No.______________

In The

Supreme Court of the United States

DEMETRIAS TAYLOR, as representative of the estate of Iretha Jean Lilly, Deceased; TERRANCE HAMILTON; TERRANCE LAMONT HAMILTON, as next friend and father of I.H.,

Petitioner,

v.

MCLENNAN COUNTY; KIMBERLY RIENDFLIESCH; DESERA ROBERTS; JOHN WELLS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

WILLIAM PIERATT DEMOND
DEMOND LAW, PLLC
1520 Rutland St.
Houston, TX 77008
(713) 701-5240
william@demondlaw.com
Counsel of Record for Petitioners

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QUESTION PRESENTED

Does the provision of three EKGs, an aspirin, and a nitroglycerin pill over the course of three hours to a pre-trial detainee (who then died from an otherwise untreated myocardial infarction) constitute sufficient "medical care" entitling jail nurses, the jail's only doctor, and the municipality to summary judgment in § 1983 cases, particularly where the nurses' refusals to transfer said detainee to a hospital was caused by municipal "policy" or "procedure"?

TABLE OF CONTENTS

Question Presented i

Table of Authorities viii

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 2

Statement 3

Factual Background 4

A. Timeline 4

B. Dr. Wells's admissions concerning the serious threat of harm to Ms. Lilly, the roles of jail nurses, and Roberts 8

C. Discovering Dr. Wells's involvement 10

Reasons for Granting the Petition 12

A. Providing EKGs, an aspirin, and a nitroglycerin pill over the course of three hours to a pre-trial detainee suffering from a severe myocardial infarction does not constitute constitutionally adequate "medical care" 13

1. Nurse Roberts 13

2. Nurse Riendfliesch 16

B. Admissible evidence established (1) the policymaker with respect to medical care at the jail, (2) one or more unconstitutional policies, practices, procedures, customs, or failures, and (3) moving force causation 18

1. Dr. Wells was the policymaker with respect to medical care at the McLennan County jail 18

a. Relevant facts 18

b. Analysis 20

2. Official policies, practices, customs, procedures, and failures 21

a. Refraining from transferring inmates to the hospital without Dr. Wells's approval 22

b. The care provided to Ms. Lilly comported with McLennan County "policies" 23

c. The medical unit was unstaffed during pill pass 23

d. Custom or practice of inadequate training and supervision..................24

e. Illegal conduct of decisionmaker or policymaker........................26

f. Ratification...........................27

3. Moving force............................27

C. The discovery rule (or equitable tolling) should apply because Dr. Wells's identity was unjustly withheld by McLennan County and there is no evidence of undue prejudice to any party.......................29

1. Dr. Wells was an unknown cause of Ms. Lilly's suffering and death...............................29

2. No defendant is unduly harmed..................................32

3. Alternatively, equitable tolling should apply.................33

D. The Fifth Circuit continues to defy the Rules in Section 1983 cases..35

Conclusion..38

TABLE OF CONTENTS FOR THE APPENDIX

Appendix A (Fifth Circuit Court of Appeals Opinion, filed January 20, 2020).............1a

Appendix B (Memorandum Opinion and Order, signed December 3, 2018)...................3a

Appendix C (Memorandum Opinion and Order, signed October 2, 2018)...........................51a

Appendix D (Report and Recommendation, signed August 31, 2018)....................................55a

Appendix E (Report of Texas Ranger Patrick Peña (excerpts), received March 24, 2017)......................................64a

Appendix F (Deposition of Respondent Dr. John Wells (excerpts), conducted April 9, 2018)....................................68a

Appendix G (Deposition of Dr. Paul W. Dlabal, MD, FACP, FACC, FAHA (excerpts), conducted April 24, 2018)..................83a

Appendix H (Dr. Dlabal's Expert Report, signed July 10, 2018) 86a

Appendix I (Desera Roberts' Motion for Summary Judgment (excerpt), filed June 15, 2018)..93a

Appendix J (Kimberly Riendfliesch's Motion for Summary Judgment (excerpts), filed June 15, 2018)............................94a

Appendix K (Affidavit of McLennan County Sheriff Parnell McNamara (excerpt), signed June 5, 2018)...........................95a

Appendix L (Email from McLennan County's Attorney Regarding Deposition under Federal Rule of Civil Procedure 30(b)(6), sent February 26, 2018).........................96a

Appendix M (McLennan County's Response to Petitioners' Public Information Act Request, sent July 5, 2016)..98a

Appendix N (Agreement for Medical Director/Physician Services between McLennan County and Dr. Wells (excerpts), signed November 8, 2011)...................99a

Appendix O (Ms. Lilly's First EKG,
taken October 6, 2014 at 5:56:45 pm)................104a

Appendix P (Ms. Lilly's Third EKG,
taken October 6, 2014 at 8:09:01 pm)................105a

TABLE OF AUTHORITIES

Cases

Albertson v. T.J. Stevenson & Co., Inc.,
749 F.2d 223 (5th Cir. 1984)....................30, 31

Balle v. Nueces Cty.,
690 Fed. App'x 847, 851
(5th Cir. 2017) (unpub.)............................28

Barrow v. Greenville Indep. Sch. Dist.,
480 F.3d 377 (5th Cir. 2007)........................37

Bell v. Wolfish,
441 U.S. 520, 99 S.Ct. 1861,
60 L.Ed.2d. 447 (1979)..............................13

Bennett v. City of Slidell,
728 F.2d 762 (5th Cir. 1984) (en banc),
cert. denied, 472 U.S. 1016 (1985)................21

Bennett v. Pippin,
74 F.3d 578 (5th Cir. 1996).........................26

Bd. of Cty. Comm'rs v. Brown,
520 U.S. 397, 117 S.Ct. 1382,
137 L.Ed.2d 626 (1997)..............................26

Cada v. Baxter Healthcare Corp.,
920 F.2d 446 (7th Cir. 1990)........................34

Castro v. Collecto, Inc.,
634 F.3d 779 (5th Cir. 2011)........................33

City of Canton v. Harris,
489 U.S. 378, 109 S.Ct. 1197,
103 L.Ed.2d 412 (1989)........................25, 28

City of Revere v. Mass. Gen. Hosp.,
463 U.S. 239, 103 S.Ct. 2979,
77 L.Ed.2d 605 (1983)...............................21

City of St. Louis v. Praprotnik,
485 U.S. 112, 108 S.Ct. 915,
99 L.Ed.2d 107 (1988)...........................12, 21

Coleman v. Sweetin,
745 F.3d 756 (5th Cir. 2014)........................17

Colle v. Brazos Cty., Tex.,
981 F.2d 237 (5th Cir. 1993)........................28

Davis v. Johnson,
158 F.3d 806 (5th Cir. 1998)........................33

Dodds v. Cigna Secs., Inc.,
12 F.3d 346 (2d Cir. 1993)...........................34

Edler v. Hockley Cty. Comm'rs Court,
589 Fed. App'x 664
(5th Cir. 2014) (unpub.).............................28

Edwards v. United States,
173 F.3d 424, 1999 WL 96138
(4th Cir. 1999) (unpublished disposition)......30

Estelle v. Gamble,
429 U.S. 97, 97 S.Ct. 285,
50 L.Ed.2d 251 (1976)................12, 13, 16, 25

Furnes v. Reeves,
362 F.3d 702 (11th Cir. 2004),
cert. denied, 543 U.S. 978 (2004)..................33

Gelin v. Hous. Auth. of New Orleans,
456 F.3d 525 (5th Cir. 2006)........................20

Gibbs v. Gimmette,
254 F.3d 545 (5th Cir. 2001)........................13

Green v. Doe,
260 Fed. App'x 717
(5th Cir. 2007) (unpub.)............................34

Green v. United States,
180 Fed. App'x 310
(3d Cir. 2006) (unpub.)..............................30

