical distress requiring medical assistance

Weaver repeatedly testified in her deposition that she could not see Boykin, Jr.'s face during the majority of the transport. Weaver Dep. at 15:25-16:1. According to Weaver, had she seen Boykin, Jr.'s face as she did when reviewing the rear dash camera video of her patrol unit after the incident, she would have concluded that medical attention was necessary and immediately taken Boykin, Jr. to the hospital. *Id.* at 94:19-95:15; *see also* Weaver Second Aff., ¶ 11 ("Had I observed such condition at any time during the transport, I would have taken Boykin, Jr. immediately to Wadley Regional Medical Center as it was in route to the jail.").

According to Weaver, the first time she had actual knowledge Boykin, Jr. was in medical distress was after they arrived in the jail garage. Weaver Second Aff., ¶ 10. Ranger Mason opined in his second affidavit that, based on his professional experience, training and judgment, "a reasonable officer under the same circumstances would

conclude from the video that the first time Weaver had actual knowledge of Boykin, Jr. being in serious medical distress is after they parked in the garage at the Bi-State jail facility." Mason Second Aff., ¶ 5. Dr. O'Connor acknowledged in his deposition that Weaver could have misconstrued Boykin, Jr.'s abnormal breathing pattern in the latter portion of the transport when things worsened because "he was still breathing; he was still conscious." O'Connor Dep. at 73:5-18.

c. At the Bi-State jail

The transport from the scene of the arrest to the Bi-State jail garage took a little over eight minutes. Weaver Rear Seat Video, time mark 9:40 to 18:00. Upon arrival at the jail garage, it took Weaver approximately one minute to park her patrol unit as she waited for a truck to move and then backed into the parking space. Weaver Body Camera Video, time mark 18:00 to 19:05.

Weaver stopped the patrol unit and stated, "Alright, we're here." *Id.*, time mark 19:09. Weaver exited and walked around to the passenger's side and opened the door. Boykin, Jr. was leaning away from Weaver. Weaver commented, "And I'm not picking you up and dragging you out either so come on, quit playing." Weaver stated, "Darren!" Weaver then leaned forward to perform a sternum rub on his chest and called out, "Darren!" four (4) times. *Id.*, time mark 19:30 to 19:55; *see also* O'Connor Dep. at 60:20-61:14 (stating he recalled from the recording the urgency in Weaver's tone of voice and thought Weaver "was very appropriate" and first recognized that Boykin,

Jr. was "in extremis" at that moment in time when she first determined he was nonresponsive to her). Weaver then called out, "Sarge!" Weaver Body Camera Video, time mark 19:58.

After Weaver pulled Boykin, Jr. out of the car and onto the ground, Weaver Dep. at 93:3-7, she began CPR.[20] Investigative Report at 12. In her second affidavit, Weaver describes what happened as follows:

> When I opened the passenger door to the rear compartment I asked Boykin, Jr. to get out and over the next several seconds stated, 'Let's go!' and called his named, "Darren!" several times. It was at this moment I discovered he was nonresponsive and in medical distress. I immediately called "Sarge!" to get the attention of TTPD Officer William Scott who had followed me to the jail. I checked for a pulse, did a sternum rub, removed Boykin, Jr. from the patrol unit and began CPR.

Weaver Second Aff., ¶ 10.

After Scott parked in the Bi-State jail garage,[21] Scott got out of his patrol unit and began walking toward the

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20. The CPR was chest compressions only; there were no breaths given to Boykin, Jr. Weaver Dep. at 81:11-22.

21. Scott arrived at the Bi-State jail garage and parked approximately nine minutes after leaving the scene of the arrest. Scott Body Camera Video, time mark 2:08 to 11:28.

direction of where Weaver had parked her patrol vehicle. Scott Second Aff., ¶ 8. As Scott approached, he heard Weaver yell for him. *Id.* Scott then observed Weaver outside the rear passenger door and Boykin, Jr. lying on the floor. *Id.* Weaver advised Scott that Boykin, Jr. was not responding and did not have a pulse. *Id.*; Scott Body Camera Video, time mark 12:24; Weaver Body Camera Video, time mark 20:30. Weaver continued performing CPR while another officer attempted to remove the left handcuff. Weaver Body Camera Video, time mark 20:43 to 21:40 (Weaver noted "there's no response").

Via police radio, Scott and Weaver requested that LifeNet (i.e. an ambulance) and the jail nurse respond to the jail parking lot. Weaver Second Aff., ¶ 10; Scott Second Aff., ¶ 8; Scott Body Camera Video, time mark 12:50. During her deposition, Weaver testified that Scott called for LifeNet as the two of them began to give medical aid in the form of chest compressions to Boykin, Jr. Weaver Dep. at 81:11-19.

Both Scott and TTPD Officer Clinton Akin assisted in providing CPR to Boykin, Jr. Scott Second Aff., ¶ 8; Scott Body Camera Video, time mark 13:48. The other handcuff was removed. Weaver Body Camera Video, time mark 21:56. Weaver stated, "TC had him in custody. I was just transporting." Weaver Body Camera Video, time mark 22:10; Scott Body Camera Video, time mark 14:05. Weaver checked Boykin, Jr. for a pulse and noted, "no pulse." Weaver Body Camera Video, time mark 22:56. Weaver held Boykin, Jr.'s head while Scott continued chest

compressions and asked someone nearby, "You don't have one of those CPR masks do you?" *Id.*, time mark 23:08.

Weaver opened Boykin, Jr.'s eye and shined in a flashlight. *Id.*, time mark 23:18. She then stated, "Sarge, his pupils aren't responding." *Id.*, time mark 23:20; Scott Body Camera Video, time mark 15:16. Weaver stated, "Hurry, let's go!" Scott Body Camera Video, time mark 16:14. A jail nurse arrived first. *Id.* at 16:24. An AED was brought down by a jail nurse and the AED indicated "not to use." Investigative Report at 12; Weaver Body Camera Video, time mark 25:45.

At 2:38 p.m., the Fire Department and LifeNet arrived. Scott Body Camera Video, time mark 17:25. LifeNet arrived approximately four minutes and thirty-seven seconds after Weaver and Scott requested emergency medical care to the scene. Weaver Body Camera Video. LifeNet took over care of Boykin, Jr. before transporting him to the hospital. Scott Second Aff., ¶ 8; Scott Body Camera Video, time mark 18:00 (approximately five minutes after Scott first called LifeNet).

During this time, Weaver stated to emergency personnel, "he said he was going to pass out but he is also being charged with a bunch of felonies so it's one of those things." Madison Revised Report at 27; Weaver Body Camera Video, time mark 26:15. Weaver then stated to a male officer, "you know how he's got the felony faint in the backseat—'oh I'm gonna pass out' he's fine we get about two blocks from the jail and he's like . . . and then . . . " Another officer then asked, "was he out?," to which Weaver

responded, "but he wasn't and so whenever I would slow on the brakes like his body would stay, like he would pull back." Weaver Body Camera Video, time mark 27:59 to 28:14; Madison Revised Report at 27.

A couple of minutes later, Weaver told a female taking notes, "So, we get here and so I thought he was just doing the felony faint I'm gonna slump over but I'm gonna . . . still keep myself from falling over and hitting myself." Weaver Body Camera Video, time mark 29:25 to 29:32; Madison Revised Report at 27. According to Weaver, "But I don't know what happened prior to the arrest . . . like he kept saying that he was tired, that his legs hurt, and he kept wanting to lay down, and stuff like that . . . normal stuff when you're getting charged with felonies, you know." Weaver Body Camera Video, time mark 30:09 to 30:21; Madison Revised Report at 28. The male officer commented that it could have been either narcotics or a "congenital defect in his heart that he didn't realize." Weaver Body Camera Video, time mark 30:21 to 30:27. Weaver then stated, "He was already gassed when they had him in custody . . . because he ran from the college to the . . . gas station at Richmond and College to E-Z-Mart." *Id.*, time mark 31:17 to 31:28.

3. Subsequent events

LifeNet transported Boykin, Jr. to Wadley Regional Medical Center ("WRMC"). Scott Second Aff., ¶ 8. According to Scott's supplemental report, attached as an exhibit to his deposition, he spoke with an attending nurse who advised Scott that Boykin, Jr.'s condition was

critical but that he had a pulse and that his breathing was assisted. Scott Dep., Ex. 7. Justice of the Peace Nancy Talley pronounced Boykin, Jr. deceased at approximately 6:51 p.m. and signed an order for autopsy and release of medical records. Investigative Report at 4.

WRMC records list the cause of death as sudden cardiac arrest; acute hypoxemic respiratory failure; hypoxic encephalopathy; acute renal failure; hyperkalemia; and shock liver. Dkt. No. 89, Ex. 16, WRMC Records at 5, 23-24, 59. An autopsy was performed at the Southwestern Institute of Forensic Sciences in Dallas. The medical examiner, Dr. Emily Ogden, found sickle cell trait in multiple organs. Dr. Ogden concluded that Boykin, Jr. died as a result of complication of sickle cell trait. The Autopsy Report revealed Boykin, Jr. had sickled red blood cells in his lungs, liver, kidney, heart, and spleen. Autopsy Report at 3. According to the autopsy's conclusion, Boykin, Jr. died "as a result of complications of sickle cell trait," and the "physical exertion of running ~ 1/3 mile, in Texas, in August, precipitated a sickle cell crises that ultimately led to the decedent's death." *Id.* at 5.

4. Alleged failures to provide medical aid

Plaintiffs allege Defendants "deliberately chose not to provide medical care resulting in [Boykin, Jr.'s] death." Dkt. No. 7 at 4; *see also* Dkt. No. 21, ¶ 11 ("Clearly, Boykin was not breathing normal and knowing that he was running in very hot temperature, the officers failed to provide Boykin with any medical attention, nor did they call for medical personnel to evaluate Boykin."). In his

revised report, Plaintiffs' retained police liability expert, Kevin Madison, lists nineteen opinions, twelve of which address Weaver, Hobbs, and Scott. Grouping Defendants together, Madison opines Defendants "failed to summon Emergency Medical Services (EMS) to examine, assess, and treat" Boykin, Jr. at the scene of the arrest even though he was having difficulty breathing and complained of an inability to breathe while located at 2314 College Street, Texarkana, Texas. Madison Revised Report, ¶¶ 1, 2, 3, 4, 5, 6, 7, 9, 13, 14. Additionally, Madison opines that no reasonable police officer at the scene of the arrest would have failed to call EMS for medical assistance under the circumstances prior to transport when Boykin, Jr. (1) complained of trouble breathing then passing out causing officers to carry him to the patrol car; and (2) screamed for help in the back of the patrol car and complained of an inability to breathe. *Id.*, ¶¶ 10, 11.

Madison offers two additional opinions specifically with regard to Weaver, asserting: (1) Weaver's failure to continue to monitor Boykin, Jr. during the transport to Bi-State jail "violated Texarkana Texas Police Department's General Orders, 10.01.1 Searching and Transport, Section 3 Procedures, Sec. 14 . . . " (*id.*, ¶ 8); and (2) no reasonable police officer would have failed to stop their patrol car and immediately summon EMS for medical assistance after initiating transport when Boykin, Jr. "complained of an inability to breathe, vocalized that he was going to pass out, then slipped into an unconscious and unresponsive state." (*id.*, ¶ 12). Finally, Madison offers five opinions specifically with regard to Scott, alleging he violated his duties as a "police Sergeant and Supervisor." *Id.*, ¶¶ 15-19.

Appendix D

Defendants' retained police liability expert, Thomas Kerss, opines that all TTPD officers acted reasonably when faced with a detainee manifesting signs and symptoms commonly associated with extreme physical exertion. Kerss Report at 26. According to Kerss, Boykin, Jr. "otherwise appeared to have been in good, healthy physical condition, as his mother . . . reported to Ranger Josh Mason and as was evident by his frequent playing of basketball." *Id.* Boykin, Jr.'s complaints "closely aligned with the shortness of breath and fatigue that Officer Altamirano experienced after having chased and fought with Mr. Boykin." *Id.* Kerss further opines as follows:

> None of the officers involved in Mr. Boykin's arrest believed his complaints were related to anything more than his physical exertion, fatigue, and capture. This belief was supported by each officer present, plus Dean Washington in his statement to Ranger Mason and later to me. Each of the Texarkana College witnesses present and the defendants acknowledged that his symptoms bore common similarities to similar situations they had experienced in the past and was in line with normal expectations. Ranger Mason also expressed to me his conclusions supporting the reasonableness of their actions, and those beliefs align with my own personal experiences, support that conclusion and help form the basis for my belief that the defendants' actions clearly aligned with what a reasonable peace officer would believe in that situation.

Id. at 26-27.

5. Medical causation

In the opinions of both medical causation experts, the physical exertion of running one-half mile, in Texas, in August, could have precipitated a sickle cell crisis that ultimately led to Boykin, Jr.'s death. Defendants' expert, Dr. Stacey Hail, opines that "given the presence of sickle cell trait on hemoglobin electrophoresis and that fact that [Boykin, Jr.] had just engaged in a foot pursuit for ½ mile in August heat, sudden collapse due to sickle cell trait cannot be ruled out as a cause of death." Hail Report at 8 (opining another cause of death scenario that cannot be ruled out is stress cardiomyopathy). Dr. Hail opines there was no indication to summon LifeNet at the scene as it was unknown to the officers and also to Boykin, Jr. that he had a potential underlying medical condition that could put him at risk for sudden cardiac arrest after exertion. *Id.* at 12. According to Dr. Hail, it did not become apparent to her as a seasoned emergency physician while carefully reviewing Weaver's back seat footage that Boykin, Jr. was experiencing a medical emergency until time marker 14:50 when Boykin, Jr. was demonstrating a type of labored breathing consistent with agonal respirations. *Id.* It did not appear to Dr. Hail that Weaver was aware of this change in Boykin, Jr.'s physical condition because she was in the front seat driving. *Id.* at 13.

Dr. Hail opines "[w]ithin reasonable medical probability, more emergent medical attention would not have changed [Boykin, Jr.'s] outcome in this case." *Id.* "Even if [Boykin, Jr.] had been transported to the emergency department, emergency physicians would not

have been aware of [Boykin, Jr.'s] underlying condition and more likely than not, would be unable to reverse the exertional sickling in time to prevent cardiac arrest." *Id.* at 12-13. Dr. Hail further noted that individuals that experience cardiac arrest due to ventricular fibrillation (typically from a myocardial infarction or a "heart attack") have a better survival rate because ventricular fibrillation is a "shockable" rhythm; however, in Boykin, Jr.'s case, "the automated external defibrillator did not advise a shock because [Boykin, Jr.] was not demonstrating a shockable rhythm." *Id.* at 13.

Plaintiffs' medical expert, Dr. Francis O'Connor, provided a written report and was deposed. In his report, Dr. O'Connor opines that "[i]n my professional opinion, early recognition of an ECAST [Exercise Collapse Associated with Sickle Cell Trait] event in Mr. Boykin's case, with early medical intervention to include oxygen, and intravenous hydration, may have resulted in survival." O'Connor Report at 11. Dr. O'Connor further opines as follows:

> While it is not expected that a non-medical professional would recognize an ECAST event, Mr. Boykin displayed clear signs of distress that in my opinion warranted evaluation from a medical professional. In Mr. Boykin's case, this evaluation could have resulted in earlier medical assessment and intervention, including oxygen, hydration, and transport to an emergency facility, that may have saved Mr. Boykin's life.

Id. at 11-12.

Appendix D

During his deposition, Dr. O'Connor agreed that the occurrence rate of exertional sudden death with sickle cell trait is not very common and is very difficult to diagnose even for medical professionals. O'Conner Dep. at 35:18-38:2 (explaining ECAST has a "wide spectrum of presentations" and is a "very uncommon event" so "it makes it difficult and challenging for medical professionals to recognize"). Dr. O'Connor would not expect nonmedical professionals, including police officers, to be able to recognize an ECAST event. *Id.* at 46:18-22. Dr. O'Connor noted there is no literature or medical study available indicating at what point an ECAST event is irreversible and would lead to death. *Id.* at 54:13-20 (noting it "is not clear when that window opens and closes").

Although Dr. O'Connor testified "people who are treated early can survive," he could not put a medical "probability number on it." *Id.* at 55:25-56:4. When pressed during his deposition regarding whether he could state with a reasonable medical probability that Boykin, Jr. would have survived with emergent medical care, Dr. O'Connor stated as follows:

> . . . I'm making clear he did have an ECAST event. In my review of the literature, as there's thin literature in this area, the earlier you are identified, the earlier you are treated, the greater the probability you have of survival. It doesn't guarantee survival. But it gives you a chance. And and that's what I'm trying to communicate in my opinion, that there was a window for Mr. Boykin. Albeit, I can't tell you

> when it began and when it closed. That with early intervention, he would have had a chance for survival.

Id. at 56:17-57:3. Dr. O'Connor testified that if Boykin, Jr.'s condition had been identified early on and he had early access to EMS or the hospital, "it's possible that he could have survived." *Id.* at 57:4-17 (stating "he would have had the opportunity for early intervention in an emergency room for supportive care and a chance for survival"). In further addressing that Boykin, Jr. "would have had perhaps a better opportunity for survival if he had been identified on the ground and transported to a hospital or provided emergency medical care," Dr. O'Connor noted there are cases of ECAST where people are seen right away and may die and there are other cases where they are seen right away and they survive. *Id.* at 58:5-17.

IV. APPLICABLE LAW

A. Denial of medical care

This lawsuit presents an episodic act or omission claim, thereby invoking the deliberate indifference standard. The Fifth Circuit has held that an arrestee's or pretrial detainee's Fourteenth Amendment claims are governed by the same legal standards the Supreme Court uses for a prisoner's Eighth Amendment claims.[22] *Reed*, 2023 WL

22. The Constitution imposes a duty on the state to provide for the safety and wellbeing of the people it incarcerates. *Williams v. City of Yazoo, Mississippi*, 41 F.4th 416, 422-23 (5th Cir. 2022) (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S.

3563017, at *2 (citing *Baughman v. Hickman*, 935 F.3d 302, 306 (5th Cir. 2019)); *see also Nerren v. Livingston Police Dep't*, 86 F.3d 469, 473 (5th Cir. 1996) ("After the initial incidents of a seizure have concluded and an individual is being detained by police officials but has yet to be booked, an arrestee's right to medical attention, like that of a pretrial detainee, derives from the Fourteenth Amendment."); *see also Williams v. City of Yazoo, Mississippi*, 41 F.4th 416, 423 n. 4 (5th Cir. 2022) (noting the Fifth Circuit is in the "slight majority" of circuits that apply the Eighth Amendment standard equally to denial-of-care claims by pre-and post-trial detainees).

