NO. 23-1204

In the Supreme Court of the United States

DANIEL KINSINGER,

Petitioner,

v.

SHERELLE THOMAS, ADMINISTRATOR OF THE ESTATE OF TERELLE THOMAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF THE AMICUS CURIAE

The NATIONAL SHERIFFS' ASSOCIATION (the "NSA") is a non-profit association formed under 26 U.S.C. § 501(c)(4).[1] Formed in 1940 the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. the NSA has over 20,000 members and is the advocate for 3,083 sheriffs throughout the United States. The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in the judicial process where the vital interests of law enforcement and its members are affected. Amicus represents the nation's sheriffs who operate more than 3,000 local correctional facilities throughout the country. The vast majority of these facilities house both convicted as well as pretrial inmates. Sheriffs, as the custodians of the inmates housed within these facilities, are charged with providing a safe and secure environment for both the inmates and for their staff.

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[1] This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received timely notice of the intent to file this brief.

FACTS

The pertinent facts are as follows.

Officers believed that Decedent detainee may have ingested an unknown amount of narcotics when apprehended. Decedent was coherent and not demonstrating any medical symptoms while in their presence other than feeling hot despite the cold temperature. In addition, Decedent denied consuming cocaine several times.

Officer Carriere transported Decedent to the Dauphin County Booking Center. Upon arrival at the Booking Center, Carriere informed medical staff that Decedent may have ingested cocaine. Decedent was evaluated by a jail nurse and cleared to be placed in a cell. Decedent subsequently fell backwards onto the floor and hit his head, after which he suffered cardiac arrest. Twenty minutes later Decedent was transported by emergency medical technicians to Pinnacle Harrisburg Hospital for medical treatment. There Decedent was pronounced dead from cocaine and fentanyl toxicity.

The Third Circuit denied officers qualified immunity finding that the law was clearly established that officers cannot have a detainee, believed to have ingested narcotics, evaluated by jail medical staff rather than taken directly to a hospital.

SUMMARY OF ARGUMENT

Officers are entitled to Qualified Immunity unless their actions were clearly established to be a Constitutional violation. As of 2023, at least four federal courts of appeal have held that officers transporting a detainee who has ingested narcotics to be evaluated by an EMT or jail medical staff, rather than a hospital, do not violate a clearly established Constitutional right and are entitled to Qualified Immunity. Further, officers were not deliberately indifferent to a serious medical condition by simply suspecting a detainee ingested narcotics, without signs of overdose, as held by numerous courts.

Decedent denied ingesting narcotics on numerous occasions. Decedent did not show signs of overdose while in officers' custody. Officers did what they believed to be the right thing to do by having him evaluated by the jail nurse. Officers did not draw the inference that a substantial risk of serious harm existed by them doing nothing. Officers did, in fact, do something to address any medical problems. They had Decedent evaluated medically. Accordingly, officers were not deliberately indifferent to a serious medical need.

I. Qualified Immunity Requires Existing Precedent Place the Constitutional Question Beyond Debate and Apparent to All but the Plainly Incompetent or Those Who Knowingly Violate the Law.

Qualified immunity attaches when an official's conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known.'" *White v. Pauly*, 580 U.S. 73, 78-79 (January 9, 2017), *citing*, *Mullenix v. Luna*, 577 U.S., at 11, 136 S.Ct. 305; 193 L.Ed.2d 255, 257. The Court in *Pauly* provided that "[w]hile this Court's case law 'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id.*, at 12, 136 S.Ct. 305; 193 L.Ed.2d 255, 257. In other words, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Ibid.*

This Court in *Pauly* stated, "In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. *Pauly*, 580 U.S. at 79, *citing*, *e.g.*, *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 611, n. 3, 135 S.Ct. 1765; 191 L.Ed.2d 856, 866 (2015) (collecting cases). The *Pauly* Court has found this necessary both because qualified immunity is important to "'society as a whole,'" *ibid.*, and because as "'an immunity from suit,'" qualified immunity "'is effectively lost if a case is erroneously permitted to go to trial,'" *Pauly*, 580 U.S. at 79, *citing*, *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

In *Pauly*, this Court stated, "Today, it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *Pauly*, 580 U.S. at 79, *citing*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). As the *Pauly* Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. *Pauly*, 580 U.S. at 79, *citing*, *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Otherwise,

the *Pauly* Court reasoned, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Pauly*, 580 U.S. at 79, *citing*, *Anderson*, 483 U.S. at 639, 107 S.Ct. 3034, 97 L.Ed.2d 523.