Griffin v. Rogers,
399 F.3d 626 (6th Cir. 2005)........................33

Gustavson v. United States,
655 F.2d 1034 (10th Cir. 1981)....................31

Herrera v. Command Sec. Corp.,
837 F.3d 979 (9th Cir. 2016)........................33

Holmberg v. Armbrecht,
327 U.S. 392, 66 S.Ct. 582,
90 L.Ed. 743 (1946)..................................34

Indus. Constructors Corp. v.
U.S. Bureau of Reclamation,
15 F.3d 963 (10th Cir. 1994)........................34

Jett v. Dall Indep. Sch. Dist.,
491 U.S. 701, 109 S.Ct. 2702,
105 L.Ed.2d 598 (1989)..............................20

Koch v. Gregory,
536 Fed. App'x 639 (7th Cir. 2013),
cert. denied, 572 U.S. 1037 (2014)................31

Lavellee v. Listi,
611 F.2d 1129 (5th Cir. 1980)......................30

Mandel v. Doe,
888 F.2d 783 (11th Cir. 1989)......................20

McCullough v. United States,
607 F.3d 1355 (11th Cir. 2010).....................31

McMahan v. Taylor,
2013 WL 867121
(N.D. Miss. Mar. 7, 2013) (unpub.)...............15

Menominee Indian Tribe of Wis. v. United States,
614 F.3d 519 (D.C. Cir. 2010)......................33

Mounts v. Grand Trunk Western R.R.,
198 F.3d 578 (6th Cir. 2000)........................30

Move, Inc. v. Citigroup Glob. Mkts., Inc.,
840 F.3d 1152 (9th Cir. 2016)......................33

Nicolazzo v. United States,
786 F.2d 454 (1st Cir. 1986)........................30

Osborn v. United States,
918 F.2d 724 (8th Cir. 1990)........................31

Pembaur v. City of Cincinnati,
475 U.S. 469, 106 S.Ct. 1292
89 L.Ed.2d 452 (1986)..............................21

Porro v. Jefferson Cty. of Okla,
2007 WL 1674156
(W.D. Okla. June 7, 2007) (unpub.)...............34

Pretus v. Diamond Offshore Drilling, Inc.,
571 F.3d 478 (5th Cir. 2009)........................30

Raddatz v. United States,
750 F.2d 791 (9th Cir. 1984)........................31

Rhode v. Denson,
776 F.2d 107 (5th Cir. 1985)........................21

Santana-Venegas v. Principi,
314 F.3d 1293 (Fed. Cir. 2002).....................33

Taurel v. Cent. Gulf Lines, Inc.,
947 F.2d 769 (5th Cir. 1991)........................30

Tolan v. Cotton,
572 U.S. 650, 134 S.Ct. 1861,
188 L.Ed. 2d 895 (2014)............................24

Trinity Marine Prods., Inc. v. United States,
812 F.3d 481 (5th Cir. 2016)........................34

United States v. Kubrick,
444 U.S. 111, 100 S.Ct. 352,
62 L.Ed.2d 259 (1979)..........................29, 31

Valdez ex rel. Donely v. United States,
518 F.3d 173 (2d Cir. 2008)........................30

West v. Atkins,
487 U.S. 42, 108 S.Ct. 2250,
101 L.Ed.2d 40 (1988)................................27

Young v. United States,
535 U.S. 43, 122 S.Ct. 1036,
152 L.Ed.2d 79 (2002)................................33

Statutes

28 U.S.C. § 1254 (1)..1

42 U.S.C. § 1983.........................i, 2, 3, 12, 16, 18, 21

Other

Federal Rule of Civil Procedure 1..........................35

Federal Rule of Civil Procedure 11........................32

Federal Rule of Civil Procedure 56........................35

PETITION FOR A WRIT OF CERTIORARI

Petitioners Demetrias Taylor, Terrance Hamilton, and Terrance Lamont Hamilton respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The per curiam opinion of the Fifth Circuit (App. 1a-2a) is unreported. The district court's Order granting summary judgment to Respondents McLennan County, Desera Roberts, and Kimberly Riendfliesch (App. 3a-50a) is unreported. Additionally, the district court's Order adopting the Magistrate's Report and Recommendation and dismissing Petitioners' claims against Dr. Wells with prejudice (App. 51a-54a) is unreported, as is the Magistrate Judge's Report and Recommendation (App. 55a-63a).

JURISDICTION

The judgment of the court of appeals was filed on January 20, 2020 (Martin Luther King, Jr. Day). This Court's jurisdiction rests on 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

42 U.S.C. Section 1983 provides (in relevant part):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other 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…

STATEMENT

Iretha Jean Lilly ["Ms. Lilly"] was a 36-year-old black mother of five and pre-trial detainee who died in the McLennan County jail more than three hours after the first of three EKGs revealed she was suffering from an acute myocardial infarction. Two McLennan County employees stated it was county "policy" or "procedure" to refrain from sending inmates like Ms. Lilly to the hospital without approval from the jail's only doctor (Dr. Wells),[1] who trained them "in terms of medical policy and procedures and protocols[.]"[2] The lower courts concluded Ms. Lilly was "attended to" and provided "medical care"[3] and that all defendants were entitled to summary judgment. This result unreasonably (1) deprives the People of access to their statutory remedy for violations of their constitutionally protected rights under color of state law, (2) weakens pre-trial detainees' clearly established constitutional rights to medical care, and (3) perpetuates an increasingly entrenched judicial culture of absolving government actors of liability for violating said rights despite the absence of qualified immunity from the Constitution, the common law, and the text of Title 42 United States Code Section 1983.

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[1] App. 64a-65a, at ¶ 7.6; see also App. 65a-66a, at ¶ 13.8.

[2] App. 71a, at p. 84.

[3] App. 21a ("Perhaps (but only perhaps) a refusal to provide Lilly with an EKG at all might raise constitutional issues. However, in this case Lilly was attended to and given three separate EKGs. This is evidence of medical care being provided, and not evidence of a denial that would constitute *punishment*.") (emphasis added); see also ibid. (questioning whether Petitioners "could even establish a negligence claim.").

FACTUAL BACKGROUND

A. Timeline

Most facts herein were developed by Texas Ranger (now Lt.) Patrick Peña in the course of his 696-page investigation and grand jury presentment.

Ms. Lilly was admitted to the McLennan County jail as a pre-trial detainee the morning of October 6, 2014. By 11:30 am, she told jailers she was experiencing pain and numbness in one of her legs. Because Ms. Lilly was crying, the nurses delayed her booking process until approximately 3:20 pm (almost four hours after she was taken to jail). At approximately 5:10 pm, Nurse Outley saw Ms. Lilly in the medical unit and took her vitals; Ms. Lilly told Nurse Outley she was having pain in her left arm and chest.

Approximately 45 minutes later (at 5:56 pm), a nurse performed the first EKG on Ms. Lilly. The EKG machine showed ST elevations and read, "CONSIDER ACUTE STEMI…ST elevation, CONSIDER ACUTE INFARCT."[4] Despite Ms. Lilly's EKGs and the absence of Dr. Wells, Nurse Roberts left the jail and did not call an ambulance due to McLennan County's "**policy**" which precluded her from doing so.[5] "Pill

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[4] App 104a.