The Court of Appeals for the Fifth Circuit recently explained the standard as follows:

> To prove a Fourteenth Amendment deliberate indifference claim, a detainee must prove the jail official (1) was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," (2) that she "actually drew the inference," and (3) that she "disregarded that risk." *Baldwin v. Dorsey*, 964 F.3d 320, 326 (5th Cir. 2020) (quotation

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189, 199-200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)). For people already convicted of a crime, this duty stems from the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 423 (citing *Estelle v. Gamble*, 429 U.S. 97, 103-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). For those like Boykin, Jr., who have not yet faced trial, it stems from due process clause of the Fourteenth Amendment instead. *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 535-37, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)).

> omitted). That means the detainee must show the jailer was aware of a "substantial risk of serious harm" to him and that she nevertheless "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Davis v. Lumpkin*, 35 F.4th 958, 963 (5th Cir. 2022) (quoting *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985)). Actions by officials that are merely "inept, erroneous, ineffective, or negligent do not amount to deliberate indifference." *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 420 (5th Cir. 2017) (per curiam).

Reed, 2023 WL 3563017, at *2.

Put more succinctly, "[t]o prove deliberate indifference, [Plaintiffs] must show that the defendants knew that he faced a substantial risk of serious harm and failed to take reasonable measures to abate that risk." *Williams*, 41 F.4th at 423. The "knowledge inquiry is subjective," asking what Defendants "knew, not what they 'should have perceived.'" *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 535-37, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). "But the reasonableness question is objective: It turns on whether the officials' response to a known risk was reasonable as a matter of law." *Id.* Subjective deliberate indifference "is an extremely high standard to meet." *Baughman*, 935 F.3d at 307 (quoting *Domino v. Tex. Dep't of Crim. Just.*, 239 F.3d 752, 756 (5th Cir. 2001)).

In the context of denial of medical care like the allegations here, "pretrial detainees have a constitutional right . . . not to have their serious medical needs met with deliberate indifference." *Robinson v. Midland Cnty., Texas*, 80 F.4th 704, 709 (5th Cir. 2023) (quoting *Thompson v. Upshur County*, 245 F.3d 447, 457 (5th Cir. 2001)). A serious medical need is "one for which treatment has been recommended or for which the need is so apparent that even laymen would recognize that care is required." *Id.* (quoting *Gobert v. Caldwell*, 463 F.3d 339, 345 n.12 (5th Cir. 2006)). Officials violate that right when they ignore, intentionally mistreat, or evince "wanton disregard" for an inmate's serious medical needs. *Id.* (citing *Gobert*, 463 F.3d at 346 (quoting *Domino*, 239 F.3d at 756)). *Gobert* provided examples of what actions do not constitute deliberate indifference, i.e., "[u]nsuccessful medical treatment, acts of negligence, or medical malpractice . . . [or] a prisoner's disagreement with his medical treatment, absent exceptional circumstances." *Graham v. Hodge*, 619 Fed. Appx. 394, 396 (5th Cir. 2015) (quoting *Gobert*, 463 F.3d at 346). Plaintiffs must also show that harm resulted from the allegedly deliberately indifferent conduct. *Robinson*, 80 F.4th at 711 (citing *Mendoza v. Lynaugh*, 989 F.2d 191, 193 (5th Cir. 1993)).

B. Supervisory liability

"Section 1983 does not create supervisory or *respondeat superior* liability." *Parker v. LeBlanc*, 73 F.4th 400, 404 (5th Cir. 2023) (quoting *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002)). Nonetheless, "[s]upervisory officials may be liable under § 1983 for their failure to adopt

policies if that failure causally results in a constitutional injury." *Id.* at 404-05 (quoting *Crittindon v. LeBlanc*, 37 F.4th 177, 186 (5th Cir. 2022)). "Liability only arises when the officials act, or fail to act, with 'deliberate indifference,' a 'disregard [for] a known or obvious consequence of [their] action[s].'" *Id.* at 405 (quoting *Crittindon*, 37 F.4th at 186 (quoting *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011))). "[A] plaintiff must show either the supervisor personally was involved in the constitutional violation or that there is a sufficient causal connection between the supervisor's conduct and the constitutional violation."[23] *Id.* (quoting *Evett v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 330 F.3d 681, 689 (5th Cir. 2003) (quotation marks and citation omitted in *Parker*)).

V. DELIBERATE INDIFFERENCE

Plaintiffs bring Fourteenth Amendment deliberate indifference claims against Defendants. As noted above, a showing of deliberate indifference requires a detainee to show the officer was aware of a "substantial risk of serious

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23. Plaintiffs bring a supervisory liability claim against Scott for his alleged failure to supervise his subordinate officers at the scene of the arrest. Thus, Plaintiffs assert Scott was personally involved in the alleged constitutional violation and do not allege that Scott implemented an unconstitutional policy that was "the moving force" behind Boykin, Jr.'s "constitutional violation." *Reed*, 2023 WL 3563017, at *5. Plaintiffs' law enforcement expert Madison agrees there is no evidence that Scott was a policymaker for the Texarkana Police Department. Madison Dep. at 235:25-236:15 (stating Scott is a policy enforcer); *see also* Scott Aff., ¶ 3 (stating he was not a policymaker for the City of Texarkana, Texas).

harm" to him and that the officer nevertheless failed to take reasonable measures to abate that risk (i.e., "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs"). *Reed*, 2023 WL 3563017, at *2 (quoting *Davis v. Lumpkin*, 35 F.4th 958, 963 (5th Cir. 2022) (quoting *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985))). Hobbs' and Scott's subjective awareness and the reasonableness of their response can only be examined at the scene of the arrest, whereas Weaver's awareness and response can be examined at the scene of the arrest and during her transport of Boykin, Jr.

A. Whether Defendants had actual knowledge <u>at the scene of the arrest</u> that Boykin, Jr. faced a substantial risk of serious harm and failed to take reasonable measures to abate that risk

At the outset, there is no evidence or argument that Defendants had actual knowledge that Boykin, Jr. had sickle cell trait or was undergoing an ECAST event. Plaintiffs instead principally focus on Defendants' knowledge that Boykin, Jr. was breathing heavily and Defendants' response to his labored breathing. Defendants admit they were aware of Boykin, Jr.'s labored breathing, and that after Boykin, Jr. was moved from the grass field to the back of Weaver's air-conditioned patrol car, Hobbs increased the airflow in response to Boykin, Jr.'s request to "please turn the air on, I can't breathe, please."

The evidence of record does not show that Defendants had subjective awareness that Boykin Jr.'s labored breathing was tied to a substantial risk of serious harm. When she arrived at the scene of the arrest, Weaver observed that both Altamirano and Boykin, Jr. appeared to be physically exhausted which seemed normal after running one-half mile in the August heat. Weaver Second Aff., ¶ 6. Although she heard Boykin, Jr. complain that he could not breathe and that his legs hurt, both complaints seemed consistent for a suspect having fled from the TCPD for that distance. *Id.* Weaver did not think Boykin, Jr. was in serious medical distress when he was put into her patrol unit or when she departed the arrest scene. *Id.* ("If I had determined that Boykin, Jr. was in serious medical distress, I would have immediately called for emergency care assistance or requested another officer at the scene to do so.").

During Hobbs' brief encounter with Boykin, Jr. in the backseat of Weaver's patrol vehicle, which totaled thirty-two seconds, (1) Hobbs had a conversation with Boykin, Jr. wherein Boykin, Jr. said "I can't breathe;" (2) Hobbs provided additional air conditioning to Boykin, Jr.; and (3) Hobbs observed that Boykin, Jr. was alert and breathing, although with difficulty. According to Hobbs, having previously observed Altamirano exhausted from the pursuit, he reasonably believed that Boykin, Jr.'s difficulty breathing was the result of being involved in a foot pursuit on a hot and humid August afternoon. No other officer on the scene spoke of any medical concerns of Boykin, Jr. At no time did Hobbs believe or infer that Boykin, Jr. was experiencing any type of serious medical

crisis, or that a substantial risk of serious harm existed. Hobbs Second Aff., ¶ 9.

Scott had no interaction with, or observation of, Boykin, Jr. during Scott's approximately one minute at the scene of the arrest. During that minute, Scott had a brief conversation with Hobbs and Weaver, wherein Scott was informed that, although Boykin, Jr. said that he could not breathe, Boykin, Jr. was hollering and was exhausted from the foot chase. Scott believed the judgment of Hobbs and the other officers on-scene and believed that Boykin, Jr. was not in any serious medical distress. According to his second affidavit, the first time Scott became aware of Boykin, Jr. suffering from serious medical distress was after he arrived at the Bi-State jail and observed Weaver providing medical assistance to Boykin, Jr. Scott Second Aff., ¶ 9.

In their responsive briefing, Plaintiffs ask "th[e] Court to take judicial notice that an inability to breathe or difficulty breathing is a serious medical condition that requires medical attention." Dkt. Nos. 113 at 19, 115 at 15. At the hearing, the undersigned indicated the Court would take judicial notice of the fact that an inability to breathe or difficulty breathing can be a serious medical condition based on the facts of the particular case; however, the undersigned could not find that difficulty breathing necessarily is a serious medical condition that requires medical attention. Dkt. No. 151 (Transcript) at 59:9-14.

Plaintiffs are therefore left with the argument that Defendants misunderstood the source of Boykin, Jr.'s

labored breathing, its seriousness, and the possible complications from his recent physical exertion. But "[u]nsuccessful medical treatment, acts of negligence, or medical malpractice . . . [or] a prisoner's disagreement with his medical treatment, absent exceptional circumstances" "do not constitute deliberate inference." *Graham v. Hodge*, 619 Fed. Appx. 394, 396 (5th Cir. 2015) (quoting *Gobert*, 463 F.3d at 346). This is particularly true here, where Defendants were confronted with the same symptoms that one would expect from a physically exhausted person. *See Batiste*, 458 Fed. Appx. at 357-58 ("Further, the hereditary 'sickling' phenomenon described by Plaintiffs' expert is hardly the kind of obvious medical need that a non-medical expert would understand required attention. According to the Plaintiffs' expert's testimony, the trait appears through heavy breathing and fatigue, both of which are easily confused with symptoms of someone who had just run over a quarter mile while fleeing the police."). Thus, this case falls within the "symptoms-only scenarios" wherein the Fifth Circuit has found "[o]bserving [the injured's] behavior alone" was not enough to establish the defendants' knowledge. *See Williams*, 41 F.4th at 424-25.

The only other evidence Plaintiffs have to show actual knowledge on the part of Weaver at the scene (other than Boykin, Jr.'s complaints that he could not stand or breathe) is the testimony of their liability expert, Kevin Madison, that the video seems to show Boykin, Jr. passed out for one to two seconds before being placed into Weaver's patrol car. Madison Dep. at 59:23-60:18 (stating it occurred at time mark 3:49 on Weaver's Body Camera Video); *see also* Madison Revised Report at 4, 10, 12, 33, 78-81 (stating on

numerous occasions throughout his revised report that Boykin, Jr. "briefly passed out" on the grass of the yard where he was arrested). However, Madison agreed in his deposition that right before that timestamp, the video shows Boykin, Jr. answering a question about his date of birth and made other comments to Chief Gass.[24] Madison Dep. at 62:5-24. Madison also did not recall during his deposition seeing any evidence in any of the college police reports that Boykin, Jr. briefly passed out at the scene. *Id.* at 60:21-24, 66:4-8.

In her second affidavit, Weaver states that at no time at the scene did she observe Boykin, Jr. briefly pass out or otherwise lose consciousness. Weaver Second Aff., ¶ 6. Additionally, Chief Gass—who was also present at the time in question—testified that Boykin, Jr. did close his eyes but also repeatedly was able to talk and also gave the officers an alias of Jason Williams when asked his name. Gass Aff., ¶ 17. Finally, the Court notes Plaintiffs' medical expert, Dr. O'Conner, also viewed the video and testified that Boykin, Jr. "never lost consciousness," "did not pass out," and "was communicating with the officers." O'Connor Dep. at 33:9-19.

Consistent with Madison's deposition, the video shows Boykin, Jr.'s head go briefly limp as the officers moved him to Weaver's patrol car, but Boykin, Jr. was responding to the officers' questions both before and after that brief moment and he does not otherwise appear to

24. Thus, Weaver knew Boykin, Jr. had enough cognitive ability to give his date of birth and an alias.

lose consciousness. Boykin, Jr. was able to get into the back of Weaver's patrol car by himself. According to Altamirano, although Boykin, Jr. at first said he could not walk, he "ultimately agreed he could enter the patrol unit by himself and did so." Altamirano Aff., ¶ 11.

As noted, none of the officers at the scene reported Boykin, Jr. "briefly passed out." Thus, even if one were to credit Madison's characterization of the video as showing Boykin, Jr. "briefly pass[ing] out," there is no evidence that anyone *at the scene* was aware of that. Given the video shows Boykin, Jr. being cognizant throughout his arrest and the lack of any eyewitness evidence to the contrary, the two-second clip relied upon by Madison is not such "an apparent or obvious risk to [Boykin, Jr.'s health]" that shows Defendants had *actual* awareness of a serious medical need. *Williams*, 41 F.4th at 423, n.5; *see also Farmer v. Brennan*, 511 U.S. 825, 841-43 & n. 8, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (noting that although certain obvious risks, such as a "longstanding, pervasive, well-documented" record of inmate attacks, may allow a juror to determine a prison official had actual knowledge of a risk of attack, "courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly").

Given the uncontroverted evidence that Defendants thought Boykin, Jr.'s labored breathing immediately following the foot chase did not represent a substantial risk to Boykin, Jr.'s health, Plaintiffs cannot show Defendants

were deliberately indifferent at the scene of the arrest. That necessarily excludes Hobbs and Scott from liability because Plaintiffs only challenge their conduct at the scene of the arrest.

Putting aside the issue of whether Defendants were subjectively aware that Boykin, Jr.'s labored breathing presented a substantial risk of serious harm, the evidence also does not show they failed to take reasonable measures to abate the situation. Boykin, Jr. had just run half a mile in the August heat and complained he could not breathe, and his legs hurt. He was moved to the back of an air-conditioned patrol car. When he asked for more air, Officer Hobbs increased the airflow. There is no evidence or argument that the actions the officers took—placing Boykin, Jr. in a shaded and cooler environment—were unreasonable.

Instead, Plaintiffs focus on what Defendants did not do. Plaintiffs assert that Defendants did not provide Boykin, Jr. with any "medical aid."[25] At the hearing, counsel stated Boykin, Jr.'s labored breathing did not

25. During the hearing, Defendants Hobbs and Scott's counsel stated that throughout the entire case—in Plaintiffs' complaints, in all the depositions, in the deposition of Kevin Madison, and in Madison's expert report—the focus has been entirely "on the failure of the officers to summon medical aid." Dkt. No. 151 (Transcript) at 22:17-23. According to counsel, in light of their briefing on recent Fifth Circuit cases which "clearly stated that the law was not clearly established as to summoning medical aid, . . . Plaintiffs switched their arguments" to failure to provide any medical aid at all. Id. at 23:7-21 (further nothing Plaintiffs' counsel never state what that "medical aid" would be).

improve after a couple of minutes of rest following the foot chase; thus, because there was no observed recovery while at the scene of the arrest, the officers should have provided some "sort of actual medical intervention" (for example, calling EMS, providing an oxygen tank with a face mask if there had been one available or giving Boykin, Jr. water) instead of "nothing." Dkt. No. 151 (Transcript) at 41:2-46:22, *see also id.* at 47:12-19 ("It is not our position that any specific one medical act had to occur. Instead, it is our position that some level of medical involvement had to occur."). According to counsel, "[t]he objectively unreasonable act here is the act of having a person in labored difficult breathing for minutes and minutes and minutes and doing nothing more than really turning on the air conditioning and putting him in the shade. That's objectively unreasonable." *Id.* at 48:3-7.

In response, Weaver's counsel argued there is no evidence in the record (nor specific allegations in the complaints) as to what particular aid should have been provided by Defendants. *Id.* at 62:1-18. According to counsel, "the reason why they don't do that is because there's . . . no case law establishing [Defendants] have a duty to provide aid." *Id.* at 62:19-22.

The Court's analysis begins with a discussion of *Williams v. City of Yazoo, Mississippi* ("*Williams*"), 41 F.4th 416 (5th Cir. 2022), a case extensively relied upon by Plaintiffs, wherein the court did find such a duty.[26]

26. The Court notes that approximately one month prior to this *Williams* case, the Fifth Circuit entered *Williams v. Zachary*, No. 21-60753, 2022 WL 2101518, at *4 (5th Cir. June 10, 2022),

In that case, Williams, a pretrial detainee, died in his cell after bleeding internally for hours. *Id.* at 419. His survivors alleged that law enforcement officers knew that Williams had been assaulted with a metal pipe and that he was vulnerable to internal bleeding if injured, yet they ignored requests for help from Williams, his family, and his fellow detainees, and left Williams to suffer in his cell until it was too late. *Id.* The Fifth Circuit affirmed the district court's denial of qualified immunity, holding that if these facts were proven at trial, the officials' indifference to Williams's serious medical needs violated his clearly established constitutional rights. *Id.*

The evidence, viewed in the light most favorable to Williams's survivors, showed that on the evening of Williams's death, Williams and his girlfriend (Smith) got into a physical altercation, and a witness alerted both Smith's family and the police. *Id.* Smith's family arrived first, and Smith's brother hit Williams on the side with either a bedrail or a metal pipe. *Id.* When the officers arrived a few minutes later, Williams told Officers Dean and Banks that he had been drinking and that Smith's brother had assaulted him with a pipe. *Id.* Williams lifted his shirt to show Dean where he had been hit, revealing superficial scratches. *Id.* During the conversation, Williams laid down on the porch as if trying to sleep. *Id.*

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wherein the court affirmed the district court's grant of summary judgment, in part, because the arrestee had no known preexisting conditions. The Court discusses the second *Williams* case (referred to herein as "*Zachary*") below in its discussion of whether Weaver violated Boykin, Jr.'s clearly established constitutional rights by showing deliberate indifference to his medical needs.

at 420. Officer Harris handcuffed Williams and informed him that he was under arrest for domestic violence. *Id.*

Witnesses remembered what happened next differently. Smith recalled that Williams struggled to walk and collapsed on his way to the police car. *Id.* The officers said Williams was passively resisting arrest by forcing them to carry him to the vehicle. *Id.* Harris sprayed mace in Williams's eyes, the officers loaded Williams into the police car, and they brought Williams to the county detention center. *Id.*

Williams was in and out of consciousness during booking; he urinated on himself and slumped out of his chair to the ground; and he did not cooperate with the officers' requests for personal information. *Id.* Contrary to jail policy, no officer screened Williams for medical needs. *Id.* Dean and Banks escorted Williams to his cell, and again, Williams needed assistance walking. *Id.* Three detainees overheard Williams ask Dean and Banks for help during the walk to his cell, stating "I need my medical assistance, and I can't breathe," "I need some help. I need y'all to call my people, my family so I can get my medication." *Id.* The officers did not respond to Williams's pleas. *Id.*

Importantly, Williams's mother (who was worried because she knew Williams had been in a scuffle at the house and likely needed medical attention) and other family members came to the jail and spoke to the officers. *Id.* During the conversation, Williams's mother told the group that Williams "grabbed his side and fell over" before

his arrest. She explained that Williams's blood did not clot normally so that "if he got hurt in any kind of way . . . he would just bleed." *Id.* Williams's sister chimed in, noting that "[H]e could die!" *Id.* Banks responded that Williams had passed out twice in front of them, but Dean dismissed his concerns, suggesting that Williams was merely being uncooperative to avoid arrest. *Id.* The officials did not take any action in response to this information. *Id.*

> Once in his cell, Williams repeatedly called for his mother and for medical attention. He was unable to stand or use the toilet on his own. His cellmate propped him into a seated position against a wall, and he lost consciousness there.
>
> For two to three hours, Williams's fellow detainees banged on their cell doors and repeatedly yelled to Langston that Williams was having a medical emergency. Langston asked them to quiet down and told them that she could not do anything until her superior returned to the jail. She did not check on the detainees hourly, as required by prison policy.
>
> Around 2:15 a.m., officers found Williams dead in his cell.