In *Pauly*, the Court found that the panel majority misunderstood the "clearly established" analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated a constitutional right. *Pauly*, 580 U.S. at 79. Instead, the majority relied on cases that lay out principles at only a general level. *Id.* This Court in *Pauly* stated, "Of course, 'general statements of the law are not inherently incapable of giving fair and clear warning' to officers, (*United States v. Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)), but 'in the light of pre-existing law the unlawfulness must be apparent.'" *Pauly*, 580 U.S. at 79-80, *citing*, *Anderson v. Creighton*, *supra*, at 640, 107 S.Ct. 3034, 97 L.Ed.2d 523.

II. As of 2023, at Least Four Federal Courts of Appeal Have Held That Officers Transporting a Detainee Who Has Ingested Narcotics to Be Evaluated by an EMT or Jail Medical Staff, Rather than a Hospital, Do Not Violate a Clearly Established Constitutional Right and Are Entitled to Qualified Immunity.

In *S.R. v. Scott Cnty.,* 2023 U.S. App. LEXIS 9006 (5th Cir. April 14, 2023), officers were faced with a detainee believed to have ingested narcotics and had white foam coming from either side of her mouth. Officers had a paramedic check her and then transported her to the police station to be assessed by the

nurse. She died from an overdose at the Detention Center. The Fifth Circuit held officers were entitled to qualified immunity because the law was not clearly established that officers were required to have her evaluated at a hospital. *Id.* at 6.

Plaintiffs simply assert that the Deputies were deliberately indifferent by taking Musgrove to the police station and not directly to the hospital. The Fifth Circuit provided, "But '[t]o accept appellant's claim would be to mandate as a matter of constitutional law that officers take all criminal suspects under the influence of drugs or alcohol to hospital emergency rooms rather than detention centers. That would be a startling step to take.'" *Id.* at 12-13, *citing*, *Grayson v. Peed*, 195 F.3d 692, 696 (4th Cir. 1999); *see also Sanchez v. Young Cnty.*, 866 F.3d 274, 281 (5th Cir. 2017) ("The Constitution does not require that officers always take arrestees suspected to be under the influence of drugs or alcohol . . . to a hospital against their wishes.").

Based on *Scott County*, the Fifth Circuit in 2023 believed it would be a "startling step to take" to mandate as a matter of constitutional law that officers take all criminal suspects under the influence of drugs or alcohol to hospital emergency rooms rather than detention centers. Yet the Third Circuit below held that it is beyond debate and "clearly established" that Decedent had a constitutional right to be taken to a hospital rather than be evaluated by a healthcare professional at the jail. By implication then all members of the Fifth Circuit are plainly incompetent or knowingly violate the law by holding that the constitutional question is not beyond debate based on existing precedent. And presumably, members of the Fifth Circuit know more about constitutional law than the

average patrolman. Accordingly, this Court's upholding the Third Circuit's holding that the law is clearly established to officers is a "starling step to take."

Not only does the Fifth Circuit believe the constitutional question is not "clearly establish," but so does the Sixth Circuit. In *Barberick v. Hilmer*, 727 Fed. Appx. 160, 161 (6th Cir. April 4, 2018), officers believed the detainee had swallowed narcotics and was trying to commit suicide by overdose. Officers had him evaluated by an EMT on the scene and transported him to jail. Upon arrival at the jail, detainee was unresponsive and died from combined drug intoxication. His widow sued claiming deliberate indifference to a serious medical condition. *Id*.

The Sixth Circuit held that plaintiff did not identify controlling authority that would make clear to an officer in that position that failure to seek out further medical assistance immediately after receiving an EMT evaluation could constitute deliberate indifference. *Id*. at 164. The law governing the asserted constitutional violation was therefore not clearly established. *Id*.