[5] App. 64a-65a, at ¶ 7.6 ("It is **policy** when Dr. Wells is available, that he be the determining factor if an inmate is to be sent to the hospital. Dr. Wells was available on the night in question.") (emphasis added); see also App. 65a-66a, at ¶ 13.8 ("[I]t is **procedure** to not send any inmate out of jail without Dr. Wells' [sic] approval.") (emphasis added) and App. 94a ("The provision of medical care to Lilly by Riendfliesch was in compliance with the McLennan

pass" started at approximately 7:30 pm and finished at 9:08 pm; during this time, there were zero nurses in the medical wing.[6] At 7:45 pm, Ms. Lilly again complained of chest pain to a nurse and was again transported to the medical unit (where there were no nurses). Nurse Riendfliesch performed a second EKG on Ms. Lilly and noted the results were the same as they were earlier in the day.[7]

At 8:09 pm (more than two hours after the first EKG revealed Ms. Lilly was suffering from a heart attack), Roberts called Dr. Wells and told him Ms. Lilly was experiencing chest pain. She also told him she was waiting for the EKGs to be sent to her and she would forward them to him upon receipt. At approximately 8:10 pm, Nurse Riendfliesch performed a third EKG and the results were the same as the previous two. Specifically, it also read "CONSIDER ACUTE STEMI…ST elevation, CONSIDER ACUTE INFARCT."[8] Riendfliesch then contacted Roberts by phone and was instructed to take the EKGs to the officer-in-charge "so he could take a picture of [them] and send them to [Roberts's] phone via text message."

The McLennan County jail both (1) lacks the technological ability to forward EKGs from the EKG machine itself and (2) has a policy which prevents

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County's jail **policies**…") (emphasis added). Cf. App. 95a ("At no time prior to the death of Ms. Lilly, did I have any actual or constructive knowledge…the medical needs of inmates were being ignored by the jail and medical staff at the McLennan County Jail, *nor do I have any such knowledge today*.") (emphasis added).

[6] App. 72a-74a.

[7] App. 38a.

[8] App. 105a.

medical staff from using their cell phones (even to forward EKGs to someone capable of reading them). Instead, medical staff must present an EKG readout to the officer-in-charge, have him or her take a picture of it, and forward it via cellphone to the intended recipient.

Roberts (who was off-site) then called Riendfliesch and was told the third EKG was similar to the first one. Roberts told Riendfliesch to give Ms. Lilly one nitroglycerin tablet and one aspirin.[9] Despite being incapable of diagnosing Ms. Lilly's condition,[10] Roberts received the EKG images on her cellphone from the officer-in-charge at approximately 8:23 pm; she then concluded "it was **probable** [Ms.] **Lilly was having a cardiac event** due to the ST elevation still present in the second [third] EKG."[11] Roberts then forwarded the pictures to Dr. Wells.

Roberts stated Dr. Wells was off-site but available, that she believed he would have phoned her upon receiving the EKG, and that he still had not done so by 8:36 pm (13 minutes after she received the third EKG and 25 minutes after it was conducted). As a result, she called Dr. Wells. At 8:39 pm, Wells called Roberts back and they discussed how the "ST elevations were still present" in the third EKG, but now they were even "more pronounced".[12] Nurse Roberts told Ranger Peña:

> "I assumed when Dr. Wells told me he was going to call the jail himself that he

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[9] App. 38a-39a; see also App. 45a and App. 65a, at ¶ 7.6.

[10] App. 84a, at p. 89; see also App. 91a.

[11] App. 64a, at ¶ 7.6 (emphasis added).

[12] App. 65a, at ¶ 7.7.

> was going to order [Ms.] Lilly be taken to the hospital. I assumed this because I felt [she] was having a cardiac event and needed to go to the hospital for further evaluation."[13]

Dr. Wells then called Riendfliesch at the jail before deciding what he should "*finally* do with Ms. Lilly";[14] at the time, Riendfliesch was a three-minute-walk away (in "intake") and not in the medical unit. There were no nurses in the medical unit at the time because they were still on pill pass; having no nurses in the medical unit during pill pass was a regularly scheduled event at the McLennan County Jail.[15] Riendfliesch told Dr. Wells that the "second [third] EKG came back similar" to the first one. While Riendfliesch could not read EKGs, she "was wondering why Dr. Wells was not ordering [Ms.] Lilly be taken to a hospital emergency room."[16]

At 9:05 pm, Ms. Lilly was nonresponsive. At 9:08 pm (more than three hours after her first EKG and at the same time pill pass ended), Nurse Smith and a female officer entered Ms. Lilly's cell, confirmed she was nonresponsive, felt no pulse, and observed she was neither breathing nor responsive to light. **Ten minutes later** (at approximately 9:18 pm, three

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[13] App. 65a, at ¶ 7.7.

[14] App. 74a, at p. 113 (emphasis added).

[15] App. 72a ("A. [Dr. Wells] There was no nurses there. Q. There were no nurses there. Is that, in your medical opinion, a reasonable scenario to have a medical unit with no nurses in it? A. Yes. This is a jail. This is not an ICU. This is not intensive care. This is not a hospital. This is a jail facility.").

[16] App. 66a, at ¶ 13.15.

hours and 22 minutes after the first EKG revealed Ms. Lilly was suffering from an acute myocardial infarction), the first call was made for an ambulance.

At 9:31 pm, EMTs arrived on scene. Approximately 18 minutes later, they left with Ms. Lilly. At approximately 10:14 pm (more than four hours after her first EKG), Ms. Lilly arrived at the hospital and was pronounced dead. By the time she died, twelve people in McLennan County's employ knew Ms. Lilly was experiencing or complaining about chest pain.

B. Dr. Wells's admissions concerning the serious threat of harm to Ms. Lilly, the roles of jail nurses, and Roberts.

Dr. Wells has admitted:

- Ms. Lilly was suffering from a myocardial infarction;[17]
- Ms. Lilly's myocardial infarction could be classified as "severe";[18]
- Ms. Lilly's myocardial infarction would not heal without medical intervention;[19]

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[17] App. 77a, at p. 129.

[18] Ibid. Cf. App. 67a, at ¶ 18.6 (Dr. Shoultz's diagnosis that Ms. Lilly was "in the midst of having a big heart attack and should be in the hospital.").

[19] App. 78a, at pp. 130-31. Cf. App. 83a, at p. 64 (Dr. Dlabal's testimony that no available treatment at the jail "would be expected to reverse this process.").

- Ms. Lilly should have been transferred to a hospital after the first EKG was performed;[20]

- people with an EKG like Ms. Lilly's require medical attention "as soon as possible";[21]

- persons who present with chest pain are a priority due to the "ominous outcome that can occur" if left untreated;[22] and

- the McLennan County jail had a written policy that ensured members of Dr. Wells's staff were the only people capable of determining whether inmates were in need of "emergency medical treatment."[23]

Dr. Wells has also admitted:

- the jail had an EKG machine so that "diagnos[e]s" could be made;[24]

- he had been disciplined by the Texas Medical Board for authorizing McLennan County jail medical staff to "evaluate, diagnose, and treat" patients under his care;[25]

- no one at the jail other than himself and Roberts could read EKGs;[26]

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20 App. 69a-70a, at p. 36.
21 App. 79a, at p. 137.
22 App. 69a, at pp. 32-33.
23 See App. 82a, at p. 195.
24 App. 80a, at p. 138.
25 App. 82a, at pp. 227-28.
26 App. 81a, at p. 154.

- neither he nor Roberts were at the jail when Ms. Lilly received her second or third EKGs;
- he was the only doctor who worked at the jail;
- he did not know the depth of Roberts's training concerning EKGs;[27] and
- he only "surmis[ed]" that Roberts (his Director of Nursing) was trained how to read an EKG.[28]

Finally, Dr. Wells admitted that even he believed Director of Nursing Roberts acted unreasonably with respect to Ms. Lilly.[29]

C. Discovering Dr. Wells's involvement

Before filing their lawsuit, Petitioners issued a request to McLennan County under the Texas Public Information Act requesting the names of persons involved in Ms. Lilly's medical care while she was incarcerated at its jail. On July 5, 2016, the Medical Office Manager in the Health Services Division of the McLennan County jail responded to Petitioners' request on Sheriff's Office letterhead and identified six "medical personnel involved in the care of Iretha

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[27] App. 81a, at p. 172 ("Q. Did you ever go into detail with her as to the depth of that training when she was an ER nurse? A. No. Her actual training, no, I didn't.").

[28] App. 70a, at p. 81.