Id. The autopsy report concluded that Williams had died of a laceration to his liver and extension internal bleeding. *Id.* at 420-21.

Appendix D

On appeal, the Fifth Circuit first addressed the deliberate indifference claims, holding that a reasonable jury could find from the following facts that the officers all knew of a high risk that Williams was bleeding internally yet failed to provide medical assistant for that harm:

> Taking Williams's allegations as true, Dean and Banks were aware of a substantial risk to Williams's health. Williams's family was so concerned about him that they came to the station to tell law enforcement about his medical vulnerability. Williams's mother informed them that Williams suffered from a preexisting and life-threatening blood clotting condition that would cause him to bleed internally if he was "hurt in any kind of way." And Williams's sister reiterated to them how serious the condition was, explaining that Williams "could die" if injured.
>
> In addition to knowing of Williams's diagnosis, Dean and Banks knew that Williams was hurt. When they first talked to Williams, he told them that he had been hit in the side with a metal pipe. Williams's mother later reminded them that he "grabbed his side and fell over" before his arrest. Dean and Banks also witnessed Williams struggling to walk and were aware that he passed out at least twice during his arrest and booking. If any doubt remained about Williams's need for care at that point, it was eliminated when Williams told Dean and

Banks that he could not breathe and asked them for medical assistance while they escorted him to his cell. Contrast *Pearson v. Prison Health Serv.*, 850 F.3d 526, 540 (3d Cir. 2017) (concluding that officer had no knowledge of risk because plaintiffs did not present any evidence "that the seriousness of [the detainee's] bleeding was communicated to her").

If these allegations are proven, this is not a close case: Williams's diagnosis, symptoms, and requests for help notified Dean and Banks of a significant risk that he was bleeding internally. *See Easter v. Powell*, 467 F.3d 459, 463-65 (5th Cir. 2006) (finding knowledge of risk based on combination of known heart condition, complaints of chest pain, and request for medication); *Harris v. Hegmann*, 198 F.3d 153, 159-60 (5th Cir. 1999) (finding knowledge based on recent broken jaw diagnosis, complaints of pain, and requests for treatment).

The evidence construed in plaintiffs' favor would also allow a jury to find that Harris, Jaco, and VanCleave knew of Williams's serious medical situation. Like Dean and Banks, they were informed by Williams's family that he had a blood clotting condition that made any injury potentially fatal. They also saw Williams lose consciousness during booking. Unlike Dean and Banks, they did not know exactly how Williams had been injured—they only knew from his

> mother that he "grabbed his side and fell over." Although they did not know the full severity of Williams's injuries, a jury could find that the risk was obvious. *See Farmer*, 511 U.S. at 842, 114 S.Ct. 1970. Falling over can indicate a serious condition, particularly given Williams's symptoms, his family's grave concerns, and the officers' knowledge that "any kind" of injury could kill him. A jury could conclude that the officers put the clues together and were aware that Williams might be harmed. *See Nerren v. Livingston Police Dep't*, 86 F.3d 469, 473 (5th Cir. 1996) (inferring that law enforcement knew of risk from combination of potential trauma, complaints of pain, and abrasions); *see also Hare III*, 135 F.3d at 322-23, 325 (determining that law enforcement could infer suicide risk from threats of self-harm and family's concern).

Id. at 423-25.

Importantly, *Williams* is distinguishable on the subjective awareness prong. The primary dispute in *Williams* was whether the defendants were subjectively aware of Williams's blood clotting condition and risk of internal bleeding following being hit by a metal pipe. Concluding a jury could find the defendants were aware of that serious medical condition, the Fifth Circuit held the defendants could be liable for deliberate indifference for failing to reasonably provide medical care *for that condition. Id.* at 425 ("Once they learned of the combination of Williams's preexisting condition and his

trauma, they knew of the risk to his life and were obligated to take reasonable action to abate *that risk*.") (emphasis added); *see also id.* at 425-26 (noting numerous "sources—Williams, his family, and his fellow detainees—told law enforcement that Williams needed medical attention for his life-threatening blood clotting disorder;" yet, the defendants ignored their requests for help, leaving Williams to bleed to death in his cell, before concluding that "[i]f proven at trial, this indifference to Williams's known, urgent medical needs violated due process.").

As discussed above, although Defendants knew that Boykin, Jr. was having labored breathing throughout their interaction with him at the scene of the arrest, Plaintiffs have not presented any evidence showing that Defendants had actual knowledge that Boykin, Jr. suffered from sickle cell trait, a preexisting and life-threatening condition. Thus, Plaintiffs must show that Defendants failed to provide medical care for Boykin, Jr.'s difficulty breathing. Plaintiffs recognize this by asserting that "*Williams* applies because Defendants knew about Boykin, Jr's serious medical condition (inability to breathe or difficulty breathing) and ignored his complaints." Dkt. No. 115 at 16.

Plaintiffs, however, have not shown deliberate indifference or wantonness predicated on a delay in medical treatment for difficulty breathing at the scene of the arrest. Weaver and TCPD officers placed a person who just finished a long foot chase in a seated position in an air-conditioned vehicle, and Hobbs then increased the airflow to make Boykin, Jr. more comfortable. *See* Madison Dep. at 234:3-8. Plaintiffs have put forth no evidence that

this was an unreasonable response or that not doing more "clearly evidence[s] a wanton disregard" for that person's need to recover normal breathing. *Gobert*, 463 F.3d at 346.

Additionally, Plaintiffs have not identified the specific medical care that they claim should have been provided to Boykin, Jr. at the scene of his arrest. When pressed, Plaintiffs' counsel suggested calling EMS[27] or providing oxygen (if it had been available) as examples (Dkt. No. 151 (Transcript) at 41:2-46:22, 105:17-18)—but there is no evidence or persuasive argument that those actions are *required* for a "reasonable" response to someone who was breathing heavily following a long foot chase.

Considering Plaintiffs have failed to establish that Defendants Hobbs and Scott acted with deliberate indifference to Boykin, Jr.'s medical needs at the scene of the arrest, and further considering it is only their conduct at the scene of the arrest that is at issue, the undersigned recommends the Court grant Hobbs and Scott's motion for

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27. As pointed out in Weaver's reply, Dkt. No. 127 at 3, and argued by Defendants' counsel at the hearing, the failure to summons emergency medical assistance theory alleged in the complaints and asserted throughout Madison's revised report is not argued in Plaintiffs' responses. According to Weaver, Plaintiffs have apparently abandoned their claim that Weaver should have summoned emergency medical assistance in light of *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021) and *Reed v. Nacogdoches Cnty.*, No. 22-40126, 2023 WL 3563017 (5th Cir. May 19, 2023), recent Fifth Circuit cases which indicate failure to promptly call for emergency assistance in the face of a known, serious medical emergency was not a clearly established right until July of 2021, after the date of the events here.

summary judgment on the Fourteenth Amendment claims asserted against them.[28] Although the Court does not find Weaver acted with deliberate indifference to Boykin, Jr.'s medical needs at the scene of the arrest, the Court next considers whether there is sufficient evidence to create a genuine dispute of material fact with respect to whether Weaver acted with deliberate indifference to Boykin, Jr.'s medical needs during transport to the Bi-State jail.

B. Whether Weaver had actual knowledge during transport that Boykin, Jr. faced a substantial risk of serious harm and failed to take reasonable measures to abate that risk

There are several alleged facts that, at first glance, would make it easier for Plaintiffs to show Weaver had actual knowledge during transport that Boykin, Jr.

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28. This disposes of Plaintiffs' supervisory liability claim against Scott. The supervisor liability claim against Scott is dependent on a successful allegation of a constitutional violation. *Cortez-Burlingame v. Galveston Cnty.*, No. 3:18-CV-00183, 2020 WL 2062263, at *6 n. 2 (S.D. Tex. Apr. 27, 2020), *report and recommendation adopted sub nom. Burlingame v. Galveston Cnty.*, No. 3:18-CV-00183, 2020 WL 4018830 (S.D. Tex. July 16, 2020), *aff'd sub nom. Cortez-Burlingame v. Galveston Cnty.*, No. 20-40540, 2022 WL 1114413 (5th Cir. Apr. 14, 2022) (citing *Pena v. Givens*, 637 Fed. Appx. 775, 785 (5th Cir. 2015) ("Supervisory liability requires a constitutional violation by a subordinate.")). Because the undersigned determines that Boykin, Jr.'s constitutional rights were not violated, any claim for supervisor liability against Scott should be dismissed. *Id.* (citing *Luhellier v. Oyster Creek*, No. 3:18-CV-00281, 2019 WL 3419016, at *7 (S.D. Tex. July 10, 2019)).

faced a substantial risk of serious harm: Boykin, Jr.'s breathing never normalized and he continued to complain of trouble breathing and stated he was "about to pass out" during the first half of the transport; video shows Boykin, Jr. appeared to become unconscious and became non-responsive during the latter half of the transport; and, according to Madison, Weaver was able to observe from the front seat that Boykin, Jr. was "slumped over, unconscious, with agonal breathing, grasping for air." Madison Revised Report at 16.[29] However, the record evidence, viewed in the light most favorable to Plaintiffs, does not create a fact issue sufficient to show that Weaver actually had such knowledge, and the symptoms she was aware of were not so obvious to conclude otherwise.

First, Weaver explains that the first time she had actual knowledge Boykin, Jr. was in medical distress was after they arrived in the jail garage. Weaver Second Aff., ¶ 10. Ranger Mason opined in his second affidavit that, based on his professional experience, training and judgment, "a reasonable officer under the same circumstances would conclude from the video that the first time Weaver had actual knowledge of Boykin, Jr. being in serious medical distress is after they parked in the garage at the Bi-State jail facility." Mason Second Aff., ¶ 5.

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29. Madison opines that Weaver's field of view from the front seat was the same as the field of view of the rear sear camera (noting, for example, that at time mark 16:36, Weaver stared at Boykin, Jr. for over 8 seconds but turned around and did nothing even though Boykin, Jr. was unconscious and gasping for air). Madison Revised Report at 16, 22.

Second, while Defendants' expert Dr. Hail opines that Boykin, Jr. went into extremis during the latter part of the transport when Boykin, Jr. was demonstrating a type of labored breathing consistent with agonal respirations, Hail Report at 12, it did not appear to Dr. Hail that Weaver was aware of this change in Boykin, Jr.'s physical condition because she was in the front seat driving. *Id.* at 13. In her second affidavit and throughout her deposition, Weaver testified she was not able to see Boykin, Jr.'s face or eyes during that time. Weaver Second Aff., ¶ 10. Weaver testified she could not see Boykin, Jr. because he was leaned to the side toward the middle of the vehicle.[30] Weaver Dep. at 59:25-60:4; 66:3-18.

Importantly, the accident reconstruction report of Alex Germane is unchallenged and supports Weaver's testimony. Germane Report at 19-24. Germane concludes that at the times when Boykin, Jr.'s face was in Weaver's direct line of sight, Boykin, Jr. appeared to be responsive and upright. Germane Report at 23. According to Germane, at no time when Boykin, Jr. was leaning forward or to his left was his face visible in Weaver's direct line of sight, and had his face been visible in Weaver's peripheral vision at any time, she would not have been able to visually ascertain the physical position and facial expressions of Boykin, Jr. due to the lack of sensitivity of peripheral vision. *Id.* Germane opines Weaver's behavior indicates that most of her attention was focused on driving. *Id.* at 24.

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30. Plaintiffs allege Weaver could not see Boykin's face as Weaver drove past Wadley Hospital. Dkt. No. 7, ¶¶ 79-80; Dkt. No. 21, ¶¶ 28, 32.

Third, while Boykin, Jr.'s breathing never normalized and he continued to complain of trouble breathing and stated he was "about to pass out," the experts do not opine Weaver had subjective knowledge of the seriousness of Boykin, Jr.'s condition. Kerss opines Weaver was not subjectively aware that Boykin, Jr. became ill because she did not recognize the results that could occur from a medical condition that is hard to detect and rarely encountered by peace officers. Kerss Report at 31. Kerss further explains as follows:

> Officer Weaver plainly mistook the shortness of breath and leg pain as fatigue and muscle cramps from running. She may also have misconstrued behaviors, including his lack of verbal responses enroute to the jail as acting, faking, and withdrawing in silence due to his arrest. Those types of actions are often demonstrated by individuals that have been arrested and they were not viewed as having been uncommon by Officer Weaver. Officer Weaver's tone and actions clearly changed after she got to the jail and, for the first time, became consciously aware that Mr. Boykin was having a medical crisis, and worked diligently to resuscitate him, as described . . . above. Officer Weaver[] did not have a sudden change of heart that caused her to transition from having intentionally ignored a serious medical need enroute to the jail, to one where she decided to try and save him. Rather, her actions, tone and demeanor make it clear that

> defendant Weaver had not been subjectively aware that Mr. Boykin needed care until that moment in the jail, at which time she responded reasonably. Her actions did not demonstrate a conscious indifference to his wellbeing.

Id.; *see also* Hail Report at 12-13 ("Even if [Boykin, Jr.] had been transported to the emergency department, emergency physicians would not have been aware of [Boykin, Jr.'s] underlying condition and more likely than not, would be unable to reverse the exertional sickling in time to prevent cardiac arrest."); *see also* O'Conner Dep. at 35:18-38:2 (explaining ECAST has a "wide spectrum of presentations" and is a "very uncommon event" so "it makes it difficult and challenging for medical professionals to recognize"), 46:18-22 (stating he would not expect nonmedical professionals, including police officers, to be able to recognize an ECAST event).

Plaintiffs nevertheless assert there is a fact question as to what Weaver knew during transport, especially considering that Boykin, Jr. continued to complain of difficulty breathing in the first half of the transport and then became non-responsive during the latter portion of the transport when it appears he passed out. Dkt. No. 151 (Transcript) at 95:1-19. At the hearing, Weaver's counsel characterized Plaintiffs' core position is that "Weaver, based on what she was observing and hearing, should have perceived something different." Dkt. No. 151 (Transcript) at 63:23-64:4 (stating "that theory flies in the face" of Fifth Circuit precedent). Plaintiffs' counsel agreed that if Weaver simply misdiagnosed the symptoms, that is not actionable. *Id.* at 96:19-22.

Appendix D

During her deposition, Weaver stated she had the ability to drive Boykin, Jr. to the hospital while in transport, but she did not see that Boykin, Jr. was in medical distress. Weaver Dep. at 15:9-16:19 (further stating she would have immediately taken him to the hospital if she felt he was in medical distress). Weaver stated she did not believe Boykin, Jr. was under medical distress even when he was not responsive; rather, she believed Boykin, Jr. was ignoring her because of his felony charges. *Id.* at 84:25-85:7. Weaver further testified as follows:

> A. Usually, when somebody's being charged with a bunch of felonies and we get closer to the jail, they kind of emotionally shut down, so they ignore me or they just don't want to talk. I've had people fake anxiety attacks. I've had people saying that they're going to pass out. It was just one of those situations, again, that I thought was happening.
>
> Q. So based off of your experience with other people who have complained about medical issues when they were charged with felonies, you believed that Mr. Boykin did not actually have the complaints he was voicing to you?
>
> A. Correct.
>
> Q. So even though he was telling you that he was going to pass out and that he couldn't breathe, you did not feel it was appropriate to get him medical care.

> A. I did not feel it was necessary to give him medical care at that time.
>
> Q. Okay. And you continued to believe that after he stopped responding to you during the transport to the jail?
>
> A. I did not believe that he was under medical distress whenever I was transporting him to the jail and when he was not responding to me.

Weaver Dep. at 84:3-85:2; *see also id.* at 91:9-24. According to Weaver, she was transporting Boykin, Jr. to the jail to see the nurse because "usually they are able to assist with getting them water, checking their blook pressure, checking their pulse ox," and vitals. Weaver Dep. at 109:4-13; *see also* 105:25-106:1 ("I transported him to the jail to see the nurse.").

Plaintiffs suggest that Weaver was aware of facts from which she could infer that Boykin, Jr. was in serious medical distress—but Plaintiffs have not sufficiently shown facts that would allow a jury to conclude Weaver actually made that inference. Weaver's testimony and conduct—including the urgency in her voice at the Bi-State jail garage—indicate that she did not perceive such a risk.[31] Indeed, Plaintiffs' medical expert, Dr. O'Connor,

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31. In affirming the officers' motion for summary judgment on the deliberate indifference claims in *Aguirre v. City of San Antonio*, 995 F.3d 395 (5th Cir. 2021), the Fifth Circuit noted that an officer's demeanor is relevant to determining whether he subjectively disregarded a risk of serious harm. In that case,

acknowledged in his deposition that Weaver could have misconstrued Boykin, Jr.'s abnormal breathing pattern in the latter portion of the transport when things worsened and Boykin, Jr. became non-responsive, nothing "he was still breathing; he was still conscious." O'Connor Dep. at 73:5-18. Dr. O'Connor further testified that he recalled from the recording the urgency in Weaver's tone of voice at the Bi-State jail garage and thought Weaver "was very appropriate" and first recognized that Boykin, Jr. was "in extremis" at that moment in time when she first determined he was nonresponsive to her. *Id.* at 60:20-61:14.

Weaver's failure to realize there was a medical emergency negates any claim of deliberate indifference unless the risk of serious harm was so patently obvious that it should demonstrate she did, in fact, have that knowledge. *Batiste*, 458 Fed. Appx. at 356. However, in *Batiste*, the Fifth Circuit specifically held that a similar situation involving alleged symptoms of sickle cell trait "was anything but obvious" and could not "rise to the level of a serious medical need for which 'treatment has been

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the police's dashcam videos showed that the officers surrounding Aguirre—who was lying in a prone, "hog-tie-like" position, ultimately leading to his death from asphyxiation—were "smiling and laughing" before an officer attempted CPR. *Kelson v. Clark*, 1 F.4th 411, 420 (5th Cir. 2021) (citing *Aguirre*, 995 F.3d at 403-04). However, the court emphasized that the officers "quickly took on a sober aspect as Aguirre remained unresponsive, which suggests their initial manner was the result of subjective unawareness of the risk rather than knowledge of the risk and a deliberate choice not to take any precautions against the realization of the danger's fatal consequences." *Id.* (citing *Aguirre*, 995 F.3d at 421).

recommended or for which the need is so apparent that even laymen would recognize that care is required.'" *Id.* (quoting *Gobert*, 463 F.3d at 345, n.12).