The Sixth Circuit found in an earlier case that the law was not clearly established. In *McGaw v. Sevier Cty.*, 715 Fed. Appx. 495, 496 (6th Cir. October 31, 2017), McGaw arrived at the Sevier County Jail, having consumed enough alcohol and opiates to leave him visibly intoxicated. He told his booking officers that he had consumed an unspecified amount of vodka and three "roxys"—slang for roxicodone, a prescription opiate. *Id*. Defendant officers summoned a jailhouse nurse to examine McGaw. *Id*. The nurse informed them that McGaw could safely be left in a holding cell to sleep off his intoxication. *Id*. However, during the

night, McGaw suffered a heart attack caused by the combination of alcohol and drugs, and later died at the hospital. *Id.*

Plaintiffs in that 42 U.S.C. § 1983 action alleged deliberate indifference by the officers to McGaw's medical needs, and failure on the part of the county to train its officers to recognize medical emergencies. *Id.* at 496-497. The district court denied defendants' summary judgment motions, and defendants appealed. *Id.* at 497. The Sixth Circuit held that because the officers relied on what they reasonably believed to be appropriate treatment advice by the jail nurse, they did not act with deliberate indifference and were accordingly entitled to qualified immunity. *Id.*

In addition to the Fifth and Sixth Circuits holding that the law was not clearly established, the Tenth Circuit agreed. In *Estate of Duke v. Gunnison Cty. Sheriff's Office*, 752 Fed. Appx. 669, 670 (10th Cir. November 29, 2018), officers had a detainee believed to be under the influence of narcotics and alcohol. He was transported to jail and underwent a drug recognition exam. *Id.* He later died in jail from a drug overdose. *Id.* at 672.

Plaintiffs, Duke's parents and his estate, filed suit against GCSO and several individuals involved in Duke's detention. *Id.* The district court granted summary judgment in favor of defendants. It concluded that the individual defendants were entitled to qualified immunity. *Id.*

The Tenth Circuit explained that to defeat a qualified immunity defense "existing law must have placed the constitutionality of the officer's conduct beyond debate." *Id.* at 674, *citing*, *D.C. v. Wesby*, 138 S.Ct. 577,

589, 199 L.Ed.2d 453 (2018). The court found that Duke exhibited many common characteristics of intoxicated individuals but was responsive and functioning. Based on this, the court affirmed the grant of qualified immunity to the individual defendants. *Id*.

In addition to the Fifth, Sixth and Tenth Circuits holding that a detainee who has ingested narcotics does not have a clearly established right to a hospital visit, the Eleventh Circuit also so holds. In *Sanders v. City of Dothan*, 409 Fed. Appx. 285 (11th Cir. January 19, 2011), after a police chase, the arrestee was placed in a police car. *Id*. at 286. Officers saw a substance that looked like cocaine in the car and in the arrestee's beard, but he denied swallowing anything and showed no signs of impairment or intoxication. *Id*. , at 287. While the arrestee was handcuffed in the police car, an officer used a taser on the arrestee so he would open his mouth and lift his tongue. Officers drove two blocks to the jail. *Id*. at 288. The arrestee appeared to be in some kind of medical distress and was only then taken to the hospital, where he died from acute cocaine intoxication. *Id*.

The appellate court determined that the Fourteenth Amendment claim failed because the administrator did not provide evidence that the officer was aware that the arrestee was at substantial risk of serious harm due to a serious medical need. *Sanders*. , at 289. The Eleventh Circuit found that even if the officer was aware that the arrested had swallowed some amount of cocaine, there was no evidence that he was aware that the arrestee had swallowed an amount large enough to put him at serious risk of harm. *Id*.

III. Deliberate Indifference Does Not Include an Official's Failure to Alleviate a Significant Risk He Should Have but Did Not Perceive.

The seminal case establishing the deliberate indifference standard is *Farmer v. Brennan*, 511 U.S. 825 (June 6, 1994). There, this Court rejected an objective test for deliberate indifference. *Id.* at 837. The Court held that instead, a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Id.* The court explained that this approach comports best with the text of the Amendment as our cases have interpreted it. *Id.* The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." *Id.* An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation, according to this Court in *Farmer*. *Id.* at 825-826. The *Farmer* Court reasoned that the common law reflects such concerns when it imposes tort liability on a purely objective basis. *Id. citing*, William Prosser et al., PROSSER AND KEETON ON TORTS §§ 2, 34, pp. 6, 213-214; *see also* Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680; *United States v. Muniz*, 374 U.S. 150, 10 L.Ed.2d 805, 83 S.Ct. 1850 (1963). Most importantly in the instant case, this Court explained that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no

cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Farmer*, 511 U.S. at 837-838. In such a situation, tort liability may apply, but it would not be a constitutional violation.