[29] App. 71a, at p. 85 (Q. Was that decision to not act after she received this [EKG] reasonable, in your medical opinion? A. [Dr. Wells] No.").

Lilly on October 6, 2014."[30] Dr. Wells was not identified in this response.[31] Instead, Petitioners only received information identifying Dr. Wells on March 24, 2017 after subpoenaing Ranger Peña's report (which McLennan County did not have). Less than four months later (on July 14, 2017) but more than two years after Ms. Lilly's death, Petitioners added Dr. Wells as a defendant.

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[30] App. 98a.

[31] Ibid.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition under:

- Supreme Court Rule 10(c) because the Fifth Circuit has decided important questions of federal law concerning (i) constitutionally adequate medical care to pre-trial detainees that conflicts with this Court's holding in *Estelle v. Gamble*, 429 U.S. 97 (1976) and (ii) the identity of policymakers that conflicts with this Court's holding in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988);

- Supreme Court Rule 10(c) because the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court (*i.e.*, is Section 1983's statute of limitations tolled against government actors whose identity has been unjustly withheld by other government actors); and

- Supreme Court Rule 10(a) because the Fifth Circuit has sanctioned such a departure from the accepted and usual course of judicial proceedings as to again call for an exercise of this Court's supervisory power.

A. Providing EKGs, an aspirin, and a nitroglycerin pill over the course of three hours to a pre-trial detainee suffering from a severe myocardial infarction does not constitute constitutionally adequate "medical care"

1. Nurse Roberts

Ms. Lilly was a pretrial detainee and was entitled to reasonable medical care under the Fourteenth Amendment.[32] Upon seeing Ms. Lilly's first EKG, Nurse Roberts, "felt inmate Lilly was having a cardiac event and needed to go to the hospital for further evaluation" and knew it revealed a possible ST elevation.[33] Upon seeing Ms. Lilly's third EKG, Nurse Roberts concluded "it was **probable** inmate Lilly was having a cardiac event," knew her ST elevations were even "more pronounced",[34] and personally believed Ms. Lilly "needed to go to the hospital."[35]

Knowing these facts yet refusing to act shows a wanton disregard and deliberate indifference for Ms. Lilly's open, obvious, and serious medical needs that would have been identified by reasonable people with

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[32] See generally *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). See also *Gibbs v. Gimmette*, 254 F.3d 545, 548 (5th Cir. 2001) (citing *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc)). Cf. *Bell v. Wolfish*, 441 U.S. 520, 535, n. 16, 99 S.Ct. 1861, 60 L.Ed.2d. 447 (1979).

[33] App. 65a, at ¶ 7.6.

[34] App. 65a, at ¶ 7.7.

[35] App. 65a, at ¶ 7.7.

zero medical training.[36] Despite being the Director of Nursing, Roberts refused to transfer Ms. Lilly to a hospital (or to order any of her subordinates to initiate such a transfer) because McLennan County had a "policy" which prevented her from doing so.[37] When EMTs were finally called, it was by another nurse who believed she was violating McLennan County's "procedure" when she did so.[38]

All reasonably trained medical professionals would have known Ms. Lilly's EKG revealed an ST elevation[39] and that she needed to be transported to a hospital.[40] Dr. Dlabal even opined "the EKG is unnecessary for the recognition of MI."[41] Even when these facts are ignored, Dr. Wells testified Roberts acted unreasonably.[42]

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36 App. 90a ("[I]t is clear that any layperson…aware of her symptoms and complaints, should consider the very likely possibility of heart attack (MI) as a cause of this patient's chest pain. The simple recognition of this possibility is sufficient for anyone, whether medically trained or not, to activate emergency response systems and to initiate transport to appropriate medical facilities."); see also App. 91a.

37 App. 64a-65a, at ¶ 7.6.

38 App. 65a-66a, at ¶ 13.8.

39 App. 84a, at p. 98 ("Q. Would a reasonably trained medical professional know that this EKG revealed an ST elevation? A. Certainly that, yes."); see also App. 85a, at pp. 107-08 (Dr. Dlabal's testimony that the EKG readout was provided "for the less skilled healthcare professionals.").

40 App. 84a, at p. 98; see also App. 83a, at p. 53 and App. 90a.

41 App. 90a.

42 App. 71a, at p. 85.

Alternatively, Dr. Wells's testimony that Roberts both knew how to read a EKG[43] and ordered an EKG to be performed because she suspected Lilly was "suffering from a cardiac disease"[44] would permit reasonable jurors to (1) find Nurse Roberts knew how to read an EKG and (2) conclude she was deliberately indifferent to a medical condition she knew was sufficiently serious (especially when viewed in connection with Nurse Roberts's instruction to her subordinate to conduct subsequent EKGs).[45] Dr. Dlabal also opined (1) "computer interpretation of EKGs has been implemented in order to allow untrained and unqualified medical personnel to focus their attention on the possibility of heart disease and, where applicable, its severity"[46] and (2) "[i]n this case, the statements 'CONSIDER ACUTE MYOCARDIAL INFARCTION' and 'POSSIBLE STEMI,' raise the level of concern to the highest possible based upon computer reporting, given that STEMI is the worst of all possible heart attacks and, by implication, carries the highest risk of complication, including death."[47]

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[43] App. 78a, at p. 131; see also App. 81a, at p. 154 (no one other than Dr. Wells and Roberts was trained to read an EKG).

[44] See App. 78a, at p. 131.

[45] Compare App. 64a, at ¶ 7.3 (evidencing said instruction) with *McMahan v. Taylor*, 2013 WL 867121, *3 (N.D. Miss. Mar. 7, 2013) (unpub.) (denying qualified immunity in the jail medical context; "Like *Farmer* and *Lawson*, Dr. Thomas' scheduling of a follow up appointment to run diagnostic tests suggests a known, obvious risk.").

[46] App. 91a; see also App. 85a, at pp. 107-08.

[47] App. 91a; see also ibid.

Roberts was deliberately indifferent to Ms. Lilly's medical needs and her conduct evinced a wanton disregard for a serious medical condition that all reasonable people know will (if left untreated) cause death.[48] Therefore, the courts' decisions below run afoul of *Estelle v. Gamble*, particularly given Ms. Lilly's status as a pre-trial detainee and the absence of any reasonable response to her condition. Under these facts, a jury could find Roberts appreciated the dangers to Ms. Lilly yet provided no care to alleviate them. Roberts was therefore not entitled to summary judgment based on qualified immunity, particularly given the absence thereof from the Constitution, the text of Section 1983, and the common law.

2. Nurse Riendfliesch

Licensed Vocational Nurse Riendfliesch performed the second and third EKGs on Ms. Lilly and knew the results of the first EKG. She saw that both Ms. Lilly's second and third EKGs were the "same as the previous EKG that was taken by the daytime shift." Dr. Dlabal has testified that all reasonably trained medical professionals would have known said EKG revealed an ST elevation and that any medical professional "would have an obligation to transfer this patient…as expeditiously as possible."[49] Dr. Shoultz (interviewed by Ranger Peña) agreed[50] and there is no

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48 See, e.g., App. 87a-88a.

49 App. 84a, at p. 98; see also App. 83a, at p. 53 ("[A]ny delay in transfer [of Ms. Lilly to a facility capable of treating her] was harmful or deleterious to her condition as the minutes rolled by minute by minute."); App. 88a; and App. 90a.

50 App. 67a, at ¶ 18.6.

evidence to the contrary. Dr. Dlabal has opined these facts should have been sufficient to "activate emergency response systems and to initiate transport to appropriate medical facilities."[51]

After discussing the results of the follow-up EKG with Dr. Wells and noting Dr. Wells stated Ms. Lilly was possibly having a myocardial infarction,[52] Nurse Riendfliesch was "wondering why Dr. Wells was not ordering [Ms.] Lilly to be taken to a hospital emergency room."[53] Despite facts which all lay people and reasonably trained medical professionals would interpret to represent an active danger to life, Riendfliesch failed to transfer Ms. Lilly to a hospital.