The Court, having carefully reviewed the evidence of record in the light most favorable to Plaintiffs, does not find sufficient evidence to create a genuine issue of material fact that Weaver had actual knowledge during transport of a substantial risk of serious harm. However, even assuming there is sufficient evidence in the record for a factfinder to conclude that Weaver was aware of facts during the latter part of the transport from which the inference could be (and was) drawn that a substantial risk of serious harm existed, the Court does not find sufficient evidence to create a genuine issue of material fact that Weaver failed to take reasonable measures to abate that risk.

Plaintiffs assert Weaver should have provided aid, but the only aid they identify is that Weaver should have taken Boykin, Jr. directly to the hospital rather than to the jail. Counsel agreed at the hearing that Weaver's conduct must be more than inept, negligent, or even grossly negligent. Dkt. No. 151 (Transcript) at 96:23-97:8 (further arguing that Weaver "was deliberately indifferent, that she knew and she didn't care").

For support, Plaintiffs rely on *Nerren v. Livingston Police Dep't*, 86 F.3d 469 (5th Cir. 1996), where the Fifth Circuit affirmed the district court's denial of qualified immunity and found the arresting officers had violated a detainee's clearly established constitutional rights.

In that case, Nerren had presented sufficient summary judgment evidence from which a reasonable juror could find an expressed intent to punish. *Id.* at 474 (noting the arresting officers' statement implied they were refusing medical attention to Nerren following an automobile accident because Nerren was not concerned about the other accident victims, and from this, a reasonable juror could conclude that Nerren was denied medical attention as punishment for fleeing the accident). Additionally, the detainee's "face and chest were marred with abrasions, he was in [obvious] pain, and he informed the Arresting Officers that he needed medical attention" for his injuries. *Williams v. Zachar* y ("*Zachary*"), No. 21-60753, 2022 WL 2101518, at *4 (June 10, 2022) (quoting *Nerren*, 86 F.3d at 473) (bracket added in *Zachary*). "The detainee's need for care was obvious because the officers *knew* he 'had recently been involved in a multiple vehicle . . . accident.'" *Id.* (emphasis in *Zachary*). In *Nerren*, the arresting officers flat-out "denied [the detainee's] request for the express reason that he had fled the scene of the accident without regard for the plight of the other victims." *Id.*

Here, Weaver acknowledges some of her comments during transport may have been insensitive.[32] Having considered the entirety of the video records, the Court

32. Possibly referring to her statement in response to Boykin, Jr.'s saying he was going to pass out, "You'll be okay, just lean against the glass;" her later comment after Boykin, Jr. became non-responsive that "You know you're still going to jail either way, right;" and her comment after she applied the brakes for a stop sign, "You know somebody that passes out isn't able to stop themselves from falling forward, right . . . Fun fact."

does not find any evidence that Weaver purposefully treated Boykin, Jr. incorrectly or intended to inflict pain or punish him. *See Cortez-Burlingame v. Galveston Cnty.*, No. 3:18-CV-00183, 2020 WL 2062263, at *6 (S.D. Tex. Apr. 27, 2020), *report and recommendation adopted sub nom.*, No. 3:18-CV-00183, 2020 WL 4018830 (S.D. Tex. July 16, 2020), *aff'd sub nom.*, No. 20-40540, 2022 WL 1114413 (5th Cir. Apr. 14, 2022). And, as discussed at length above in the discussion of the *Williams* case, Defendants were not on notice that Boykin, Jr. had a preexisting condition. *See Zachary*, 2022 WL 2101518, at *4 ("It is undisputed that [the detainee] complained only of wrist pain, back pain, and stomach discomfort—and only intermittently at that. And Zachary, unlike the officers in *Nerren*, was not on notice that [the detainee] had recently undergone significant trauma. (This is true even on the assumption that the booking-room video demonstrates [the detainee] was in significant pain and not just discomfort.)").[33]

Defendants' liability expert Kerss opines Weaver's actions and inferences throughout the transport process "were consistent with that of a reasonable peace officer facing the same or similar circumstances." Kerss Report at 30. Kerss opines the comments Weaver made at the scene of the arrest and during transport, including empathetic and non-flattering ones, demonstrate that

33. As noted by Weaver's counsel at the hearing, in *Nerren*, there was "no other logical explanation for the medical risks [Nerren] was experiencing;" however, here "[t]here's no magic leap from leaving the inference or conclusion [Weaver] reached that [Boykin, Jr.] was physically exhausted to it's got to be something else." Dkt. No. 151 (Transcript) at 86:1-2, 10-12.

she never drew an inference that there was a substantial risk of harm to Boykin, Jr. until she had parked at the sallyport and attempted to remove him from her patrol vehicle. *Id.* According to Kerss, once that recognition occurred, Weaver acted reasonably by summoning aid from Scott and attempting to resuscitate Boykin, Jr. *Id.* Plaintiffs never present a persuasive counter-argument to this train of logic.

Plaintiffs, with the vantage of now having lost a loved one, perhaps rightly take offense to Weaver's comments or the fact that Weaver drove *past* a hospital en route to the jail to be booked in (and presumably seen by a nurse). But Weaver's actions do not show she failed to properly respond to the situation as she understood it. Viewing the evidence most favorable to Plaintiffs, the most they could establish is that Weaver's understanding was wrong, i.e., that she was negligent, unobservant, or drew the wrong inferences from the situation—which, as explained above, is not sufficient to show deliberate indifference.

Considering Plaintiffs have failed to establish that Weaver acted with deliberate indifference to Boykin, Jr.'s medical needs during transport, and further considering the Court's above findings as to Weaver's conduct at the scene of the arrest, the undersigned recommends the Court grant Weaver's motion for summary judgment on the Fourteenth Amendment deliberate indifference claims.[34]

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34. For this reason, the Court does not need to address Defendants' separate assertion that Dr. O'Connor's testimony that Boykin, Jr. might have survived if he had received medical attention sooner is insufficient to show "the causal link between

VI. QUALIFIED IMMUNITY

As an independent ground for the recommendation, the Court recommends Defendants' motions for summary judgment be granted on the basis of qualified immunity.

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the defendant's unconstitutional acts or omissions and the death of the victim, as required by the state's wrongful death statute." *De Paz Gonzalez v. Duane*, No. 21-11258, 2023 WL 5769339, at *5 (5th Cir. Sept. 6, 2023) (quoting *Slade v. City of Marshall*, 814 F.3d 263, 264 (5th Cir. 2016) (quotation omitted in Duane)).

Even if the Court were to consider medical causation, the Court would not be persuaded, as urged by Defendants' counsel at the hearing, that Dr. O'Connor's failure to testify within a "medical reasonable probability" would necessarily end the entire lawsuit. *See* Dkt. No. 151 (Transcript) at 31:16-32:11, 61:3-7. There is an important distinction between survival and wrongful death causes of action under § 1983. *Phillips ex rel. Phillips v. Monroe Cnty., Miss.*, 311 F.3d 369, 373 n.1 (5th Cir. 2002). Claims brought as part of a survival action, "redress[] any constitutional injuries suffered by the Decedent before his death" and require a different causation analysis. *Id.* (emphasis original); *see also Moore v. LaSalle Mgmt. Co., L.L.C.*, 41 F.4th 493, 504 (5th Cir. 2022) ("Indeed, often survivors don't even have to prove the cause of the victim's death to recover. Wrongful death claims are different, though. Since they 'create new causes of action on behalf of the statutorily-designated persons in order to compensate them for the death of the decedent,' plaintiffs must prove the cause of the decedent's demise under state causation principles to recover."); *see also Duane*, 2023 WL 5769339, at *5 n. 5 (stating in a footnote that the plaintiffs voluntarily dismissed their claims brought on behalf of De Paz-Martinez, Jr.'s estate under Texas's survival statute, claims which were effectively derivative claims, so "naturally the Fifth Circuit's holding regarding causation only applied to the plaintiffs' wrongful death action asserted under § 1983"). This case involves both wrongful death and survival actions.

Appendix D

A. Applicable law

Under the doctrine of qualified immunity, "[g]overnment officials performing discretionary functions generally are shielded 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." *Aguirre v. City of San Antonio*, 995 F.3d 395, 406 (5th Cir. 2021) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Thus, to establish whether Defendants are entitled to qualified immunity at the summary judgment stage, the Court must "engage in a two-pronged inquiry. The first asks whether the facts, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a federal right." *Id.* (quoting *Tolan v. Cotton*, 572 U.S. 650, 655-56, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014) (cleaned up in *Aguirre*)). "The second prong of the qualified-immunity analysis asks whether . . . the right in question was 'clearly established' at the time of the violation." *Id.* (quoting *Tolan*, 572 U.S. at 656, 134 S.Ct. 1861 (citing *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002))).

For a right to be "clearly established," the right's contours must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Gonzalez v. Duane*, No. 4:20-CV-072-A, 2022 WL 4450282, at *4 (N.D. Tex. Sept. 23, 2022), *aff'd*, 2023 WL 5769339 (5th Cir. Sept. 6, 2023) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). Individual liability thus turns on the objective

legal reasonableness of the defendant's actions assessed in light of clearly established law at the time. *Id.* (citing *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)).

Although Supreme Court precedent does not require a case directly on point, existing precedent must place the statutory or constitutional question beyond debate. *Id.* at *5 (citing *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 551, 196 L.Ed.2d 463 (2017)). Clearly established law should not be defined at a high level of generality, but "it is not necessary that a previous case presenting identical facts exist in order for a right to be clearly established." *Frank v. Parnell*, No. 22-30408, 2023 WL 5814938, at *5 (5th Cir. Sept. 8, 2023) (citation omitted). This is because the central concept is that of fair warning: "The law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* (quoting *Trammell v. Fruge*, 868 F.3d 332, 339 (5th Cir. 2017) (internal quotations omitted in *Frank*)).

B. Analysis

To overcome Defendants' assertion of qualified immunity, Plaintiffs must show there is a genuine issue of material fact concerning (1) "whether the officer[s] violated a constitutional right" and (2) "whether the right at issue was clearly established at the time of the alleged misconduct." *Williams v. Zachary* ("*Zachary*"), No. 21-

60753, 2022 WL 2101518, at *3 (5th Cir. June 10, 2022) (quoting *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019)). In this case, the Court has discussed above the first question and found Defendants did not commit a constitutional violation. However, assuming that they did, the Court considers the second question—whether Defendants violated a *clearly established* constitutional right at the time of Boykin, Jr.'s arrest in 2019.

"A right is clearly established if it is one that is sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right." *Reed*, 2023 WL 3563017, at *3 (quoting *Cope v. Cogdill*, 3 F.4th 198, 204 (5th Cir. 2021) (emphasis added in *Reed*) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (per curiam))). Plaintiffs bear the "heavy burden" to show that the right Defendants violated was clearly established. *Id.* (citing *Morrow*, 917 F.3d at 874). And a right is only clearly established where the relevant precedent "has placed the . . . constitutional question beyond debate." *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)). In short, executive officers are entitled to qualified immunity except "the plainly incompetent or those who knowingly violate the law." *Id.* (quoting *Morrow*, 917 F.3d at 876).

To begin with, the Court must properly frame the right at issue "in light of the specific context of the case." *Id.* (citing *Cope*, 3 F.4th at 204 (noting courts must be careful not to "define clearly established law at a high level of generality")). Plaintiffs assert, relying on cases

(including *Williams* and *Nerren* discussed above), that "the complaint is Defendant[s] refused to treat Boykin and ignored Boykin's complaints to a known medical risk (Boykin's inability to breathe)."[35] *See* Dkt. No. 113 at 35; *see also id.* at 31, 35-39 (similar).

As an initial matter, Plaintiffs have not framed the right with adequate specificity. *See Zachary*, 2022 WL 2101518, at *4. Take *Reed* as an example. In that case, Fuentes was the lone control room operator at the jail charged with responding to the emergency intercom system which allowed pretrial detainees to page the control room and alert the jail staff to problems or emergencies. *Reed*, 2023 WL 3563017, at *1. On the day in question, Reed had a seizure and fell out of bed. *Id.* Almost one minute later, the emergency intercom rang in the control room. *Id.* When the emergency intercom rang, Fuentes was making a personal phone call to pay her brother's electric bill. *Id.* Over the next three minutes, the emergency intercom rang six more times, some of which Fuentes answered and some of which she ignored. *Id.* (telling Reed at one point "[t]hey're working on it—they'll be down in a minute").

35. Whereas Hobbs and Scott focus on the alleged failure to call for emergency assistance at the scene of the arrest, Dkt. No. 91 at 16-17, Weaver notes in her motion that Plaintiffs allege Defendants were deliberately indifferent by not providing or summoning medical care prior to leaving the arrest scene or (with regard to Weaver) on the way to the Bi-State jail. Dkt. No. 89 at 23-24.

Appendix D

Just over three minutes after the emergency intercom first rang, several officers arrived at Reed's dorm; meanwhile, the jail nurse (who was in the control room with Fuentes) left the control room and walked toward Reed's dorm. *Id.* After the officers could not find a pulse and observed no signs of breathing, they did not attempt to resuscitate Reed. *Id.* A little over one minute later, the jail nurse arrived and found Reed had a "faint" pulse and was "gasping for air." *Id.* Rather than start CPR, she left the dorm to get supplies to properly treat Reed. *Id.* Exactly two minutes after she had left the dorm, the jail nurse reentered and one minute later, an officer began chest compressions while another nurse performed rescue breaths. *Id.* at *1-2. The paramedics arrived approximately four minutes later and took over chest compressions. *Id.* at *2. Reed was taken to the hospital, where he was diagnosed with an anoxic brain injury. *Id.*

Reed sued Fuentes, the jail nurse, the sheriff, and the county under § 1983, claiming they violated his Fourteenth Amendment rights when they deliberately denied him access to medical attention. *Id.* The trial court granted summary judgment to the defendants. On appeal, the Fifth Circuit held Fuentes, the jail nurse, and the sheriff were entitled to qualified immunity on Reed's Fourteenth Amendment claims. *Id.* Notably, the Fifth Circuit, considering the specific factual context of that case, framed the issue very specifically as: "Whether it violates the Fourteenth Amendment for a jailer to ignore emergency intercom calls for three minutes and fourteen seconds while handling a personal phone call." *Id.*

Here, it is not a fair characterization to say Defendants "refused" to treat Boykin, Jr. or that they "ignored" his complaints. Boykin, Jr. was placed in an air-conditioned patrol car out of the sun, had air-conditioning placed on him, and was taken to a jail at where least Weaver knew had a nurse who could further evaluate him. Instead, the more specific complaint seems to be that Defendants should have done something more at the scene of the arrest or that Weaver should have taken Boykin, Jr. to the hospital rather than the jail. And without minimizing Boykin, Jr.'s distress, there has been no suggestion that Boykin, Jr. had a complete "inability" to breathe; instead, the evidence shows Defendants were aware that Boykin, Jr. had "difficulty" breathing, and experts have opined about Boykin, Jr.'s "abnormal" breathing pattern that could have indicated a serious condition. *See* O'Connor Dep. at 73:5-18 (acknowledging in his deposition that Weaver could have misconstrued Boykin, Jr.'s abnormal breathing pattern in the latter portion of the transport when things worsened because "**he was still breathing**; he was still conscious").

Regardless of the correct level of specificity in framing the question, Plaintiffs have not met the "heavy burden" to show that the right Defendants allegedly violated was "clearly established." *Reed*, 2023 WL 3563017, at *3 (citing *Morrow*, 917 F.3d at 874); *see also Zachary*, 2022 WL 2101518, at *4. Regarding the alleged failure to call EMS at the scene of the arrest,[36] the Fifth Circuit stated

36. Recall that immediately after Boykin, Jr. failed to respond to Weaver's sternum rub upon arriving at the jail, Weaver started CPR and alerted Scott, who instantly called for an ambulance and jail medical staff.

that "it was not until July 2021 that our court held that failing to promptly call for emergency assistance in the face of a *known*, serious medical emergency violates the Constitution."[37] *Id.* at *4 (citing *Cope*, 3 F.4th at 209 ("For these reasons, we now make clear that promptly failing to call for emergency assistance when a detainee faces a known, serious medical emergency—e.g., suffering from a suicide attempt—constitutes unconstitutional conduct.")). According to the Fifth Circuit in *Reed*, "it's also not clear that every reasonable officer would conclude that ignoring an emergency intercom—which *might* be alerting to a medical emergency—is the same as an officer *knowing* for a fact that a medical emergency is ongoing and not calling for emergency assistance like the officer in *Cope*." *Id.* (emphasis original).

This last point is pertinent here. As addressed above, the Fifth Circuit has already stated that a hereditary "sickling" phenomenon "is hardly the kind of obvious medical need that a non-medical expert would understand required attention," and "the trait appears through heavy breathing and fatigue, both of which are easily confused with symptoms of someone who had just run over a quarter mile while fleeing the police." *Batist*e, 458 Fed. Appx. at 357-58. Considering Defendants were confronted with symptoms identical to what everyone would expect from a physically exhausted person, it is far from clear that every reasonable officer would conclude—based on Boykin, Jr.'s

37. With regard to Reed's deliberate indifference claim against the jail nurse for delaying CPR, the Fifth Circuit held Reed pointed to no controlling case law that clearly governed the situation. *Reed*, 2023 WL 3563017, at *4.

repeated statements of difficulty breathing following a foot pursuit—that a medical emergency was ongoing which would require summoning or providing additional medical assistance. Thus, regarding Plaintiffs' complaint that emergency assistance should have been called sooner (or at the scene of the arrest), Boykin, Jr.'s right in this context was not clearly established on August 29, 2019, *see Cope*, 3 F.4th at 209, and Defendants are entitled to Qualified Immunity based on that complaint.

Plaintiffs' other complaint is that Defendants failed to "do anything meaningful," "provide" medical care themselves, "refused to treat," or otherwise "ignored" Boykin, Jr.'s urgent medical risk, Dkt. No. 113 at 35, including that Weaver should have taken Boykin, Jr. directly to the hospital (instead of anticipating aid from the jail), *id.* at 42. However, Plaintiffs point to no "existing precedent" that "place[s] the . . . constitutional question[s]" in this case "beyond debate." *Zachary*, 2022 WL 2101518, at *4 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)).

"[T]o overcome qualified immunity, the plaintiff's version of those disputed facts must also constitute a violation of clearly established law. This requires the plaintiff to "identify a case"—usually, a "body of relevant case law"—in which "an officer acting under similar circumstances . . . was held to have violated the [Constitution]." *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 330 (5th Cir. 2020) (citations omitted). Yet Plaintiffs point to no controlling case or body of relevant case law in which an officer acting under

similar circumstances was held to have violated the Constitution.