The *Farmer* Court further explained, "To be sure, the reasons for focusing on what a defendant's mental attitude actually was (or is), rather than what it should have been (or should be), differ in the Eighth Amendment context from that of the criminal law." *Id.* at 839. Here, a subjective approach isolates those who inflict punishment; there, it isolates those against whom punishment should be inflicted. *Id.* But the result is the same: to act recklessly in either setting a person must 'consciously disregard' a substantial risk of serious harm. *Id.*, *citing*, Model Penal Code § 2.02(2)(c)."

IV. Officers Who Act Reasonably to a Substantial Risk of Harm Are Not Deliberately Indifferent.

"[O]fficials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844.

> A prison official's duty under the Eighth Amendment is to ensure "reasonable safety," (*Helling*, *supra*, at 33; *see also Washington v. Harper*, 494 U.S. at 225; *Hudson v. Palmer*, 468 U.S. at 526-527), a standard that incorporates due regard for prison officials' "unenviable task of keeping dangerous men in safe custody under humane conditions." *Spain v. Procunier*, 600 F.2d 189, 193 (CA9 1979)

> (Kennedy, J.); *see also Bell v. Wolfish*, 441 U.S. 520, 547-548, 562, 60 L.Ed.2d 447, 99 S.Ct. 1861 (1979). Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause.

Farmer, 511 U.S. at 844-845.

In the instant case, Officers acted reasonably by having Decedent, who displayed no signs of overdose other than being hot, evaluated by a healthcare professional, jail medical staff, to clear him medically before being incarcerated. Accordingly, Officers were not deliberately indifferent to a serious medical need. And even if Officers were found to be deliberately indifferent, they were entitled to qualified immunity under existing precedent.

V. Not Only Are Officers Entitled to Qualified Immunity, but Precedent Shows They Were Not Deliberately Indifferent.

An examination of the facts and decisions below shows that officers in the instant case were not deliberately indifferent to a serious medical condition because Decedent was not exhibiting obvious signs of overdose when transported to the jail for medical evaluation. The facts of these cases are strikingly similar to the instant case and provide clear guidance to this Court.

In *S.R. v. Scott Cnty.,* 2023 U.S. App. LEXIS 9006 (5th Cir. April 14, 2023), a man called 911 to report a disturbance outside his house. *Id*. at 1-2. One of the participants in the disturbance was Musgrove who was behaving erratically and had "white foam" coming

from both sides of her mouth. *Id.* at 2. Deputy Holland called an ambulance for "a female subject out here under the influence of something." *Id.*

Roughly 20 minutes after the encounter began, Sheriff's Deputy Cody May arrived at the scene. The paramedics arrived soon after. The paramedics asked, "Have you had any drugs or alcohol today?" Musgrove said "no." *Id.* at 3. The paramedics explained again that they were there to help and that Musgrove needed to be honest with them about whether she had consumed any drugs or alcohol. *Id.* Again, she denied consuming any substances. Nevertheless, the paramedics asked Musgrove multiple times if she wanted to go to the hospital and tried to convince her to go with them. Musgrove declined. *Id.* at 3-4. After Musgrove became even more aggressive and accusatory, the Deputies placed her under arrest for public intoxication, disorderly conduct, and child endangerment. *Id.* at 4.

The Deputies then drove Musgrove to the Scott County Detention Center to be assessed by a nurse. Musgrove talked intermittently during the 15-mile ride and sat back up at one point before laying down again. *Id.* When they arrived at the Detention Center at 10:13 p.m., Musgrove was found breathing but unresponsive in the backseat and ultimately died at the hospital from drug-induced cardiac arrest. *Id.*

In evaluating the case on appeal, the Fifth Circuit provided that Plaintiffs must show that Deputies Holland and May subjectively believed Musgrove was at a substantial risk of overdosing and that they nevertheless "refused to treat her, ignored her complaints, intentionally treated her incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for her serious medical needs." *Id.* at 7.