Riendfliesch (1) saw the EKG, (2) was told by the jail doctor that Ms. Lilly was possibly suffering from a myocardial infarction, (3) knew, should have known, or must have known it revealed a condition requiring more than an aspirin, (4) had an obligation to transfer Ms. Lilly to the hospital, (5) personally questioned the care being given to Ms. Lilly, and (6) chose to refrain from sending Ms. Lilly to the hospital (or taking any other step calculated to provide her with constitutionally adequate medical care). These undisputed facts would permit a reasonable juror to conclude that Riendfliesch is liable because she showed a wanton disregard and deliberate indifference for Ms. Lilly's open, obvious, and serious medical needs,[54] particularly in light of nurse Smith's

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[51] App. 90a; see also App. 84a, at p. 98 and App. 83a, at p. 53.

[52] App. 94a.

[53] App. 66a, at ¶ 13.15.

[54] Compare *Coleman v. Sweetin*, 745 F.3d 756, 765 (5th Cir. 2014) (per curiam) (prison officials may violate the Constitution when they exhibit "deliberate indifference to

decision to violate procedure by calling for an ambulance.[55] Therefore, Riendfliesch was not entitled to summary judgment, particularly given the absence of qualified immunity from the Constitution, the text of Section 1983, and the common law.

B. Admissible evidence established (1) the policymaker with respect to medical care at the jail, (2) one or more unconstitutional policies, practices, procedures, or customs, and (3) moving force causation

The trial court granted McLennan County's motion for summary judgment after concluding Dr. Wells was not the relevant policymaker[56] and that there was no evidence to establish a deliberately indifferent policy.[57] This important federal question concerning the identity of the policymaker under these facts should be answered by this Court.

1. Dr. Wells was the policymaker with respect to medical care at the McLennan County jail.

a. Relevant facts

The district court acknowledged, "A policymaker is 'one who takes the place for the governing body in a designated area of city

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a prisoner's serious medical needs.") (citing *Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006)) with App. 93a (Roberts' admission that Ms. Lilly had a "serious medical condition").

[55] App. 65a-66a, at ¶ 13.8.

[56] App. 31a-33a.

[57] See, e.g., App. 33a.

administration.'"[58] McLennan County admitted in writing that, "as the medical director, Dr. Wells was **solely** responsible for promulgating and enacting medical protocols for the jail medical staff."[59] Without more, this should establish Dr. Wells was the policymaker with respect to medical care at the jail as a matter of law.

Additionally, Dr. Wells testified that no one oversaw his medical policies, practices, customs, or procedures at the jail[60] and that he had (1) "ultimate responsibility with respect to medical care" at the jail,[61] (2) responsibility for developing the medical "policies, practices, customs, or procedures" within the jail,[62] and (3) responsibility for supervising the jail medical staff.[63] Dr. Wells also testified that he personally had "full reign and control over the medical unit at the jail"[64] and that he did not report to anyone concerning (1) his decisions to treat (or not treat) inmates at the McLennan County Jail[65] or (2) his "verbal standing orders";[66] there is no evidence to the contrary. Furthermore, McLennan County adopted a

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[58] App. 29a (quoting *Zarnow v. City of Wichita Falls,* 614 F.3d 161, 167 (5th Cir. 2010) (citing *Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir. 1984) (en banc))).

[59] App. 97a (emphasis added).

[60] App. 76a-77a, at pp. 124-25.

[61] App. 75a-76a, at pp. 118-19.

[62] App. 68a, at p. 10 ("Q. Developing those protocols, policies and procedures, that was part of your job? A. Yes."); see also App. 99a-100a.

[63] App. 68a, at p. 14; see also App. 100a.

[64] App. 81a, at p. 152.

[65] App. 77a, at p. 126; see also App. 78a-79a, at pp. 132-33.

[66] App. 78a-79a, at pp. 132-33.

contract with Dr. Wells that (1) obligated him to provide medical care to inmates at the jail,[67] (2) ensured only medical personnel would be responsible for determining when inmates would receive medical attention,[68] and (3) did not require Dr. Wells (the only doctor at the jail) to report to anyone concerning medical care to inmates at the jail.[69]

b. Analysis

"A court's task is to 'identify those officials or governmental bodies who speak with final policymaking authority for the local government actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.'"[70] Even physicians' assistants are properly considered policymakers with respect to medical care when there is no supervision or review of their decisions.[71] Here, Dr. Wells was the unsupervised doctor to whom McLennan County deliberately and designedly delegated the sole responsibility for (1) providing medical care to inmates and (2) developing the medical "policies, practices, customs, or procedures" within the jail.[72] Therefore, his decisions concerning medical care and medical policies at the jail was "final". See *City of St. Louis v. Praprotnik*,

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[67] App. 99a.

[68] App. 102a; see also App. 82a, at p. 195.

[69] See App. 77a, at p. 126.

[70] *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).

[71] *Mandel v. Doe*, 888 F.2d 783, 794 (11th Cir. 1989); see also *Gelin v. Hous. Auth. of New Orleans,* 456 F.3d 525, 530 n.7 (5th Cir. 2006) (citing *Mandel,* 888 F.2d at 794).

[72] App. 68a, at p. 10; see also App. 99a-100a.

485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

Therefore, the County is liable even if Dr. Wells was simply its final decision-maker with respect to medical care at its jail. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484-85, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (declining respondent's invitation to "overlook this delegation of authority" and holding the county could be liable under Section 1983). This deliberate assignation of specific and comprehensive authority makes Dr. Wells a policymaker with respect to medical care at the jail as a matter of law. See *Praprotnik*, 485 U.S. at 124 (quoting *Pembaur*, 475 U.S. at 483); see also *Bennett v. City of Slidell*, 728 F.2d 762, 768-69 (5th Cir. 1984) (en banc),[73] *cert. denied*, 472 U.S. 1016 (1985).

2. Official policies, practices, customs, procedures, and failures

"In short, the injured detainee's constitutional right is to receive the needed medical treatment[.]" *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 245, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983). Admissible

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[73] Compare *Bennett*, 728 F.2d at 769 ("Policymakers…are not supervised except as to the totality of their performance…The governing body may delegate policymaking authority…**by a job description**…") (emphasis added) with App. 69a, at p. 28 ("developing policies, procedures and protocols" was one of Dr. Wells's "job descriptions"). See also *Rhode v. Denson*, 776 F.2d 107, 108 (5th Cir. 1985) ("The critical circumstance is that Denson, as a constable of a precinct, was not given that discretion, or range of choice, that is at the core of the power to impose one's own chosen policy.").

evidence establishes McLennan County (a) had a policy, practice, custom, or procedure of refraining from transferring inmates like Ms. Lilly to hospitals without Dr. Wells's authority, (b) provided care to Ms. Lilly in compliance with county policy, (c) deliberately left the nursing unit unstaffed at pill pass despite the presence of a pre-trial detainee therein suffering from a known myocardial infarction, (d) failed to adequately train and supervise jail medical staff, (e) is liable through Dr. Wells's conduct, and (f) ratified the conduct of its medical staff via its purported policymaker.

a. Refraining from transferring inmates to the hospital without Dr. Wells's approval

Nurse Roberts and nurse Smith said it was jail "policy" and "procedure" to refrain from transferring inmates to the hospital when Dr. Wells was available.[74] Dr. Wells testified that he was always available.[75] Therefore, admissible evidence shows said unconstitutional policy, procedure, practice, custom, or protocol ensuring that people like Ms. Lilly would suffer and die was active at all relevant times.

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[74] See App. 64a-65a, at ¶ 7.6 ("It is policy when Dr. Wells is available, that he be the determining factor if an inmate is to be sent to the hospital. Dr. Wells was available on the night in question."); see also App. 65a-66a at ¶ 13.8 ("[I]t is procedure to not send any inmate out of jail without Dr. Wells' [sic] approval.").