Plaintiffs cite *Nerren v. Livingston Police Dep't*, 86 F.3d 469 (5th Cir. 1996), but that case does not place it "beyond debate" that Defendants violated Boykin, Jr.'s constitutional rights. The Fifth Circuit previously explained that in *Nerren*, the detainee's "face and chest were marred with abrasions, he was in [obvious] pain, and he informed the Arresting Officers that he needed medical attention" for his injuries and further noting the detainee's need for care was obvious because the officers knew he "had recently been involved in a multiple vehicle . . . accident." *Zachary*, 2022 WL 2101518, at *4. Unlike the officers in *Nerren*, Defendants were not on notice that Boykin, Jr. had sickle cell trait, the cause of his death, and the Fifth Circuit has found that officers, who are not medical professionals, are entitled to qualified immunity when they misdiagnose the source of labored breathing to a foot chase rather than "sickling" brought on by exertion. *See Batiste*, 458 F. App'x at 357-58.

As discussed above, in *Batiste*, the plaintiffs' expert opined the decedent "died from 'sickling' [caused by physical exertion when he fled from the officers] that could have been avoided had he received immediate medical attention."[38] *Id.* at 355-58. In other words, even if the

38. To be clear, the officers in Batiste called EMS at the scene of the arrest. However, EMS was called per policy because the officers tased the detainee during his arrest, not to treat him for labored breathing after a foot chase or from sickling. *See, e.g.*, *Batiste*, 458 Fed. Appx. at 359.

Court were to find the right at issue (however defined) was clearly established at the time of the alleged misconduct, the Court would find Plaintiffs failed to show Defendants' conduct was objectively reasonable in light of *Batiste* and the relevant case law.[39] Defendants had no knowledge of any pre-existing medical condition and were confronted with symptoms identical to what one would expect from a physically exhausted person. The evidence shows the officers and witnesses at the scene of the arrest also believed that Boykin, Jr. was not in medical distress but tired because of a foot pursuit of nearly one-half mile in the

39. Compare this case with the Fifth Circuit's decision in *Wagner v. Bay City, Texas*, 227 F.3d 316 (5th Cir. 2000). There, officers pepper sprayed the plaintiff, cuffed him, and placed him on his chest in the back of the patrol car. *Dyer v. Houston*, 964 F.3d 374, 385 (5th Cir. 2020) (citing *Wagner*, 227 F.3d at 319). Instead of taking the plaintiff to the hospital to flush out the pepper spray, the officers drove him to jail. *Id.* There, they discovered the plaintiff had stopped breathing and attempted CPR; the plaintiff later died at the hospital. *Id.* (citing *Wagner*, 227 F.3d at 318-19). The Fifth Circuit concluded the officers were entitled to qualified immunity against a deliberate indifference claim. *Id.* (citing *Wagner*, 227 F.3d at 324-25). Among other reasons, the court explained that the officers heard the plaintiff moaning during the trip to jail (indicating he was still breathing), and that, when the officers realized he had stopped breathing in jail, they "immediately began CPR." *Id.* (citing *Wagner*, 227 F.3d at 325). Further, the suggestion that the officers take the plaintiff to the hospital was "based solely on a need to decontaminate the effects of the pepper spray," and there was no evidence "that the delay in the decontamination caused [the plaintiff] to stop breathing." *Id.* Thus, the court concluded there was no evidence that the officers "had knowledge that [the plaintiff] was in need of any other immediate medical attention." *Id.*

August heat. Plaintiffs fail to show the actions Defendants took were not objectional reasonable to "treat" someone who was breathing heavily following a long run.

For the above reasons, Plaintiffs fail to show Defendants are not entitled to qualified immunity.

VII. RECOMMENDATION

Based on the foregoing analysis, it is hereby

RECOMMENDED that Motion for Summary Judgment of Defendant Jerrika Weaver on Plaintiff and Intervenor's Deliberate Indifference Claim (Dkt. No. 89) and Motion for Summary Judgment of Defendants Brent Hobbs and William Scott on Plaintiff and Intervenor's Deliberate Indifference Claim and Defendant William Scott's Motion for Summary Judgment on Supervisory Liability Claim (Dkt. No. 91) be **GRANTED.** It is further

RECOMMENDED that Plaintiff's and Intervenor's claims against Weaver, Hobbs, and Scott be dismissed with prejudice.

Objections

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which

objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this the 20th day of October, 2023.

/s/ J. Boone Baxter
J. Boone Baxter
UNITED STATES MAGISTRATE JUDGE

APPENDIX E — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, MCALLEN DIVISION, FILED AUGUST 1, 2025

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

CIVIL ACTION NO. 7:22-cv-00276

MARTINA PENA, INDIVIDUALLY AND AS NEXT BEST FRIEND OF A.P., AND ARISTEDES PENA, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF ALBERTO PENA,

Plaintiffs,

v.

STARR COUNTY, TEXAS, EVELARIO GARZA, UBALDO SUAREZ, CHESTER CERVANTES, ERASMO RIOS JR., DANIEL GARCIA, HECTOR LOPEZ III, JAVIER GONZALEZ, JOEL GARZA, EMILIO GARZA, JESUS BARRERA JR., CESAR JUAREZ JR.,

Defendants.

Filed August 1, 2025

OPINION AND ORDER

The Court now considers "Plaintiffs' Motion to Strike Testimony of Defense Expert Thomas Fowlkes;"[1]

1. Dkt. No. 54.

"Defendants' Opposed Motion to Exclude or Limit Expert Opinions of Judy Melinek;"[2] "Defendants' Opposed Motion to Exclude or Limit Expert Opinions of Natasha Powers;"[3] and "Defendants' Opposed Motions to Exclude or Limit Expert Opinions of Tim Gravette."[4] The Court also considers the motions for summary judgment filed by each of the following Defendants: Miguel "Chester" Cervantes;[5] Evelario Garza;[6] Daniel Garcia;[7] Joel Garza;[8] Cesar Juarez Jr.;[9] Hector Lopez III;[10] Ubaldo Suarez;[11] Starr County;[12] as well as "Defendant Erasmo Rios Jr.'s Motion to Dismiss Pursuant to Rule 12(b)(5);"[13] "Defendant Javier Gonzalez's Motion to Dismiss Pursuant to Rule 12(b)(5);"[14] and Plaintiffs' "Stipulation of Dismissal of Defendant Javier

2. Dkt. No. 55.

3. Dkt. No. 56.

4. Dkt. No. 57.

5. Dkt. No. 58.

6. Dkt. No. 59.

7. Dkt. No. 60.

8. Dkt. No. 61.

9. Dkt. No. 62.

10. Dkt. No. 63.

11. Dkt. No. 64.

12. Dkt. No. 65.

13. Dkt. No. 85.

14. Dkt. No. 86.

Gonzalez and Erasmos Rios in Exchange for Acceptanc [sic] of Trial Subpoenas Pursuant to Federal Rule of Civil Procedure 41."[15] The respective opposing party has filed a response to each opposed motion.

I. Brief Background and Procedural History

This case arises from a death in Starr County Jail. Plaintiffs allege the following sequence of events.[16] On August 13, 2020, Alberto Pena was arrested on a criminal mischief charge. Prior to and while being transported to the jail, he was witnessed by the officers hitting his head on the window of the patrol car. One of the officers believed Alberto had knocked himself out. After being transported to the jail, he was placed in a detox cell. While in the detox cell, Mr. Pena began banging his head against the plexiglass door, striking the wall with his hands and generally creating a ruckus. Ultimately County employees restrained Mr. Pena in a WRAP system roll cart made to prevent him from further self-harm.

After being placed in the WRAP system, Alberto began to scream that he could not breathe. His cries were heard by his cousin, Edgar Pena, who was also in Starr County's custody. Edgar was escorted by Defendants Emilio Garza, Jesus Barrera, Cesar Juarez and Ubaldo Suarez to Mr. Pena's cell to help calm him down. While there, Edgar saw that Alberto's face was purple, he heard him complaining that he could not breathe and

15. Dkt. No. 90.

16. Dkt. No. 33.

heard him begging for help. Edgar asked the guards to loosen the chest straps in the WRAP system, but the guards declined. Edgar was taken back to his cell. Shortly thereafter, Alberto died.

Plaintiffs, the family of Alberto, brought this suit on August 12, 2022. Their allegations include:

- Section 1983 claims based on deliberate indifference against Defendants Chester Cervantes, Erasmo Rios Jr., Daniel Garcia, Hector Lopez III, Javier Gonzalez, Joel Garza, Ubaldo Suarez, Emilio Garza, Jesus Barrera Jr., and Cesar Juarez Jr.[17]

- Section 1983 claims based on failure to supervise against Defendant Evelario Garza;

- Section 1983 claims based on *Monell* against Starr County;

- Wrongful death action against all Defendants; and

- Survival action against all Defendants.

Because the case is before the Court on summary judgment, the Court addresses the motions to exclude first.

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17. *Id.* at 32.

II. Motions to Strike/Exclude/Limit Expert Opinions/ Testimony

a. Legal Standard for Expert Opinion Admissibility

"[T]he Federal Rules of Evidence control the admission of expert testimony."[18] Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> >
> > (b) the testimony is based on sufficient facts or data;
> >
> > (c) the testimony is the product of reliable principles and methods; and
> >
> > (d) the expert has reliably applied the principles and methods to the facts of the case.[19]

"Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful. Similarly,

18. *Mathis v. Exxon Corp.*, 302 F.3d 448, 459 (5th Cir. 2002).

19. Fed. R. Evid. 702.

low probative value, or a total lack of it, will render proposed expert testimony unhelpful and, therefore, inadmissible under Federal Rule of Evidence 702."[20] The Court scrutinizes proposed expert testimony more searchingly than lay witness testimony for its pertinency and potential prejudice.[21]

Once testimony is deemed relevant, the reliability of the expert's methodology becomes the touchstone. The *Daubert* test is a flexible one,[22] and "under *Daubert*, any step that renders the analysis unreliable renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."[23]

To test reliability, the Court assesses the intellectual rigor of the proposed expert testimony,[24] which must

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20. 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 702.02[5] (Mark S. Brodin, ed., 2d ed. 1997) (cleaned up), *quoted in Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 591 (1993).

21. *Rule 702 of the Federal Rules of Evidence Is Sound; It Should not be Amended*, 138 F.R.D. 631, 632 (1991) (Weinstein, J.), *quoted in Daubert*, 509 U.S. at 595.

22. *Daubert*, 509 U.S. at 594.

23. *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 278 n.11 (5th Cir. 1998) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)) (cleaned up).

24. *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

be validated by an independent and objective source beyond the expert's assurances,[25] and the Court "should ensure that the [expert] opinion comports with applicable professional standards outside the courtroom and that it will have a reliable basis in the knowledge and experience of [the] discipline."[26] However, an expert report or opinion need not be in lockstep with the relevant discipline's prevailing view in order to be admissible.[27] "Certain more specific factors, such as testing, peer review, error rates, and 'acceptability' in the relevant scientific community . . . might prove helpful in determining the reliability of a particular scientific 'theory or technique.'"[28]

The Court's task at this stage is gatekeeping, not premature factfinding. "As a general rule, questions

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25. *Brown v. Ill. Cent. R.R.*, 705 F.3d 531, 536 (5th Cir. 2013) (quoting *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc)); *see Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007) (alteration and quotation omitted) ("But the existence of sufficient facts and a reliable methodology is in all instances mandatory. Without more than credentials and a subjective opinion, an expert's testimony that "it is so" is not admissible.").

26. *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) (second alteration in original) (quotation omitted).

27. *Whitehouse Hotel LP v. Comm'r*, 615 F.3d 321, 332 (5th Cir. 2010) (rejecting the argument that compliance with uniform published professional standards goes to admissibility rather than credibility); *see Daubert*, 509 U.S. at 588 ("Nothing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility.").

28. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (quoting *Daubert*, 509 U.S. at 593-94).

relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration."[29] Indeed, the Fifth Circuit has cautioned against transforming a motion to exclude an expert into a trial on the merits, because the factfinder may be entitled to accept or reject an expert's testimony *including* by judging whether the predicate facts on which an expert relied are accurate.[30] In short, experts may rely on disputed facts, but not unsubstantiated assertions. Cross-examination and presentation of competing evidence, rather than exclusion for inadmissibility, are the traditionally favored ways to challenge an expert opinion.[31] "It is the role of the adversarial system, not the court, to highlight weak evidence."[32]

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29. *United States v. 14.38 Acres of Land, more or less Situated in Leflore Cnty.*, 80 F.3d 1074, 1077 (5th Cir. 1996) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)); *see* FED. R. EVID. 702 advisory committee's note to 2000 amendment ("When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.").

30. *See Pipitone*, 288 F.3d at 250.

31. *See MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 852 (5th Cir. 2015) (quoting *Daubert*, 509 U.S. at 596; *see 14.38 Acres of Land*, 80 F.3d at 1078) ("[T]he trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.").

32. *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 562 (5th Cir. 2004).

Appendix E

As a preliminary matter, the Court notes that the principal issue in this case is the failure to enlist the aid of medical personnel, rather than the course of treatment. In this context, the Court addresses the motions to exclude.

b. Analysis

1. Plaintiffs' Motion to Strike Testimony of Defense Expert Thomas Fowlkes[33]

Defendants have designated Dr. Thomas Fowlkes to testify on "[t]he appropriateness of the care, medical screening, response to abnormal behavior, access to medical care and response to the medical emergency provided Mr. Alberto Pena . . . Mr. Pena's past medical history and autopsy finding" and to respond to the opinion of Plaintiffs' experts.[34]

Plaintiffs move to strike Dr. Fowlkes testimony contending that:

> Dr. Fowlkes is a physician who is board certified in addiction and emergency medicine to opine on (1) the standard of care for healthcare workers in a jail, (2) the cause of Plaintiff's death, which involved blunt force trauma to the head and struggle under prolonged restraint, (3) the reasonableness of the actions by the patrol deputies at the scene of the arrest, and

33. Dkt. No. 54.

34. Dkt. No. 73-1 at 7-8.

> (4) the reasonableness of the conduct of the detention officers in the Starr County Jail. Dr. Fowlkes is not a forensic pathologist—or even a pathologist. Nonetheless, he plans to testify at trial on causation of death by adopting and repeating the opinions of the medical examiner, Dr. Frank Salinas, as if they are his own.
>
> His opinions on causation of death should be excluded at trial, as he provides no analysis supporting his ipse dixit conclusions and simply parrots Dr. Salinas—likely due lacking any experience in the areas at issue. His opinions on the reasonableness of the patrol deputies and the jailers should be stricken as he has zero experience as a patrol deputy or jailer; thus, his opinions in these areas are completely unreliable. Finally, his opinions regarding the standards of care for providing medical care in a correctional setting should be stricken as no medical personnel are involved in this case and his healthcare standards of care do not apply to patrol deputies or detention officers.[35]

The record shows that Dr. Thomas Fowlkes is "a medical doctor who has approximately 25 years of experience in emergency and addiction medicine in a correctional setting."[36] Additionally, Dr. Fowlkes is certified in addiction medicine, as a medical review officer

35. Dkt. No. 54 at 5.

36. Dkt. No. 73 at 5.

for drug/alcohol testing, as an adult detention officer, and until June 2024 was a certified correction healthcare professional.[37] As set out in his report, Defendants provide that Dr. Fowlkes reviewed existing medical history and autopsy findings in preparing his report.[38] "Unlike an ordinary witness, [] an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation."[39] This "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline."[40]

The fact that Dr. Fowlkes utilized existing medical information during his review of this case is of no concern to the Court. The Court has been presented with no evidence that the underlying medical information which may have assisted Dr. Fowlkes in the formation of his opinion is unreliable. The Court finds that Dr. Fowlkes' experience in emergency and addiction medicine in a correctional setting qualifies him to provide his opinion on the causation of death in this case. Therefore, the motion is hereby **DENIED**.

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37. Dkt. No. 73-1 at 41.

38. Dkt. No. 73 at 6.

39. *Daubert*, 509 U.S. at 592.

40. *Id.*

2. Defendants' Opposed Motion to Exclude or Limit Expert Opinions of Judy Melinek[41]

Defendants move the Court to exclude or limit the expert opinions of Plaintiffs' expert, Dr. Judy Melinek.[42] Plaintiffs have designated Dr. Melinek to testify on the cause of Mr. Pena's death and what steps could have been taken to avoid that death. Defendants argue that Dr. Melinek, a forensic pathologist, is unqualified to provide "expert testimony in this case related to: 1.) the failure to provide medical treatment; 2.) what medical treatment could have or should have been provided; and 3.) what medical treatment might have saved the decedent's life in this matter."[43] To be specific, Defendants do not contest that

> [Dr. Melinek] is no doubt highly qualified to offer opinions as to forensic pathology and cause of death itself and as counsel noted in her deposition, do not intend to challenge her qualification to opine as a pathologist only. However, Dr. Melinek is not qualified, and never has been, to offer opinions regarding what kind of medical care or treatment would have or could have saved the decedent's life. In both her report, and her deposition testimony, Dr. Melinek strayed so far out of her limited expertise as to be borderline laughable.[44]

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41. Dkt. No. 55.

42. *Id.*

43. *Id.* at 7.

44. *Id.* at 5 (The Court frowns upon such a juvenile attack.).

Defendants contend that "Dr. Melinek has zero experience or qualifications to be opining on medical care that should have been provided to the decedent; much less that any such medical care would in fact have resulted in a different outcome in decedent's life."[45] However, by definition forensic pathology is "[t]he specific branch of medicine that establishes or interprets evidence dealing with diseases and disorders of the body, esp. those that cause death."[46] Dr. Melinek has an extensive background in forensic pathology and is certified by the American Board of Pathology in anatomic, clinical, and forensic pathology.[47] The Court finds that providing expert testimony in this case related to the cause of death, mechanism of injury and steps that could have averted that is within Dr. Melinek's expertise as a forensic pathologist.

Thus, the Court finds that Dr. Melinek is qualified to provide her opinion in this matter. As a reminder, cross-examination and presentation of competing evidence, rather than exclusion for inadmissibility, are the traditionally favored ways to challenge an expert opinion.[48] The Court sees no reason to depart from that standard here. Accordingly, the motion is hereby **DENIED**.

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45. *Id.* at 6.

46. Forensic Pathology Definition, Black's Law Dictionary (12th ed. 2024).

47. Dkt. No. 76 at 5-7.

48. *See MM Steel, L.P.*, 806 F.3d at, 852 (5th Cir. 2015) (quoting *Daubert*, 509 U.S. at 596; *see 14.38 Acres of Land*, 80 F.3d at 1078) ("[T]he trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.").