Both Deputies explained that they did not believe Musgrove was in immediate danger. *Id*. at 8. But the court reasoned that even if the Deputies were mistaken in this belief, it is well established that "the failure to alleviate a significant risk that the [Deputies] should have perceived, but did not[,] is insufficient to show deliberate indifference." *Id*., *citing*, *Farmer v. Brennan*, 511 U.S. 825, 838, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

Plaintiffs responded that this case is not about whether the officers knew about a potential overdose specifically. Rather, Plaintiffs asserted the Deputies believed Musgrove had taken some substance, and that should be sufficient to create a triable issue of fact on the Deputies' awareness of a substantial risk. *Scott County* at 9. The Fifth Circuit held, "Our precedent forecloses that contention." *Id*. The court held that Plaintiffs failed to identify any evidence that either Deputy interpreted Musgrove's behavior as a sign of overdose or otherwise believed that serious harm was about to befall her. *Id*. at 11.

As for the third deliberate-indifference prong, the court believed that "the Deputies responded to the situation with tact and care, not 'reckless disregard.'" *Id*. quoting *Farmer*, 511 U.S. at 836. The court reiterated that "to satisfy the third prong, Plaintiffs must prove that the Deputies refused to treat Musgrove, ignored Musgrove's complaints, intentionally treated Musgrove incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for Musgrove's serious medical needs." *Id*. The court concluded that Deputies Holland and May did none of the above. Instead, they called an ambulance—even after Mus-

grove had repeatedly denied consuming any drugs or alcohol and repeatedly refused medical attention. *Id.*

In *McGaw v. Sevier Cty.*, 715 Fed. Appx. 495 (6th Cir. October 31, 2017), McGaw turned himself in to the Sevier County Jail on a capias warrant for a previous failure to appear in court on charges of misdemeanor assault and public intoxication. At the time of his arrival at the jail, McGaw was visibly intoxicated. *Id.* at 496. He could not state what time it was, lacked the ability to sit up by himself, and was flummoxed by questioning. *Id.* McGaw did maintain enough presence of mind to state the reason for his condition. He told his booking officers that he had consumed an unspecified amount of vodka and three "roxys"—slang for roxicodone, a prescription opiate. *Id.*

Defendant officers summoned a jailhouse nurse, Judy Sims, to examine McGaw. *Id.* Sims was a licensed practical nurse (LPN), employed by First Med, Inc., a contractor to Sevier County. *Id.* Officer McKinzie informed Nurse Sims that McGaw had reported consuming alcohol and three "roxys." Nurse Sims proceeded to examine McGaw, finding that his pupils were pinpoint and nonreactive to light and his speech was slurred, but his blood pressure, heart-rate, and blood-oxygen percentages were all within what Sims considered to be normal limits. *Id.* After conferring with her supervisor, Jessie Timbrook, another LPN, Nurse Sims informed the officers that McGaw did not need to see a doctor or be taken to a hospital, but could be left in a cell overnight for "monitoring." *Id.* Following that advice, the officers brought McGaw to a holding cell. *Id.*

At around 1:09 a.m., jail staff observed McGaw in his cell and noticed he was unresponsive and not

breathing. *Id*. The officers transported McGaw from the jail to a hospital, where doctors diagnosed McGaw as having suffered full cardiac arrest. *Id*. McGaw remained in a coma until his death on April 6. The autopsy report stated that McGaw had died from "a combination of alcohol and oxycodone toxicity" caused by McGaw's consumption of those substances. *Id*.

The Sixth Circuit held that Defendant officers were entitled to qualified immunity because they did not act with deliberate indifference to McGaw's medical needs when they relied on what they reasonably believed to be appropriate advice from Nurse Sims. *Id*. at 497. The court held that the officers placed McGaw in the observation cell because they reasonably believed, based on Nurse Sims's assessment, that this was the medically appropriate thing to do, and were thus entitled to qualified immunity for acting pursuant to that assessment. *Id*.

The Sixth Circuit noted that, as the Third Circuit has reasoned, where "a prisoner is under the care of medical experts . . . a non-medical prison official will generally be justified in believing that the prisoner is in capable hands." *Id*., *citing*, *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004). The court believed that the record did not show any evidence that the officers were or should have been aware that their lay understandings of this situation were superior to Nurse Sims's trained assessment. *McGaw*, 715 Fed. Appx. at 497.