[75] Cf. App. 64a-65a, at ¶ 7.6 ("Dr. Wells was available on the night in question.").

b. The care provided to Ms. Lilly comported with McLennan County "policies"

Nurse Riendfliesch (represented by the same counsel as McLennan County) stated that the care she provided to Ms. Lilly "was in compliance with the McLennan County's jail policies[.]"[76] Sheriff McNamara agrees.[77] Admissible evidence therefore demonstrates McLennan County's policy of providing inadequate medical care to its inmates. This compliance with jail "policy" was a moving force behind Ms. Lilly's injuries and the County should be estopped from arguing otherwise.

c. The medical unit was unstaffed during pill pass

McLennan County's practice or custom was to have the medical unit unstaffed during "pill pass" (the time Ms. Lilly was unattended and suffering from a myocardial infarction). Dr. Wells testified that during that time, there were no nurses in the medical facility.[78] This regular practice of having no nurses in the medical ward despite the known presence of an inmate with chest pain and multiple EKGs showing ST elevations and a myocardial infarction constitutes the official and unconstitutional operating practice which caused Ms. Lilly to be deprived of her clearly established right to constitutionally adequate medical care. Even Dr. Wells concedes this arrangement would have been unreasonable but for the fact that it

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[76] App. 94a.

[77] App. 95a.

[78] See App. 72a-74a.

occurred in a jail,[79] thereby evidencing a separate and unequal standard of care for people in the free world versus pre-trial detainees like Ms. Lilly.

d. Custom or practice of inadequate training and supervision

Dr. Wells's subordinates say McLennan County had a policy or procedure which prevented them from transferring Ms. Lilly to the hospital.[80] Even when the Rules and *Tolan*[81] are disregarded and McLennan County's denial of said policy or procedure is improperly accepted as dispositive,[82] said subordinates' separate beliefs evidence McLennan County's custom and practice (as implemented by its relevant policymaker) of failing to adequately train and supervise jail medical staff concerning their obligations and authorities to transfer inmates to the hospital when they are faced with life-threatening medical conditions which they know the jail cannot treat. Petitioner's expert has testified that this evidences "confusion among the staff as to who had the authority to do what with regard to emergency care of a serious medical illness."[83] This confusion is a constitutionally inadequate method of inevitably

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[79] App. 73a-74a.

[80] App. 64a-65a, at ¶ 7.6; see also App. 65a-66a, at ¶ 13.8.

[81] See *Tolan v. Cotton*, 572 U.S. 650, 651, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014).

[82] See App. 16a (concluding summary judgment evidence established nurses had "the training, authorization, and discretion to send inmates to the hospital based on the medical needs of the inmates without first seeking approval from Dr. Wells.").

[83] App. 83a.

causing "torture or a lingering death." *Estelle*, 429 U.S. at 103 (quoting *In re Kemmler*, 136 U.S. 436, 447, 10 S.Ct. 930, 34 L.Ed. 519 (1890)); *see also City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) ("We hold today that the inadequacy of police training may serve as the basis for 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.").

The Texas Medical Board reprimanded Dr. Wells in a separate incident for improperly delegating authority to the nurses **at the McLennan County jail**. Dr. Wells testified he was reprimanded for authorizing McLennan County jail medical staff to "evaluate, diagnose, and treat" patients under his care[84] (despite the fact that nurses cannot diagnose).[85] In her motion for summary judgment, Nurse Roberts even *admitted* she did that which she could not do, *i.e.,* she made "an effort to provide a diagnosis and treatment of Lilly's serious medical condition[.]"[86] Therefore, Dr. Wells's continuous delegation of diagnosis and treatment authority to unqualified nurses despite being reprimanded therefor constitutes a custom or practice of inadequate training, supervision, and care as implemented by McLennan

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[84] App. 82a, at pp. 227-28.

[85] App. 84a, at p. 89; see also App. 91a ("Nurses, by nature, are not capable of rendering medical diagnoses.").

[86] App. 93a. Cf. App. 77a, at pp. 124-25 (Dr. Wells's testimony that having an RN involved meant that the nurses were authorized to "make an assessment and if they thought it was urgent enough in this case they could have called the paramedics[.]").

County's policymaker with respect to medical care at its jail (whoever it is).

Finally, Dr. Wells admitted he did not know what training his Director of Nurses had received with respect to EKGs.[87] Given that the only jail doctor improperly and consistently delegated responsibility to Roberts to read EKGs, diagnose inmates, and treat inmates without knowing her training, McLennan County is liable for inadequate training and supervision of the medical staff at its jail (regardless of whoever its policymaker is).

e. Illegal conduct of decisionmaker or policymaker

The county is liable because Dr. Wells acted in his capacity as policymaker.[88] Assuming *arguendo* Dr. Wells was only the final decisionmaker, Petitioners can still hold the county liable because he decided to refrain from sending Ms. Lilly to the hospital in said capacity and the courts below accepted the County's argument that this was an isolated event.[89]

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[87] App. 81a, at p. 172.

[88] *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 409, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997); see also *Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996) (holding that municipal liability may arise under the single incident exception, provided the decision was made by a final policymaker responsible for the activity) (citations omitted).

[89] See *Bd. of Cty. Comm'rs*, 520 U.S. at 406 ("A final decisionmaker's adoption of a course of action 'tailored to a particular situation and not intended to control decisions in later situations' may, in some circumstances, give rise to

f. **Ratification**

Even if the Sheriff is the county's relevant policymaker,[90] his affidavit reveals that he has ratified the conduct of the jail medical staff. Specifically, he swore he has *never* been made aware of "medical care and treatment…not being provided to inmates."[91] This sworn statement reveals that the purported policymaker believes Ms. Lilly received adequate medical care. See *City of St. Louis*, 485 U.S. at 127 ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final."). This constitutes ratification and the courts below erred when they implicitly concluded otherwise.

3. **Moving force**

No medical personnel at the McLennan County jail ordered Ms. Lilly's transfer to a hospital capable of treating her despite providing her with EKGs, seeing the EKG readouts, knowing she had ST elevations, and subjectively believing she was in danger. These failures were the moving force behind Ms. Lilly's suffering and death. Additionally, McLennan County had a deliberately indifferent "policy of maintaining an on-duty jail supervisory staff

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municipal liability under § 1983.") (quoting *Pembaur*, 475 U.S. at 481).

[90] But see *West v. Atkins*, 487 U.S. 42, 54 n. 12, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) ("[F]ew of those with supervisory and custodial functions are likely to be involved directly in medical care.").

[91] App. 95a.

that did not include anyone with authority to transfer an inmate to a medical facility" that was the moving force behind Ms. Lilly's suffering and death.[92]

Alternatively, McLennan County delegated relevant policymaking and supervisory authority to Dr. Wells.[93] Therefore, the county is liable as a matter of law because its policymaker personally made a specific decision (and continuously failed to properly supervise and train his staff) that was the moving force behind Ms. Lilly's suffering and death.[94]

Petitioners need not prove deliberate indifference[95] for their "conditions-of-confinement theory" (which attacks the "general conditions, practices, rules, or restrictions of pretrial confinement").[96] These conditions were also a moving force behind Ms. Lilly's suffering and death. The

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[92] See *Colle v. Brazos Cty., Tex.*, 981 F.2d 237, 245 (5th Cir. 1993); see also *Balle v. Nueces Cty.*, 690 Fed. App'x 847, 851 (5th Cir. 2017) (unpub.) (citing *Colle*) and *City of Canton v. Harris*, 489 U.S. 378, at 388-89.

[93] See e.g., App. 97a (email from McLennan County's counsel stating, "As the Medical Director, Dr. Wells was solely responsible for promulgating and enacting medical protocols for the jail medical staff.").