3. Defendants' Opposed Motion to Exclude or Limit Expert Opinions of Natasha Powers[49]

Defendants move the Court to exclude the expert opinions of Plaintiffs' expert, Natasha Powers. Ms. Powers is a retired police officer retained to testify in police, security, and public safety practices."[50] Defendants argue that her opinions regarding use of force are irrelevant and prejudicial, she is unqualified to give opinions regarding provisions of medical attention, she is not qualified to give opinions on jail related matters, her opinions on WRAP application are unreliable, irrelevant and prejudicial, her opinions are unreliable as they are based on non-verified facts and are purely speculative, and finally she fails to provide support for her designation and regardless, a negligence standard does not apply to section 1983 claims.[51]

Ms. Powers' report details the five questions she was asked to address. The Court finds that Ms. Powers is qualified by education, training and experience to opine on these matters.

a) Use of Force

While the Court agrees with Defendants that this is not a "use of force" case, the Court disagrees with

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49. Dkt. No. 56.

50. Dkt. No. 56-3 at 1.

51. Dkt. No 56.

Defendants' characterization of Ms. Powers testimony on this issue. Ms. Powers' opinion that certain Defendants "used excessive force when they restrained Pena"[52] is not irrelevant simply because a use of force claim is not pursued here. Nor is it unduly prejudicial.

b) Opinions Regarding Provisions of Medical Attention

Defendants argue that Ms. Powers provided opinions that equate to medical opinion but that she does not have any medical training, medical education or medical experience of any kind. Defendants assert that

> In this regard, expert Powers attempts to offer opinions regarding "deliberate indifference" of the County and jailers in the Starr County jail as to a failure to provide medical attention. She opines several times in her report, discussed in Section C, that Pena was in "distress" or "medical distress." Further, she opines that Deputy Cervantes and Garcia ignored "Pena's medical and mental health emergency." She later opines that the arresting deputies failed to provide Pena with emergency mental health diagnosis and medical care. She opines that the involved Starr County Detention employees failed to provide Pena with mental health and emergency medical care.[53]

52. Dkt. No. 56-3 at 44.

53. Dkt. No. 56 at 5-6.

After reviewing Ms. Powers' expert report, it appears to the Court that Ms. Powers is not providing medical opinion but rather explaining, based on her experience, what medical signs that police professionals are trained to look for when using a restraint device such as the one that Mr. Pena was placed in. To be clear, Ms. Powers is not opining on what medical treatment should have been provided, but rather on whether medical treatment should have been sought. Thus, the Court does not find that Ms. Powers' opinions can be considered expert medical opinion.

c) Opinions on Jail Related Matters.

Defendants also seek to exclude "Ms. Powers opinions, use of pictures, videos, documents, outside materials and even observations regarding what she believes took place in the Star County Jail. . . ."[54]

Defendants' basis for this argument is that "[i]t is clear from her report, summary of alleged professional qualifications, and attached resume that Ms. Powers has *zero* qualifications or even work experience with a jail, or even correctional facilities."[55]

Plaintiffs respond that they

> do not intend to introduce opinions of Natasha Powers regarding jail related matters—as

54. Dkt. No. 56 at 7.

55. *Id.* at 6.

> they have another expert, Tim Gravette, for that purpose. This case focuses on the deputies and jailers refusing to provide medical care for a man who they were aware had knocked himself unconscious after repeatedly slamming his head into hard surfaces.[56]

A review of Ms. Powers' report convinces the Court that the proposed testimony, even if it addresses matters occurring while Mr. Pena was in jail, is within Ms. Powers' expertise. One of the basic issues in this case is whether and when officers should have sought medical assessment/care for Alberto Pena. Ms. Powers is qualified to opine on this question.

d) WRAP application

Defendants argue that Ms. Powers' opinions on the WRAP application are irrelevant and prejudicial. However, as previously mentioned, the Court finds otherwise. Moreover, Plaintiffs argue that

> [a]t this time, Plaintiffs do not intend to introduce opinions of Natasha Powers regarding application of the WRAP restraint system. This case focuses on the deputies and jailers refusing to provide medical care for a man who they were aware had knocked himself unconscious

56. Dkt. No. 77 at 7, ¶ 3.

> after repeatedly slamming his head into hard surfaces. Should the evidence at trial cause opinions on the application of the WRAP system to be relevant, Plaintiffs reserve the right to raise this issue with the Court before introducing these opinions.[57]

Thus, the Court declines to address this issue further.

e) Non-Verified Facts

Defendants also argue that Ms. Powers "makes a series of wholly unreliable speculative assertions and conclusory asserts to entirely non-verifiable inaccurate facts."[58] Defendants go on to state that Ms. Powers made-up that Mr. Pena was rendered unconscious, that he was yelling for help, that he was in distress, that it was improper for him to be left unattended, amongst other things. Whether Mr. Pena may have lost consciousness is clearly in dispute, however, the other allegedly "non-verifiable inaccurate facts" have some support in the record or are opinions. These are matters more properly addressed through cross examination.

As the Court has noted, the Court's task at this stage is gatekeeping, not premature factfinding. "As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that

57. Dkt. No. 77 at 73.

58. Dkt. No. 56 at 8.

opinion rather than its admissibility and should be left for the jury's consideration."[59]

f) Negligence Standard

Finally, Defendants seemingly argue that, without saying it, Ms. Powers has inappropriately written her opinion with a negligence standard in mind.[60] Based on a review of Ms. Powers' report, the Court finds otherwise. Nonetheless, the Court agrees that a negligence standard does not apply and will exclude any opinions based on that standard.

For the foregoing reasons, the motion is hereby **DENIED**.

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59. *United States v. 14.38 Acres of Land, more or less Situated in Leflore Cnty.*, 80 F.3d 1074, 1077 (5th Cir. 1996) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)); *see* FED. R. EVID. 702 advisory committee's note to 2000 amendment ("When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.").

60. Dkt. No. 56 at 10, ¶ F.

4. Defendants' Opposed Motion to Exclude or limit Expert Opinions of Tim Gravette[61]

Finally, Defendants move to exclude the expert opinions of Plaintiffs' expert, Tim Gravette. As background and qualifications, Mr. Gravette asserts that he is a twenty-year corrections veteran. Nine of those twenty years were served as an Associate Warden with the Federal Bureau of Prisons.[62] Defendants assert that Mr. Gravette is unqualified to give opinions regarding provision of medical attention; that his opinions on provision of medical attention are unreliable, irrelevant and prejudicial; that his numerous opinions regarding force used and observation checks should be excluded as they are irrelevant, speculative, unreliable, conclusory and prejudicial. Defendants also assert that Tim Gravette's report fails to provide support for his designation, that it is based on a negligence standard which does not apply to Section 1983 claims, and finally, that he is unqualified to give opinions as to policies and procedures for holding pre-trial detainees.[63]

a) Qualification to Give Opinions Regarding Provisions of Medical Attention

Defendants argue that Mr. Gravette does not have the medical training, medical education or medical experience

61. Dkt. No. 57.

62. Dkt. No. 57-3 at 1.

63. Dkt. No. 57.

to be qualified to opine on the deliberate indifference of the County jailers as to a failure to provide medical attention.[64]

Plaintiffs argue that

> Mr. Gravette is a retired correctional officer and associate warden providing expert opinions on whether the detention officer defendants in this case conducted themselves in line with established correctional practices when they refused to provide medical care for a man who they were aware had knocked himself unconscious after repeatedly slamming his head into hard surfaces in the jail. Mr. Gravette provides no medical opinions—but instead simply opines on whether the jailers acted in concert with established police practices.[65]

After reviewing Mr. Gravette's report, the Court agrees that Mr. Gravette is not providing medical opinions in his report. This entire case deals with the question of whether Defendant Starr County correctional employees can be found to have been deliberately indifferent to the alleged medical needs of Mr. Pena. Those Defendants are not medical professionals. Mr. Gravette's report speaks from his experience as a correctional employee trained for the same or similar circumstances. While those circumstances require some baseline assessment of individuals in custody who may be in medical distress, that

64. *Id.* at 5.

65. Dkt. No. 78 at 5-6.

opinion does not delve into medical treatment but instead asks the question of whether it was appropriate to seek the assistance of a medical professional. As previously ruled, with another of Plaintiffs' experts, this expert is not testifying about what medical treatment should have been provided, but on whether medical treatment should have been sought.

b) Reliability, Relevance, and Prejudice of Opinions on Provision of Medical Attention

Defendants next argue that Mr. Gravette's opinions on the question of medical provisions are "purely speculatory and would not only not help the fact-finder with respect to the deliberate indifference standard related to the constitutional requirement of medical attention, but in fact would be entirely prejudicial to Defendants, given their unreliability; their conclusory nature; their failure to be grounded in any actual scientific medical analysis; and their lack of relevancy to the proper standard."[66] Whether by design or inadvertence, Defendants simply misconstrue Mr. Gravette's report.

Mr. Gravette's report sets out the Texas Commission on Jail Standards and by using his own "knowledge, education, training, and years of experience working as a correctional professional," applies those standards to the facts of this case.[67] Mr. Gravette is qualified to provide

66. Dkt. No. 57 at 6.

67. Dkt. No. 57-3.

his opinions and from the Court's review, the opinions do not appear to be unreliable considering Mr. Gravette's background.

c) Opinions Regarding Force Used and Observation Checks

Defendants next argue that Mr. Gravette's opinions regarding excessive use of force are not relevant.[68] Plaintiffs state that they do not intend to introduce the opinions of Mr. Gravette regarding force.[69] Thus the Court will revisit this issue if and when it is an issue.

Defendants also argue that Mr. Gravette's opinions on observation checks amount to "random opinions" that are "speculative, conclusory and unreliable."[70] However, as previously addressed, Mr. Gravette bases his opinions on the Texas Commission on Jail standards which the Courts finds relevant to the facts in this case.

d) Support for Designation and Negligence Standard

Defendants next argue that Mr. Gravette fails to provide support for his assertion that the employees of Starr County were deliberately indifferent toward Mr.

68. Dkt. No. 57 at 8.

69. Dkt. No. 78 at 12.

70. Dkt. No. 57 at 9.

Pena.[71] Defendants' objections here are a cut and paste version of their objections to Ms. Powers' proposed testimony. As with Ms. Powers, Defendants' objections are without merit.

e) Opinions as to Policies and Procedures for Holding Pre-Trial Detainees

Lastly, Defendants argue that although Mr. Gravette has many years of experience in a correctional setting, he is not qualified to render opinion "with pre-trial detainees or specific issues related to intaking or housing pre-trial detainees which would include applying Texas law to pre-trail detention matters."[72] According to Defendants "[i]t is completely disingenuous for someone who has spent their entire career with federal correctional facilities to offer opinions as to what a county jail should be doing with respect to holding pre-trial detainees."[73]

The Court does not agree with this assertion. If anyone is being disingenuous, it is Defendants. Defendants fail to recognize that while the legal source of a pretrial detainee's claim may be distinct from that of a prisoner, the deliberate indifference standard is substantially similar.[74] Mr. Gravette clearly indicates he is considering the Texas

71. Dkt. No. 57 at 11.

72. *Id.* at 12.

73. *Id.*

74. *Hare v. City of Corinth, Miss.*, 74 F3d. 633, 648-49 (5th Cir. 1996).

Commission on Jail Standard. That Mr. Gravette has extensive experience in a federal correctional setting does not render his opinion unreliable. Rather, Mr. Gravette is fully qualified to render his expert opinion on the duties of a correctional officer based upon his training, experience and the correct standard.

Based on the foregoing, Defendants' motion to exclude or limit the expert opinions of Tim Gravette is hereby **DENIED.**[75]

III. Motions for Summary Judgment

a. Legal Standard for Summary Judgment

Federal Rule of Civil Procedure 56 provides that a court has the ability to grant summary judgment when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[76]

"A fact is 'material' if its resolution could affect the outcome of the action,"[77] while a "genuine" dispute is present "only if a reasonable jury could return a verdict for the non-movant."[78] As a result, "[o]nly disputes over

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75. Dkt. No. 57.

76. FED. R. CIV. P. 56(a); *see Bulko v. Morgan Stanley DW Inc.*, 450 F.3d 622, 624 (5th Cir. 2006).

77. *Burrell v. Dr. Pepper/Seven UP Bottling Grp.*, 482 F.3d 408, 411 (5th Cir. 2007).

78. *Fordoche, Inc. v. Texaco, Inc.*, 463 F.3d 388, 392 (5th Cir. 2006); *see Bache v. Am. Tel. & Tel. Co.*, 840 F.2d 283, 287 (5th Cir.

facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[79] "Although this is an exacting standard, summary judgment is appropriate where the only issue before the court is a pure question of law."[80] The Court does not weigh the evidence or evaluate the credibility of witnesses and views all facts and inferences in the light most favorable to the nonmovant,[81] including "resolv[ing] factual controversies in favor of the nonmoving party, but only where there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts."[82]

In a Section 1983 case such as this, where Defendants seek summary judgment based on qualified immunity, the burden is then on Plaintiffs to establish a genuine factual dispute whether the allegedly wrongful conduct violated clearly established law.[83] Thus, the Court will be applying

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1988) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)) ("[T]o determine if an issue of material fact is genuine, we must then decide whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'").

79. *Anderson*, 477 U.S. at 248.

80. *Sheline v. Dun & Bradstreet Corp.*, 948 F.2d 174, 176 (5th Cir. 1991).

81. *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996).

82. *Boudreaux v. Swift Transp. Co*, 402 F.3d 536, 540 (5th Cir. 2005).

83. *Brown v. Callahan*, 623 F.3d 249, 252-253 (5th Cir. 2010) (citations omitted).

a modified summary judgment standard as it analyzes Defendants' qualified immunity defenses.

> The qualified immunity defense has two prongs: whether an official's conduct violated a constitutional right of the plaintiff; and whether the right was clearly established at the time of the violation. A court may rely on either prong of the defense in its analysis.
>
> If the defendant's actions violated a clearly established constitutional right, the court then asks whether qualified immunity is still appropriate because the defendant's actions were objectively reasonable in light of law which was clearly established at the time of the disputed action. Whether an official's conduct was objectively reasonable is a question of law for the court, not a matter of fact for the jury. To be clearly established for purposes of qualified immunity, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The unlawfulness of the defendant's actions must have been readily apparent from sufficiently similar situations, but it is not necessary that the defendant's exact act have been illegal. An official's actions must be judged in light of the circumstances that confronted him, without benefit of hindsight. In essence, a plaintiff must allege facts sufficient

> that no reasonable officer could have believed his actions were proper.[84]

As to the first prong of the qualified immunity defense, pretrial detainees have a clearly established Fourteenth Amendment right not to be denied, by deliberate indifference, attention to serious medical needs.[85] To succeed on a deliberate-indifference claim, Plaintiffs must show that (1) the official was aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and (2) the official actually drew that inference.[86]

As for the second prong of the qualified immunity standard, "[t]o be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[87] As the Fifth Circuit has held, "the salient question we ask at prong two is whether the state of law at the time of the incident gave the officers fair warning that their alleged treatment of [the plaintiff] was unconstitutional."[88]

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84. *Id.* at 25 (internal quotation marks and citations omitted).

85. *Id.* (citing *Hare v. City of Corinth*, 74 F.3d 633, 650 (5th Cir. 1996)).

86. *Dyer v. Houston*, 964 F.3d at 374 (2020) (internal quotation marks and citations omitted).

87. *Id.* at 383 (internal quotation marks and citations omitted).

88. *Id.* (internal quotation marks and citations omitted).

b. Factual Background

The following facts are undisputed, unless otherwise stated, and pertinent to Defendants' motions for summary judgment.

On August 13, 2020, Starr County Deputies were dispatched to the Pena home in response to a 911 call regarding Alberto Pena. Deputy Miguel "Chester" Cervantes, the first on the scene, was approached by Alberto's father who advised Deputy Cervantes that his son was highly intoxicated and under the influence of drugs. Upon encountering Alberto, Deputy Cervantes noticed Alberto had heavy slurred speech and unsteady balance with a strong odor of alcohol. Deputy Cervantes handcuffed Alberto without incident. Lt. Erasmo Rios and Deputy Daniel Garcia, who had then arrived on the scene, placed Alberto in the back of Deputy Cervantes' patrol unit.

While in the patrol unit, before departing the scene, Alberto became rowdy and hit the interior of the patrol unit with his head twice. Whether Alberto lost consciousness is a disputed fact issue. Alberto again hit himself on the interior of the vehicle during his transportation to the Starr County Jail. To prevent further injury, the vehicle stopped and Lt. Rios got in the back of the seat with Alberto to monitor him for the remainder of the ride to the jail.

Defendant Cervantes arrived at the county jail with Alberto at approximately 3:16 p.m. Defendant Cervantes

completed an arrest complaint which notes Albert was under the influence of drugs and alcohol.[89] Alberto was then placed in the detox holding cell. While in the detox cell at approximately 3:34 p.m., Alberto intentionally struck his forehead on the cell's metal door polycarbonate ballistic glass three times. Within a minute Sgt. Hector Lopez, Officer Jesus Gonzalez, and Sgt. Chris Galvan entered the detox holding cell to talk with Alberto about hitting his head on the cell window to get him to stop and calm down.

As he had not yet been booked, at approximately 4:29 p.m., Alberto was escorted out of the detox holding cell and taken to the booking area. Alberto was booked without incident and then escorted back to the detox holding cell by Detention officer Joel Garza.

At approximately 5:38 p.m., Alberto again intentionally struck his head 14 times on the cell's metal door polycarbonate ballistic glass. Again, within a minute, Sgt. Hector Lopez and Detention Officers Joel Garza and Javier Gonzalez entered the detox holding cell to talk to Alberto. Alberto was able to stand and walk and interact with the officers. Alberto was then escorted out of the detox holding cell by Sgt. Hector Lopez and Detention Officers Joel Garza and Javier Gonzalez. At approximately 5:41, Alberto was escorted back into the detox holding cell. Alberto was walking and conscious.

From 5:41 until 6:39 p.m. Alberto was conscious and alternatively sitting, walking, talking, pacing, tapping

89. Dkt. No. 66-4 at 5.

on windows, talking into the intercom, and holding up a piece of paper for jailers to see. At approximately 6:27 p.m., Alberto continued with his aggressive behavior and struck the cell's metal door polycarbonate ballistic glass five times with his right fist. At approximately 6:33 p.m., Alberto struck his right shoulder against the cell's metal door. At approximately 6:38 p.m., Alberto struck the cell's metal door four times with his right hand and then the cell wall once with his hand.

In response, Detention Officers Lopez, Gonzalez, Joel Garza and Barrera entered the detox holding cell at 6:39 p.m. and continued to talk to Alberto. The Detention officers did not notice any problems with his breathing, or his ability to stand or ability to communicate other than his continued intoxication.

At approximately 6:48 p.m., Alberto intentionally struck the cell's metal door with his left foot. During this time, Officers were advised that Alberto was voicing threats to harm Officer Gonzalez. Due to those perceived threats and Alberto's previous incidents of hitting his head and punching the cell with his fists, Sgt. Lopez made the decision to place Alberto in the WRAP restraint to prevent any further harm to himself or the officers.