The Sixth Circuit in *McGaw* found:

> Cases in this and other circuits demonstrate that a non-medically trained officer does not act with deliberate indifference to an inmate's

> medical needs when he "reasonably deferred to the medical professionals' opinions." *Johnson v. Doughty*, 433 F.3d 1001, 1010 (7th Cir. 2006). For example, this court has held that a police officer was entitled to qualified immunity in a case where medical professionals had failed to recognize an arrestee's cocaine overdose because the officer "was entitled to rely on the EMTs' and the jail nurse's medical assessments that [the arrestee] did not need to be transported to the hospital." *Spears v. Ruth*, 589 F.3d 249, 255 (6th Cir. 2009). In *Spears*, this court recognized the fact that the EMTs and a jail nurse who had improperly diagnosed the arrestee in that case "presumably had a greater facility than the average layperson to recognize an individual's medical need," and thus the police officer did not err in deferring to what appeared to be their more capable judgment.

McGaw, 715 Fed. Appx. at 498.

The court noted, as the Third Circuit has explained, in a situation where a non-trained officer defers to a medical professional's judgment, "absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official . . . will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference." *Id.*, *citing*, *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004). The *McGraw* court concluded, "Here, the officers had no reason to know or believe that Nurse Sims's recommendation was inappropriate, and thus did not act

with subjective deliberate indifference when they followed it." *McGaw*, 715 Fed. Appx. at 498.

The court held that an officer does not act with subjective deliberate indifference when he does not override a medical recommendation that he reasonably believes to be appropriate, even if in retrospect that recommendation was inappropriate. *Id*., *citing*, *Spruill*, 372 F.3d at 236. Nor has the Sixth Circuit ever recognized the status of an LPN as precluding an officer from relying on that LPN's judgment. *McGaw*, 715 Fed. Appx. at 498. The *McGraw* court stated, "By analogy, in *Spears* we held that there was no constitutional violation in an officer following the recommendations of a jail nurse and EMTs." *McGaw*, 715 Fed. Appx. at 498, *citing*, *Spears*, 589 F.3d at 255. Instead, the *McGraw* court reasoned, the test for deliberate indifference requires a more general failure by an officer: that an officer "was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, that he drew that inference and chose to disregard the risk." *McGaw*, 715 Fed. Appx. at 498, *citing*, *Spears*, 589 F.3d at 255. "Where, as here, an officer responds to a substantial risk of serious harm by asking for and following the advice of a professional the officer believes to be capable of assessing and addressing that risk, then the officer commits no act of deliberate indifference in adhering to that advice." *McGaw*, 715 Fed. Appx. at 498-499.

In *Barberick v. Hilmer*, 727 Fed. Appx. 160 (6th Cir. April 4, 2018), officers believed the detainee had swallowed narcotics and was trying to commit suicide by overdose. *Id*. at 161. Officers had him evaluated by an EMT on the scene and transported him to jail. *Id*.

Upon arrival at the jail, detainee was unresponsive and died from combined drug intoxication. *Id*. His widow sued claiming deliberate indifference to a serious medical condition. *Id*.

The Sixth Circuit held that plaintiff did not identify controlling authority that would make clear to an officer in that position that failure to seek out further medical assistance immediately after receiving an EMT evaluation could constitute deliberate indifference. *Id*. at 164.

In *Sanders v. City of Dothan*, 409 Fed. Appx. 285 (11th Cir. January 19, 2011), officers on a traffic stop suspected that the substance in Sanders' car was "rock" cocaine. *Id*. at 286-287. One of these officers, Ronald Hall, leaned into Eggleston's patrol car to interrogate Sanders. *Id*. at 287. During the interrogation, Hall noticed that Sanders had several white flakes in his beard, and he pointed them out to Eggleston. *Id*. Both officers knew from experience that suspects often conceal contraband and other evidence in their mouths. *Id*. No drugs were found in his mouth. *Id*. Hall then retrieved a drug swab from his patrol car and wiped off some of the white flakes from Sanders' beard. *Id*. They tested positive. *Id*.