[94] See *Colle*, 981 F.2d at 245; see also *Balle,* 690 Fed. App'x at 851 (citing *Colle*).

[95] See *Edler v. Hockley Cty. Comm'rs Court*, 589 Fed. App'x 664, 699 (5th Cir. 2014) (unpub.) (citing *Duvall v. Dallas Cty., Tex.*, 631 F.3d 203, 207 (5th Cir. 2011) (per curiam) (citations omitted)).

[96] Id., at *6-7 (quoting *Hare v. City of Corinth*, 74 F.3d 633, 644-45 (5th Cir. 1996) (en banc)).

lower courts erred when they summarily disregarded Petitioners' allegations and evidence.[97]

Finally, Dr. Wells was not identified in McLennan County's Public Information Act response. When viewed in the light most favorable to Petitioners, the County's response constitutes a concession that it did not even consider its only doctor to have been "involved" in Ms. Lilly's medical care.[98] This non-involvement of the only person capable of diagnosing Ms. Lilly or sending her to the hospital was also a moving force behind Ms. Lilly's prolonged suffering and death.

C. **The discovery rule (or equitable tolling) should apply because Dr. Wells's identity was unjustly withheld by McLennan County and there is no evidence of undue prejudice to any party**

1. **Dr. Wells was an unknown cause of Ms. Lilly's suffering and death**

This Court has characterized the identity of the person who "inflicted the injury" as a "critical fact[ ]";[99]

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[97] Compare App. 14a-15a (detailing Petitioners' allegations) with App. 15a ("The Court finds that there is no credible summary judgment evidence that an alleged practice, rule, or policy of the County of not sending inmates to the hospital without the approval of Dr. Wells (regardless of whether the practice existed or not) violated Lilly's constitutional rights. This is *not* a medical malpractice or negligence case.").

[98] App. 91a.

[99] *United States v. Kubrick*, 444 U.S. 111, 122, 100 S.Ct. 352, 359, 62 L.Ed.2d 259 (1979) ("[T]he facts about

this established proposition of law has been cited by every Circuit court of appeals.[100] Petitioners "ask[ed]"

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causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the **critical** fact***s*** that he has been hurt **and *who* has inflicted the injury**. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask.") (emphases added); see also *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223, 229 (5th Cir. 1984) ("[T]he discovery rule…should be applied in federal cases whenever a plaintiff is not aware of and has [had] no reasonable opportunity to discover the critical facts of his injury and its cause.") (citing *DuBose v. Kansas City Southern R. Co.,* 729 F.2d 1026, 1030 (5th Cir. 1984), *cert. denied*, 469 U.S. 854, 105 S.Ct. 179, 83 L.Ed.2d 113 (1984)); *Pretus v. Diamond Offshore Drilling, Inc.*, 571 F.3d 478, 482 (5th Cir. 2009) ("When the discovery rule applies, the plaintiff's cause of action does not accrue on the date the tortious act occurred, but on the date the plaintiff discovers, or reasonably should have discovered, both the injury and its cause.") (quoting *Albertson,* 749 F.2d at 228-29); and *Taurel v. Cent. Gulf Lines, Inc.*, 947 F.2d 769, 771 (5th Cir. 1991).

[100] See *Nicolazzo v. United States*, 786 F.2d 454, 455-56 (1st Cir. 1986) (reversing summary judgment in favor of government); *Valdez ex rel. Donely v. United States*, 518 F.3d 173, 177 (2d Cir. 2008) (applying equitable tolling and reversing dismissal of FTCA claim); *Green v. United States*, 180 Fed. App'x 310, 313, 2006 WL 839054, *3 (3d Cir. 2006) (unpub.); *Edwards v. United States*, 173 F.3d 424, 1999 WL 96138 (4th Cir. 1999) (unpublished disposition) (affirming summary judgment against plaintiff because she knew the "critical fact" of "who ha[d] inflicted the injury"); *Lavellee v. Listi*, 611 F.2d 1129 (5th Cir. 1980) (reversing summary judgment in a § 1983 case where plaintiff believed his back pain was caused by assaults rather than medical malpractice); *Mounts v. Grand Trunk Western R.R.*, 198

(as instructed)[101] via a Public Information Act request and received a government-sanctioned lie that withheld Dr. Wells's identity and involvement.[102]

Petitioners should not be denied relief for governmental misconduct based on subsequent governmental misconduct. A plaintiff's "cause of action does not accrue on the date the tortious act occurred, but on the date the plaintiff discovers, or reasonably should have discovered, both the injury and its cause."[103] Through no fault of their own, Petitioners did not know Dr. Wells was a cause of their injury and there is neither evidence nor argument they should have known.

Dr. Wells caused prolonged pain and death to be inflicted upon Ms. Lilly despite the fact that she had been convicted of no relevant crime. Petitioners did not receive Ranger Peña's report until March 24,

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F.3d 578, 581 n. 1 (6th Cir. 2000); *Koch v. Gregory*, 536 Fed. App'x 639, 660 (7th Cir. 2013), *cert. denied*, 572 U.S. 1037 (2014); *Osborn v. United States*, 918 F.2d 724, 731 (8th Cir. 1990) (concluding plaintiff's action was not time-barred and reversing dismissal); *Raddatz v. United States*, 750 F.2d 791, 795-96 (9th Cir. 1984) (concluding plaintiff's claim was not time-barred and reversing summary judgment); *Gustavson v. United States*, 655 F.2d 1034, 1036 (10th Cir. 1981) (affirming summary judgment against plaintiff because he knew "his injury and its cause"); and *McCullough v. United States*, 607 F.3d 1355, 1358-59 (11th Cir. 2010).

[101] See *Kubrick*, 444 U.S. at 122 ("There are others who can tell him if he has been wronged, and he need only ask.").

[102] See App. 98a.

[103] *Albertson*, 749 F.2d at 229 (citing (*inter alia*) *Kubrick*, 444 U.S. at 122).

2017 and could not have reasonably sued Dr. Wells before receiving it;[104] even if they should have known his identity (an argument no party nor court has made), Petitioners would have violated Federal Rule of Civil Procedure 11 if they filed suit against Dr. Wells despite the absence of *any* evidence that he was "involved" in Ms. Lilly's purported "medical care". Petitioners reasonably relied to their detriment upon McLennan County's unambiguous response to a Public Information Act request; therefore, the discovery rule should apply and Petitioners' case against Dr. Wells (in his individual capacity) should be reinstated.

2. <u>No defendant is unduly harmed</u>

There is no showing that Dr. Wells (or any other defendant) has suffered any undue harm from either (1) McLennan County's refusal to comply with the Public Information Act or (2) service on Dr. Wells after the conventional statute of limitations ran. Specifically, there is no evidence that evidence has been lost or that the search for truth has been

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[104] Petitioners did not become aware (through the undersigned counsel) of said identity until approximately four to six weeks after receipt. Specifically, the undersigned concedes his analytical progress concerning Ranger Peña's report was slowed by at least three independent factors: (1) being the attorney responsible for reading all 696 pages before acting; (2) the remainder of his active § 1983 case load, and (3) the thoroughness (and disturbing nature) of Ranger Peña's extensive investigation. These facts were presented to the Fifth Circuit, but not to the district court.

frustrated;[105] instead, the evidence is the same as it was when compiled by Ranger Peña. Dr. Wells has already given his deposition and did not unduly suffer from a faulty memory thereat. Therefore, the discovery rule should apply and Petitioners should be permitted to proceed against Dr. Wells.

3. Alternatively, equitable tolling should apply

"It is hornbook law that limitations periods are 'customarily subject to "equitable tolling[.]"'"[106] The doctrine of equitable tolling "preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable"[107] and applies when

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[105] See *Castro v. Collecto, Inc.*, 634 F.3d 779, 784 (5th Cir. 2011) (quoting *United States v. Land*, 213 F.3d 830, 837 (5th Cir. 2000) (quoting *Hohri v. United States*, 586 F.Supp. 769 (D.D.C. 1984))).