At approximately 6:50 p.m. Sgt. Lopez and Detention Officers Gonzalez, Garza and Barrera approached Alberto's cell. Officer Gonzalez gave commands for Alberto to turn against the wall with his hands behind his back. Alberto did not immediately comply, so Officer Gonzalez deployed pepper spray. Alberto then kneeled and

was handcuffed and escorted out of the detox holding cell. At approximately 6:53 p.m., the same detention officers escorted Alberto back into the detox holding cell in a WRAP Restraint System rolling cart.

At approximately 7:48 p.m., due to his squirming, Albert ended up laying down almost entirely flat on the rolling cart. Detention Officers Joel Garza and Barrera entered the detox holding cell and re-positioned Alberto in an upright position on the rolling cart and provided him water.

Night shift came on duty at 8 p.m. At 8:05 p.m. Alberto continued to squirm, broke loose from the rolling cart and fell onto the ground, still handcuffed behind his back. Alberto was rolling around on the cell floor and attempting to get up. At approximately 8:11 p.m., Detention Officers observed and heard Alberto out of the WRAP rolling cart, on the floor and kicking the cell door. Supervisor Sgt. Evelario Garza and Officers Suarez, Juarez, Emilio Gaza and Barrera entered the detox holding cell. The officers removed Alberto from the wrap restraint chair and kept him upright while they adjusted the straps on the chair. The officers also adjusted Alberto's handcuffs and poured water over his head.

At approximately 8:51 p.m., Officer Suarez escorted Alberto's cousin, Edgar Pena, who was an inmate down the hall, to the detox holding cell's metal door window with the idea of having Edgar calm Alberto down. Edgar was escorted away from Alberto's cell after a few minutes' conversation.

At approximately 9:01 p.m., Alberto stopped moving while restrained to the WRAP rolling cart system and he appeared to stop breathing. At approximately 9:12 p.m., Detention Officer Emilio Garza did an observation check on Alberto and observed foam on Alberto's mouth. At approximately 9:13 p.m., Detention Officers entered the detox holding cell and attended to Alberto. Alberto was removed from the WRAP rolling cart, and Detention Officers began Cardiopulmonary Resuscitation (CPR) First Aid.

At approximately 9:25 p.m., the Rio Grande City Fire Department arrived at the jail to assist and at approximately 9:28 p.m. Emergency Medical Services Paramedics arrived. Alberto was then placed on a stretcher and transported to Starr County Memorial Hospital in Rio Grande City. Alberto was pronounced dead at approximately 10:12 p.m.

A toxicology analysis showed that at the time of his death, Alberto had Ethanol (alcohol), Benzoylecgonine (Cocaine Degradation Product), Cocaethylene (Cocaine/Ethanol By-Product), Delta-9 Carboxy THC (Inactive Metabolite, and Delta-9 THC (Active Ingredient of Marijuana) in his system. The autopsy report listed Alberto's cause of death as "Cardiorespiratory Arrest While Under the Influence of Mixed Drugs" and the manner of death as "Accidental."

c. Analysis

1. Miguel "Chester" Cervantes[90] and Daniel Garcia[91]

Defendants Miguel "Chester" Cervantes and Daniel Garcia were two of the three arresting officers of Alberto Pena for the Class B Misdemeanor offense of Criminal Mischief for causing damage to property.

Defendant Cervantes was the first to arrive at the Pena home having received the call from dispatch at approximately 2:34 p.m. The undisputed summary judgment evidence establishes that Defendant Cervantes was advised that Alberto was intoxicated, using drugs and causing property damage.[92] Defendant Cervantes placed Alberto in handcuffs and escorted him out of the house. Defendant Daniel Garcia, who had then arrived, also recognized that Alberto was highly intoxicated. Defendant Garcia assisted in placing Alberto in the patrol unit. Defendant Cervantes returned to the home to talk with Alberto's father. While in front of the home, Defendant Cervantes "heard a bang and was notified by Deputy Garcia that Mr. Pena banged his head on the police vehicle window."[93] Defendant Garcia also "noticed Mr. Pena hitting his head on the window of the rear

90. Dkt. No. 58.

91. Dkt. No. 60.

92. Dkt. No. 66-4 at 5

93. Dkt. No. 66-10 at 2.

passenger door and heard the thump." Alberto was found on his side and was "pushed back into the vehicle." Soon after, Defendant Daniel Garcia heard another thud and again found Alberto "on his side with his eyes closed [] mumbling like a typical drunk person." Defendant Garcia and his partner "immediately attempted to get a reaction from [Alberto] by hollering at him [] and tapping his face." Defendant Garcia "believed [Alberto] was intoxicated and [that] this was a normal action with drunks."[94]

While Defendant Cervantes was transporting Alberto to the county jail, Alberto again "begin to hit himself on the interior of the vehicle." Defendant Cervantes stopped the vehicle and Lt. Rios, who was also assisting, entered the back seat to ride with Alberto for the remainder of the trip. Defendant Cervantes arrived at the jail with Alberto at approximately 3:16 p.m. After delivering Alberto to jail, neither Defendant Cervantes nor Defendant Garcia had further interaction with Alberto.

These are the undisputed facts most favorable to the Plaintiffs. Plaintiffs do allege that Alberto lost consciousness because of the head banging in the vehicle prior to transport. The summary judgment evidence does indicate Lt. Rios stated to Alberto that "you knocked yourself out" but this is not definitive evidence that Alberto lost consciousness. There is no other summary judgment evidence that Alberto lost consciousness during this time period. Furthermore, there is no summary judgment evidence that Alberto suffered head trauma,

94. Dkt. No. 66-12 at 2.

or that he died due to head trauma. Nonetheless, relying on their claim that Alberto lost consciousness, Plaintiffs allege that Defendants acted with deliberate indifference in ignoring Alberto's medical needs. The Court will assume, for purposes of this analysis that Alberto passed out for a brief period while in the police unit.

Given these facts, the Court finds that Plaintiffs cannot meet their burden of showing that these Defendants acted with deliberate indifference. The Plaintiffs fail to show Defendants Cervantes and Garcia were aware of facts from which the inference could be drawn that a substantial risk of serious harm existed. Even if Alberto lost consciousness, he recovered quickly, did not show visible signs of injury, responded to intervention, was alert during transport and was able to walk upon arrival at the jail. No inference arises from these facts that a substantial risk of harm existed. Nor can Plaintiffs show that these Defendants actually drew that inference.

Even if Plaintiffs could meet the deliberate indifference standard, Plaintiffs cannot show that the law under these circumstances was clearly established. Plaintiffs compare this matter to *Dyer v. Houston*.[95] There, the Decedent, a pretrial detainee "died after violently bashing his head over 40 times against the interior of a patrol car while being transported to jail."[96] Officers observed the Decedent's "erratic behavior, and physically restrained him." He also bit an officer and was placed in leg

95. *Dyer*, 964 F.3d at 377.

96. *Id.*

restraints. After two hours in a cell, the officers noticed the Decedent's labored breathing and transported him to a local hospital where he eventually died.[97] Further, the autopsy report in *Dyer* confirmed that the cause of death was craniocerebral trauma.[98] However, a forty-five minute interaction with Alberto during which he banged his head three to four times yet was responsive, walking and otherwise appeared uninjured is quite distinct from the facts of *Dyer.* The Fifth Circuit in *Dyer* considered the totality of the circumstances rather than focusing solely on the head strikes. There, officers were aware that Decedent was under the influence of drugs, he was exhibiting erratic behavior, he was rolling and yelling, and he bit an officer all before being placed in a patrol unit.[99] In the unit, Decedent continued his erratic behavior screaming and thrashing and banging his head against the metal cage, side window and back some forty-six times before arriving at the jail.[100] Decedent was then brought into the jail kicking and screaming, and immediately placed in restraints.[101] The Fifth Circuit found that "the Officers had custody of a delusional detainee who was severely harming himself, and yet—despite being aware of the detainee's dire condition—they did nothing to secure

97. *Id.* at 379.

98. *Id.* at 379.

99. Id. at 378

100. *Id.* at 378-79.

101. *Id.* at 379.

medical help."[102] This is quite distinct from the facts here. In sum, the *Dyer* case does not give these Defendants fair warning that their behavior was deliberately indifferent to Alberto's serious medical needs.

Thus, the Court concludes that a reasonable jury could not find Defendants Miguel "Chester" Cervantes and Daniel Garcia acted with deliberate indifference to Alberto's serious medical needs. There is no genuine dispute of material fact as to whether the first or second prong of the qualified immunity standard has been met.

Therefore, the Court **GRANTS** Defendants' motion for summary judgment as to the defense of qualified immunity for Defendants Miguel "Chester" Cervantes[103] and Daniel Garcia.[104]

2. Hector Lopez III[105] and Joel Garza[106]

Defendants Hector Lopez III and Joel Garza were working the day shift at the Starr County jail while Mr. Pena was incarcerated there on August 13, 2020.[107] Defendant Lopez was the booking officer and Defendant

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102. *Id.* at 384.

103. Dkt. No. 58.

104. Dkt. No. 60.

105. Dkt. No. 63.

106. Dkt. No. 61.

107. Dkt. No. 63 at 2, ¶ 4.

Garza was the sergeant on duty. The arresting officers did not report Alberto striking his head against the patrol car window to jail staff upon transfer to the institution. However, arresting officer Defendant Cervantes reported in his "Complaint and Affidavit of Probable Cause for Arrest" that at the time of arrest, Alberto's father reported that Alberto "was highly intoxicated and under the influence of drugs" and that he "became rowdy and began causing damage" to their home.[108] Additionally, Defendant Garza admits knowing Alberto was rowdy and Defendant Garza observed Alberto was highly intoxicated.[109] Similarly, Defendant Lopez was aware that Alberto had been rowdy and that he was intoxicated. Thus, while Defendants Lopez and Garza may not have been aware of Alberto striking his head in the patrol car, they each observed that Alberto was intoxicated and, via the complaint, advised that he was under the influence of unidentified drugs, and that he was rowdy as a result of that then unknown concoction.

At 3:34 p.m., within just 18 minutes of arrival at the jail, Alberto struck his head against the cell window and fell to the ground.[110] He was calmed down in his cell but nothing further was done. Because he was so intoxicated when he arrived, he was not booked until an hour later, at 4:29 p.m. Even then, Alberto remained "highly

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108. Dkt. No. 66-4 at 6.

109. Dkt. No. 66-15 at 1-2.

110. *Id.* at 2.

intoxicated."[111] Then at 5:38 p.m., over two hours after he arrived at the jail, Alberto struck his head 14 times against the window in his cell. Defendants Lopez and Garza along with another entered the cell to get Alberto to calm down. Defendant Garza observed that Alberto fell to his knees after banging his head and was concerned that he would hurt himself.[112] Additionally, Defendant Garza observed Alberto was still visibly intoxicated.[113] Defendant Lopez observed that Alberto was on his knees and appeared dazed.[114] Additionally, Defendant Lopez observed red marks and bumps on Alberto's forehead and that Alberto was still "visibly intoxicated."[115] Defendants passed off Alberto's actions as "simply an intoxicated individual exhibiting highly erratic intoxicated-like actions."[116] This aggressiveness continued with five strikes of his fist at 6:27 p.m. and four strikes with his right hand at 6:38 p.m. Defendant Lopez again passed this off as "just another agitated intoxicated prisoner."[117] Finally, after a strike with his left foot and a threat to one of the officers at 6:48

111. Dkt. No. 66-14 at 2.

112. *Id.*

113. *Id.*

114. Dkt. No. 66-15 at 2.

115. *Id.*

116. *Id.*

117. *Id.* at 3.

p.m., Alberto was placed in a WRAP[118] restraint device in a sitting position. To do so, the officers had to pepper spray Alberto due to the threats and as he was non-compliant to commands. Defendant Lopez again passed off Alberto's behavior as "just another agitated intoxicated prisoner."[119] Before Defendant Lopez ended his shift, he learned that Alberto was no longer in a sitting position, and he had Alberto repositioned by Defendant Garza and another officer.[120]

The summary judgment declarations of both Defendants Lopez and Garza repeatedly assert that they observed no visible injuries or wounds, that Alberto never lost consciousness, never complained of pain and never requested medical assistance. Yet neither Defendant addresses the fact that from the time of arrival at 3:14 p.m., Alberto, who was known to be under the influence of alcohol and drugs, was agitated, aggressive, engaging in self-harm, non-complaint, and threatening to such an extent that he had to be placed in restraints. Each Defendant also attests that "if someone appeared to obviously need medical treatment for visible or obvious injuries or conditions," it should be provided.[121] Yet, by

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118. Dkt. No. 66-14 at 3 (The WRAP is a prisoner/suspect restrain device which essentially restrains a suspect's arms and legs in a cocoon-like jacket, hands cuffed behind; and then prisoner is set up in a low-siting chair with wheels.).

119. Dkt. No. 66-15 at 3.

120. *Id.*

121. Dkt. No. 66-14 at 4; Dkt. No. 66-15 at 14.

their own testimony, throughout this period of time, Alberto remained highly intoxicated. After well over 3 hours in custody, having observed Alberto's abnormally aggressive behavior and knowing that he was under the influence of an unknown cocktail of drugs and alcohol, neither of these Defendants alerted medical staff to check on Alberto's condition. Clearly, these Defendants were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," and they "actually drew that inference" as they chose to place Alberto in a WRAP restraint system.[122]

The autopsy confirms what the officers knew from their own observations—that Alberto was highly intoxicated. At the time of death, Alberto had Ethanol (alcohol), Benzoylecgonine (Cocaine Degradation Product), Cocaethylene (Cocaine/Ethanol By-Product), Delta-9 Carboxy THC (Inactive Metabolite, and Delta-9 THC (Active Ingredient of Marijuana) in his system. The autopsy report listed Alberto's cause of death as "Cardiorespiratory Arrest While Under the Influence of Mixed Drugs." To sum up, these Defendants knew that Alberto was under the influence of a mixture of drugs and alcohol, they saw Alberto exhibit bizarre and highly aggressive behavior for an extended period of time, they knew Alberto's bizarre behavior escalated to an extent that he had to be restrained and yet they did not seek medical attention for Alberto. Then Alberto died as a result of exactly what the officers knew and could gather from their observation of him.

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122. *Sims v. Griffin*, 35 F.4th 945, 949-50 (5th Cir. 2022)

Thus, while these Defendants may not have had an obligation to seek medical attention for Alberto due to a head injury, the Court does find that a factual dispute exists as to whether Defendants Lopez and Garza were aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that these officers drew that inference. While these Defendants may have taken steps to address Alberto's behavior, they took no steps to address his serious medical needs—a high state of intoxication. Alberto was clearly intoxicated, yet these Defendants ignored that state because Alberto had not suffered a physical injury they could see. On these facts, a reasonable jury may conclude that each of these Defendants was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and that each of these Defendants drew that inference. Thus, the Court finds that there is a genuine dispute as to the first prong of the qualified immunity standard as to Defendants Hector Lopez III and Joel Garza

Turning to prong two of the qualified immunity standard, the Court considers whether Alberto's right to receive medical attention under these circumstances was clearly established. To show that a right was clearly established, a plaintiff "must 'identify a case' or 'body of relevant case law' holding that 'an officer acting under similar circumstances . . . violated the [Constitution].'"[123]

123. *Id.* at 951.

Plaintiffs again compare this case to *Dyer* but they also rely on *Thompson v Upshur County, TX*.[124] There, Thompson died after approximately four days in custody at two different jails during which he began suffering from delirium tremens at the second jail such that an ambulance was called to transport him to the hospital.[125] Although warned that injuries and death could result absent hospitalization, Thompson refused medical treatment.[126] He was returned to the first jail where the symptoms of delirium tremens worsened.[127] Although he suffered a head injury which bled, no head gear for protection was used but he was placed in a restrain jacket.[128] Significantly, when the sergeant on duty left for the day, despite being aware of Thompson's history, she instructed officers not to request medical care unless Thompson was dying.[129] Thompson subsequently suffered a seizure and died.[130] The Fifth Circuit found the sergeant was not entitled to qualified immunity noting "that all reasonable jailers would have recognized the constitutional obligation not to instruct her subordinates not to disturb her at home

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124. *Thompson v. Upshur Cnty., TX*, 245 F.3d 447 (5th Cir. 2001).

125. *Id.* at 452-53.

126. *Id.*

127. *Id.* at 454.

128. *Id.*

129. *Id.*

130. *Id.*

or summon an ambulance unless a detainee was on the verge of death.[131]

In contrast to these two cases, the Fifth Circuit found officers were entitled to qualified immunity in *Stapleton v. Lozano.*[132] There, Stapleton was stopped and arrested on suspicion of public intoxication.[133] A search of his vehicle revealed various controlled substances.[134] While being booked he was swaying and unsteady and noted he was not feeling well.[135] Two hours after being booked, he was still swaying and unsteady, he then went to his knees where he remained for the next hour or so.[136] When the cellmate tried to move Stapleton, he was unable to do so.[137] The officer on duty was called, and he called for more help.[138] Around twenty-five minutes later the officer and a first responder entered the cell and found Stapleton unresponsive.[139] He was transferred to the hospital where he died within an hour.[140]

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131. *Id.* at 464.

132. *Stapleton v.* Lozano, 125 F.4d 743 (5th Cir. 2025).

133. *Id.* at 747.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

Appendix E

The Fifth Circuit, in addressing the first prong of qualified immunity, found that the plaintiffs had failed as to both the arresting officer and the officer on duty. Although finding in favor of the officers on the first prong, the Court considered the second prong—whether the right to medical care under these circumstances was clearly established. The Fifth Circuit held that the plaintiffs "were required to identify a case in which an officer who did not obtain medical treatment for a detainee exhibiting symptoms consistent with significant intoxication was held to have violated the Constitution."[141] Because the plaintiffs failed "to provide a factually comparable case" they were unable "to overcome the officers' qualified immunity."[142]

Similarly here, Plaintiffs have failed to identify a factually comparable case sufficient to overcome the second prong of qualified immunity. Thus, the motions for summary judgment for Defendants Hector Lopez III[143] and Joel Garza[144] are hereby **GRANTED**.

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141. *Id.* at 753.