The officers asked Sanders if he had swallowed cocaine. *Id*. He denied swallowing cocaine. *Id*. The officers again asked Sanders if he had swallowed cocaine, pointing out that they needed to know for his safety and because they would need to take him to get his stomach pumped if he had swallowed cocaine. *Id*. Sanders denied swallowing cocaine for a second time. *Id*. The officers tried again, this time telling Sanders that they knew he had swallowed cocaine and that they were going to take him to get his stomach

pumped. *Id*. Sanders denied swallowing cocaine for a third time, and he pleaded with the officers not to take him to get his stomach pumped. *Id*. By then, a K-9 unit had arrived on the scene and identified Sanders' car as containing illicit drugs. *Id*. at 287-288. Eggleston and Hall discussed whether it would be a good idea to take Sanders to the hospital to get his stomach pumped because they did not know how much cocaine he had swallowed. *Id*. at 288. They never reached a decision. *Id*.

All of the officers on the scene who interacted with Sanders agreed that he showed no signs of impairment or intoxication. *Id*. His eyes were not dilated, his speech was not slurred, and he did not appear to be agitated. *Id*. He was alert, "oriented," and able to provide identity and other basic information to Eggleston, including locations, dates, and numbers. *Id*. He did not complain of medical problems, show signs of medical distress, or request medical attention or treatment. *Id*.

Therefore, rather than take Sanders to the hospital to get his stomach pumped, Eggleston drove Sanders the two blocks to the Dothan City Jail for booking. *Id*. About one hour had passed from the time Eggleston first stopped Sanders to the time Eggleston drove Sanders to the jail. *Id.* During the short drive to the jail, Eggleston and Sanders were talking to each other, and Eggleston did not think that anything was wrong. *Id*. But when they arrived at the jail's sally port, Eggleston noticed that Sanders was dazed and appeared to be in some kind of medical distress. *Id*. Eggleston told the jail sergeant to call the paramedics, moved Sanders out of the patrol car, and took off the handcuffs. *Id*. When the paramedics arrived about

seven to ten minutes later, Eggleston informed them that he suspected that Sanders had taken drugs. *Id*. The paramedics then transported Sanders to the hospital, where he died a few days later. *Id*. The autopsy reports that the cause of Sanders' death was "acute cocaine intoxication." *Id*.

The Sixth Circuit held that Plaintiff failed to provide evidence that Eggleston was aware that Sanders was at substantial risk of serious harm due to a serious medical need. *Id*. Even if Eggleston was aware that Sanders had swallowed some amount of cocaine, there is no evidence that he was aware that Sanders had swallowed an amount large enough to put him at serious risk of harm. *Id*. The court reasoned that the Constitution does not require an arresting police officer or jail official to seek medical attention for every arrestee or inmate who appears to be affected by drugs or alcohol. *Id*. at 289.

The court believed that the evidence, in the light most favorable to the Plaintiff, showed that Eggleston was not aware that Sanders was at substantial risk of harm; not only did Sanders repeatedly say he had not swallowed any drugs and that he did not want to be taken to the hospital, but he was also alert, talked normally, responded to questions by providing basic personal information, did not complain of any medical problems, and had no other signs of being impaired or intoxicated. *Id*. The court added that it is by no means clear that in the face of Sanders' denials and apparently normal behavior Eggleston could have had Sanders' stomach pumped against his will, even if Eggleston had attempted to do so. *Id*. The court held that Plaintiff simply had not met his burden of showing that there was a general issue of material fact

about whether Eggleston was deliberately indifferent to Sanders' serious medical need. *Id*.

With numerous federal appeals courts holding that officers are not required to bring a detainee who ingests an unknown amount of narcotics to a hospital but remains lucid and not showing symptoms of overdose, such a required hospital visit is not clear and beyond debate to a reasonable officer and the constitutional right to a hospital visit is not "clearly established." Further, such actions by officers are not deliberately indifferent to a serious medical condition.

CONCLUSION

Officers are entitled to Qualified Immunity because Decedent did not have a clearly established right to be evaluated at a hospital instead of by a jail nurse for suspicion of ingesting an unknown amount of narcotics. In addition, Officers were not deliberately indifferent to a serious medical need. Decedent denied ingesting narcotics on numerous occasions. Decedent did not show signs of overdose while in officers' custody. Officers did what they believed to be the right thing to do by having him evaluated by the jail nurse. Accordingly, officers were not deliberately indifferent to a serious medical need. As such, the Third Circuit opinion below should be reversed. Alternatively, this Court should grant certiorari and remand the case with instructions on the proper standards for deliberate indifference and qualified immunity.

Respectfully submitted,

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