[106] *Young v. United States*, 535 U.S. 43, 49, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002) (citing *Irwin v. Dept. of Veterans Affairs*, 498 U. S. 89, 95, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990)); see also *Furnes v. Reeves*, 362 F.3d 702, 723-24 (11th Cir. 2004) (quoting *Young* and affirming trial court's application of equitable tolling), *cert. denied*, 543 U.S. 978 (2004); *Griffin v. Rogers*, 399 F.3d 626, 631 (6th Cir. 2005) (quoting *Young* and applying equitable tolling); *Herrera v. Command Sec. Corp.*, 837 F.3d 979, 985 (9th Cir. 2016) (same); *Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 529 (D.C. Cir. 2010) (same); *Move, Inc. v. Citigroup Glob. Mkts., Inc.*, 840 F.3d 1152, 1156-57 (9th Cir. 2016) (quoting *Young*); and *Santana-Venegas v. Principi*, 314 F.3d 1293, 1296-97 (Fed. Cir. 2002) (quoting *Young* and analyzing the doctrine).

[107] *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998) (citing *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 1995) (citing *Burnett v. New York Cent. R.R. Co.*, 380 U.S.

a plaintiff can prove two elements: "[F]irst, that the defendants concealed the conduct complained of, and second, that the plaintiff failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim."[108] Here, Petitioners timely sought information from McLennan County via a statutory procedure and McLennan County fraudulently concealed Dr. Wells's involvement (or, at worst, admitted its only doctor and final decisionmaker with respect to medical care at the jail was not even "involved" in Ms. Lilly's "medical treatment"). Therefore, equitable tolling should apply hereto and Petitioners' Complaint against Dr. Wells should be considered timely.

424, 428, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965))); see also *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946) (equitable tolling provides that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered....") (internal quotations omitted).

[108] *Trinity Marine Prods., Inc. v. United States*, 812 F.3d 481, 489 (5th Cir. 2016) (citations omitted); see also *Green v. Doe*, 260 Fed. App'x 717, 719 (5th Cir. 2007) (unpub.). Accord *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (equitable tolling applies when plaintiff "cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant."); *Dodds v. Cigna Secs., Inc.*, 12 F.3d 346, 352 (2d Cir. 1993) (tolling applies if defendants "actively prevent[ed]" plaintiff from discovering basis of claim); *Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 969 (10th Cir. 1994) (defendant's "active deception" tolls the statute of limitations); and *Porro v. Jefferson Cty. of Okla*, 2007 WL 1674156, *1 (W.D. Okla. June 7, 2007) (unpub.).

D. The Fifth Circuit continues to defy the Rules in Section 1983 cases

The Fifth Circuit continues to sanction such departures from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Two different nurse-defendants told Ranger Peña that it was McLennan County's "policy" or "procedure" to refrain from sending inmates like Ms. Lilly to the hospital without Dr. Wells's consent.[109] The lower courts nevertheless found summary judgment evidence established the County's nursing staff had "the training, authorization, and discretion to send inmates to the hospital based on the medical needs of the inmates without first seeking approval from Dr. Wells."[110] This materially erroneous and activist violation of Federal Rules of Civil Procedure 1 and 56 deprived Petitioners of their right to seek a statutory remedy for a constitutional wrong and continues to embolden those who need no emboldening in the Fifth Circuit.

The trial court also concluded:

> While Plaintiffs have *alleged* that Nurses Trinecha Outley and Kimberly Riendfliesch did not send Lilly to the hospital because they had not received approval from Dr. Wells to do so; Plaintiffs are unable to rebut the summary judgment evidence that establishes that the nurses had no

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[109] App. 64a-65a, at ¶ 7.6; see also App. 65a-66a at ¶ 13.8.

[110] App. 16a.

> knowledge of any substantial risk of serious harm to Lilly which required immediate additional attention and/or transport to the hospital.[111]

This conclusion ignores common sense, the undisputed facts, and Dr. Dlabal's uncontested expert opinions[112] while concluding (without supporting evidence) that neither reasonable people nor reasonably trained medical staff would know untreated heart attacks are fatal. This absurdity of

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[111] App. 20a; see also ibid. ("Additionally, Plaintiffs are unable to rebut Defendants' evidence that Nurses Outley and Riendfliesch believed there was no reason to contact Dr. Wells and seek his approval to send Lilly to the hospital.").

[112] App. 90a ("Of the approximately 900 inmates incarcerated at that time, there could be none with more need of medical care and attention than lretha Jean Lilly, for whom the consequences of failure to access such care **predictably and foreseeably conferred a risk of death**, and which in fact did occur, consistent with the natural history of untreated disease.") (emphasis added); see also ibid. ("[I]t is clear that any layperson…aware of her symptoms and complaints, should consider the very likely possibility of heart attack (MI) as a cause of this patient's chest pain. The simple recognition of this possibility is sufficient for anyone, whether medically trained or not, to activate emergency response systems and to initiate transport to appropriate medical facilities."); and App. 91a ("Further, based upon the computer interpretation written in plain English, there was sufficient information to have heightened the awareness of the nonmedical and medical personnel on duty as to the acuity and severity of the condition, and should have provided further impetus for initiating transport of this patient to appropriate care.").

this implicit judicial notice that untreated heart attacks are somehow not fatal is compounded by the lower courts' conclusions that McLennan County cannot be responsible for its failure to train its medical staff to know untreated heart attacks are fatal, particularly in light of (1) Roberts's belief that Ms. Lilly was experiencing a cardiac event (and needed to be in a hospital) and (2) Riendfliesch's "wondering why Dr. Wells was not ordering [Ms.] Lilly be taken to a hospital emergency room."[113]

Finally, the trial court relied on *Barrow v. Greenville Indep. Sch. Dist.*, 480 F.3d 377, 382 (5th Cir. 2007), for the proposition that Dr. Wells was not the policymaker because a separate entity could "guide" his discretion.[114] The county's contract with Dr. Wells provided that his "exercise of medical judgment is independent"[115] and "the Jail Captain shall have no control over the means or methods by which medical services are provided or over the Physician's exercise of medical judgment[.]"[116] Additionally, Dr. Wells testified that no one could overrule any of his medical decisions[117] and he did not have to submit any policies or procedures to anyone for approval.[118] Even if there was evidence to the contrary, this would (at worst) be a fact question for a jury.

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[113] App. 66a, at ¶ 13.15.

[114] App. 30a-31a.

[115] App. 102a, at ¶ 6.1.

[116] App. 101a-02a, at ¶ 1.4.

[117] App. 75a-76a, at pp. 118-19.

[118] App. 76a. at pp. 124-25; see also App. 77a, at p. 126.

CONCLUSION

Even if nurses Roberts and Riendfliesch are entitled to summary judgment because they did not comprehend the danger to Ms. Lilly, McLennan County failed to train them to comprehend said danger. The County had a duty to train medical staff concerning foreseeable life-threatening medical conditions (like heart attacks) and county-approved responses thereto. Either the nurses were right (and the county had a policy or procedure which prevented them from acting) or they were wrong and the policymaker failed to train them otherwise. Either way, pre-trial detainees suffering from heart attacks over the course of three hours are constitutionally entitled to more than EKGs, an aspirin, and a nitroglycerin pill unless this Honorable Court denies this Petition.

The Court should grant the Petition.

Respectfully submitted,

WILLIAM PIERATT DEMOND
DEMOND LAW, PLLC
1520 Rutland St.
Houston, TX 77008
(713) 701-5240
william@demondlaw.com
Counsel of Record for Petitioners
Demetrias Taylor, as representative of
the estate of Iretha Jean Lilly, Deceased;
Terrance Hamilton; and
Terrance Lamont Hamilton,
as next friend and father of I.H.