142. *Id.*

143. Dkt. No. 63.

144. Dkt. No. 61.

3. Cesar Juarez Jr.[145] and Ubaldo Suarez[146]

Defendants Cesar Juarez Jr. and Ubaldo Suarez were working the night shift at Star County jail while Mr. Pena was incarcerated there on August 13, 2020.[147]

Upon beginning their shifts, both Defendants Juarez and Saurez were made aware that Alberto had banged his head against the window of his cell a number of times and that he was in the WRAP system.[148] Within ten minutes of Defendants' arrival, Alberto broke loose from the rolling cart and fell onto the ground, still handcuffed behind his back.[149] He was repositioned but continued to be agitated.[150] Then, in an attempt to calm Alberto down, his cousin, a fellow inmate down the hall, was brought to Alberto's cell at about 8:51.[151] The cousin, Edgar Pena, testified that he heard Alberto screaming and he asked to be brought to Alberto to help calm him down.[152] He observed Alberto to be purple in the face and complaining that he could

145. Dkt. No. 62.

146. Dkt. No. 64.

147. Dkt. No. 66-20.

148. Dkt. No. 66-20 at 2.

149. *Id.*

150. *Id.*

151. *Id.*

152. Dkt. No. 75 at 596.

not breathe.[153] However, Alberto did recognize his cousin and was vocal, even screaming after Edgar left his cell. During the cousin's interaction with Alberto, Defendant Juarez noticed Alberto's "eyes were swollen and his pupils dilated, and his eyes looked out."[154]

The position of these Defendants is very similar to the Defendants in the previous section. The officers here knew that Alberto was intoxicated, and that his behavior had been such that Alberto was in the WRAP system. Defendant Juarez also observed Alberto's swollen eyes and dilated pupils. Construing Edgar's testimony in favor of the non-movants, both Defendants would have heard Alberto complaining that he could not breathe. However, this complaint is contradicted by the fact that Alberto was yelling throughout this period of time. Additionally, these Defendants had very limited interaction with Alberto. While Alberto was not directly observed between 8:51 and 9:01 when he became unresponsive, he was checked at 9:12 and attended to within a minute.

As with the Defendants Cervantes and Garcia, the Court concludes that a reasonable jury could not find Defendants Cesar Juarez Jr. and Ubaldo Saurez acted with deliberate indifference to Alberto's serious medical needs. Thus, there is no genuine dispute of material fact as to whether the first prong of the qualified immunity standard has been met.

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153. *Id.*

154. *Id.*

Even if the Court found the that the first prong of qualified immunity standard had been met, the Court's assessment as to the second prong is exactly the same as the prior section pertaining to Defendants Lopez and Garza. The *Dyer* case, as well as the predicate case, *Thompson v. Upsher County, Texas*[155] did not give Defendants Juarez and Suarez fair warning of a clearly established right to medical treatment under these circumstances.

Thus, the motions for summary judgment for Defendants Cesar Juarez Jr.[156] and Ubaldo Suarez[157] are hereby **GRANTED**.

4. Evelario Garza[158]

Defendant Evelario Garza was the sergeant on the night shift at the Starr County Jail the night Alberto was in custody.[159] The analysis applicable to Defendants Saurez and Juarez is the same for Defendant Sergeant Garza on the issue of direct liability. Defendant Sergeant Garza's qualified immunity defense differs from the ones previously addressed to the extent that it is based on a

155. *Thompson* 245 F.3d at 447 (5th Cir. 2001).

156. Dkt. No. 62.

157. Dkt. No. 64.

158. Dkt. No. 59.

159. Dkt. No. 74 at 77.

failure to supervise.[160] On this issue, Plaintiffs contend that Alberto should have been checked within fifteen minutes of 8:51 p.m., as required by the Texas Commission on Jail Standards when a detainee is in restraints. Had that been done, according to Plaintiffs, Alberto would have been found unresponsive since video shows that time to be 9:01 p.m. Plaintiffs contend that had Alberto been checked timely, he would not have died.

To establish a supervisory liability claim, Plaintiffs must show that (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference.[161] As support for their claim, Plaintiffs point to the fact that Alberto was not checked until 9:12 p.m. (outside the fifteen minute window). However, one instance of failure to check at a fifteen-minute interval is insufficient to show a failure to supervise claim. Plaintiffs provide absolutely no evidence that Defendant Sergeant Garza knew that Alberto had not been checked since 8:51 p.m., nor do Plaintiffs provide any evidence that Defendant Sergeant Garza was deliberately indifferent to Alberto's medical needs. On a failure to supervise claim "[p]roof of deliberate indifference normally requires a plaintiff to show a pattern of violations and that the inadequate training or supervision is "obvious and obviously likely to result in a

160. *Id.* at 12.

161. *Smith v. Brenoettsy*, 158 F.3d 908, 911-12 (5th Cir. 1998).

'constitutional violation.'"'"[162] The only case Plaintiffs cite is distinct and insufficient to show a pattern.[163]

Thus, there exists no genuine factual dispute and the motion for summary judgment as to Defendant Evelario Garza is hereby **GRANTED**.[164]

5. Starr County[165]

Plaintiffs argue that under *Monell*[166] Starr County is liable for Alberto's death. Pursuant to *Monell*, counties are persons within the meaning of Section 1983 and can be held liable for violations of a person's constitutional rights. However, they cannot be held liable on the basis of respondeat superior. "[M]unicipal liability under section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom."[167] Plaintiffs here allege two alternative theories to support their claim againt Starr County: (1) pursuant to *Monell*, the

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162. *Brown*, 623 F.3d at 255 (5th Cir. 2010).

163. Dkt. No. 74 at 78.

164. Dkt. No. 59.

165. Dkt. No. 65.

166. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978).

167. *Est. of Bonilla by & through Bonilla v. Orange Cnty., Texas*, 982 F.3d 298, 308 (5th Cir. 2020) (internal citations omitted.).

episodic acts and omissions of County Jailers and (2) the unconstitutional conditions of confinement at the County Jail.

a) Episodic Acts and Omissions

"To establish municipal liability in an episodic-act case, a plaintiff must show '(1) that the municipal employee violated the pretrial detainee's clearly established constitutional rights with subjective deliberate indifference; and (2) that this violation resulted from a municipal policy or custom adopted and maintained with objective deliberate indifference.'"[168]

As established in the preceding sections, Plaintiffs have failed to establish, as a matter of law, that the individual officers' actions amounted to deliberate indifference and/or that Alberto's rights were clearly established at the time of his death. As for the second prong of the *Monell* claim, Plaintiffs again argue that the failure to monitor Alberto every fifteen minutes constitutes a policy or custom amounting to deliberate indifference.

Defendants assert that

> [e]ven if such a de facto policy exists, Plaintiffs cannot show that any failure to monitor by failing to comply with state administrative

168. *Garza v. City of Donna*, 922 F.3d 626, 634 (5th Cir. 2019) (quoting *Brumfield v. Hollins*, 551 F.3d 322, 331).

> standards constituted a violation of any federal law or caused Mr. Pena's death. It is well established that violations of state law are not actionable under § 1983. Additionally, there is no Fifth Circuit precedent governing how often an inmate must be monitored under the circumstance in which Mr. Pena was detained nor do Plaintiffs cite to one.[169]

The Court agrees with Defendants. Plaintiffs fail on both prongs of a *Monell* claim. As detailed in the previous sections, Plaintiffs' claims against the individual Defendants fail to overcome the qualified immunity defense. And as with Defendant Sergeant Garza, Plaintiffs fail to show any pattern and thus fail to show a policy or custom. Thus, the Court finds that Plaintiffs have also failed to establish deliberate indifference for the second prong of a *Monell* claim. Accordingly, Defendants' motion for summary judgment as to Plaintiffs' *Monell* claims against Starr County is hereby **GRANTED.**

b) Conditions of Confinement

A conditions of confinement claim requires Plaintiffs to show "'an intended condition or practice, or show that jail officials' acts are 'sufficiently extended or pervasive . . . to prove an intended condition or practice.'"[170] The Fifth Circuit has held that there is no substantive difference

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169. Dkt. No. 65 at 20 (internal citations omitted).

170. *Est. of Bonilla by & through Bonilla v. Orange Cnty.*, Texas, 982 F.3d 298, 308 (5th Cir. 2020).

between a *Monell* policies or customs requirement or the conditions of confinement showing and further that the causation element is the same for both claims.[171] Moreover, "[w]hen a plaintiff challenges conditions of confinement, 'the proper inquiry is whether those conditions amount to punishment of the detainee.'"[172] Furthermore, the Plaintiffs "must demonstrate a pervasive pattern of serious deficiencies in providing for his basic human needs; any lesser showing cannot prove punishment in violation of the detainee's Due Process rights."[173]

For this claim, Plaintiffs point to the alleged failure to monitor and failure to provide medical care.[174] However, Plaintiffs fail to show that either of these failures was the result of a policy or custom. More importantly, for purposes of a conditions of confinement claim, Plaintiffs fail to show that these failures amounted to punishment. The evidence shows that while medical personal were not called, Alberto was attended to throughout his time in the cell, that officers responded to his erratic behavior, that he was monitored at regular intervals and that officers used a restraint not as punishment, but to prevent injury.

Thus, the Court finds that Plaintiffs have failed on

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171. *Id.*

172. *Id.* (internal citation omitted).

173. *Id.* (internal citation omitted.)

174. Dkt. No. 74 at 94-104.

both theories of liability against Starr County. For the foregoing reasons Defendant Starr County's Motion for Summary Judgment is hereby **GRANTED.**

6) Wrongful Death and Survival Action Claims

To recover on a wrongful death claim under Section § 1983, a plaintiff must show: (1) a constitutional violation; and (2) a causal connection between the violation or omission and the death of the decedent.[175]

To recover on a survival statute claim under Section 1983 Plaintiff must show: (1) a constitutional violation; and (2) a causal connection between the violation and the injury to the decedent that the survival statute claim redresses. Section 1983 incorporates both the Texas Wrongful Death Statute and the Texas Survival Statute.[176]

For the same reasons outlined above, the Court **GRANTS** Defendants' motion for summary judgment as to these claims.

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175. *Montano v. Orange Cty., Texas*, 842 F.3d 865 at 882.

176. *See Pluet v. Frasier*, 355 F.3d 381 at 383-84 (5th Cir. 2004); *Rodgers v. Lancaster Police & Fire Dep't*, 819 F.3d 205 at 209 (5th Cir. 2016); *Estate of King v. Tex. Dep't of Criminal Justice*, Civil Action No. H-22-1858, 2023 WL 6370646, at *3 (S.D. Tex. July 13, 2023).

Appendix E

IV. Motions to Dismiss for Failure to State a Claim and Stipulation of Dismissal

Plaintiffs filed returns of service of summons for Defendant Javier Gonzalez executed on April 4, 2025[177] and Defendant Erasmos Rios Jr. executed on April 21, 2025.[178] Subsequently, each Defendant filed a motion to dismiss pursuant to Rule 12(b)(5).[179] Plaintiffs have now filed a stipulation of dismissal for both of these Defendants in exchange for acceptance of trial subpoenas.[180]

Under Federal Rule of Civil Procedure 41(a)(1)(A)(i), Plaintiffs may dismiss a judicial action without a court order by filing a notice of dismissal before the opposing party serves an answer or motion for summary judgment. Such motion to dismiss is without prejudice unless Plaintiffs state otherwise.[181] Here, Plaintiffs pray to dismiss with prejudice. The Fifth Circuit has held that Rule 41(a) may be used to dismiss individual defendants.[182] Defendants have not served an answer or motion for summary judgment in this case. Accordingly, no further

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177. Dkt. No. 84.

178. Dkt. No. 84-1.

179. Dkt. Nos. 85 & 86.

180. Dkt. No. 90.

181. Fed. R. Civ. P. 41(a)(1)(B).

182. *Williams v. Seidenbach*, 958 F.3d 341, 344-345 (5th Cir. 2020).

action by the Court is necessary[183] and Plaintiffs have effectively dismissed these Defendants from this case.

All of Plaintiffs' claims against Javier Gonzalez and Erasmos Rios Jr. are hereby **DISMISSED WITH PREJUDICE**. The Clerk of Court is instructed to terminate the case as to Defendants Javier Gonzalez and Erasmos Rios.

Further, the motions to dismiss[184] for failure to state a claim filed by the aforementioned Defendants are hereby **DENIED AS MOOT**.

V. Defendants Emilio Garza and Jesus Barrera Jr.

The Court notes that Defendants have not submitted a motion for summary judgment for Defendants Emilio Garza and Jesus Barrera Jr. The record shows that summons was issued for these two Defendants,[185] but there has been no return of service filed. Thus, it is unclear to the Court whether Plaintiffs intend to proceed against Defendants Emilio Garza and Jesus Barrera Jr. Pursuant to Rule 4 of the Federal Rules of Civil Procedure the Court hereby gives Plaintiffs notice that the case against these two Defendants will be dismissed within ten days of this

183. *See Bechuck v. Home Depot U.S.A., Inc.*, 814 F.3d 287, 291 (5th Cir. 2016) (quoting *In re Amerijet Int'l, Inc.*, 785 F.3d 967, 973 (5th Cir. 2015) (per curiam)).

184. Dkt. Nos. 85-86.

185. Dkt. No. 35.

order unless Plaintiffs show cause for the failure to timely serve these Defendants.

VI. Conclusion

Based on the foregoing, the Court hereby **DENIES** "Plaintiffs' Motion to Strike Testimony of Defense Expert Thomas Fowlkes;"[186] **DENIES** "Defendants' Opposed Motion to Exclude or Limit Expert Opinions of Judy Melinek;"[187] **DENIES** "Defendants' Opposed Motion to Exclude or Limit Expert Opinions of Natasha Powers;"[188] and **DENIES** "Defendants' Opposed Motions to Exclude or Limit Expert Opinions of Tim Gravette."[189]

The Court **GRANTS** "Defendant Miguel "Chester" Cervantes's Motion for Summary Judgment"[190] and **DISMISSES** Plaintiffs' claims against **MIGUEL "CHESTER" CERVANTES**; **GRANTS** "Defendant Evelario Garza's Motion for Summary Judgment"[191] and **DISMISSES** Plaintiffs' claims against **EVELARIO GARZA**; **GRANTS** "Defendant Daniel Garcia's Motion for Summary Judgment"[192] and **DISMISSES** Plaintiffs'

186. Dkt. No. 54.

187. Dkt. No. 55.

188. Dkt. No. 56.

189. Dkt. No. 57.

190. Dkt. No. 58.

191. Dkt. No. 59.

192. Dkt. No. 60.

claims against **DANIEL GARCIA**; **GRANTS** "Defendant Joel Garza's Motion for Summary Judgment"[193] and **DISMISSES** Plaintiffs' claims against **JOEL GARZA**; **GRANTS** "Defendant Cesar Juarez Jr.'s Motion for Summary Judgment"[194] and **DISMISSES** Plaintiffs' claims against Cesar Juarez Jr.; **GRANTS** "Defendant Hector Lopez III's Motion for Summary Judgment"[195] and **DISMISSES** Plaintiffs' claims against Hector Lopez III; **GRANTS** "Defendant Ubaldo Suarez's Motion for Summary Judgment."[196] and **DISMISSES** Plaintiffs' claims against Ubaldo Suarez; **GRANTS** "Defendant Starr County's Motion for Summary Judgment"[197] and **DISMISSES** Plaintiffs' claims against Starr County.

The Court **DENIES AS MOOT** "Defendant Erasmo Rios Jr.'s Motion to Dismiss Pursuant to Rule 12(B)(5);"[198] **DENIES AS MOOT** "Defendant Javier Gonzalez's Motion to Dismiss Pursuant to Rule 12(b)(5);"[199] and **DISMISSES DEFENDANTS JAVIER GONZALEZ AND ERASMOS RIOS** pursuant to Plaintiffs' "Stipulation of Dismissal of Defendant Javier Gonzalez and Erasmos Rios in Exchange

193. Dkt. No. 61.

194. Dkt. No. 62.

195. Dkt. No. 63.

196. Dkt. No. 64.

197. Dkt. No. 65.

198. Dkt. No. 85.

199. Dkt. No. 86.

for Acceptanc [sic] of Trial Subpoenas Pursuant to Federal Rule of Civil Procedure 41."[200]

Finally, the Court hereby **CANCELS** the parties' final pretrial conference previously set for September 18, 2025 at 9:00 a.m.

IT IS SO ORDERED.

DONE at McAllen, Texas, this 1st of August, 2025.

/s/ M. Alvarez
Micaela Alvarez
Senior United States District Judge

200. Dkt. No. 90.

APPENDIX F — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 29, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-40472

PARIS THORPE, AS NEXT FRIEND A.B.,

Plaintiff-Appellant,

DARREN BOYKIN,

Intervenor Plaintiff-Appellant,

v.

JERRIKA WEAVER; BRENT HOBBS;
WILLIAM SCOTT,

Defendants-Appellees.

Filed July 29, 2026

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:21-CV-106

Appendix F

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before SOUTHWICK, GRAVES, and WILSON, *Circuit Judges.*

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 40 and 5th Cir. R. 40), the petition for rehearing en banc is DENIED.

APPENDIX G — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 25, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-40481

MARTINA PENA, INDIVIDUALLY, AND AS NEXT BEST FRIEND OF A.P.; ARISTEDES PENA, INDIVIDUALLY, AND ON BEHALF OF ESTATE OF ALBERTO PENA,

Plaintiffs-Appellants,

v.

STARR COUNTY, TEXAS; EVELARIO GARZA; UBALDO SUAREZ; CHESTER CERVANTES; DANIEL GARCIA; HECTOR LOPEZ, III; JOEL GARZA; EMILIO GARZA; JESUS BARRERA, JR.; CESAR JUAREZ, JR.,

Defendants-Appellees.

Filed September 25, 2026

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:22-CV-276

Appendix G

ON PETITION FOR REHEARING EN BANC

Before STEWART, ENGELHARDT, and DOUGLAS, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 40 and 5TH CIR. R. 40), the petition for rehearing en banc is DENIED.

APPENDIX H — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 8, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-40472

PARIS THORPE, AS NEXT FRIEND A. B.,

Plaintiff-Appellant,

DARREN BOYKIN,

Intervenor Plaintiff-Appellant,

v.

JERRIKA WEAVER; BRENT HOBBS;
WILLIAM SCOTT,

Defendants-Appellees.

Filed July 8, 2026

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:21-CV-106

JUDGMENT

Before SOUTHWICK, GRAVES, and WILSON, *Circuit Judges.*

Appendix H

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellant pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See FED. R. APP. P. 41(b). The court may shorten or extend the time by order. See 5TH CIR. R. 41 I.O.P.

Certified as a true copy and issued as the mandate on Aug 05, 2026

Attest: /s/ Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX I — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 28, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-40481

MARTINA PENA, INDIVIDUALLY, AND AS NEXT BEST FRIEND OF A. P.; ARISTEDES PENA, INDIVIDUALLY, ON BEHALF OF ESTATE OF ALBERTO PENA,

Plaintiffs-Appellants,

v.

STARR COUNTY, TEXAS; EVELARIO GARZA; UBALDO SUAREZ; CHESTER CERVANTES; DANIEL GARCIA; HECTOR LOPEZ, III; JOEL GARZA; EMILIO GARZA; JESUS BARRERA, JR.; CESAR JUAREZ, JR.,

Defendants-Appellees.

Filed August 28, 2026

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 7:22-CV-276

JUDGMENT

Appendix I

Before STEWART, ENGELHARDT, and DOUGLAS, *Circuit Judges.*

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellants pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See FED. R. APP. P. 41(B). The court may shorten or extend the time by order. See 5TH CIR. R. 41 I.O.P.

Certified as a true copy and issued as the mandate on Oct 02, 2026

Attest: /s/ Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit